Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number: **2024/0125**

Re: **MSVK**

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Emeritus Professor P A Fairall, Senior Member**

Date: **27 March 2024**

Place: **Sydney**

The decision by the Minister's delegate dated 4 January 2024 is set aside and in substitution, it is decided that the cancellation of the applicant's Class TY Subclass 444 Special Category (Temporary) visa is revoked under subsection 501CA(4) of the *Migration Act 1958* (Cth).

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

Emeritus Professor P A Fairall, Senior Member

Catchwords

MIGRATION – Migration Act 1958 (Cth) – non-revocation of mandatory visa cancellation – Direction No.99 – protection of Australian community – family violence – strength, nature and duration of ties to Australia – best interests of minor children – expectations of the Australian community – extent of impediments if removed – where applicant convicted of aggravated kidnapping – where applicant spent formative years in Australia – decision under review set aside

Legislation

Migration Act 1958 (Cth)

Cases

CRNL v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCAFC 138

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane [2021] HCA 41

NHBK and Minister for Immigration, Citizenship, and Multicultural Affairs (Migration) [2023] AATA 364

Secondary Materials

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

REASONS FOR DECISION

Emeritus Professor P A Fairall, Senior Member

27 March 2024

INTRODUCTION

1. The applicant is a 34-year-old New Zealand citizen. He has lived in Australia since infancy.

2. The applicant has lived in Australia for more than 30 years. He first arrived with his mother KC on 12 May 1990, when he was only months old. KC was in the process of separating from her partner, the applicant's biological father. She and the applicant returned to New Zealand in 1994 to obtain formal custody from a New Zealand court. She obtained the necessary court order on 21 March 1994, and they returned to Australia in May 1994.[1] The applicant has lived permanently in Australia since then.[2]

3. Until his visa was cancelled under provisions of the *Migration Act 1958* (Cth) (the **Act**),[3] he held a Class TY Subclass 444 Special Category (Temporary) visa provided to all New Zealand citizens upon entry into Australia. It is not a permanent visa.

4. The applicant has a lengthy criminal record. His offending as an adult commenced on 9 March 2007 when he was 18 years old. He committed several offences over the following years, dealt with by way of fines or bonds, none attracting a custodial sentence. However, in September 2018 he was charged with two offences: aggravated kidnapping,[4] and unlawful wounding with intent to cause grievous bodily harm.[5] He pleaded not guilty to both charges. On 21 June 2019 he was committed to the Parramatta District Court for trial.[6] On 13 March 2020, he was acquitted on the charge of wounding.[7] On 26 June 2020, he was convicted of aggravated kidnapping and sentenced to eight years imprisonment with a non-parole period of five years and four months. The sentence commenced on 17 October 2018, with the non-parole period ending on 16 February 2024.[8]

5. His visa was then cancelled under subsection 501(3A) of the Act. The notice of cancellation was issued on 8 September 2020.[9] He responded to an invitation to make representations regarding revocation of the decision to cancel his visa.[10] On 4 January 2024, a delegate of

---

[1] G3, 134.

[2] G3, 101-102.

[3] Subsection 501(3A): G3, 103.

[4] *Crimes Act 1900* (NSW), paragraph 86(2)(a). The offence is described as *Take/detain in company w/l to get advantage occasion actual bodily harm.* Aggravated kidnapping is punishable by up to 20 years imprisonment.

[5] *Crimes Act 1900* (NSW), subsection 33(1): G, 33.

[6] RTB, 9.

[7] RTB, 9.

[8] G3, 54.

[9] Subsection 501(3A): G3, 103.

[10] G3, 58, 62, 77; RTB, 225.

the Minister advised him that the original cancellation decision would not be revoked.[11] On 9 January 2024, he applied to the Tribunal for review of the decision not to revoke the cancellation decision (the **reviewable decision**).[12]

6. On 16 February 2024, the non-parole period ended, and he was transferred to immigration detention. The head sentence will not expire until 16 October 2026.[13]

7. The application was heard by the Tribunal on 12 and 13 March 2024. The applicant was represented by Dr J. Donnelly, of counsel. The Minister was represented by Mr. T. Eteuati, a solicitor employed by the Australian Government Solicitor.

THE HEARING

8. The applicant gave evidence and was cross-examined at length. The following individuals also gave evidence and were exposed to cross-examination: KC, his mother; GC, his 17-year-old daughter; NP, the wife of his cousin; and LP, her mother.

