Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number(s):	**2023/8118**
Re:	**Abdul Wahab Trad**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Senior Member Dr Linda Kirk**
Date:	**22 January 2024**
Date of written reasons:	**27 March 2024**
Place:	**Sydney**

Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal sets aside the Reviewable Decision dated 25 October 2023 to refuse to revoke the Mandatory Visa Cancellation Decision and, in substitution, decides that the cancellation of the Applicant's Bridging A (Class WA) (subclass 010) visa is revoked.

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

Senior Member Dr Linda Kirk

CATCHWORDS

MIGRATION *– visa cancellation – mandatory cancellation under section 501(3A) of the Migration Act 1958 (Cth) – where the Applicant does not pass the character test – whether there is 'another reason' to revoke the cancellation – consideration of Ministerial Direction No. 99 – protection of the Australian community – links to the Australian community – the best interests of minor children in Australia – expectations of the Australian community – legal consequences of the decision – impediments to removal – decision under review set aside*

LEGISLATION

Administrative Appeals Tribunal Act 1975 (Cth)

Migration Act 1958 (Cth)

CASES

FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 775

FYBR and Minister for Home Affairs (2019) 272 FCR 454

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

Holloway v Minister for Immigration, Citizenship and Multicultural Affairs [2022] FCA 1126

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

Jal v Minister for Immigration and Border Protection [2016] AATA 789

Marzano v Minister for Immigration and Border Protection [2017] FCAFC 66
Minister for Home Affairs v Buadromo [2018] FCAFC 151

Minister for Immigration v HSRN [2023] FCAFC 68

PNLB and Minister for Immigration and Border Protection [2018] AATA 162

Poi-ilaoa and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2021] AATA 587

Saleh and Minister for Immigration and Border Protection [2017] AATA 367

Suleiman v Minister for Immigration and Border Protection (2018) 74 AAR 545

Viane v The Minister for Immigration and Border Protection [2018] FCAFC 116; 162 ALD 13

SECONDARY MATERIALS

Direction No. 99 – Migration Act 1958 – Direction under section 499: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA

WRITTEN REASONS FOR DECISION

Senior Member Dr Linda Kirk

27 March 2024

1. Abdul Wahab Trad ('the Applicant') is a 45-year-old citizen of Lebanon,[1] who first arrived in Australia on 15 September 2004.[2] He relocated permanently to Australia on 30 July 2013.[3] Prior to its cancellation, the Applicant held a Bridging A (Class WA) (subclass 010) visa which he was granted on 22 January 2020 ('the visa').[4]

2. On 1 April 2022, the Applicant was convicted in the NSW District Court of two counts of *Have sexual intercourse with child >=10 &14 years*, three counts of *Intentionally sexually touch child >=10 years and <16 years,* and *Intentionally incite child >=10 yrs & <16 yrs sexual touch* ('the sexual offences'). He was sentenced to an aggregate sentence of three years imprisonment.[5]

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[1] Exhibit R1, G11, 70.

[2] Ibid, G37, 146.

[3] Ibid.

[4] Ibid.

[5] Ibid, G6, 38.

3. On 2 June 2022, the Applicant's visa was mandatorily cancelled under subsection 501(3A) of the *Migration Act 1958* (Cth) ('the Act') ('the Mandatory Visa Cancellation Decision') because a delegate of the Minister ('the Respondent') was satisfied that the Applicant did not pass the character test in subsection 501(6) of the Act as he was considered to have, pursuant to subsection 501(7)(c), a 'substantial criminal record' within the meaning of section 501(6)(c) as he had been sentenced to a term of imprisonment of more than 12 months and was serving a sentence of imprisonment on a full-time basis in a custodial institution: section 501(3A)(b).[6] At the time, the Applicant was serving a sentence of full-time imprisonment at Junee Correctional Centre in New South Wales for an offence against a law in Australia. The Applicant was invited to make representations to the Respondent about revoking the decision to cancel his visa within 28 days of receipt of the Mandatory Visa Cancellation Decision.

4. On 18 May 2023, the Applicant was released on parole and transferred to Villawood Immigration Detention Centre ('VIDC').[7]

5. On 17 October 2022 and 25 January 2023, the Applicant made representations seeking revocation of the Mandatory Visa Cancellation Decision.[8]

6. On 25 October 2023, a delegate of the Respondent decided, under subsection 501CA(4) of the Act, not to revoke the Mandatory Visa Cancellation Decision ('the Reviewable Decision').[9] The Applicant was notified of the Reviewable Decision on the same date.[10]

7. On 28 September 2023, the Applicant applied to the Administrative Appeals Tribunal ('the Tribunal') for review of the Reviewable Decision under subsection 500(1)(ba) of the Act.[11]

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[6] Ibid, G8, 56-63.

[7] Transcript of proceedings, 11 January 2024, 24.

[8] Exhibit R1, G15, 95; Exhibit R1, G16, 97.

[9] Ibid, G4, 19.

[10] Ibid, G3, 10-13.

[11] Ibid, G2, 4.

8. The matter was heard by the Tribunal on 11 and 12 January 2024. The Applicant attended the hearing in person and was represented by counsel. He was assisted by an interpreter in the Arabic and English languages.

9. The following persons gave oral evidence and were cross-examined at the hearing:

- the Applicant
- NBT, the Applicant's wife

10. The material before the Tribunal consists of:

- Section 501 G-Documents (G1 – G38, pp. 1 – 170) filed 17 November 2023 – Exhibit R1
- Respondent's Tender Bundle (RTB1 – RTB2, pp. 1 – 20) filed 22 December 2023 – Exhibit R2
- Respondent's Statement of Facts, Issues and Contentions dated 20 December 2023 ('RSFIC')
- Applicant's Statement of Facts, Issues and Contentions dated 4 December 2023 ('ASFIC')
- Applicant's Statement dated 2 December 2023
- Applicant's Statement dated 23 December 2023
- Statement of NBT dated 2 December 2023
- Statement of NBT dated 7 January 2024

11. The Tribunal has reviewed the evidence before it and refers to relevant materials below.

LEGISLATION

12. Subsection 501(3A) of the Act compels the Minister to cancel a visa in certain circumstances:

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

(ii) …; and

(b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

13. Paragraph 501(6)(a) of the Act relevantly provides that a person does not pass the 'character test' if the person has a 'substantial criminal record'. Paragraph 501(7) of the Act provides:

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

a) the person has been sentenced to death; or

b) the person has been sentenced to imprisonment for life; or

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

d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or

e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or

f) the person has:

(i) been found by a court to not be fit to plead, in relation to an offence; and

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

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

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

15. Subsection 501CA(4) confers on the Minister the discretion to revoke the Mandatory Visa Cancellation Decision under subsection 501(3A). Subsection 501CA(4) provides:

(4) The Minister may revoke the original decision if:

(a) the person makes representations in accordance with the invitation; and

(b) the Minister is satisfied:

(i) that the person passes the character test (as defined by section 501); or

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

16. Paragraph 500(1)(ba) of the Act provides that applications may be made to the Tribunal for review of decisions of a delegate of the Minister under subsection 501CA(4) not to revoke a decision.

MINISTERIAL DIRECTION NO. 99

17. Subsection 499(1) of the Act provides:

> *The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:*
>
> *(a) the performance of those functions; or*
>
> *(b) the exercise of those powers.*

18. Subsection 499(2A) of the Act provides that "A person or body must comply with a direction under subsection (1)."

19. On 23 January 2023, the Minister, for the purposes of section 499 of the Act, made a Direction titled *Direction No. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ('the Direction'). The commencement date for operation of the Direction was 3 March 2023.[12]

20. Paragraph 5.1 sets out the objectives of the Direction. Sub-paragraphs 5.1(1) and (2) provide:

> *(1) The objective of the Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens. Relevantly, a non-citizen who does not pass the character test (see Annex A for explanation) is liable for refusal of a visa or cancellation of their visa.*
>
> *(2) Specifically, under subsection 501(1) of the Act, non-citizens may be refused a visa if they do not satisfy the decision-maker that they pass the character test. Under subsection 501(2), non-citizens may have their visa cancelled if the decision-maker reasonably suspects that they do not pass the character test, and the non-citizens do not satisfy the decision-maker that they do pass the*

[12] Upon its commencement, the Direction revoked the operation of "Direction no. 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA".

character test. Where the discretion to refuse to grant or to cancel a visa is enlivened, the decision-maker must consider the specific circumstances of the case in deciding whether to exercise that discretion.

21. Paragraph 5.1(4) provides:

> *(4) The purpose of this Direction is to guide decision-makers in performing functions or exercising powers under section 501 and 501CA of the Act. Under section 499(2A) of the Act, such decision-makers must comply with a direction made under section 499.*

22. Paragraph 5.2 of the Direction sets out the principles which provide the framework within which decision-makers should approach their task of deciding whether to refuse a visa under section 501 of the Act. These principles are as follows:

> *(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*
>
> *(2) Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*
>
> *(3) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measureable* [sic] *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 cancellations 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 [sic] *risk of causing physical harm to the Australian community.*

23. Paragraph 6 of the Direction provides:

> *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.*

24. Paragraph 7(1) provides that, when taking the relevant considerations into account, 'information and evidence from independent and authoritative sources should be given appropriate weight.'

25. Paragraph 7(2) states that '[p]rimary considerations should generally be given greater weight than the other considerations.' That does not preclude the Tribunal, however, based on the specific circumstances of each case, to give an 'other' consideration the equivalent of or greater weight than a primary consideration.[13] Paragraph 7(3) states that '[o]ne or more primary considerations may outweigh other primary considerations.' However, as Kenny and Mortimer JJ stated in their joint judgment in *Jagroop v Minister for Immigration and Border Protection and Another*, 'the weighing process in each case is in substance left, as it must be, to the individual decision-maker exercising the power under section 501'.[14]

26. Paragraph 8 of the Direction sets out five Primary Considerations that the Tribunal must take into account. They are:

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

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[13] *Suleiman v Minister for Immigration and Border Protection* (2018) 74 AAR 545, [23]; [28] (Colvin J).

[14] (2016) 241 FCR 461, [57].

5) *expectations of the Australian community.*

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

a) *legal consequences of the decision;*

b) *extent of impediments if removed;*

c) *impact on victims; and*

d) *impact on Australian business interests.*

ISSUES FOR DETERMINATION

28. Before the power in subsection 501CA(4) of the Act to revoke the original decision is enlivened, the decision-maker must be satisfied that the conditions for the exercise of the power have been met.

