Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number(s):	**2023/8080**
Re:	**David Andrew Miller**
	APPLICANT
And	**Minister for Immigration, Citizenship and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Senior Member O'Donovan**
Date of Decision:	**22 January 2024**
Date Reasons Published:	**1 February 2024**
Place:	**Canberra**

The decision under review is affirmed.

……[SAS]……

Senior Member O'Donovan

Catchwords

MIGRATION – mandatory cancellation of applicant's Class BF Transitional (permanent) visa – applicant is a citizen of United Kingdom – aggravated sexual intercourse with a minor – persistent sexual abuse of a child – destroy or damage property – break enter and steal – failure to pass the character test – whether there is another reason to revoke the visa cancellation – Direction No. 99 – protection of the Australian community – family violence –best interests of minor children – expectations of the Australian community – strength, nature and duration of ties – extent of impediments if removed – standard of medical care United Kingdom – decision under review affirmed

Legislation

Migration Act 1958 ss 501, 501(3A), 499, 501CA

Cases

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

HZCP v Minister for Immigration and Border Protection [2019] FCAFC 202

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

Minister for Home Affairs v Buadromo [2018] FCAFC 151

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

Plaintiff M1/2021 v Minister for Home Affairs (2022) 96 ALJR 497

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

Secretary to the Department of Justice and Regulation v LLG [2018] VSCA 155

Mukiza and Minister for Home Affairs [2019] AATA 4445

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

Senior Member O'Donovan

31 January 2024

1. The applicant was born in the United Kingdom on 20 November 1979.

2. He lived in the UK until 20 March 1987 when he moved to Australia with his parents and older brother.

3. From 2002 the applicant accumulated a significant criminal record as an adult. His offending culminated in him being incarcerated in 2017 for breach of an apprehended violence order. He was subsequently convicted in 2019 in relation to persistent sexual abuse of a child. He was sentenced to imprisonment for a period of 8 years and 6 months with a non-parole period of 6 years. On 15 August 2017 the applicant's visa was cancelled under section 501(3A) of the *Migration Act 1958* (the Migration Act). On 20 August 2017 the applicant made representations seeking revocation of the cancellation decision. On 27 October 2023, a delegate of the respondent decided not to revoke the cancellation. On 31 October 2023 the applicant applied to the Administrative Appeals Tribunal (the Tribunal) for review of that decision.

4. The Tribunal can decide to revoke the cancellation decision if the Tribunal is satisfied that:

   (a) the applicant passes the character test (as defined by section 501 of the Act); or

   (b) there is another reason why the cancellation decision should be revoked.[1]

5. It is accepted that the applicant does not pass the character test. Consequently, the only question is whether there is another reason why the cancellation decision should be revoked.

6. In recent Federal Court cases a question has arisen as to whether, if I am satisfied that there is another reason why the cancellation decision should be revoked, I have a residual

[1] See section 501CA(4).

discretion not to revoke the cancellation.[2] While the question does not appear to be finally settled,[3] I have approached this matter on the basis that:

(a) The decision-making process is a single stage process: if I am satisfied that there is another reason why the cancellation decision should be revoked I do not have a discretion to nonetheless refuse to revoke it;

(b) Section 501CA(4)(b)(ii) requires me to examine the factors for and against revoking the cancellation. If satisfied following an assessment and an evaluation of those factors, that the cancellation should be revoked, I am obliged to act on that view.[4]

7. In considering whether there is another reason why the cancellation decision should be revoked, the Tribunal must have regard to the matters contained in a ministerial direction issued under section 499 of the Migration Act. The relevant direction is Direction No 99 which was executed on 23 January 2023 and commenced on 3 March 2023 (**the Direction**). Informed by the principles identified in that direction, I must take into account the considerations identified in sections 8 and 9 when I am determining whether there is another reason why the cancellation should be revoked.

8. The Direction is divided into 'Primary' and 'Other' considerations. Primary considerations should generally be given greater weight than the other considerations (but there is scope to weight 'Other' considerations more highly in appropriate circumstances[5]).

9. The primary considerations are:

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

(b) Whether the conduct engaged in constitutes family violence;

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[2] See for example *Au v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 125.
[3] See *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 96 ALJR 497 at [22].
[4] See *Gaspar v Minister for Immigration and Border Protection* [2016] FCA 1166 (*Gaspar*); (2016) 153 ALD 337, at [38].
cited with approval by the Full Court in *Minister for Home Affairs v Buadromo* [2018] FCAFC 151. See also ibid, [21], citing, inter alia, *Gaspar v Minister for Immigration and Border Protection* [2016] FCA 1166; 153 ALD 337, [38] (North ACJ); *Marzano v Minister for Immigration and Border Protection* [2017] FCAFC 66; 250 FCR 548, [31] (Collier J, with whom Logan and Murphy JJ agreed).
[5] *Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594 at [23].

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

(d) The best interests of minor children in Australia;

(e) Expectations of the Australian community.

10. The other considerations are:

(a) The legal consequences of the decision;

(b) The extent of impediments to the applicant establishing and maintaining basic living standards if removed;

(c) The impact on victims;

(d) The Impact on Australian business interests.

11. I am also required give consideration to any other considerations raised by the applicant.

12. Having considered each of the considerations and weighed them appropriately, I am not satisfied that there is another reason why the cancellation decision should be revoked. Consequently, the visa cancellation decision stands.

13. My reasons for that decision are set out below.

Evidence before the Tribunal

14. The following material was taken into evidence in the course of the hearing:

(a) G-Documents filed with the Tribunal on 22 March 2021 (**G-Docs**);

(b) Applicant's tender bundle in three parts: Part 1 (filed 15 December 2023), Part 2 (filed 29 December 2023) and Part 3 (filed 9 January 2024) (**Exhibit A1**);

(c) Statement of Philip Miller (applicant's father) dated 5 December 2023 (**Exhibit A2**);

(d) Applicant's statement dated 4 December 2023 (**Exhibit A3**);

(e) Report of Dr Emily Kwok (clinical and forensic psychologist) dated 27 November 2023 (**Exhibit A4**)

(f) Statement of Cathy Miller (applicant's mother) dated 5 December 2023 (**Exhibit A5**)

(g) Statement of Nicole Miller (applicant's former sister-in-law) dated 8 January 2024 (**Exhibit A6**)

(h) Statement of John Miller (applicant's brother) dated 9 January 2024 (**Exhibit A7**)

15. The following witnesses gave oral evidence and were cross-examined:

(a) The applicant;

(b) Dr Emily Kwok;

(c) Cathy Miller;

(d) Nicole Miller;

(e) John Miller.

Fact finding principles

16. In reaching my findings on the primary facts I must apply the principle, clarified by the Full Court of the Federal Court in *HZCP v Minister for Immigration and Border Protection* (*HZCP*),[6] that '…relying on evidence contrary to the essential conviction or sentencing facts would in itself be an error'. The Court made clear that a person who makes representations to revoke the cancellation of a visa cannot advance a factual position that undermines the relevant convictions and sentences as 'another reason' why the original decision to cancel should be revoked.

[6] [2019] FCAFC 202 at [68].