9. GC was an especially powerful witness. She was overwhelmed by the process of giving evidence under these depressing circumstances but resolute in her support for her father. His mother KC also spoke to the level of support she had provided as a grandmother and the support she would continue to provide to the applicant. She blamed herself for not arranging for him to acquire Australian citizenship when he was a child, for had she done so he would not be facing deportation. She spoke of the deep roots that she and her ancestors had in Australia.

10. The applicant and his long-term partner PN separated in around 2016. They had two children, GC and a son MC.

11. GC lives with her grandmother KC (the applicant's mother). She plans to live with the applicant if he is released. MC, his 13-year-old son, moved to Queensland with PN some five years ago.

---

[11] G2, 10.
[12] G1, 1.
[13] G3, 54.

12. The applicant listed other children in his Personal Statement, and the Tribunal heard from their mother NP. She spoke of the important place that the applicant holds in the lives of her children.

THE SOLE ISSUE

13. A person sentenced to a term of imprisonment of 12 months or more does not pass the character test, by reason of the combined operation of subsections 501(6)(a) and 501(7)(c) of the Act.

14. The conviction and sentence for aggravated kidnapping are not in dispute in these proceedings. I therefore find that he does not pass the character test.

15. The sole question for the Tribunal is whether there is 'another reason' under reason under subsection 501CA(4) why the decision to cancel his visa should be revoked.

EXERCISING THE DISCRETION UNDER SUBSECTION 501CA(4)

16. Section 499 of the Act provides that the Minister may give written directions to a person or body exercising powers and functions under the Act, where the directions relate to the performance of those functions or the exercise of those powers. Direction No. 99 (the **Direction**), enacted under section 499 and commencing on 3 March 2023, provides a range of considerations to which the Tribunal should have regard in exercising its discretion under subsection 501CA(4).

17. Part 1 of the Direction provides a set of principles that the Tribunal should have regard to when applying these considerations. I note the principles referred to in paragraph 5.2 and especially the following:

> *(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 noncitizens 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.*

18. Part 2 provides that the Tribunal must have regard to five primary considerations in section 8 and four other considerations in section 9. The considerations identified in the Direction are not exhaustive.[14] There may be some reason not explicitly stated in the Direction which constitutes 'another reason' within the purview of paragraph 501CA(4)(b)(ii).

19. The section 8 primary considerations are as follows:

- Protection of the Australian Community (PC1)
- Family violence committed by the non-citizen (PC2)
- The strength, nature, and duration of ties to Australia (PC3)
- Best interests of minor children in Australia affected by the decision (PC4)
- Expectations of the Australian community (PC5)

20. The section 9 'other considerations' are as follows:

- Legal consequences of decision under section 501 or 501CA (OC1)
- Extent of impediments if removed (OC2)
- Impact on victims (OC3)
- Impact on Australian business interests (OC4)

PRIMARY CONSIDERATION 1: PROTECTION OF THE AUSTRALIAN COMMUNITY

21. Between 2007 (when he turned 18) and 2017, the applicant was convicted of seven summary offences dealt with in the Parramatta Local Court, and three summary offences dealt with in the Blacktown Local Court. The details are contained in the National Criminal History Check.[15]

---

[14] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41, at [13] the High Court of Australia stated: 'What is "another reason" is a matter for the Minister. Under this scheme, Parliament has not, in any way, mandated or prescribed the reasons which might justify revocation, or not, of a cancellation decision in a given case.'

[15] G3, 33.

(a) On 6 February 2013, he was convicted of possessing prohibited drugs and fined $250.[16]

(b) On 29 January 2014, he was convicted of three offences, being common assault (DV)-T2, and two counts of property damage (DV). He was fined $500 for each offence and placed on a 12-month good behaviour bond.[17]

(c) On 9 June 2016, he was convicted of two driving offences, driving with mid-range PCA,[18] and driving while licence suspended.[19] He was fined $500, placed on a bond, and disqualified from driving for 18 months.

(d) On 6 September 2017, he was convicted of three offences; trespass,[20] property damage,[21] and possession of a prohibited drug.[22] He was fined $150 for trespass, and $600 for the drug offence, and placed on a 12-month bond for the property damage.

(e) On 21 November 2017, he was convicted of driving while his licence was cancelled (1st offence). He was placed on a 6-month bond with a requirement that he not commit any traffic offence.[23]

22. As noted above, on 26 June 2020, he was convicted of aggravated kidnapping and sentenced to eight years imprisonment with a non-parole period of five years and four months. The sentence commenced on 17 October 2018, with the non-parole period ending on 16 February 2024.[24] The head sentence concludes on 16 October 2026.