29. There is no dispute that the Applicant made the representations required by subsection 501CA(4)(a) of the Act. The issue before the Tribunal is whether the discretion to revoke the Mandatory Visa Cancellation Decision may be exercised. In *Minister for Home Affairs v Buadromo,*[15] the Full Court of the Federal Court of Australia made the following observations in relation to sub-section 501CA(4):

> *there has been some discussion in the authorities as to whether s 501CA(4) contains a residual discretion in the decision-maker by reason of the use of the word 'may' in the chapeau of the subsection, or whether the balancing of the factors favouring a refusal to revoke the cancellation is part of the one exercise of determining whether there is another reason the original decision should be revoked. The weight of authority in this Court favours the latter view ...*[16]

30. The issues for determination are:

1) whether the Applicant passes the 'character test'; and

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[15] [2018] FCAFC 151.

[16] Ibid, [21], citing, inter alia, *Gaspar v Minister for Immigration and Border Protection* [2016] FCA 1166; (2016) 153 ALD 337, [38] (North ACJ); *Marzano v Minister for Immigration and Border Protection* [2017] FCAFC 66; (2017) 250 FCR 548, [31] (Collier J, with whom Logan and Murphy JJ agreed).

2) whether there is 'another reason' why the Mandatory Visa Cancellation Decision should be revoked.

31. If the Applicant succeeds on either ground, the Tribunal must find that the Mandatory Visa Cancellation Decision should be revoked.

EVIDENCE BEFORE THE TRIBUNAL

Early life in Lebanon

32. The Applicant is the youngest of 13 children born to his parents. His early life was affected by the Lebanese Civil War, and he did not attend school for very long as it was often closed. He can read a little Arabic, but he never learned to write, other than to write his name.[17] He has very limited English language skills.[18]

33. In Lebanon, the Applicant worked as a trader of shoes and other goods purchased in Syria, and he bought and restored furniture for sale. He also worked with a shoemaker.[19] On one occasion when the Applicant went to Syria to buy shoes and other goods, 'there was a mix up with names' and he was arrested. He was subjected to torture in prison and was physically injured and suffered psychologically. The Applicant was released after three months when the 'mix up' was discovered. He was left 'destroyed' by this experience.[20]

34. The Applicant's brother and sister migrated to Australia, and they provided the rest of the family with financial assistance. His other family members remained in Lebanon.[21]

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[17] Respondent's Tribunal Book, TB11(e), 171.

[18] Transcript of proceedings, 11 January 2024, 22-23.

[19] Respondent's Tribunal Book, TB11(e), 172.

[20] Ibid, TB11(e), 169.

[21] Ibid, TB11(e), 171.

Migration to and work in Australia

35. The Applicant first visited Australia in September 2004 with the assistance of his two siblings who had settled here.[22] He visited Australia a further three times in 2006, 2007 and 2009, and stayed for periods of up to three months.[23] He permanently relocated to Australia in July 2013 when he became engaged and was granted a prospective spouse visa.[24]

36. Between the period 2013 and 2021, the Applicant was employed part-time by Impressive Wardrobes fitting wardrobes, kitchens, and shower screens. From 2019 to 2021, he was self-employed in his own business, A2Z Installations, on a full-time basis.[25] He worked primarily as sub-contractor for Impressive Wardrobes which sourced the work which was undertaken by him, and he invoiced Impressive Wardrobes.[26] He continued this work as a sub-contractor while he was on bail awaiting his criminal trial.[27] He had very limited interaction with clients except in the 'rare cases when they want[ed] to make a little modification'.[28]

Criminal history in Australia

37. The Applicant's National Criminal History Check dated 1 June 2022 records his criminal convictions in Australia.[29]

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[22] Ibid, TB11(e), 172.

[23] Exhibit R1, G37, 146.

[24] Transcript of proceedings, 11 January 2024, 7.

[25] Ibid, 8-9.

[26] Ibid, 26.

[27] Ibid.

[28] Ibid, 25.

[29] Exhibit R1, G6, 37-40.

Sexual offences

38. On 1 April 2022, the Applicant was convicted of the sexual offences in the NSW District Court following a trial by judge alone. The victim of these offences was a 13-year-old girl who was previously unknown to the Applicant. The sentencing remarks of Judge Pickering SC dated 1 April 2022 outline the circumstances of the offending.[30] On 15 March 2020, the Applicant was driving along a road in Bankstown when he encountered the victim who then got into his van. After the victim entered the Applicant's vehicle, there was 'some degree of flirtation and conversation, some of which was initiated by the victim.' The Applicant drove the victim to a park and placed his hands inside the victim's bra, or top, and put his hand on her breast. He then touched her leg and the outside of her vagina before digitally penetrating her.[31] During a subsequent police traffic stop, the victim did not appear to be 'highly distressed'. His Honour surmised that although the victim may not have been keen to engage in the sexual activity, she 'she did nothing really to indicate to him that he was not entitled to do it and she was happy enough for it to occur.'[32] The Applicant then drove the victim to another location where he touched her breast and digitally penetrated the victim again, and then asked her to suck his penis. Afterwards, he dropped the victim off at the railway station. Despite the Applicant's denial of any sexual activity, there was DNA evidence from his ejaculation in the front of the vehicle.

39. At trial, the Applicant entered a plea of not guilty. Judge Pickering SC found the Applicant guilty of the sexual offences, describing his behaviour as 'a chance encounter which subsequently resulted in sexual activity.'[33] His Honour noted that there was no suggestion 'that [the Applicant] was manipulative, aggressive, lied to [the victim], or really did anything outside of have a friendly conversation with her where she decided, along with him, to engage in sexual activity.'[34] However, he observed that the Applicant 'had been in Australia long enough to know that this was illegal, you cannot then

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[30] Ibid, G7, 41-43.

[31] Ibid.

[32] Ibid, G7, 43.

[33] Ibid, G7, 42.

[34] Ibid, G7, 44.

engage in sex with a 13 year old.'[35] His Honour observed that the Applicant 'was perhaps misguided as to how [the victim] actually did feel about the entire incident.'[36] The victim described 'feeling awkward and that she could not necessarily really stop what was happening' in circumstances in which the Applicant had 'the ability to control where they are going, how they are going and in those circumstances also when she will be dropped off.'[37]

40. In sentencing the Applicant, Judge Pickering observed that his conduct was 'below the mid-range of objective seriousness'.[38] However, he found that the gravity of the Applicant's offending was still such that there was 'no option other than full time imprisonment'.[39]

Other offences

41. In addition to the sexual offences, the Applicant's COPS records indicate that he has been the subject of two apprehended violence orders and has committed seven traffic offences.[40]

Remorse and responsibility for offending

42. In his request for revocation of the Mandatory Visa Cancellation Decision dated 28 June 2022, under the heading 'Reasons for Revocation' the Applicant stated:[41]

> *1. …*
>
> *2. Conviction is being appealed*

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[35] Ibid.

[36] Ibid.

[37] Ibid, G7, 45.

[38] Ibid, G7, 52.

[39] Ibid.

[40] Tribunal Book, TB4, 27.

[41] Exhibit R1, G10, 64.

…

43. During cross-examination, the Applicant told the Tribunal that his lawyers completed his revocation request, and he signed it. He said that the contents were not explained to him nor was the request translated into Arabic.[42]

44. In the undated Personal Circumstances form that the Applicant submitted with his revocation request, he wrote:[43]

> *The applicant did not commit the offence and a conviction appeal is on foot.*
>
> *…*
>
> *The applicant has not admitted the offending and an appeal is pending.*

45. During cross-examination, the Applicant was asked about whether he had intended to appeal the conviction, and if he still intended to do so. He stated:[44]

> *No, no more. So what happened, originally I wanted to ask for appeal. I talked to a private lawyer. But the fees were too high. I couldn't afford them. So then I talked to a Legal Aid lawyer. And then we thought to just appeal for the conviction of the – the visa … – revocation. Just an issue too, just to ask, an appeal regarding the visa revocation, not appeal the conviction.*

46. He was asked when he made the decision to abandon the appeal of his criminal conviction. He stated:

> *When I went to Long Bay jail. It's taken about 10 months in Long Bay jail. I'm not sure. About five, six months before I finished my jail term.*
>
> *… I remember Long Bay jail but I don't remember the date. Late 2022 or early 2023.*[45]
>
> *…*

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[42] Transcript of proceedings, 11 January 2024, 22.

[43] Exhibit R1, G11, 78.

[44] Transcript of proceedings, 11 January 2024, 23.

[45] Ibid, 23.

When the lawyer told me about this, it was about a month before my jail sentence ends. So I thought it's just a month left. There's no point to do that. When the lawyer talked to me of the appeal, I had only one month left from my jail sentence.[46]

47. In his statement dated 2 December 2023, the Applicant stated:[47]

I make this statement to express my sincere remorse and reflections on the events that led to my incarceration and the subsequent cancellation of my visa.

I am deeply sorry for the actions and decisions that led to my involvement in criminal activities. My actions were misguided, and I failed to foresee the consequences that unfolded. The experience of going to jail was a significant wake-up call for me, and it made me realise the gravity of my mistakes.

48. During cross-examination, the Applicant was asked whether he had anything further to say in relation to his remorse and regret for the sexual offences. He stated:[48]

… What I did is something, like, big and I am very remorseful. I regret a lot.

Impact on victim

49. The victim of the Applicant's offences provided a Victim Impact statement to the Court that was referred to by Judge Pickering in his sentencing remarks. She stated:

I was in a situation that made me feel disgusted of my mind and body. I became silent as days passed by, I got shy when people looked at me, or even got close to me, it felt like a burden.

50. The victim stated that prior to the Applicant's offending against her, 'she was an athlete doing running and good at drawing, she loved art, she was outgoing, she was confident, she had a lot of friends but after [the offending] happened they disappeared.' She outlined the impact the Applicant's offending had on her family and how 'she has to carry the grief on her shoulders as well as [that of] the other people ...'[49] She stated: *50*

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[46] Ibid, 24.

[47] Tribunal Book, TB6, 49, [4]-[5].

[48] Transcript of proceedings, 11 January 2024, 38.

[49] Exhibit R1, G7, 47.

[50] Ibid.

I know I am a wise person but the crime has made feel that trusting people is difficult and it is hard to understand how [the Applicant] could do this.

51. In his evidence in chief, the Applicant was asked about his perspective on the victim of his offending. He stated:[51]

I thought about everything. And that should not have happened.

52. The Applicant was asked to explain what he meant by this. He stated:[52]

Thinking about this one affected me a lot, especially being in the prison, put me a lot of stress. All this impacted me, impacted my wife, impacted my children. Because I think about this all the time, I, like, I was in a way suffering psychologically. The death of my mum while in prison made things even worse to me.

Rehabilitation

53. The Applicant completed a 'Sexual Harassment Compliance' course in July 2023.[53] He told the Tribunal that the course was online and took 90 minutes per day over two days.[54] He was asked what he learned during the course, and he stated:[55]

That you can't talk to people against their will. You can't deal with them against their will. You can't touch anyone against their will.