17. I do note however that the applicant is entitled, subject to some qualifications, to seek different findings from the Tribunal in relation to any criminal convictions which did not form the basis of the decision to cancel his visa. The principles to be applied by the Tribunal when considering evidence of this nature were comprehensively summarised by Justice Bromberg in *HZCP*. The principles are stated concisely in the following passage from *Secretary to the Department of Justice and Regulation v LLG*, cited with approval by Justice Bromberg:

> The authorities distinguish between cases where a previous conviction is the basis for a decision-maker or reviewing tribunal's jurisdiction and those where it is not. In the former case, the essential factual basis of the conviction (or sentence, as the case may be) is not able to be reviewed, but the circumstances of the conviction can be reviewed for a purpose other than impugning the conviction itself. In the latter case, the essential facts underlying the convictions are not immune from challenge and the conviction is conclusive only of the fact of the conviction itself, but there is a heavy onus on a person seeking to challenge the facts upon which the conviction is necessarily based.[7]

18. In this matter I am therefore bound by the essential findings made in relation to the persistent sexual abuse of a minor conviction. I do however have more freedom to depart from the findings made in relation to the many other crimes of which the applicant has been convicted.

19. The applicant was in my assessment an honest witness. His memory appeared to some degree to have been affected by years of alcohol and drug abuse. I have accepted his evidence at face value for the most part. In reaching my findings, unless the applicant was clearly mistaken about a matter of detail (having regard to the other evidence available to me), I have accepted his evidence. The only significant conflict in the evidence arose in relation to an outstanding assault charge which pre-dates his incarceration in 2017. The charge relates to a family violence incident, the details of which are outlined in a Queensland Police information report. The applicant initially exercised the privilege against self-incrimination when asked questions in relation to the charges. Following an opportunity to discuss the issue with his counsel, the applicant elected to waive the privilege and gave an account of the assault. It was for the most part consistent with the police report about the incident, but the applicant specifically denied punching his victim in the face – an allegation recorded by the police.

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[7] [2018] VSCA 155, at [42].

20. Given that the applicant has been generally truthful in the giving of his evidence, I have accepted the applicant's version of events for the purposes of making my decision.

Facts

21. My findings of fact are set out below. Where a finding is controversial, I have referenced the evidence on which the finding is based.

22. The applicant arrived in Australia from the UK in March 1987. He arrived with both his parents, Philip and Catherine, and his older brother John. After living initially in Blacktown in Sydney, the family moved to the south coast of NSW.

23. Following the move, the applicant fell in with a bad crowd and began using illegal drugs. He was 12 years old at the time. Around the same time he was the subject of sexual abuse by a relative.

24. The applicant's drug use included cannabis, heroin, amphetamine, methamphetamine and abuse of the prescription drug Xanax.

25. The applicant left school in Year 9, at the age of approximately 14 years. He qualified as a painter and decorator and for the bulk of his working life worked as a roof repairer and restorer. It would appear that despite his other difficulties he is good at this work and had little difficulty obtaining and retaining employment.

26. In addition to his use of illegal drugs, the applicant was also a heavy drinker. While his accounts of his drinking have varied to a degree over time, I am satisfied that the applicant drank very large quantities of alcohol, most days, from the age of 18 until he was incarcerated in 2017. On some accounts he was drinking more than 60 standard drinks every day.[8]

27. The applicant's adult offending is set out in the G-Documents at pages 40-43, and includes the following:

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[8] Exhibit A4, para 25.

(a) In February 2002 the applicant was fined for driving an unregistered vehicle and an uninsured vehicle;

(b) In May 2002 he was fined for driving while his licence was suspended and fined for having a mid-range prescribed concentration of alcohol (PCA) in his blood stream while driving. His licence (which was already suspended) was suspended for a further 6 months;

(c) In September 2005 he was ordered to undertake community service for a break and enter offence;

(d) In March 2006 the applicant was fined following conviction for driving with a high range PCA and he was disqualified from driving for 3 years;

(e) In November 2006 the applicant was convicted of breaking and entering a building to steal items and a sentence of imprisonment for 3 months was imposed;

(f) In December 2006 the applicant was fined again for driving with a PCA in his bloodstream. He was also sentenced to 4 months imprisonment for driving while disqualified. His disqualification was extended for a further four years;

(g) On 3 December 2008 the applicant was ordered to undergo periodic detention commencing on 12 December 2008 for driving while disqualified. A further four years (starting on 12 December 2018) was added to his period of disqualification. A previous habitual offender disqualification was quashed;

(h) In December 2012 the applicant was fined for damaging and destroying property;

(i) In April 2013 the applicant was sentenced to an 18-month prison term for destroying or damaging property valued at under $60,000. The damage occurred after the applicant went to a person's house to recover a guitar belonging to his partner's daughter. After breaking down the door the applicant smashed every window in the house as well as taking property which he believed belonged to his partner or her daughter. The applicant was given a non-parole period of 12 months. Release on parole was subject to supervision and acceptance of drug and alcohol abuse counselling and treatment from the Probation and Parole Service;

(j) Following an appeal to the District Court the non-parole period was reduced to 9 months;

(k) In May 2014 the applicant was dealt with in relation to a common assault in a domestic violence context. He was placed on a 12-month good behaviour bond;

(l) In February 2016 he was fined for possessing drug paraphernalia. No conviction was recorded;

(m) In January 2017 the applicant was dealt with by the court for contravention of a domestic violence order on 30 June 2016 and 20 November 2016. In both instances, arrest warrants were issued due to his failure to appear in court. He faced charges for assaults occasioning bodily harm in a domestic violence incident on 30 March 2016 and for common assault;

(n) In June 2017 the applicant was sentenced to 4 months imprisonment starting from 25 May 2017 for contravening a prohibition/restriction in a domestic violence-related Apprehended Violence Order;

(o) On 18 October 2019 the applicant was sentenced to 8 years and 6 months for persistent sexual abuse of a child and possessing child abuse material. The non-parole period was set at 6 years.

28. Before considering the detail of the most serious offences, it is worth placing the offending in a broader context.

29. The applicant's first romantic relationship commenced at age 14 with a girl of similar age. Both he and his partner regularly used drugs. His partner ceased using drugs when she was pregnant with the applicant's child at around the age of 18. The couple had a son, who is now 25. The relationship broke down in 1999 when the applicant was 20 and his son was 2.

30. After the relationship broke down the applicant had fortnightly contact with his son for at least some period, although at some point lost regular contact with him. The applicant told psychologist Dr Kwok that as of November 2023, he did not have regular contact with his

eldest son.[9] However at the hearing the applicant advised that he had resumed regular telephone contact.

31. Between 1999 and 2006 the applicant had interactions with police on a range of matters including breaking and entering, driving while intoxicated and some domestic incidents.

32. In late 2006 the applicant was jailed in relation to a break and enter offence and for driving while disqualified. He served his sentence and was released in the second quarter of 2007. He returned to jail in December 2008 for periodic detention for driving while disqualified. He failed to report for weekend detention in May 2009 and completed his sentence in full-time custody. He was released on 20 August 2009.

33. At some point the applicant commenced a relationship with one Ms Rigby. In his evidence the applicant described her as one of his partners. On that basis I am satisfied that violence towards her meets the definition of family violence. It was due to his conduct in relation to Ms Rigby that the applicant was first subjected to an apprehended violence order. In August 2010 the applicant and Ms Rigby had a heated dispute about the music Ms Rigby was listening to, resulting in the applicant grabbing her by the wrist and injuring it. Ms Rigby fled the premises.[10] The police were called and the applicant arrested. An apprehended violence order was issued in relation to the applicant. There do not appear to be any further incidents of family violence involving Ms Rigby.