Mental health

54. A report authored by Dr Olav Nielssen, Psychiatrist, dated 10 March 2022 was tendered in court in the Applicant's criminal proceedings.[56] Dr Nielssen diagnosed the Applicant with Post-Traumatic Stress Disorder, Depression and Anxiety due to his experiences

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[51] Transcript of proceedings, 11 January 2024, 10.

[52] Ibid.

[53] Exhibit R1, G35, 142.

[54] Transcript of proceedings, 11 January 2024, 18.

[55] Ibid.

[56] Tribunal Book, TB11(e), 168-174.

growing up in Lebanon during the war, and the torture he was subjected to when he travelled to Syria and was arrested and held in prison for three months. Dr Nielssen did not identify any causal link between the Applicant's mental health and his offending because at the time of the consultation he maintained his plea of not guilty.[57]

55. In his statement dated 2 December 2023, the Applicant described the current state of his mental health:[58]

> *Since being in immigration detention, I have been experiencing a significant decline in my mental health. The lack of activities and the feeling of helplessness, as my life seems completely out of my control, have been taking a toll on me. The uncertainty of my situation and the separation from my family have exacerbated this mental strain.*

56. In his oral evidence, the Applicant told the Tribunal that if he returns to the community, he wants his GP to refer him to a psychologist. He said he wants to talk to the psychologist about 'the problem' he got himself into.[59]

Risk of re-offending

57. In his sentencing remarks dated 1 April 2022, Judge Pickering SC stated:[60]

> *In my view [the Applicant] has good prospects of rehabilitation, he is unlikely to offend in the future, this seems to be a matter in which he made a poor choice in the moment. Whether he was sexually frustrated and saw an opportunity here with someone who was flirting with him and he made an extremely poor legal and moral decision at the time I do not know, but it does seem to be a spur of the moment incident in which he let his otherwise prior good behaviour dissipate for an afternoon event that he will regret for the rest of his life. Other than that, in my view, as I said he is someone who is unlikely to offend in the future, his time in custody will be difficult even if Corrective Services pick up their act and start taking his health seriously.*

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[57] Ibid, TB11(e), 173.

[58] Ibid, TB6, 50, [11].

[59] Transcript of proceedings, 11 January 2024, 16.

[60] Exhibit R1, G7, 53.

58. In a report dated 13 January 2022, prepared in advance of sentencing the Applicant, Ms Kellie Blake, Psychologist,[61] assessed the Applicant's risk of re-offending using an actuarial risk assessment, the Static-99R.[62] The Applicant's total score on the Static-99R was 1, based on the following items: aged 40 to 59.9 (score of -1); having an unrelated victim (score of 1); and having a stranger victim (1 point). This places him in the 'Level III - Average Risk' category.[63]

59. In his statement dated 2 December 2023 the Applicant stated his commitment not to re-offend:[64]

> *I want to unequivocally state that I will never put myself in such a situation again. The lessons I have learned from this experience are indelible, and I am committed to making better choices in the future. The experience of incarceration and the risk to my visa status have been sobering, and I understand the importance of adhering to the law and the expectations of the Australian community.*
>
> *Moving forward, I am dedicated to being a law-abiding individual and a responsible member of society. I understand that actions speak louder than words, and I am committed to demonstrating my change through my actions. I am genuinely remorseful for my past actions and am fully committed to a positive and law-abiding future. I humbly request the opportunity to prove my commitment to change and to make amends for my past mistakes.*

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[61] Exhibit R2, RTB, 18-20.

[62] The Static-99R (Hanson & Thornton, 2000; Harris, Phenix, Hanson, & Thornton, 2003; Helmus, Babchishin, Hanson, & Thornton, 2009; Phenix, Fernandez, Harris, Helmus, Hanson, & Thornton, 2016) is an actuarial risk assessment instrument "intended to position offenders in terms of their relative degree of risk for sexual recidivism based on commonly available demographic and criminal history information that has been found to correlate with sexual recidivism in adult male sex offenders" (Phenix, Fernandez, Harris, Helmus, Hanson, & Thornton, 2016). The Static-99R has moderate predictive accuracy in ranking offenders according to their relative risk for sexual recidivism and produces estimates of future risk based on a number of risk factors present in any one individual. On average, there is a 70% chance that a randomly selected recidivist would have a higher score than a randomly selected non-recidivist. The ability of Static-99R to assess relative risk has been fairly consistent across a wide variety of samples, countries, and unique settings. It is widely accepted by the international scientific community and is utilised in several other jurisdictions in Australia and around the world. The Static-99R consists of 10 items, with total scores (obtained by summing all the items) ranging from -3 to 12.

[63] Exhibit R2, RTB, 19.

[64] Tribunal Book, TB6, 49, [7]-[8].

Wife and children

60. The Applicant and his wife, NBT, married in April 2015. They have two children, NAT born in 2017 and ST born in 2018.[65]

61. In his statement dated 2 December 2023, the Applicant described his relationship with his wife and children:[66]

> *I maintain a very close bond with my wife and two children who are residing in Australia. Despite the physical distance and the challenging circumstances, our relationship remains strong and is a crucial source of emotional support for me.*
>
> *…*
>
> *One of the few solaces in my current situation is the frequent communication I have with my children. I speak with them approximately 5-6 times a day, either through video calls or phone calls. These interactions are incredibly important to me, providing much-needed comfort. Despite this, I miss my children immensely, and not being able to be physically present in their lives is a source of deep sorrow.*
>
> *My relationship with my wife has also been greatly affected by my detention. I miss her as much as I miss my children. The few opportunities I have had to see her and my children in person in detention have been bittersweet, serving as a reminder of the life I am missing out on while detained.*
>
> *Being separated from my family has been the hardest part of my detention. The inability to be there for my wife and children, to support them and share in our daily lives, is something that weighs heavily on me every day.*
>
> *My current situation in immigration detention has had a profound impact on my mental wellbeing and my family life. The limited contact with my wife and children, though valuable, is not a substitute for being with them. I deeply miss my family and the life we had, and I am eager to reunite with them and resume my role as a husband and father.*

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[65] Exhibit R1, G16, 99, [9].

[66] Tribunal Book, TB6, 50, [10], [12]-[15].

62. In his statement dated 25 January 2023, the Applicant elaborated on his relationship with his children:[67]

> *I wish to say a bit more about my children:*
>
> - *Before I entered custody, I had an amazing relationship with my children. I would take the children out on the weekends and in the evenings. I was there to put them to sleep. Every night I would cut up their favourite fruit and feed them.*
> - *I enjoyed making my kids their favourite dinners. I would take the kids to the park, the shops and for walks. I miss having my children wrap their arms around me and cuddle on the couch. Since being in custody, speak to the children at every opportunity.*
> - *It causes me great distress to hear the children crying for me and knowing there is nothing I can do to ease their pain. It breaks my heart to know that my son needs various medical treatment to help him with his disabilities. My wife cannot afford to get him that support.*
> - *If I was at home with my family, I would be working to ensure my wife and children do not go without.*
> - *My children are my world. Without them, I am nothing. The consequences of me being removed from Australia will be lifelong sorrow and sadness. My children need me. I need them*.

63. The Applicant told the Tribunal that when he was in gaol in Nowra, his wife would visit him every second week because it is a long journey.[68] Since he has been in immigration detention, his wife visits him twice a week with the children.[69]

Siblings

64. The Applicant has a close relationship with his brother, IT his brother's wife, ET, and his sister, RAT who are Australian citizens. The Applicant would stay with them when

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[67] Exhibit R1, G16, 100, [10].

[68] Transcript of proceedings, 11 January 2024, 12.

[69] Ibid, 13.

he visited Australia and following his marriage, they would gather for family dinners, picnics and outings.[70]

65. In his letters of support, IT stated that he has a 'very close and loving relationship'[71] with the Applicant, and he misses him and feels like he has lost his 'best friend'.[72] He would be 'absolutely devastated' if the Applicant were removed from Australia. His minor aged children, AT, MT1 and MT2 have 'a loving and decent relationship' with the Applicant,[73] and he 'provides [the] children with emotional guidance and practical assistance.'[74]

66. RAT states in her letters that the Applicant has been a 'positive influence' upon her, and she would be devastated if he were to be removed from Australia.[75] Her children, RA and NA have a 'strong relationship' with the Applicant and if he were removed from Australia, the children would be 'deeply affected' and 'would be denied an important uncle figure [and] the opportunity to continue to get close emotional and practical assistance from their uncle.'[76]

Nieces and nephews

67. The Applicant claims to have an 'extremely close' relationship with his minor aged nieces and nephews, who are the children of his siblings:[77]

- AT born 2008, aged 15 years
- MT1 born 2010, aged 13 years

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[70] Exhibit R1, G11, 76.

[71] Ibid, G23, 127.

[72] Ibid, G20, 124.

[73] Ibid, G23, 127.

[74] Ibid, G23, 128.

[75] Ibid, G24, 129; G21, 125.

[76] Ibid, G24, 130.

[77] Ibid, G11, 75-76.

- MT2 born 2015 aged 8 years
- RA, born 2007, aged 16 years
- NA, born 2009, aged 14 years

68. The Applicant told the Tribunal that he has a 'very good' relationship with his nieces and nephews and, when he sees them, he gives them presents.[78] He speaks to the children when he calls their parents.[79]

Family in Lebanon

69. The Applicant has family members who continue to reside in Lebanon, being four sisters and five brothers.[80] He told the Tribunal that his siblings all reside in Tripoli.[81] In addition, the Applicant has three uncles/aunts and 21 nieces/nephews in Lebanon.[82]

Future plans

70. In his statement dated 2 December 2023, the Applicant detailed his plans for the future:[83]

> *In this section of my statement, I outline my aspirations and plans for my future, particularly focusing on my intentions to reunite with my family, re-establish my career, and address my health concerns.*
>
> *A central part of my future plan involves spending quality time with my family. I am keen to provide for my wife and children, both emotionally and financially. Being with them is my top priority, and I am committed to playing an active and supportive role in our family life.*
>
> *Professionally, I plan to return to work in the construction industry. My expertise lies in installing wardrobes, kitchens, and shower screens. Prior to my current situation, I worked as a sole trader under my own at A2Z Installations, often*

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[78] Transcript of proceedings, 11 January 2024, 13.

[79] Ibid, 14.

[80] Exhibit R1, G11, 77; Transcript of proceedings, 11 January 2024, 34.

[81] Transcript of proceedings, 11 January 2024, 34.

[82] Exhibit R1, G11, 77.