34. In December of 2012 the applicant commenced a relationship with Kirsty Jackson.

35. Ms Jackson was the mother of two daughters, TJ and SJ, and one son, CJ.[11] At the start of 2013 the children were aged between approximately 9 and 20 years.

36. After the commencement of that relationship the applicant committed his most serious break and enter offence.

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[9] Exhibit A4, paragraph 32.
[10] Exhibit R1, 55, and applicant's oral evidence.
[11] Exhibit R1, 175.

37. On 1 January 2013 the applicant entered and trashed the premises of a third party, ostensibly for the purposes of recovering property owned by Ms Jackson and her daughter. The sentencing remarks in relation to this offence included the following:

> The defendant has pleaded guilty to serious matters involving his breaking in through the door of premises that had been shut and systematically destroying property in the premises and also smashing the windows of a vehicle. I understand there was an issue about a guitar that the co-accused's daughter owned and was requiring. But to act the way in which the defendant did clearly in the court's view requires a significant penalty as a deterrent to the accused as well as a message to the community generally, this high level of naked violence is just simply not acceptable.
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> Yes the defendant does have significant problems over many years in relation to alcohol and the abuse of drugs. He does have a record limited though however [sic] he does have a matter for damage property in 2010.
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> I have taken into account what has been said in reference together with the probation report. In all the circumstances I certify gaol is the only sentence that is available in relation to the action of this particular defendant.[12]

38. The applicant was sentenced to 18 months in prison with a non-parole period of 12 months. The non-parole period was reduced on appeal to 9 months.

39. On 30 September 2013 the applicant was released from jail. While in jail he had successfully completed a course to assist with his alcohol abuse (Getting SMART).[13] It was not successful in keeping him sober following his release into the community

40. In October 2013 the applicant received a warning from the Department of Immigration and Border Protection that 'any further criminal convictions, or any other conduct on your behalf that comes within the scope of subsection 501(6), could result in consideration of the cancellation of your visa.'[14]

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[12] Exhibit R1, 44.
[13] Exhibit R1, 78.
[14] Exhibit R1, 184.

41. On 21 November 2013 the applicant was re-arrested. He was arrested as a result of an incident involving his partner's daughter SJ (the subject of the applicant's later sexual abuse charge). The incident was precipitated by a fight within the family on a public street. The applicant and Ms Jackson were abusing SJ publicly. She screamed at them and ran towards a road. The applicant gave chase and grabbed her by the collar and swung her around with enough force to cause her feet to lift off the ground. Witnesses reported the matter to a passing police officer. SJ had wet herself and appeared distressed, according to police, and they intervened on that basis. The applicant was arrested. The police applied for an apprehended violence order which was granted. He was released on bail the following day. It appears he was ultimately given a 12-month good behaviour bond.[15]

42. In late 2014 the applicant's first son with Ms Jackson was born. In early January of 2015 police were called to a domestic situation but charges were not proceeded with.

43. The applicant and Ms Jackson's second child was born in late 2015.

44. At some point during 2015 the applicant and Ms Jackson moved to Queensland. On 20 December 2015 police were called to a domestic disturbance at a caravan park. The applicant accepts that the argument between him and Ms Jackson occurred and that he pushed her to the ground which according to police caused lacerations to Ms Jackson's elbows and knees. The applicant was arrested. A protection order was made on 5 January 2016 against the applicant.[16] On 30 March 2016 the applicant again assaulted Ms Jackson during a dispute about alcohol. The applicant is alleged to have punched Ms Jackson in the face. The applicant denies this, and for the purposes of these proceedings I accept those denials. He does however admit to grabbing Ms Jackson by her wrists and dragging her off the couch, leaving marks on her wrists. The police were called and the applicant was again arrested. He was charged with breaching a domestic violence order and assault causing actual bodily harm.

45. Following his court appearance in relation to the March incident, the protection order previously made against the applicant was varied on 13 April 2016. The order included a

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[15] Exhibit R1, 36.
[16] Exhibit R1, 18.

requirement that the applicant not consume alcohol at any place where Ms Jackson was and must not enter such a place within 12 hours of consuming alcohol.

46. In February 2016 the applicant was dealt with by the courts, but with no conviction entered, for possessing drug-related utensils.

47. On 20 November 2016 the applicant was at home with Ms Jackson. He consumed alcohol in breach of the orders previously made by the court. Police went to the couple's address on an unrelated matter and determined that the applicant had breached the conditions of the protection order. He was again arrested and charged with contravening a domestic violence order.

48. At this point in time Ms Jackson was pregnant with her third child with the applicant. Around this time their other two children were removed into state care. I do not have a detailed picture as to why they were removed, but the applicant conceded that the children had been removed because of drug and alcohol use in the home. He explicitly denied that the children were not being adequately cared for. He also denied using drugs in front of the children. He did not however deny, and I am satisfied that it was the case, that he was taking drugs and consuming large quantities of alcohol while the children were in his care.

49. Meanwhile SJ, returned to live with her mother and the applicant. What followed involved the most serious offending in which the applicant engaged. I will set out and adopt the factual findings of the sentencing judge who dealt with the matter:

> Between December 2012 and November 2016, [the applicant] was in a relationship with the victim's [SJ] mother. The offender and the victim's mother resided at an address in Toowoomba in Queensland. The relationship between the offender and the victim's mother resulted in three children.
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> The victim, [SJ], was born on 8 October 2002 and was aged 14 years at the time of the offending, in fact just 14, noting the first date on the indictment. The victim resided at the Toowoomba property with the offender, her mother, and the three young children from her mother's relationship with the offender. She referred to the offender as her stepfather.

Not long after her 14th birthday, on 8 [O]ctober 2016, the offender and the victim were outside the garage of the Toowoomba property. The offender had a bong containing cannabis and offered it to the victim. The victim recalled smoking about five cones of cannabils [sic] and feeling, according to the facts, “pretty stoned”. The offender said to her, “jeez, you look sexy in that skirt”. The victim said, “you can’t say that to me” and the offender apologised. The offender then kissed the victim before taking her into the lounge room where they had penile-vaginal intercourse.

Following that first occasion, there were multiple other times that the offender and the victim engaged in sexual intercourse at the Toowoomba property. These further incidents occurred when the victim’s mother was out of the house or sleeping. There was an occasion whilst still living at the Toowoomba property where the victim and the offender left the house late at night and had penile-vaginal intercourse in the grounds of the local high school.

On 20 November 2016, the victim had an argument with her mother and left the family home, and the offender left with her. Somewhat disturbingly, the Department of Family Services in Queensland became involved and the offender was given temporary parental responsibility for the victim. The victim and the offender resided in various locations in Queensland and they continued to have penile-vaginal sexual intercourse, and the victim recalls that on no occasion did the offender wear protection.

In early January 2017, the offender and the victim moved to Oak Flats in New South Wales where they lived for a few weeks in the house of the offender’s brother and his family. The offender and the victim were staying in the lounge room of that property. The offender’s brother and his family believed the offender and the victim were sleeping separately. However, often they slept together on the lounge. On several occasions when the family were asleep, the offender and the victim engaged in penile-vaginal sexual intercourse at those premises.

Between mid-January and mid-February 2017, the offender and the victim had no fixed abode. They stayed with friends and also slept in a tent. They continued to have penile-vaginal sexual intercourse and on one occasion in the tent in the bush area in the Oak Flats area. On 12 [F]ebruary 2017, the victim was removed from the offender’s care and placed with her biological sister. The offender continued to telephone her.