[83] Tribunal Book, TB6, [24]-[31].

working six days a week. I am eager to return to this line of work, as it not only provides financial stability for my family but also a sense of purpose and accomplishment for me.

Upon my release, I intend to return to living in Yagoona. Resuming life in a familiar environment will be instrumental in my readjustment and will provide a stable base for rebuilding my life with my family.

An important aspect of my future plans includes addressing my mental health issues. My wife has committed to helping me get a mental health treatment plan for sessions to address my PTSD, depression, and other mental health concerns.

I am fully aware of the importance of this treatment for my overall wellbeing and am committed to actively engaging in the necessary therapy and interventions.

My overarching goal is to lead a stable, productive, and fulfilling life with my family. I am determined to overcome the challenges I have faced and to build a positive future for myself and my loved ones.

I am fully committed to making the most of my future opportunities, particularly in terms of reuniting with my family, returning to my profession, and addressing my health concerns. These steps are crucial for me to move forward and provide a stable, happy, and healthy environment for my family.

71. During cross-examination, the Applicant was asked whether he has been in contact with Impressive Wardrobes to inquire about whether he has any future working with them as an employee or sub-contractor. He told the Tribunal that he has not been able to talk to anyone at Impressive Wardrobes because he was sent to gaol. However, the management at Impressive Wardrobes are aware of his convictions. He said that if Impressive Wardrobes did not want him to work for them, there are many other Lebanese-owned companies, and he has friends who can help him to find work.[84]

Health issues

72. In his statement dated 2 December 2023, the Applicant detailed the physical health issues he is currently experiencing:[85]

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[84] Transcript of proceedings, 11 January 2024, 27, 39.

[85] Tribunal Book, TB6, 53, [33]-[36].

For the past four months, I have been dealing with a persistent and troubling rash. Despite various attempts at treatment, no one has been able to diagnose or effectively treat this condition. A skin specialist has examined me and was unable to recognise the nature of this rash, which is a cause of significant concern and discomfort for me.

I have been prescribed four different types of cream in an attempt to treat the rash, but none have been effective. The persistent nature of this rash, coupled with the inability of medical professionals to treat it, has been both physically uncomfortable and mentally distressing.

In addition to the rash, there is a concern about inflammation of my spleen. I am being sent to a specialist for this issue, adding another layer of anxiety regarding my health. The uncertainty and potential seriousness of this condition are deeply worrying.

The combination of my unresolved health issues, particularly the rash and potential spleen inflammation, and the stress of being away from my family, have taken a toll on my overall well-being. The lack of effective medical treatment and diagnosis for these health concerns only adds to the urgency of my desire to return home, where I can seek comprehensive medical care and be surrounded by the support of my family.

Concerns about return to Lebanon

73. In his statement dated 2 December 2023, the Applicant stated:[86]

I also provide this statement to express my grave concerns about the potential risks and dangers I would face if I were to return to Lebanon, particularly in relation to my health and personal safety.

One of my primary concerns is the prospect of leaving my family behind in Australia. This separation would not only be emotionally challenging but would also remove me from the support network that has been crucial for my wellbeing.

The security situation in Lebanon is highly unstable and dangerous. I am very concerned about the risk of being subjected to crime, conflict, and terrorism. The volatile security environment poses a real and immediate threat to my personal safety.

[86] Tribunal Book, TB6, 51-52, [16]-[23].

I am currently managing several health conditions, including Type 2 Diabetes, high cholesterol, and heart problems, for which I require regular medication, including blood thinners. In addition to these physical health issues, I also require mental health treatment.

Unfortunately, in Lebanon, there is a significant stigma associated with mental health issues, often leading to ostracization. Furthermore, access to necessary medications for both my physical and mental health conditions is severely limited in Lebanon. I am deeply concerned that I will not be able to receive the adequate healthcare I require there, which could lead to a serious deterioration in my health.

The cultural attitudes in Lebanon towards mental health are worrying. The lack of understanding and acceptance could result in me being treated as an outcast, further exacerbating my mental health challenges, and isolating me from potential support systems.

The combination of the dangerous security situation, the risk of becoming a victim of crime, war, and terrorism, and the lack of adequate healthcare, particularly for my chronic health conditions, creates an environment in Lebanon that poses a serious risk to my overall safety and wellbeing.

My return to Lebanon would place me in a highly precarious situation, jeopardising both my physical and mental health and putting my personal safety at risk. These concerns are deeply troubling and constitute significant barriers to my potential repatriation.

74. In his statement dated 25 January 2023, the Applicant elaborated on his concerns about being returned to Lebanon:[87]

In circumstances where I am removed from Australia, I have the following serious concerns:

a) This would cause the breakdown in my marriage. My wife has already indicated to me that she would not live in Lebanon. Consequently, my wife and children would remain in Australia. To be without my family in Australia would be absolutely devastating. My family are my world.

b) I would permanently be excluded from returning to Australia. Accordingly, I would not be able to visit my children, wife, and siblings in Australia. Moreover, I would be denied the opportunity to build an ongoing special close relationship with my nieces and nephews in Australia.

[87] Exhibit R1, G16, 97-98, [5].

c) *My children will suffer lifelong adverse consequences without their father in Australia. My children will be denied the tender love and care that I could otherwise provide to them if I remain in Australia. If I am permitted to remain in Australia, I could provide them with strong emotional, financial, and practical assistance.*

d) *I am concerned about my own mental health and psychological disposition if removed to Lebanon. To be permanently separated from my family in Australia is beyond words. I am concerned that I would be suicidal if returned to Lebanon. I also do not believe I would receive adequate medical treatment in Lebanon for my deteriorating mental health.*

e) *I also have general concerns for my safety if returned to Lebanon. The country is a dangerous place. My life and well-being could be at real risk if returned to Lebanon.*

f) *I will not have any accommodation in Lebanon. There are severe water shortages. There is no welfare. It is extremely unlikely that I will be able to obtain employment in Lebanon. I will need to explain my criminal record and time and immigration detention. No one will give me a job if they found out my criminal background in Australia. Moreover, there is a very significant job shortage in Lebanon. The economy is in a bad state. I will suffer very significant impediments if removed to Lebanon.*

Applicant's wife, NBT

75. NBT provided statements dated 25 January 2023,[88] 2 December 2023,[89] and 7 January 2024,[90] and gave oral evidence at the hearing.

76. In her statement dated 2 December 2023, NBT described her relationship with the Applicant:[91]

> *[The Applicant] and I share a committed and loving marital relationship. Despite the physical separation due to his detention, our bond remains strong and unbroken. The separation has been challenging for both of us. We miss each other*

[88] Ibid, G25, 132-136.

[89] Tribunal Book, TB8, 58-61.

[90] Statement of NBT dated 7 January 2024.

[91] Tribunal Book, TB8, 1-4.

immensely. The absence of [the Applicant] from our daily lives has left a significant void, both emotionally and in terms of familial support.

Despite the challenges posed by his detention, [the Applicant] and I maintain regular and consistent communication. We speak daily through telephone and video calls. These conversations are not only vital for our emotional well-being but also crucial in sustaining our relationship.

77. NBT described the relationship between the Applicant and their two children:[92]

[The Applicant] continues to be a devoted and committed father to our two children. He makes every effort to be involved in their lives through our daily calls. He inquires about their well-being, education, and daily activities, and provides fatherly advice and emotional support.

Our children deeply miss their father. They look forward to our daily calls with him and cherish these moments. His absence has had an emotional impact on them, but they find comfort in his virtual presence and ongoing involvement in their lives.

78. During her oral evidence, NBT told the Tribunal that she and the children speak to the Applicant daily via phone and video calls, and they visit him at VIDC two or three times a week.[93] The children 'absolutely love going [to VIDC], but they hate leaving. They always ask for more time, 'Can we stay longer? I want to stay longer.'[94]

79. NBT was asked to elaborate on the relationship between the Applicant and their children and how his absence has affected them. She stated:[95]

Absolutely amazing. Very, very close relationship, it was, still is. They are missing him incredibly. [ST] still cries for him. At times, she'll wake up in the middle of the night and keep crying for him. [NAT] needs his dad. [NAT] goes through a lot of anxiety. He gets scared that I'm going to leave him. So - and I think [NAT] would really benefit from a male role model in his life, like a father figure.

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[92] Ibid, TB8, 58, [7]-[8].

[93] Transcript of proceedings, 11 January 2024, 42.

[94] Ibid.

[95] Ibid.

80. She was asked to describe the impact on her of the Applicant's absence. She stated:[96]

> *Ever since my husband left, I have been, obviously, doing it as a single mum. It's tough financially. I'm having to go to work, and then if the kids are sick, then you've got to take time off. It's tough financially. The kids have missed out on having things that they need because I can't afford it whereas if [the Applicant] was home, he would be able to - that extra financial support would be able to help get the things that the kids need. Like, I've got both kids - my second - my daughter is starting school this year. I've got to go out and buy two sets of uniforms for them. It's financially tough. Myself, I've got arthritis. I haven't been on my medication or back to the specialist for over two years now because I just can't afford to go and do that. So I've been putting myself last, and my health is getting second because, obviously, the bills and the children come first. It's tough being a single mum, and to have [the Applicant] back home would be a enormous, enormous help because it'll take that burden off me.*

81. In her statement dated 25 January 2023, NBT stated that she also suffers from a blood clotting disorder, and it is 'very risky' for her to take flights.[97]

82. In her statement dated 7 January 2024, NBT described an incident she experienced on New Years Eve 2023 which resulted in her attending hospital and having emergency surgery the following day. She told the Tribunal that she may require further surgery in early 2024.[98]

83. In her statement dated 2 December 2023, NBT outlined why she believes that the Applicant will not re-offend:[99]

> *Based on my close relationship with [the Applicant] and witnessing his transformation, I am convinced that he will not engage in criminal offending again. He has expressed deep remorse for his past actions and has demonstrated a sincere commitment to leading a responsible and law-abiding life.*

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[96] Ibid, 43-44.

[97] Exhibit R1, G25, 135, [28].

[98] Transcript of proceedings, 11 January 2024, 45.

[99] Tribunal Book, TB8, 61, [24]-[26].

I firmly believe that [the Applicant] has learnt his lesson. The time he spent in detention has given him the opportunity to reflect on his past actions and their consequences, and he is determined to make positive changes.

Being reunited with our family would provide [the Applicant] with the necessary support and stability to continue his journey of rehabilitation. Our support as a family unit is crucial for his successful reintegration into the community.

84. During cross-examination, NBT was asked to elaborate on the 'transformation' she has observed in the Applicant. She stated:[100]

He's shown a lot of regret and remorse. He's - couldn't - can't believe that he's - did what he did. So I've seen a change in him where - I think it's a lot of self-reflection he did. So he - goodness, how do I find the words? Self-reflection. He's a bit more remorseful now. He's - knows what he did was wrong, and there's a lot of regret there. So he really wants to have the opportunity to come and prove himself to us at home and to everybody and to himself that he can better.