Around the middle of February 2017, the victim began to suspect she might be pregnant. She told her sister of her suspicions and of the relationship she had with the offender. A

> pregnancy test was undertaken and indeed the victim was pregnant. Her sister contacted the victim's biological father, who then contacted New South Wales Police.
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> On 28 February 2017 the victim ran away with the offender and was reported missing. They lived in the Kiama area until located by the police on 3 March 2017. The victi[m] was spoken to by police and confirmed that she had been in a relationship with the offender and declined to make a formal statement, stating she feared the offender would be arrested. She was examined by a doctor and it was confirmed she was pregnant. On 3 March 2017, the offender took part in a recorded interview with the police in which he denied any sexual relationship with the victim.
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> On 10 April 2017, the victim underwent a surgical abortion and DNA testing of the foetus was consistent with the offender being the father…[17]

50. While the applicant was engaged in this offending, he failed to appear in court on 24 January 2017 to face the charges arising from his conduct in March and November 2016. As a consequence, a warrant was issued for his arrest.

51. He was taken into custody on 25 May 2017. Until the day he was taken into custody the applicant continued to abuse drugs and alcohol. Since being taken into custody the applicant has not used drugs or consumed alcohol, notwithstanding that they can be obtained in jail and in the immigration detention system.

52. On 6 June 2017 the applicant was dealt with by the Wollongong Local Court for contravening an apprehended violence order. The order related to SJ.[18] The terms of the order and when it was imposed are however unclear on the material available to me. It seems likely that the order was made to protect SJ after she was taken into police custody on 13 February 2017.[19] When the victim and the applicant ran away together in late February 2017, that appears to have constituted the breach.

53. The applicant was sentenced to imprisonment for four months.

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[17] Exhibit R1, 52-54.
[18] See Exhibit R1, 49.
[19] See G-Documents, 49.

54. When that sentence was served the applicant continued to be remanded in custody until the sexual abuse charges were dealt with. He pleaded guilty to the charge of sexual intercourse with a minor who was a child under his authority. The sentencing judge also referred to an offence 'on a Form 1'. An offence on a Form 1 are charges laid against an offender, of which they have not been convicted, but, on the request of the accused, are taken into account when sentencing for a principal offence that the offender has been convicted of. The Form 1 offence was possession of child abuse material which consisted of nude pictures of SJ which she had sent him voluntarily early in 2017.

55. The applicant conceded that he had been sent the photos but said he had deleted them. The police recovered them from his phone, but he had not been able to access them after deleting them. No other images of children were found on his phone.

56. He was sentenced to eight and a half years in prison commencing on 25 July 2017 with a non-parole period of six years. He was eligible for parole on 24 July 2023.

57. The applicant's behaviour in prison was extremely good. There do not appear to be any disciplinary incidents of any note and there is no evidence that he used any drugs or alcohol while he was in prison.

58. Just prior to his arrest in May of 2017 his third son with Ms Jackson, KM, was born.

59. Ms Jackson at some point re-gained custody of the children she had with the applicant. However, in May 2020, due to a deterioration in her mental health, her children were taken by the Department of Family and Community Services and placed in foster care.

60. In June 2021 the applicant was notified that he was able to have visits from his brother's children and approval had also been given for him to have visits with his three youngest sons, but via video link only. The applicant began having one thirty-minute session per month with his youngest sons during 2021.

61. While in prison and detention he undertook the following courses:

    (a) EQUIPS Addiction: completed 23 March 2021

    (b) EQUIPS Domestic and Family Violence: completed on 9 July 2021

(c) EQUIPS Foundation: completed on 8 March 2022

(d) Circuit Breaker Anger Management 101: completed 16 November 2023

(e) Smart Recovery workshop: September-December 2023

(f) Anxiety Therapy 101: 7 December 2023

(g) Depression Management: 6 December 2023

(h) Drug and Alcohol Abuse 101: 5 December 2023

(i) How to Improve Your Concentration: 16 December 2023

(j) Sexual Harassment Compliance: 16 December 2023

(k) Single Parenting: 22 December 2023

(l) Healthy Relationships: 25 December 2023

(m) 'Health Survival Tips' course on 10 February 2020, 9 March 2021 and 28 March 2022;

(n) Certificate II in Hospitality: 14 December 2020

(o) Barista course: 2017

(p) Workplace Hygiene: 2017

(q) Vocational Training Program in Chemical Handling: 2020

(r) Certificate III in Cleaning Operations: 17 December 2020

62. While in prison he engaged in the following employment:

- 20 June 2017 - 19 September 2017: Employed as General Hand in the Furniture Unit
- 26 February 2018 - 29 August 2019: Employed as General and then Lead Hand in the Ration Pack Unit

- 5 November 2019 - 10 December 2019: Employed as General Hand in the Engineering Unit
- 10 December 2019 - 8 May 2020: Employed as General and then Lead Hand in Hygiene
- 19 May 2022 - 18 June 2022: Employed as Leading Hand in Hygiene
- 20 June 2022 – parole: Employed as a General and then Lead Hand in the Bakery.

63. He was released from prison in July 2023. He was immediately taken into immigration detention. In immigration detention he was able to maintain communication with his three youngest sons via video link. He also had contact with his eldest son, who is now 25.

64. The applicant remains in Villawood Immigration Detention Centre.

Other factual matters of relevance

65. The applicant has a close relationship with his brother and his brother's wife and their children. His brother has three adult daughters (one of whom has a daughter) and a teenage son. His brother is separated from his wife but remains on good terms with her. It is proposed that if the applicant is released from immigration detention, he will live with his brother's ex-wife and her children.

66. The bond between the applicant and his brother and his brother's ex-wife is extremely close. There is a long history of association with that family and the material submitted by the applicant's nieces in particular paints a picture of an engaged and much-loved uncle who at no point represented a threat to the safety of anyone in his brother's family.

67. If released into the community, the applicant intends to move in with his sister-in-law and her children and pursue work in the building industry. There is evidence that the applicant has a willing employer lined up.

68. The applicant's parents now live in Queensland. His father is aged 69 and his mother 68. His father has difficulty with his hearing. His parents remain supportive of him and his mother gave evidence that she would be devastated if he were removed to the UK.

69. The evidence supports the conclusion that the applicant has no contact with relatives in the UK and he would be commencing a new life from scratch.

70. The applicant indicated in his evidence, and similar statements have been made in the past in the context of his release from prison, that he hoped to have more access to his sons. His current plan is to get legal advice on how his parents might be awarded custody of the boys with him providing support. While it seems improbable that such moves will result in the boys being removed from their current foster arrangements, I have no reason to doubt that it is the course the applicant intends to pursue if he is released into the community.

71. When the applicant is released he will still be on parole and will be a registered sex offender, with additional conditions imposed.

72. It is clear that the applicant has, since his incarceration, lived a life which is in stark contrast to the way in which he conducted himself prior to incarceration. He has abstained from drugs and alcohol. He meditates, exercises and has improved his diet. He has been an enthusiastic worker in the prison. He left prison a very different man to the one who entered prison. He has maintained those positive changes during his time in immigration detention.

Dr Kwok

73. To assist the Tribunal, the applicant obtained a report from forensic psychologist Dr Emily Kwok. She prepared a report, dated 27 November 2023, and provided oral evidence.