85. NBT explained what the consequence would be for her family if the Applicant were to be removed from Australia:[101]

Deporting [the Applicant] would effectively destroy our family unit. It would deprive our children of their father's presence, guidance, and support, and it would end the life we have built together in Australia. I earnestly request that the Tribunal take these concerns into consideration. The decision to deport [the Applicant] would have far-reaching and devastating consequences for him and our family.

A decision to deport [the Applicant] would irrevocably alter the course of our lives, casting a long and profound shadow over the well-being of my children and myself. Such an action would not just be a momentary hardship; it would be a deeply devastating event, leaving an indelible impact that would reverberate throughout our lifetimes.

86. In her statement dated 25 January 2023, NBT explained why she and the children will not relocate to Lebanon if the Applicant is removed from Australia:[102]

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[100] Transcript of proceedings, 11 January 2024, 46.

[101] Tribunal Book, TB8, 59-60, [15]-[16].

[102] Exhibit R1, G25, 136, [32].

In circumstances where my husband is removed from Australia, I will not follow him overseas. There are three primary reasons for this view. First, it is in the best interests of our children that they are raised in Australia. Respectfully, our children will have better opportunities and prospects in life in Australia than Lebanon. Secondly, my health conditions hinder my ability to take long overseas flights (so much so, that I have never left Australia). Thirdly, I do not see a life for myself in Lebanon. I do not want to live in such an environment for the balance of my life. There is very limited health care in Lebanon and the general security situation in that country is challenging.

87. In her statement dated 2 December 2023, NBT described the contribution the Applicant would make if he were to return to live with her and their children:[103]

[The Applicant's] return would significantly bolster the emotional stability of our family. His presence provides comfort, strength, and a sense of security, especially for our two children who have been deeply affected by his absence.

[The Applicant's] ability to work and contribute financially is crucial for our family. Currently, we are facing financial difficulties, and his return would alleviate this burden significantly. His employment would provide the necessary financial support we desperately need to maintain a stable household.

Managing the day-to-day responsibilities of our household and the care of our two children without [the Applicant] has been extremely challenging. His return would mean sharing these duties, easing the considerable strain I am currently experiencing.

Our children are struggling with the absence of their father. [The Applicant's] presence in their daily lives is not only important for their emotional well-being but also for their overall development. His active involvement in their upbringing and daily activities is irreplaceable.

The return of [the Applicant] to the Australian community would positively transform our current situation. It would restore the much-needed balance and stability in our family life, both emotionally and financially.

88. In her statement dated 25 January 2023, NBT outlined the medical conditions suffered by their son, NAT, and the treatment he requires:[104]

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[103] Tribunal Book, TB8, 60, [17]-[21].

[104] Exhibit R1, G25, 132, [9].

[NAT] has been diagnosed with an intellectual disorder. [NAT] also suffers from anxiety. [NAT] was diagnosed by Dr Sam Nassar (Paediatrician). As a result of [NAT's] health problems, he needs ongoing treatment from an occupational therapist, speech therapist and a psychologist. Given my current circumstances, I am simply not in a financial position to pay for these health services.

89. In a letter dated 13 January 2023, Dr Sam Nassar, Paediatrician, diagnosed NAT with a mild Functional / Intellectual disability, language delay, poor emotional regulation Anxiety Disorder and Sensory Processing Disorder. He also found that NAT is a high risk of Autism Spectrum Disorder (pending formal assessment). [105]

90. In her oral evidence, NBT told the Tribunal that NAT's behaviour is 'challenging', and last year she was called into the school office on five occasions. NAT is 'screaming out in the classroom, not able to sit still, fidgeting, just a lot of impulse reactions, very rough with the other children.'[106] She said that until they get the 'official diagnosis' of NAT's condition there is little they can do about his behaviour. She is unable to ask relatives, including her mother, to take care of NAT because he is 'quite full on' and 'nobody can really handle [him] for more than an hour.'[107] She is hoping that if the Applicant returns home that 'with the male role model in the house, a father figure … maybe [NAT's] behaviours would change.'[108]

EXERCISE OF DISCRETION TO REVOKE MANDATORY CANCELLATION

1) Does the Applicant pass the 'character test'?

91. In the representations and material that the Applicant submitted to the Department and the Tribunal, he does not dispute the information in the National Criminal History Check dated 1 June 2022 recording his criminal convictions and sentences. It relevantly records that on 1 April 2022 he was convicted in the District Court of New South Wales of two counts of *Have sexual intercourse with child >=10 &14 years*, three counts of *Intentionally sexually touch child >=10 years and <16 years,* and *Intentionally incite*

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[105] Ibid, G33, 138.

[106] Transcript of proceedings, 11 January 2024, 52.

[107] Ibid, 52.

[108] Transcript of proceedings, 11 January 2024, 53.

child >=10 yrs & <16 yrs sexual touch and was sentenced to an aggregate sentence of three years' imprisonment. The Tribunal is satisfied that the Applicant has a 'substantial criminal record' for the purposes of section 501(3A)(a) and section 501(6) of the Act as he has been sentenced to a term of imprisonment of 12 months or more: section 501(7)(c). The Tribunal is also satisfied, for the purposes of section 501(3A)(b) of the Act, that on 2 June 2022 the Applicant was serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the state of New South Wales.

92. The Applicant accepts that he does not pass the character test because of section 501(7)(c).[109] The Tribunal is satisfied that the Applicant does not satisfy the character test, and accordingly it finds that section 501CA(4)(b)(i) cannot be invoked to revoke the Mandatory Visa Cancellation Decision.

2) Is there 'another reason' why the Mandatory Visa Cancellation Decision should be revoked?

93. In determining whether pursuant to section 501CA(4)(b)(ii) of the Act there is 'another reason' why the Mandatory Visa Cancellation Decision should be revoked, the Tribunal must, in accordance with paragraphs 8 and 9 of the Direction, take into account the relevant 'primary considerations' and 'other considerations'. The existence or otherwise of 'another reason' is to be established on the balance of probabilities.

94. The task of identifying 'another reason' was elaborated upon by the Full Court of the Federal Court of Australia in *Viane v The Minister for Immigration and Border Protection*:

> *There is no statutory power to revoke under s 501CA(4)(b)(ii) unless the Minister is satisfied that there is a reason, other than a conclusion that the person concerned passes the character test, which means that the original decision 'should be' revoked. It is not enough that there is a matter that might be considered or may be said to be objectively relevant. It must be a reason that carries sufficient weight or significance to satisfy the Minister entrusted with the responsibility to consider whether to revoke the visa cancellation that the decision should be revoked. Only a*

[109] ASFIC, [8].

reason of that character enlivens the statutory power to revoke. It is the absence of such a reason that will result in a decision not to revoke a visa cancellation.[110]

PRIMARY CONSIDERATIONS

Primary Consideration 1 – Protection of the Australian community

95. Paragraph 8.1 of the Direction provides that, when decision-makers are considering the protection of the Australian community, they:

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

a) Nature and seriousness of the conduct

96. Paragraph 8.1.1 of the Direction provides:

> *(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:*

[110] [2018] FCAFC 116; 162 ALD 13 per Colvin J, [64].

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 conduct or offence was committed in another country, whether that offence or conduct is classified as an offence in Australia.

97. The Applicant committed six sexual offences against a 13-year-old girl who was not previously known to him with the offending occurring during a single encounter when he picked her up while driving along a road. Having regard to the factors in paragraph 8.1.1 of the Direction, and for the reasons that follow, the Tribunal finds that the Applicant's criminal offending is very serious.

98. Relevantly to paragraph 8.1.1(1)(a)(i) of the Direction, the Applicant's offences were sexual crimes which must be regarded as very serious. Having regard to paragraph 8.1.1(1)(c) of the Direction, the Tribunal finds that the custodial sentence imposed on the Applicant is an objective indicator of the seriousness of his criminal offending. The Applicant was sentenced to an aggregate term of three years' imprisonment for the six sexual offences. The commission of sexual acts with a minor is very serious and this is reflected in the significant custodial sentence imposed. While Judge Pickering observed that the Applicant's conduct was 'below the mid-range of objective seriousness', he considered the gravity of the Applicant's offending was such that there was 'no option other than full time imprisonment'.[111] Sentences involving terms of

[111] Exhibit R1, G7, 52.

imprisonment are a last resort in the sentencing hierarchy, indicating that the Court considered that, considering all possible alternatives, no penalty other than imprisonment is appropriate which reflects the objective seriousness of the offences involved.[112]

99. On the evidence before it, and for the stated reasons, the Tribunal finds that the Applicant's criminal offending is very serious in nature, and this weighs heavily against the exercise of the discretion to revoke the Mandatory Visa Cancellation Decision.

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

100. Paragraph 8.1.2 of the Direction relevantly provides:

> *(1) In considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some 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.*
>
> *(2) In assessing the risk that may be posed by the non-citizen to the Australian community, decision-makers must have regard to, cumulatively:*
>
> *a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; 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*

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[112] *Jal v Minister for Immigration and Border Protection* [2016] AATA 789 at [24]; *PNLB and Minister for Immigration and Border Protection* [2018] AATA 162 at [22] and *Saleh and Minister for Immigration and Border Protection* [2017] AATA 367 at [50]; *Poi-ilaoa and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2021] AATA 587.

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.

(i) Nature of harm to individuals or the Australian community

101. Having regard to the nature of the harm to individuals or the Australian community if the Applicant were to commit further sexual offences, in accordance with paragraph 8.1.2(2)(a) of the Direction, the Tribunal finds that there is an obvious risk of serious consequences for members of the Australian community, particularly young women or girls. If the Applicant were to commit further sexual offences, the potential physical, social, psychological and emotional impacts of his offending on his victims are likely to be very serious. The extent of the harm that may be caused by further sexual offending by the Applicant is heightened by the fact that the victim was a minor aged child and was previously unknown to him. As the type of harm that may be caused to the Applicant's victims should he reoffend is very serious, paragraph 8.1.2(1) of the Direction recognises that the Australian community's tolerance for the risk of such offending is reduced.

102. For these reasons, the Tribunal finds that the nature of the harm to individuals or the Australian community should the Applicant engage in similar criminal offending in the future is very serious, and that any risk that it may be repeated is unacceptable.

(ii) Likelihood of the Applicant engaging in further criminal or other serious conduct

103. Having regard to the likelihood of the Applicant engaging in further criminal or other serious conduct in accordance with paragraph 8.1.2(2)(b) of the Direction, the Tribunal has considered the available information and evidence before it and finds, for the reasons that follow, that the risk of the Applicant re-offending is moderate.