74. In essence her conclusions are as follows:

    (a) The applicant suffers from alcohol use disorder and substance use disorder. These were contributory to his criminal activity. Other factors contributed including poor coping skills, impulsivity and emotional dysregulation;

    (b) His current symptoms meet the criteria for adjustment disorder with mixed anxiety and depressed mood;

(c) Mr Miller's condition can be moderated by treatment in the community. He would require drug and alcohol counselling;

(d) Mr Miller would also require treatment that specifically targets his criminal offending, including domestic violence and child sexual offending;

(e) Compared with living in Australia, Mr Miller will have a higher risk of relapse to substance use and other psychosocial challenges in England;

(f) Mr Miller presents as having a moderate risk of re-offending for both sexual offences and general offending, but these will trend towards the low risk level if he continues to participate in interventions that address his criminogenic needs, establish prosocial lifestyle habits in the community, and refrain from contact with the victims. These conclusions were reached after considering both static and dynamic risk factors concerning re-offending.

75. Dr Kwok was a considered witness and in her oral evidence confirmed both her diagnosis of the applicant and his need to commence treatment. She was informed of all the measures which the applicant has undertaken to address his criminal past. She maintained her assessment that, at this point, the applicant remains a moderate risk of re-offending.

76. It is against this factual background that the considerations in the Direction must be applied. Where necessary I have made more refined findings of fact in the context of discussing the specific considerations which are relevant to the determination of the case.

Primary Considerations

Protection of the Australian Community

77. In considering the protection of the Australian community I am required to keep in mind that the Government is committed to protecting the Australian community from harm from criminal activity or other serious conduct by non-citizens. I am required to have particular regard to the principle that remaining in Australia (for a non-citizen) is a privilege which is conferred on the basis that they will be law abiding, will respect important institutions and will not cause or threaten harm to individuals or the Australian community.

78. I need also to give specific consideration to:

(a) The nature and seriousness of the applicant's conduct to date; and

(b) The risk to the Australian community, should the applicant commit further offences or engage in other serious conduct.

Nature and seriousness of the conduct

79. In considering the nature and seriousness of the conduct there are factors to which I must have regard specified in paragraphs 8.1.1(1)(a)-(h).

80. When these factors are applied to the applicant's circumstances, the result is that I must approach the applicant's case on the basis that his crimes are viewed very seriously by the Australian Government and the Australian Community. His crimes include violent and sexual crimes, crimes against women and children and crimes of family violence. I must also consider that in relation to his most serious crimes a substantial sentence was imposed by the courts. Further, the applicant's offending has persisted over a long period of time and increased in seriousness over time.

81. I have also given attention to the cumulative effect of the applicant's repeated offending. Between 2002 and 2017 the applicant demonstrated multiple anti-social traits. A propensity for violence, lack of self-control, a willingness to endanger others by driving while impaired, a lack of respect for authority by missing court dates and failing to report for periodic detention. He was a menace to his domestic partner and ultimately a child abuser of his stepdaughter.

82. The applicant's offending has increased in frequency and increased in seriousness.

83. It also counts against the applicant that he continued to offend after being warned about the consequences of further offending on his migration status. The applicant submits that now that the applicant has knowledge that he will be deported if he offends again, it is a strong deterrent to future offending. The applicant has had that knowledge for many years and it was not a sufficient deterrent to his criminal behaviour.

84. I must regard the applicant's offending very seriously and this weighs very heavily against him when I consider the goal of protecting the Australian community from criminal conduct.

The risk should the non-citizen commit further offences

85. In considering the need to protect the Australian community I must have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable. The applicant's criminality is conduct of that kind.

86. The life-long detrimental effects of adults conducting sexual relationships with children have been demonstrated with unmistakeable clarity in the course of the Royal Commission into Institutional Child Sexual Abuse. I do not have specific evidence on the harm that arises from child sexual abuse, but I am willing to proceed on the basis that it leaves deep emotional scars that a victim may never recover from. If the applicant were to repeat his conduct in relation to another minor it is reasonable to assume that the damage to the victim would be very significant.

87. There is a risk that the applicant's most serious crime will be repeated. The risk that the applicant will commit further sexual offences is assessed by his own forensic psychologist as moderate. While this risk will trend towards low if certain things happen, including if he establishes a pro-social lifestyle in the community, such an outcome is far from guaranteed. The applicant is susceptible to falling into drug and alcohol use and his sobriety has not been tested in the community. If his sexual crime is repeated, the consequences for any victim are very serious.

88. The applicant's other crimes, including violent offences and conduct, are serious. The likelihood of the applicant repeating those offences has also been assessed as moderate. He is currently not using alcohol or illicit drugs and they were a factor which was present in all of the incidents of family violence. There is a good prospect that if the applicant remains clean and sober he will not commit crimes of a similar nature. However, the applicant has only been free from drugs in an institutional setting. His ability to resist alcohol in a more normal social setting has not been tested. The household where he is planning to stay following release is very tolerant of the applicant's previous alcohol use.

In these circumstances I am satisfied that there is a risk that the applicant will relapse into alcohol abuse with a concomitant risk he will commit: a) domestic violence offences, and b) driving offences, including driving while impaired by drugs or alcohol. Crimes of this nature could have serious consequences.

89. In assessing the risk to the community, I have had regard to the factors identified in paragraph 8.1.2(2) of the Direction. My analysis is as follows.

90. The harm to others should the applicant engage in further conduct of a criminal or serious nature includes child abuse, becoming the victim of threats of violence and actual violence in a domestic context and the victim of a road accident.

91. I consider the likelihood of the applicant engaging in further criminal or serious conduct, if he remains clean and sober, to be low. Drug and alcohol abuse underpinned most of his criminality and the applicant has been clean and sober for almost 7 years. In this condition he is remorseful for his past conduct and he does not wish to repeat his offending. However, the likelihood of the applicant engaging in further criminal or serious conduct if, to use the words of Dr Kwok, he does not 'establish prosocial lifestyle habits in the community' is moderate. As the applicant's sobriety is untested in the community there remains an appreciable risk of the applicant engaging in further criminal or serious conduct.

92. In relation to the applicant's child sexual abuse, I am satisfied that Dr Kwok has properly assessed the likelihood of the applicant repeating that conduct as moderate but trending to low if certain conditions are satisfied. That assessment was made notwithstanding that the applicant is drug and alcohol free at the present time and has made considerable efforts to engage with a process of self-improvement since being in prison. I have considered whether the applicant's parole conditions and the sex offender conditions will make a material difference to that assessment but I am not satisfied that they do.

93. I am concerned (as was the Community manager involved in the Corrective Services Risk Mitigation Plan[20]) that the applicant is being released to a family home which includes a 16-year-old-boy. While I hold no concerns that the boy will become a target for sexual

[20] Exhibit R1, 140.

abuse, it is possible that he could have female friends over who are minors. I have no confidence that the applicant will be properly supervised in the household at which he intends to stay. The applicant was able to sexually abuse his victim in that house for a number of weeks in 2017 and the applicant's sister-in-law was strident in expressing her confidence in the applicant's trustworthiness with minors in the evidence she gave at the hearing. She gave that evidence despite knowing what occurred the last time the applicant stayed with her. She was also tolerant of the applicant's previous alcohol use.

94. When the applicant's parole conditions and sex offender restrictions are considered in the light of what his actual living conditions will be, I am not satisfied that they significantly reduce the assessed risk of the applicant re-offending.