104. In assessing the Applicant's risk of re-offending or engaging in other serious conduct, the Tribunal has given weight to the assessment made by Ms Kellie Blake, Psychologist in her consultation report dated 13 January 2022, prepared in advance of sentencing the Applicant.[113] His risk of sexual re-offending was assessed as 'Level III - Average Risk' category.[114]

105. The Tribunal also has had regard to the remorse demonstrated by the Applicant in relation to his criminal offending. It notes that the Applicant pleaded not guilty to the six sexual offences at trial, and he continued to maintain his innocence after he was convicted of and sentenced for these offences in April 2022. His evidence is that he sought advice about appealing his convictions, and he did not abandon his intention to do so until one month prior to the expiry of his sentence in approximately April 2023. In his request for revocation of the Mandatory Visa Cancellation Decision dated 28 June 2022, the Applicant stated that he did not admit to the offending, and he was appealing his convictions. The Applicant first expressed remorse for his sexual offending in his statement dated 2 December 2023. He stated he was 'deeply sorry for the actions and decisions that led to [his] involvement in criminal activities', that his 'actions were misguided' and he 'failed to foresee the consequences that unfolded.' In his oral evidence at the hearing, the Applicant told the Tribunal that what he did was 'big', he is 'very remorseful' and 'regret[s] a lot.' The Tribunal has attached less weight to the Applicant's expression of remorse in light of his denial of responsibility for his criminal offending from the date of the commission of the offences in March 2020 until December 2023, a period of almost four years.

106. The Tribunal also has had regard to the available evidence in relation to the rehabilitation the Applicant has undertaken since he was convicted of the sexual offences. The Applicant's only evidence of rehabilitative treatment is the three-hour sexual harassment compliance course he completed in July 2023. There is no evidence that the Applicant undertook any targeted sex offenders' programs or courses during his incarceration in gaol from April 2022 to May 2023. Based on the limited evidence of rehabilitation, the Tribunal cannot be satisfied that the Applicant has taken adequate

[113] Exhibit R2, RTB, 18-20.

[114] Ibid.

steps to address the unlawful behaviour that resulted in his criminal convictions. As a consequence, the Tribunal finds that the risk of the Applicant re-offending has not been mitigated in the four years since he committed the sexual offences.

107. The Tribunal finds that there are a number of protective factors, which reduce the Applicant's risk of recidivism. These include the support he will receive from his family, particularly his wife, sister and brother, who are committed to providing him with assistance to resume paid work and reintegrate into the community. This family support, stable accommodation and paid employment that will be available to the Applicant on his return to the community are strong protective factors that should lower his risk of reoffending. The Tribunal notes however that these protective factors were present when the Applicant committed the sexual offences. He has however indicated an intention to seek a referral to a psychologist so he can obtain advice about 'the problem' he got himself into.

(iii) whether the risk of harm may be affected by the duration and purpose of the non-citizen's intended stay and the type of visa being applied for

108. Relevantly to paragraph 8.1.2(2)(c) of the Direction, the Tribunal finds that if the Mandatory Visa Cancellation Decision is set aside and the Applicant's bridging visa is reinstated, members of the community will be at risk if he engages in further criminal or other serious conduct for the period that he continues to hold this visa.

109. On the basis of the evidence before it and taking into account the available information and evidence of the risk of the Applicant re-offending and his rehabilitation, the Tribunal finds that the likelihood of the Applicant engaging in further criminal or other serious conduct is moderate. In the context of the potential harm to the Applicant's victims, specifically young womenand girls, should he engage in the same or similar criminal conduct in the future, and the fact he is seeking the reinstatement of a bridging visa, the Tribunal finds this risk to be unacceptable.

110. For the reasons above and applying the guidance in paragraphs 8.1.1 and 8.1.2 of the Direction, Primary Consideration 1 weighs heavily against the revocation of the Mandatory Visa Cancellation Decision.

Primary consideration 2 – Family violence committed by the non-citizen

111. Paragraph 8.1.1(2) of the Direction prescribes that this consideration is relevant where the non-citizen has been convicted of an offence that involves family violence and/or there is information or evidence from independent and authoritative sources indicating that the non-citizen has been involved in the perpetration of family violence. This Primary consideration does not arise on the material before the Tribunal.

Primary Consideration 3 – The strength, nature and duration of ties to Australia

112. Paragraph 8.3 of the Direction provides:

> *(1) Decision-makers must consider any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.*
>
> *(2) In considering a non-citizen's ties to Australia, decision-makers should give more weight to a non-citizen's ties to his or her child and/or children who are Australian citizens, Australian permanent residents and/or people who have the right to remain in Australia indefinitely.*
>
> *(3) The strength, duration and nature of any family or social links generally with Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely.*
>
> *(4) Decision-makers must also consider the strength, nature and duration of any other ties that the non-citizen has to the Australian community. In doing so, decision-makers must have regard to:*
>
> *a) The length of time the non-citizen has resided in the Australian community, noting that:*
>
> *i. considerable weight should be given to the fact that a non-citizen has been ordinarily resident in Australian 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 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.

113. Having regard to paragraph 8.3(3) of the Direction, the Tribunal notes that the Applicant has very strong ties with members of his immediate family who are Australian citizens and reside in Australia, including his wife, two children, two siblings, and his five nieces and nephews. Guided by paragraph 8.3(1) of the Direction, the Tribunal has considered the impact of a decision not to revoke the Mandatory Visa Cancellation Decision on these members of the Applicant's immediate family.

114. The Applicant's immediate family members provided statements in which they state the love and support for their husband and brother, and their desire for him to return to live with them in the community. The evidence is that the Applicant's wife, children, sister and brother will be highly distressed if he is returned to Lebanon. NBT and the two children will be emotionally devastated and financially disadvantaged if the Applicant is unable to return home and resume employment as the family's primary breadwinner. This will impact on NBT's and NAT's health, as NBT is currently unable to afford the medical treatment she and her son require for their respective health conditions. The Tribunal finds that if the Applicant's visa is not reinstated, his immediate family will suffer considerable emotional and practical hardship due to the absence of their husband and father, and financial distress as a consequence of him not being able to contribute to the family's finances.

115. Relevantly to paragraph 8.3(4)(a)(ii) and (iii) of the Direction, the evidence before the Tribunal is that the Applicant has permanently resided in Australia since July 2013, being a period of more than 10 years. He arrived here as a 35-year-old adult, and therefore he did not reside in Australia during his formative years. The Applicant has made a positive contribution to the Australian economy during his residency in Australia, specifically through his employment as an installer of wardrobes, kitchens and shower screens.

116. For the stated reasons and having applied the guidance in paragraph 8.3 of the Direction, the Tribunal finds that Primary Consideration 3 weighs heavily in favour of revocation of the Mandatory Visa Cancellation Decision.

Primary Consideration 4 – Best interests of minor children in Australia affected by the decision

117. Paragraph 8.4 of the Direction provides:

> *(1) Decision-makers must make a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA is, or is not, in the best interests of a child affected by the decision.*
>
> *(2) This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to refuse or cancel the visa, or to not revoke the mandatory cancellation of the visa, is expected to be made.*
>
> *(3) If there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.*
>
> *(4) In considering the best interests of the child, the following factors must be considered where relevant:*
>
> *a) the nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);*
>
> *b) the extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;*
>
> *c) the impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;*

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

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

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

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

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

118. Paragraph 8.4(1) of the Direction requires decision-makers to determine whether revocation is in the best interests of the child. This consideration applies only if the child is expected to be under the age of 18 years at the time the decision is made: paragraph 8.4(2). The relevant minor children are the Applicant's son (NAT), his daughter (ST) and his five nieces and nephews and his nieces (AT, MT1, MT2, RA and NA). Paragraph 8.4(3) of the Direction requires the Tribunal to consider the interests of each child individually to the extent that their interests may differ.

119. Having regard to the factors in paragraph 8.4(4)(a) of the Direction, the evidence before the Tribunal is that the Applicant has a very close relationship with his son and daughter. He has maintained continued and meaningful contact with them during his periods in gaol and immigration detention through daily phone calls and frequent visits by them to VIDC. The Applicant's children are obviously missing the Applicant's physical presence and the care that he provided when he lived with them in their home. The absence of a father figure in the children's lives is negatively impacting both the children emotionally and psychologically, particularly NAT who suffers from an undiagnosed intellectual disorder.

120. The evidence in relation to the relationship between the Applicant and his nieces and nephews is that before he went to gaol, he provided them with emotional guidance and

practical assistance which they would be denied if he were removed from Australia. As required by this sub-paragraph of the Direction, the Tribunal has given less weight to the interests of the Applicant's nieces and nephews for reason that the relationship is non-parental. In relation to the factors in paragraph 8.3(4)(e) of the Direction, the evidence is that the Applicant's nieces and his nephew live with their parents who fulfill the primary parental role in their lives.

121. Relevant to the factors in paragraph 8.4(4)(b), the evidence is that the Applicant will return home and live with his wife and children if he is released into the community. He will therefore be in daily contact with his children and able to provide for them financially and contribute to their upbringing and emotional development. As both children are young, there is a considerable period during which the Applicant can make a positive contribution to their development in the years until they reach adulthood.

122. In relation to the factors in paragraph 8.4(4)(c) and 8.3(4)(d), although the Applicant's offending has resulted in his physical absence from the lives of his children and his nieces and nephews since he has been in gaol and immigration detention, there is no evidence before the Tribunal to demonstrate that the Applicant's offending has directly affected them. However, having found that the risk of the Applicant engaging in similar criminal or other serious conduct in the future is moderate, the Tribunal finds that they may be negatively impacted in the future by the Applicant's behaviour if he re-offends or acts inappropriately towards young women or girls. The Applicant currently communicates with his children via daily phone calls and twice-weekly visits to VIDC. If he were returned to Lebanon, the children would be able to continue to speak to him via phone and video calls, but they would not have the regular physical interactions with their father that they currently enjoy by virtue of them being able to visit him at VIDC. NBT's evidence is that she and the children would not relocate to Lebanon if the Applicant were returned there, and therefore the opportunities for the children to see their father in person would be extremely limited, if not non-existent, at least until they are able to travel to Lebanon for a holiday or short-term visit.

123. Having regard to the evidence before it, the Tribunal finds that if the Mandatory Visa Cancellation decision is not revoked and the Applicant is removed from Australia, this will negatively impact on his two children who will lose the physical presence of their father in their daily lives, which will significantly limit the nature and extent of the

contribution he can make to their upbringing and development. It will also diminish the opportunity for the Applicant's minor aged nieces and nephews to strengthen their relationship with their uncle, which will likely adversely impact their development in the years until they reach adulthood.

124. For the stated reasons and having applied the guidance in paragraph 8.4 of the Direction, the Tribunal finds that Primary Consideration 4 weighs heavily in favour of revocation of the Mandatory Visa Cancellation Decision.

Primary Consideration 5 – Expectations of the Australian Community

125. Paragraph 8.5 of the Direction relevantly provides:

> *(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) …*
>
> *(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 …;*

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

(e) …

(f) ...

(3) The above expectations of the Australian community apply regardless of whether the non-citizen poses a measureable (sic) 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.

126. The effect of paragraph 8.5 is that it imputes to the Australian community the expectation that non-citizens who have permission to remain in Australia will obey Australian laws. This consideration does not involve an inquiry into what the Australian community does or does not expect, because this is normatively expressed in the terms of the consideration: paragraph 8.5(4). Rather, the relevant inquiry is 'whether it is appropriate to give more or less weight to a deemed community expectation' of refusal of a visa 'that might otherwise arise simply because of the nature of the non-citizen's character concerns or offences.'[115] As a normative expression, this consideration indicates the likelihood that community expectations will in most cases lead to refusal of a visa, without dictating an inflexible conclusion. The question for a decision-maker is the weight to be attached to this consideration.[116]

127. Relevantly to the expectations of the Australian community as stated in paragraph 8.4, particularly paragraph 8.4(2)(c), and in accordance with principles 5.2(2)-(5) of the Direction, the Applicant has convictions for six sexual offences against a 13-year-old girl. Given the seriousness and nature of this offending, the Australian community

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[115] *FYBR and Minister for Home Affairs* (2019) 272 FCR 454 per Charlesworth J, [77].
[116] *Minister for Immigration v HSRN* [2023] FCAFC 68.

would expect that the Applicant should no longer have the privilege of holding a visa to remain permanently in Australia.

128. The Applicant has resided in Australia for a period of more than 10 years. Accordingly, the factors in principle 5.2(4) of the Direction, particularly the length of time the Applicant has been in Australia, support a finding that there would be higher level of tolerance by the Australian community for his criminal conduct than there would be for a non-citizen who has not lived in the community for an extended period..

129. Having had regard to the factors in paragraph 8.4 of the Direction in relation to the expectations of the Australian community, and giving them appropriate weight, and taking into account the nature, seriousness and impact of the Applicant's criminal offending, and the duration of his residency in Australia, the Tribunal finds that Primary Consideration 5 weighs against revocation of the Mandatory Visa Cancellation Decision.

OTHER CONSIDERATIONS

130. Paragraph 9 of the Direction sets out the 'Other considerations to be taken into account in making a decision under section 501(1) as follows:

> *(1) In making a decision under section 501(1), 501(2) or 501CA(4), other considerations 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*

131. While the Primary considerations carry particular weight, the Direction provides at paragraph 9 that 'Other considerations' must be taken into account by the decision-maker where relevant. Paragraph 7(2) states that '[p]rimary considerations should generally be given greater weight than the other considerations.'

132. The Tribunal notes that these considerations are 'other' considerations, as opposed to 'secondary' considerations. As Colvin J observed in *Suleiman v Minister for Immigration and Border Protection* ('*Suleiman*'):[117]

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

133. In *FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[118] Wigney J held that this analysis 'tends to overcomplicate or over intellectualise the issue'. His Honour held that the use of the word 'generally' in clause 8(4) of Direction 79 (the same wording is used in section 7(2) of the Direction) 'recognises that there may well be cases where the circumstances are such that one or more "other considerations" may be deserving of more weight than one or more primary considerations'.[119] His Honour also held that the formulation identified in *Suleiman* 'is at least potentially problematic because it tends to suggest that a decision-maker cannot give greater weight to one or more of the "other considerations" in any given case unless they consider that the case is somewhat unusual or out of the ordinary'.[120]

134. The 'other' considerations relevant to the Applicant's circumstances are considered in the following paragraphs.

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[117] (2018) 74 AAR 545, [23].

[118] [2021] FCA 775, [22].

[119] Ibid, [23].

[120] Ibid.

a) Legal consequences of the decision

135. Paragraph 9.1 of the Direction provides:

> 1) *Decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable in the circumstances specified in that section, and in the meantime, detention under section 189, noting also that section 197C(1) of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has* non-refoulement *obligations in respect of an unlawful non-citizen.*
>
> 2) *A* non-refoulement *obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act, particularly the concept of 'protection obligations', reflects Australia's interpretation of* non-refoulement *obligations and the scope of the obligations that Australia is committed to implementing.*
>
> 3) *International* non-refoulement *obligations will generally not be relevant where the person concerned does not raise such obligations for consideration and the circumstances do not suggest a* non-refoulement *claim.*

136. The Direction contains specific provisions relevant to non-citizens in relation to whom a protection finding has been made (paragraph 9.1.1) and to non-citizens in relation to whom no protection finding has been made (paragraph 9.1.2).

137. Paragraph 9.1.2 provides as follows:

> ***9.1.2 Non-citizens not covered by a protection finding***
>
> *(1) Where a protection finding (as defined in section 197C of the Act) has been made for a non-citizen in the course of considering a protection visa application made by the non-citizen, this indicates that non-refoulement obligations are engaged in relation to the non-citizen.*
>
> *(2) Section 197C(3) ensures that, except in the limited circumstances specified in section 197C(3)(c), section 198 does not require or authorise the removal of an unlawful non-citizen to a country in respect of which a protection finding has been made for the non-citizen in the course of considering their application for a protection visa. This means the non-citizen cannot be removed to that country in breach of non-refoulement obligations, even if an adverse visa decision under section 501 or 501CA is made for the non-citizen and they become, or remain, an unlawful non-citizen as a result. Instead, the non-citizen must remain in immigration detention as required by section 189 unless and until they are granted*

another visa or they can be removed to a country other than the country by reference to which the protection finding was made.

(3) Decision-makers should also be mindful that where the refusal, cancellation or non-revocation decision concerns a protection visa, the person will be prevented by section 48A of the Act from making a further application for a protection visa while they are in the migration zone (unless the Minister determines that section 48A does not apply to them - see sections 48A and 48B of the Act). Further, as a result of a refusal or cancellation decision under section 501 or a non-revocation decision under section 501CA, the person will be prevented from applying for any other class of visa except a Bridging R (Class WR) visa (see section 501E of the Act and regulation 2.12AA of the Regulations.

138. Section 197C provides:

197C Relevance of Australia's non-refoulement obligations to removal of unlawful non-citizens under section 198

(1) For the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen.

(2) An officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen.

(3) Despite subsections (1) and (2), section 198 does not require or authorise an officer to remove an unlawful non-citizen to a country if:

(a) the non-citizen has made a valid application for a protection visa that has been finally determined; and

(b) in the course of considering the application, a protection finding within the meaning of subsection (4), (5), (6) or (7) was made for the non-citizen with respect to the country (whether or not the visa was refused or was granted and has since been cancelled); and

(c) none of the following apply:

(i) the decision in which the protection finding was made has been quashed or set aside;

(ii) a decision made under subsection 197D(2) in relation to the non-citizen is complete within the meaning of subsection 197D(6);

(iii) the non-citizen has asked the Minister, in writing, to be removed to the country.

(4) For the purposes of subsection (3), a **protection finding** *is made for a non-citizen with respect to a country if a record was made in relation to the non-citizen under section 36A that the Minister is satisfied as mentioned in paragraph 36A(1)(a), (b) or (c) with respect to the country.*

(5) For the purposes of subsection (3), a **protection finding** *is also made for a non-citizen with respect to a country if the Minister was satisfied of any of the following (however expressed and including impliedly):*

(a) the non-citizen satisfied the criterion in paragraph 36(2)(a) with respect to the country and also satisfied the criterion in subsection 36(1C);

(b) the non-citizen satisfied the criterion in paragraph 36(2)(aa) with respect to the country;

(c) the non-citizen:

(i) would have satisfied the criterion in paragraph 36(2)(a) with respect to the country except that subsection 36(3) applied in respect of the non-citizen; and

(ii) satisfied the criterion in subsection 36(1C);

(d) the non-citizen:

(i) satisfied the criterion in paragraph 36(2)(a) with respect to the country but did not satisfy the criterion in subsection 36(1C); and

(ii) would have satisfied the criterion in paragraph 36(2)(aa) with respect to the country except that the non-citizen was a non-citizen mentioned in paragraph 36(2)(a);

(e) the non-citizen:

(i) satisfied the criterion in paragraph 36(2)(a) with respect to the country but did not satisfy the criterion in subsection 36(1C); and

(ii) would have satisfied the criterion in paragraph 36(2)(aa) with respect to the country except that the non-citizen was a non-citizen mentioned in paragraph 36(2)(a) and subsection 36(2C) or (3) applied in respect of the non-citizen;

(f) the non-citizen would have satisfied the criterion in paragraph 36(2)(aa) with respect to the country except that subsection 36(2C) or (3) applied in respect of the non-citizen.

(6) For the purposes of subsection (3), a **protection finding** *is also made for a non-citizen with respect to a country if:*

(a) the Minister was satisfied (however expressed and including impliedly) that, because subsection 36(4), (5) or (5A) applied to the non-citizen in relation to the country, subsection 36(3) did not apply in relation to the country; and

(b) a protection finding within the meaning of subsection (4) or (5) was made for the non-citizen with respect to another country.

(7) For the purposes of subsection (3), a **protection finding** *is also made for a non-citizen with respect to a country in circumstances prescribed by the regulations.*

…

139. Prior to its mandatory cancellation, the Applicant held a Bridging A (Class WA) (subclass 010) visa. There has not been a 'protection finding' made in relation to the Applicant as contemplated by subsection 197C(4)-(7) of the Act. Accordingly, paragraph 9.1.2 of the Direction is relevant to the Applicant's circumstances.

140. The Applicant contends that he has 'a well-founded fear for his safety' and has articulated 'a credible risk of serious harm if returned to Lebanon' based on 'the prevailing security concerns highlighted by the [DFAT] Smart Traveller Report and the current geopolitical tensions.'[121] Given the 'serious nature' of his claims and the documentation provided, the Applicant contends that 'the Tribunal would accept that Australia's non-refoulement obligations may be relevant' to his situation, 'potentially prohibiting his removal to Lebanon.'[122]

141. If the Tribunal decides not to revoke the Mandatory Visa Cancellation Decision under section 501CA, the Applicant will be prevented by section 501E of the Act from making an application for another visa, other than a Protection visa or a Bridging R (Class WR) visa (as prescribed by regulation 2.12A of the *Migration Regulations 1994* (Cth)). Section 35A of the Act defines 'protection visa' as a visa of a class provided in that section, which includes Class XA, Class XD and safe haven enterprise (Class XE) visas. Accordingly, if the Tribunal decides not to revoke the Mandatory Visa Cancellation Decision, it will be open for the Applicant to make an application for a Protection visa.