95. Accordingly, there are ongoing risks that the applicant may re-offend.

96. Taking into account the risks if the applicant re-offends and the likelihood of him doing so, as well as the seriousness of the conduct, this factor weighs very heavily against restoring his visa to him.

Family violence committed by the non-citizen

97. 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.

98. There is no dispute that the applicant committed family violence against Ms Jackson. The applicant conceded in his oral evidence that he had assaulted her on several occasions. Marrying the applicant's concessions with the police reports available to me, I am satisfied that the applicant assaulted Ms Jackson on the following occasions and on each occasion Ms Jackson was either his de facto wife or the mother of his children, or both:

    (a) On 4 January 2015, the applicant assaulted Ms Jackson in a domestic incident;[21]

[21] Exhibit R1, 50.

(b) On 20 December 2015, he pushed her to the ground, causing lacerations to her elbows and knees;[22]

(c) On 30 March 2016, the applicant grabbed her by the wrists and dragged her off the couch leaving marks on her wrists.[23]

99. The applicant also concedes that his sexual abuse of his stepdaughter constituted family violence. It is a very serious instance of it. The applicant also committed family violence against his stepdaughter in 2013 when he assaulted her on a public street.[24]

100. The applicant also committed family violence against Ms Rigby on 23 August 2010.

101. Turning then to an assessment of the seriousness of the applicant's family violence I consider:

(a) the applicant's family violence was not an isolated incident – the seriousness of his offending increased over time;

(b) the cumulative effect of the applicant's violence has had adverse consequences for Ms Jackson and her daughter;

(c) the applicant has done his best within the various institutions in which he has found himself, to learn strategies for dealing with his propensity to commit family violence. His decision to give up alcohol and illicit drugs which significantly contributes to his offending is to be applauded. If sustained, it reduces significantly the risk of him engaging in further acts of family violence. The applicant accepts responsibility for his acts of family violence and there is every indication that he understands the impact of his behaviour on his child victim in particular, but also on Ms Jackson;

(d) he has also taken steps to address the factors which contributed to the conduct, including completing an anger management course among others;

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[22] Exhibit R1, 7.
[23] Exhibit R1, 18.
[24] Exhibit R1, 51.

(e) he has not re-offended since he was most recently sentenced. However, the applicant has been either in prison or immigration detention since he was sentenced in relation to the child sexual abuse. We are yet to see how the applicant will behave in a non-institutional setting.

102. Notwithstanding the applicant's significant efforts within an institutional setting to reduce his risk of committing family violence in the future, the fact remains that he has been a consistent perpetrator of family violence over time with a variety of victims including a child in his care. Given the range, seriousness and number of family violence offences the applicant has committed, this consideration weighs heavily against revoking the cancellation.

Strength, Nature and Duration of Ties to Australia

103. This consideration weighs strongly in favour of revoking the cancellation.

104. The applicant came to Australia with his nuclear family as a young child. He has spent 37 years in Australia, including his formative years. He has been employed in Australia for most of his adult life and he still has enough connections to obtain work if he were released from immigration detention. Australia is his home. His parents and brother are Australian citizens. His four children, his four nieces and nephew, and his grand-niece are all Australian citizens.

105. He has very close connections to his parents, brother, sister-in-law as well as his nephew and three nieces. The letters from them included in the G-Documents as well as the oral evidence some of them gave at the hearing confirms that. The applicant has been able to maintain a relationship with his three youngest sons despite a long period of incarceration and has re-connected with his son from his first relationship.

106. It has been said by his relatives that the impact of an adverse decision will be devastating for them. I accept that evidence. I give very significant weight to the applicant's ties to his four children, all of whom are Australian citizens. The applicant is also connected to the mother of his children and a former employer. He has friends willing to give references in support of him. I accept that he wants to be part of the Australian community and has developed very strong bonds in that community.

107. The close family and work connections in Australia and the complete absence of any equivalent ties in the UK mean that this consideration weighs very heavily in favour of revoking the cancellation.

Best interests of minor children in Australia

108. I must determine whether revocation of the cancellation is or is not in the best interests of a minor child affected by the decision.

109. The children whose best interests must be considered are the applicant's three sons with Ms Jackson and his nephew.

110. I have considered each of the applicant's three sons' best interests separately. However, given that there are themes which are common to all three, I will explain my reasons in relation to them as a group.

Applicant's sons

111. The applicant has three sons who are minors. The youngest, KM, is 6 years old. He has met his father face to face only once and that occurred recently. His only contact with his father has been via video link for half an hour once a month.

112. The applicant has two other sons who are minors: ZM and BM. They are 9 years and 8 years old respectively. They lived with their father when he was in a relationship with Ms Jackson. While in his care they were removed into state care in late 2016 when they were approximately 2 and 1 years old. The applicant did not live with them again. Although they were returned to Ms Jackson's care for a period, the applicant was already incarcerated at that point in time.

113. In 2020, when Ms Jackson could no longer care for the children due to her deteriorating mental health, the children were placed in foster care. They have been in foster care since 12 May 2020. Their care has been provided by a woman I will refer to as RC. She has provided continuous care for them for over 3 years. She has expressed an interest in gaining permanent guardianship in relation to the boys. That however was put on hold when she became pregnant with her own child.

114. If released into the community the applicant has plans to increase his contact with his sons to three hours per week. He also has plans which he has discussed with his parents to obtain legal advice about the prospect of having them appointed as primary carers for the boys, with him providing support. The applicant's mother was unsure whether such a plan was realistic. The applicant's representative urged me to treat the plan as unrealistic and unlikely to be implementable, particularly given his ongoing status as a registered sex offender.

115. Under Direction 99, in considering the best interests of the applicant's children, specific factors must be considered, if relevant. My consideration of the relevant factors is as follows:

Nature and duration of relationship

116. The relationship between the applicant and each of his three sons is a parental relationship. As a starting point it is almost always in a child's best interest to have access to their father, preferably in person. However, in this case, the applicant proved himself to be a poor father when he was in a relationship with his children's mother such that the state intervened and removed them from his care. Drugs and alcohol played a significant role in that. Further, he has met his youngest son only once in person. The relationship between the applicant and his three youngest sons has been characterised by long absences. Between May 2017 and at least the end of 2018, the applicant had no contact with them at all. His contact with them since then has been via video link with only one in person visit. The video link visits have been only for 30 minutes each month.

Positive parental role in the future

117. It is very difficult to judge whether the applicant will play a positive parental role in his children's future. He has not performed well to date and if he returned to drug and alcohol use he is likely to be anything but a positive role model. While the applicant's lengthy period of abstinence is cause for optimism, as is the high regard he is held in as an uncle, it is difficult to be confident that his role in his children's lives will be a positive one. There will also be ongoing restrictions on the role the applicant can play in his children's lives as

a consequence of him being a registered sex offender.[25] This will be a significant impediment to him playing a full parental role for an extended period regardless of how well he copes if released into the community.

Impact of prior conduct and likely future conduct

118. The applicant's prior conduct must have had a negative impact on his children. His early work as a parent fell below the standards which child services in Queensland was prepared to tolerate and the children were removed from his care due to those concerns. His subsequent conduct resulted in him being incarcerated for an extended period of time, thus depriving his children of a male role model and the financial support which they would normally expect from their father. When their mother's mental health deteriorated, the children were then removed to state care, which may not have occurred if the applicant was not incarcerated. It is reasonable to expect that removal to foster care is difficult for any child. Whether any future conduct by the applicant will negatively impact on the children is very difficult to determine. If the applicant maintains his current level of sobriety in the community he may prove to be a positive influence. However, even on this scenario I have concerns. His current desire to seek to have his children removed from the current foster care arrangements and placed with his parents could negatively impact on his children. At present the children have a settled care arrangement which appears to be working effectively. The taking of legal steps to disrupt that, even if unsuccessful, could negatively impact on the children. Accordingly, even if the applicant remains clean and sober, I have concerns about the impact of his future conduct. If he succumbs to drug use and alcohol abuse, based on his past behaviour his behaviour would negatively impact on his children.

The effect of separation

119. I am not satisfied that the removal of the applicant to the UK and the consequential separation of the children from their father will have a significant negative impact on the children. The applicant's children have for most of their lives been physically separated from their father. Face to face contact has been limited to a single event in the last six and

[25] See G-Documents, 76 (Notice issued to registrable person under the *Child Protection (Offenders Registration Act 2000*); R1, 151.

a half years. In the UK the applicant will be able to maintain similar levels of contact to those his children have experienced in recent years using modern technology.

Others who fulfil a parental role

120. The children's foster carer fulfils the parental role at present and will continue to do so if the applicant is returned to the UK.

Views of the children

121. I am not aware of the children having expressed any view as to whether they would like their father to remain in Australia.

Risk of exposure to family violence or other neglect

122. There is evidence that the applicant's older two children were present during incidents of family violence though they were very young at the time.[26] There is also evidence that the two younger children's care was inadequate resulting in removal by the state in late 2016.

Experience of trauma

123. It is unknown whether any of the children suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

124. In relation to each of the children I am not satisfied that the applicant remaining in Australia is in their best interests. The potential for the applicant to disrupt the current settled care arrangements with ill-conceived attempts to have the children removed to his parents' care is of great concern. He does not have an established track record of good parenting and the children have little more than a biological connection with him. His attempts to create a connection with his sons can continue if he is removed to the UK. I am satisfied that non-revocation is in the best interests of the applicant's biological children. In so far as the best interests of the applicant's sons are concerned this consideration does not favour revocation.

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[26] Exhibit R1, 7, 49-50.

The applicant's nephew

125. In relation to the applicant's nephew I note the following:

(a) The relationship is long but it is a non-parental relationship. The applicant has been absent from his nephew's life for extended periods due to his incarceration at various times and due to his move to Queensland. I do however note that his nephew did visit him while he was in prison.

(b) The applicant appears to have always behaved well in relation to his nephew and he has always had his nephew's best interests at heart.

(c) I accept that the applicant's nephew may be very upset if his uncle were removed to the UK. However, he will be able to keep in touch with him by electronic means as he has done in the past during periods of separation.

(d) The applicant's nephew has parents who perform that role.

(e) The applicant's nephew has not expressed views on this issue.

(f) At the time the applicant was sexually abusing SJ, there was a risk that the applicant's nephew could have been exposed to incidents of child sexual abuse. The applicant sexually abused SJ in his nephew's house while others were asleep.

(g) There is no evidence that the applicant's nephew has suffered or experienced any physical or emotional trauma arising from the applicant's conduct.

126. It would be in the applicant's nephew's best interests if a decision to revoke the cancellation were made. Given that the relationship is non-parental the best interests of his nephew weighs in favour of revoking the visa cancellation but not very strongly.

Expectations of the Australian Community

127. As the Direction makes clear, 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, the Australian community, as a norm, expects the Government not to allow such a non-citizen to remain in Australia. Visa cancellation may be appropriate simply because the nature of the offences are such that the Australian

community would expect that the person should not be granted or continue to hold a visa. The Australian community expects that the Australian Government should cancel a person's visa if serious character concerns are raised through:

(a) acts of family violence;

(b) commission of serious crimes of a violent or sexual nature against women and children.

128. This expectation applies regardless of whether the non-citizen poses a measurable risk of causing harm to the Australian community.

129. This consideration weighs very heavily against revoking the cancellation of the applicant's visa. The applicant has over a period of 15 years repeatedly breached Australian laws. The nature of the applicant's offending, involving as it does family violence and crimes of a sexual nature against a child, is of such seriousness that it is appropriate to proceed on the basis that the Australian community would not expect a person who has done what the applicant has done to continue to hold a visa.[27]

OTHER CONSIDERATIONS

Legal consequences of the decision

130. Pursuant to Direction 99 I need to be mindful that unlawful non-citizens are, in accordance with section 198 of the Act, liable to removal from Australia as soon as reasonably practicable in the circumstances specified in that section. Accordingly, if I do not revoke his visa cancellation he will be held in immigration detention until he can be removed from Australia. As he is a citizen of the UK, I am satisfied that removal will be to the UK.

[27] I have taken account of what the applicant has submitted are offsetting factors including: (a)The fact that the applicant has been continuously resident in Australia for 36 years; (b) The applicant has robust and enduring connections with the Australian community;(c)The applicant has engaged in extensive and noteworthy rehabilitation efforts; (d) Upon release into the Australian community, the applicant will be rigorously subjected to stringent parole and sex offender conditions, significantly reducing the risk of recidivism. They are important considerations and discussed elsewhere in my decision, but do not alter my analysis of the community expectations in the applicant's case.

131. The applicant contends that the legal consequence of a decision to refuse to revoke the cancellation will be:

(a) Irreversible exclusion from re-entering Australia for the applicant; and

(b) The applicant will remain in detention until deportation to the UK and during the process the applicant's liberty will be constrained.

132. I accept that this accurately describes the legal consequences of any decision not to revoke the cancellation. These are matters of significance and weigh in favour of revoking the visa cancellation.

Extent of Impediments if Removed

133. I am also obliged to consider the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:

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

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

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

134. As the applicant is a UK citizen this consideration needs to be assessed by reference to the impediments the applicant will face if removed to the UK.

135. There are no substantial language or cultural barriers to the applicant establishing a basic standard of living in the UK. Australia and UK speak the same language and are culturally very similar. The applicant lived in the UK until he was seven and both his parents were born and raised in England prior to their arrival in Australia in 1987. I am satisfied that there will not be cultural or language barriers to the applicant establishing and maintaining basic living standards.

136. The applicant is of working age and has trade skills which will assist him to find work in the UK. He is also in good health. The evidence establishes that he has not used drugs or

alcohol since he was taken into custody in May 2017. In prison and in immigration detention he has maintained good health primarily through a vegetarian diet, meditation, regular exercise and the avoidance of drugs and alcohol. To quote his brother, he "looks the best he has ever looked". The applicant's mental health has generally been good. He has not required any medication to manage his vulnerabilities. He has seen mental health professionals on occasion while detained but he receives no ongoing treatment. If the applicant maintained the same healthy practices which he has adopted in prison it is most unlikely that he would have difficulty maintaining basic living standards in the UK although I do accept that, given his long criminal record, work may be difficult to come by.

137. If the applicant struggled to find work due to his criminal record, a return to alcohol and drugs, or his mental health deteriorated, the UK has a functioning social security system which provides income support to its citizens if they are unemployed. It also has other elements to its social safety net (council housing, for example). On the medical benefits side, the UK has the National Health Service – a comprehensive, universal medical service which is free to the user at the point of delivery. I am satisfied that the applicant will get basic support from some or all of these systems in the UK which will assist him to establish and maintain basic living standards.