142. As recognised in paragraph 9.1.2(1) of the Direction, as the Applicant has raised potential non-refoulement claims, the Tribunal must 'read, identify, understand and evaluate' those claims. In *Plaintiff M1/2021 v Minister for Home Affairs* (*'Plaintiff M1/2021'*),[123] the High Court of Australia clarified the approach to consideration of representations involving non-refoulement claims. Relevantly, the majority explained:[124]

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[121] ASFIC, [66], [73]-[77].

[122] Ibid, [67].

[123] (2002) 400 ALR 417; [2022] HCA 17.

[124] Ibid, [28]–[30] per Kiefel CJ, Keane, Gordon and Stewart JJ.

Where the representations do not include, or the circumstances do not suggest, a non-refoulement claim, there is nothing in the text of s 501CA, or its subject matter, scope and purpose, that requires the Minister to take account of any non-refoulement obligations when deciding whether to revoke the cancellation of any visa that is not a protection visa.

Where the representations do include, or the circumstances do suggest, a non-refoulement claim by reference to unenacted international non-refoulement obligations, that claim may be considered by the decision-maker under s 501CA(4). But those obligations cannot be, and are not, mandatory relevant considerations under s 501CA(4) attracting judicial review for jurisdictional error – they are not part of Australia's domestic law.

Where the representations do include, or the circumstances do suggest, a claim of non-refoulement under domestic law, again the claim may be considered by the decision-maker under s 501CA(4), but one available outcome for the decision-maker is to defer assessment of whether the former visa holder is owed those non-refoulement obligations on the basis that it is open to the former visa holder to apply for a protection visa.

143. The Respondent contends that as the Applicant has not articulated a specific claim for a Protection visa and has not made a Protection visa application, an available option for the Tribunal is for it to defer assessment of whether the Applicant is owed non-refoulement obligations.[125]

144. The Tribunal has had regard to paragraph 9.1.2(2) of the Direction which recognises that it is not necessary at the section 501 stage for a decision-maker to consider non-refoulement issues in the same level of detail as they are considered in a Protection visa application. Accordingly, the Tribunal is satisfied that it need not undertake a full and comprehensive assessment of whether the Applicant engages Australia's non-refoulement obligations. The Applicant has made claims that will require a full assessment if he makes an application for a Protection visa, as will be permitted under section 501E(2)(a) of the Act.

145. The Respondent acknowledges that as the Applicant has not yet applied for a Protection visa, the immediate effect of a decision not to revoke the Mandatory Visa

[125] Transcript of proceedings, 12 January 2024, 115.

Cancellation Decision is that he will be liable for removal from Australia as soon as reasonably practicable pursuant to section 198 of the Act.[126]

146. Guided by paragraph 9.1(1) of the Direction, the Tribunal has had regard to sections 189 and 198 of the Act and finds that a legal consequence of a decision not to revoke the Mandatory Visa Cancellation Decision is that the Applicant will be an unlawful non-citizen and subject to immigration detention pending his removal to Lebanon. Section 197C provides that the obligation to remove the Applicant from Australia under section 198 is unaffected by any non-refoulement obligations he may be owed. If the Applicant were to make a Protection visa application before he is removed to Lebanon, the Protection claims made in this application will need to be assessed. However, the assessment of these claims will be a consequence of the Applicant's application for a Protection visa. It will not be a legal consequence of the decision of the Tribunal to refuse to revoke the Mandatory Visa Cancellation Decision. Accordingly, the Tribunal finds that a legal consequence of its decision to refuse to revoke the Mandatory Visa Cancellation Decision is that the Applicant will be liable for removal to Lebanon where he may face persecution or other serious harm.

147. For the reasons stated above, the Tribunal finds that a legal consequence of its decision not to revoke the Mandatory Visa Cancellation Decision is that the Applicant will be an unlawful non-citizen subject to detention and liable to removal from Australia, and this legal consequence is not affected by any application the Applicant may make for a Protection visa. The Tribunal finds that Other consideration a) weighs very heavily in favour of the exercise of the discretion to revoke the Mandatory Visa Cancellation Decision.

b) Extent of impediments if removed

148. Paragraph 9.2 of the Direction provides:

> *1) Decision-makers must 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*

[126] RSFIC, [55].

context of what is generally available to other citizens of that country), taking into account:

a) the non-citizen's age and health;[127]

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

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

149. Having regard to the factors in paragraph 9.2(1)(a), the evidence before the Tribunal is that the Applicant is aged 45 years and he has been diagnosed as suffering from Post-Traumatic Stress Disorder, Depression, and Anxiety as well as inflammation of the spleen, diabetes, and a rash on his face and neck.[128] As a Lebanese citizen, the Applicant will have access to the health care system in Lebanon, however it is unlikely to be of the same high standard or be as readily accessible as that in Australia. The Tribunal accepts that the ongoing political and financial crisis in Lebanon, which is impacting the supply of electricity, clean water, welfare, health care and medical supplies will significantly hinder the Applicant's quality of life upon return. The Applicant's separation from his wife, children, and siblings who will remain in Australia will cause him emotional distress which may exacerbate his mental health conditions and impact on his ability to find work and re-establish himself in Lebanon.

150. Guided by paragraph 9.2(1)(b) of the Direction, the evidence before the Tribunal is that the Applicant left Lebanon as a mature adult aged 35 years. He speaks Arabic and is familiar with life in his home country, and the Tribunal is satisfied that he will not encounter significant language or cultural barriers upon return. The Applicant has acquired extensive experience as an installer of wardrobes, kitchens, and shower screens, and he worked as a trader in Lebanon prior to migrating to Australia. He should therefore be able to obtain paid employment if there is available work for a person with his skills and experience, and if his health conditions are stable and do not hinder his ability to work.

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[127] The word "health" in paragraph 9.2(1) of the Direction is understood to mean any aspect of a person's physical wellbeing and includes "the overall state of a person's fitness and condition, including underlying health issues and ongoing effects of any past injury: *Holloway v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 1126 at [12].

[128] ASFIC, [80]-[81].

151. Relevantly to paragraph 9.2(1)(c) of the Direction, the Applicant has siblings and other relatives in Lebanon who may be able to offer him support on his return, including assisting him to find suitable accommodation and paid work which will facilitate his reintegration into Lebanese society. However, the Applicant's family will be unlikely to provide him with any financial assistance as the evidence before the Tribunal is that they are poor, and prior to his incarceration the Applicant regularly sent them money so they could afford basic necessities, including food and medication.[129]

152. Having regard to the evidence before it, the Tribunal finds that the Applicant will face significant impediments if he is required to re-establish himself in Lebanon, due to his various health conditions which require ongoing medical treatment which he may not be able to access, the limited financial support his family will be able to provide him while he finds suitable accommodation and paid employment, and the emotional distress he will experience as a consequence of being separated from his wife and children. Accordingly, guided by the factors in paragraph 9.2 of the Direction, the Tribunal finds that Other consideration b) weighs heavily in favour of revocation of the Mandatory Visa Cancellation Decision.

c) Impact on victims

153. The Direction states in paragraph 9.3(1):

> *(1) Decision-makers must consider the impact of the section 501 or 501CA decision on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims, where information in this regard is available and the non-citizen being considered for visa refusal or cancellation, or who has sought revocation of the mandatory cancellation of their visa, has been afforded procedural fairness.*

154. There is no information before the Tribunal in relation to the impact on the Applicant's victim of a decision not to revoke the Mandatory Visa Cancellation Decision. The Tribunal has therefore given Other consideration c) neutral weight.

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[129] Transcript of proceedings, 11 January 2024, 45-46.

d) Impact on Australian business interests

155. Paragraph 9.4(1) of the Direction provides:

> *(1) Decision-makers must consider any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia, noting that an employment link would generally only be given weight where the decision under section 501 or 501CA would significantly compromise the delivery of a major project, or delivery of an important service in Australia*.

156. The Applicant does not claim that any Australian business interests would be affected by his removal to Lebanon. Accordingly, the Tribunal has given Other consideration d) neutral weight.

CONCLUSION

157. In summary, the Tribunal finds that Primary Consideration 1 weighs against revocation of the Mandatory Visa Cancellation Decision. The Applicant's criminal offending is very serious, particularly as it involved sexual offences against a 13-year-old child. The moderate risk of him committing further criminal offences, coupled with the nature and seriousness of the harm this would cause to his future victims and the community is such that the protection of the Australian community is best served by the non-revocation of the Mandatory Visa Cancellation Decision.

158. Primary Consideration 3 weighs heavily in favour of revocation of the Mandatory Visa Cancellation Decision as the Applicant has lived in Australia for more than 10 years and he has close and extensive family ties to Australian citizens, particularly his wife two children and two siblings, who will be detrimentally impacted by his removal from Australia.

159. Primary Consideration 4 weighs heavily in favour of revocation of the Mandatory Visa Cancellation Decision as it is in the best interest of the Applicant's minor aged children and his nieces and nephews for him to be permitted to remain in Australia.

160. Primary Consideration 5 weighs against revocation of the Mandatory Visa Cancellation Decision as the expectations of the Australian community are that the Applicant's very

serious offending should cause him to forfeit the privilege of remaining permanently in Australia, and this is not outweighed by the duration of his residency in this country.

161. In regard to the relevant Other Considerations, the legal consequence of a decision not to revoke the cancellation, namely that the Applicant will be an unlawful non-citizen liable to removal as soon as reasonably practicable to Lebanon where he claims he may face harm, and the significant extent of the impediments he will face on return, weigh very heavily in favour of revocation of the Mandatory Visa Cancellation Decision.

162. The Tribunal is satisfied that there is 'another reason' why the Mandatory Visa Cancellation Decision should be revoked and decides that the Reviewable Decision should be set aside.

DECISION

163. Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal sets aside the Reviewable Decision dated 25 October 2023 to refuse to revoke the Mandatory Visa Cancellation Decision and, in substitution, decides that the cancellation of the Applicant's Bridging A (Class WA) (subclass 010) visa is revoked.

I certify that the preceding 163 (one hundred and sixty-three) paragraphs are a true copy of the reasons for the decision herein of Senior Member Dr Linda Kirk

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

Associate

Dated: 27 March 2024

Date(s) of hearing:	**11 and 12 January 2024**
Counsel for the Applicant:	**Dr. J. Donnelly, Barrister**
Solicitors for the Respondent:	**N. Alroe, Minter Ellison**