138. Dr Kwok has, however, diagnosed the applicant with significant underlying mental disorders. She concluded as follows:

    (a) The applicant suffers from alcohol use disorder and substance use disorder. These were contributory to his criminal activity. Other factors contributed including poor coping skills, impulsivity and emotional dysregulation;

    (b) His current symptoms meet the criteria for adjustment disorder with mixed anxiety and depressed mood;

    (c) Mr Miller's condition can be moderated by treatment in the community. He would require drug and alcohol counselling;

    (d) Mr Miller would also require treatment that specifically targets his criminal offending, including domestic violence and child sexual offending;

    (e) Compared with living in Australia, Mr Miller will have a higher risk of relapse to substance use and other psychosocial challenges in England.

139. The applicant submits, and I accept, that placing the applicant in the UK with limited supports and a medical system which is likely to be more difficult for the applicant to access (and which may even be inferior to the system in Australia), creates a risk of relapse into drug and alcohol use. If this occurs it could jeopardise the applicant's capacity to establish and maintain a basic standard of living.

140. I accept that this is a realistic scenario and so there are impediments to the applicant establishing and maintaining a basic living standard in the UK which he will not face in Australia. Accordingly on some scenarios, the applicant may well struggle to maintain basic living standards, but not on all. This consideration weighs in favour of revoking the cancellation, but I only give it moderate weight.

Other considerations

Impact on victims and impact on Australian business interests

141. I have no evidence about the impact on victims and the impact on Australian business interests. Accordingly, I give these considerations neutral weight.

The applicant's mental health needs will suffer

142. The applicant also submits that a further (and separate) consideration in the decision should be that the health conditions he has which require medical and other intervention in order for him to maintain good mental health and avoid reverting to crime and substance abuse will not be dealt with in the UK as well as they would be if he remained in Australia. I accept this submission. The additional support which the applicant has in Australia and the ready availability of mental health and drug and alcohol counselling in Australia, and other specialised services, are likely to reduce the risk of him reverting to substance use and the crime associated with it and they may not be available or easy to access in the UK. This has the potential to increase the adverse impact that returning him to the UK will have. I do note that at present the applicant is managing his mental health and sobriety without significant intervention, so it may be that the difference in services between the UK and Australia will not have an impact on him, but if his need for assistance increases, the applicant's access to services in the UK is likely to be inferior. This is a factor which weighs in favour of revocation.

143. I also accept that due to the social isolation there is a greater chance that the applicant's mental health and substance abuse problems which have dogged him in the past will re-emerge in the UK as compared to the chance of them re-emerging if the applicant continues to live in Australia. This is a consideration which favours revoking the cancellation.

Remorse

The applicant submits that the applicant's expressed remorse is a substantial factor that warrants consideration. I have given it due regard. On balance I consider his expressed remorse is genuine and, in the context of his changed behaviour in relation to drugs and alcohol, worthy of careful consideration as a factor reducing his risk of re-offending in the future. However, the single biggest driver of the applicant's offending is substance abuse. If he succumbs to its use when he returns to the community, which is the risk that most concerns me, there is a significant risk he will engage in conduct which he will later regret.

Moral culpability

144. The applicant submits that individuals affected by mental illness, who commit offences influenced by their conditions, should be considered less culpable. In the applicant's case there is evidence which establishes a direct link between the applicant's alcohol use disorder and substance use disorder and his criminal offending. The applicant submits that, in light of this evidence, this should weigh in the applicant's favour. I do not accept that that is the case.

145. I accept that in some circumstances it might be appropriate to treat less seriously criminal offending that is the product of a mental illness for the purposes of determining how heavily some of the primary considerations weigh against an applicant. That is not the same as a factor weighing in the applicant's favour though. Further, in the present case, applying some notion of diminished moral culpability because of the influence of drugs and alcohol, even if only for the purposes of reducing the seriousness with which the offending is regarded, is problematic given the terms of Direction 99. Direction 99 makes clear that violent and sexual crimes, crimes of family violence and crimes against women and children are viewed 'very seriously'. I do not consider that the applicant's alcohol use disorder and substance use disorder provide a basis for treating such crimes less

seriously. In this case, sexually assaulting a child under the influence of drugs, or physically assaulting an intimate partner while drunk, are not crimes that should be viewed less seriously because substance abuse contributed to them.

CONCLUSION

146. Informed by the principles in paragraph 5.2 of the Direction, I have taken into account the considerations identified in sections 8 and 9 of the Direction which are relevant to this decision. I have also considered the other matters raised by the applicant.

147. The following considerations weigh very heavily against a decision to revoke the cancellation:

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

(b) The expectations of the Australian community; and

(c) Conduct of the applicant that constituted family violence.

148. The following considerations weigh in favour of revocation of the cancellation:

(a) The strength, nature and duration of the applicant's ties to Australia – this consideration weighs very heavily in favour revocation.

(b) The best interests of minor children weigh slightly in favour of revocation, having regard to the interests of the applicant's nephew.

(c) The legal consequences of the decision are significant given that the applicant will be removed from Australia, which he regards as his home, and permanently excluded from living here again. This weighs in favour of revocation.

(d) There are impediments which the applicant may face in establishing himself and maintaining basic living standards in the UK. It is relevant that the applicant is more likely to return to substance abuse and crime in the UK given the social isolation he will face and the greater difficulty he will face trying to access services. This consideration favours revocation of the cancellation.

(e) The applicant also has underlying health conditions which will be less effectively addressed if he returns to the UK rather than being released into the Australian community, and he is more likely to relapse into substance abuse. This favours revocation of the cancellation.

149. Weighing all of these matters, I am not satisfied that there is another reason why the cancellation decision should be revoked.

150. The decision is a difficult one. The applicant has demonstrated in the last six and a half years in custody that he is capable of reforming and improving himself. If I could be satisfied that the applicant's behaviour in the community would match his behaviour while in immigration detention, I would be willing to restore his visa and release him into the community. But the evidence does not satisfy me of that. The expert evidence is that he poses a moderate risk of re-offending. In some circumstances that may be acceptable but in circumstances where the applicant has a 15-year history of offending, the offending has increased in seriousness over time, the offending has included violence and included crimes against women and children, powerful primary considerations identified in Direction 99 weigh against him being returned to the Australian community.

151. The nature of the applicant's most serious crime makes any risk of a repeat of it unacceptable. The harm that can be caused by sexual abuse of minors, even when it occurs in the context of what could be dressed up at the time as a consensual relationship, is now well understood. When that abuse is coupled with a 14-year-old girl conceiving a child, with an abortion then being procured, serious and enduring harm has been the result. Releasing the applicant into the community when there is a risk that another young person could be damaged in the same way is not appropriate.

152. The applicant should be congratulated for the work he has done to clean up his act and to reject drug and alcohol use. There is no doubt that uprooting the applicant and sending him to a country which is not his home and where he has no support is a harsh decision. But in the balancing exercise between an applicant's interests and the risks to the broader community, on this occasion I am satisfied that a proper balancing, consistent with Direction 99, leads to the decision under review being affirmed.

I certify that the preceding 152 (one hundred and fifty-two) paragraphs are a true copy of the reasons for the decision herein of Senior Member O'Donovan.

[SAS]

Senior Member O'Donovan

Dated: 1 February 2024

Date of hearing:	**15-16 January 2024**
Date final submissions received:	**16 January 2024**
Solicitor for applicant:	**Dr Jason Donnelly**
Solicitor for respondent:	**Mr Tigiilagi Eteuati**