23. In considering the weight to be accorded the protection of the Australian community under the Direction, I note that paragraph 8.1(1) states:

---

[16] H 428438291; G3, 34, RTB 4-5, 36.
[17] H 53695557; G3, 34, RTB 6, 32-33.
[18] H 59332224; G3, 34; RTB 6, 28-29.
[19] H 60238025; G3, 34; RTB 6-7, 28.
[20] H 63249944; G3, 34; RTB 7-8, 25-26.
[21] H 63249944; G3, 34; RTB 7-8, 25-26.
[22] H 64660129; G3, 34, RTB 7, 24-25.
[23] H65490227; G3, 34, RTB 8, 21-22.
[24] H 68771344; G3, 54, RTB 9-10.

> *(1) When considering protection of the Australian community, decision-makers should keep in mind that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. 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.*

24. Paragraph 8.1(2) states that decision-makers should also consider the nature and seriousness of the non-citizen's conduct to date; and the risk to the Australian community, should the non-citizen commit further offences or engage in other serious conduct.

25. The Tribunal is required to have regard to the fact that certain types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community. These include violent and/or sexual crimes, crimes of a violent nature against women or children, regardless of the sentence imposed and acts of family violence, regardless of whether there is a conviction for an offence, or a sentence imposed.

26. The Respondent provided a chronology which includes several police incident reports. For the most part the incidents are of a minor nature. For example, until his imprisonment he had received several warnings for fare evasion, and one for fishing without a licence. He was searched on several occasions although for the most part he was not in possession of any contraband. He occasionally admitted to cannabis use. He received at least four traffic infringement notices (making an illegal U-turn, no right turn, not displaying P plates, and negligent driving). On two occasions he was suspected of breaking and entering but no charges were laid. I have taken these incidents into account. This was over a 12-year period.

27. The kidnap offence stands out in this record. During cross-examination, he stated that the victim was known to his co-offender, who was angry that he had received from him a batch of poor-quality heroin. He admitted that he assaulted the victim but denied that he had threatened to kill or main him. He expressed remorse for his participation, the prime responsibility for which he placed on his co-offender.

28. The Direction refers to certain factors to which a decision-maker should have regard including, relevantly, the sentence imposed, whether there is a trend of increasing seriousness, and the cumulative effect of repeated offending. I have noticed the sentences

above. As to a trend of increasing seriousness, it is certainly not a linear or exponential increase. Rather there is a quantum increase on a single occasion resulting in two serious charges, one of which resulted in a conviction and a condign sentence. There is no pattern of serious crimes against the person or property crime. His criminality is low level until this point. The offence is out of character.

29. In relation to risk assessment, the Direction provides:

> *8.1.2 The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct*
>
> *(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 reoffending; and*
>
> *ii. evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken). c) where consideration is being given to whether to refuse to grant a visa to the non-citizen — whether the risk of harm may be affected by the duration and purpose of the non-citizen's intended stay, the type of visa being applied for, and whether there are strong or compassionate reasons for granting a short stay visa.*

30. The applicant is a long-time drug user and for a period had a serious substance use disorder.

31. He gave evidence that he had used a variety of drugs from teenage years. As is common, it started with cannabis. He then started experimenting with ecstasy (MDMA), a powder form of methylamphetamines, and then to its crystal form (known as 'Ice'). Finally, he started using heroin, to which he became addicted.

32. The assessment of risk is fraught in relation to a person with a serious drug addiction.

33. Although he has made efforts to break his addictions, and is currently enrolled in the Buprenorphine program, which is recognised as a treatment for opioid use disorder, he failed two urine tests while in detention, as recently as 2023 and 2024. He declined to provide any details and did not concede that he was continuing to use stimulants in detention.[25]

34. I am satisfied that the risk of further drug use by the applicant is real and significant. This is borne out by his recent use of drugs in immigration detention.

35. I also note the sentencing judge's comment that:

> *I find the offender has some prospects of rehabilitation. It is positive that he has been motivated to pursue treatment for his addiction while in custody and is willing to continue. I cannot be satisfied that the offender will not commit further offences.*[26]

36. Overall, I am satisfied that this primary consideration weighs against revocation of the mandatory cancellation.

PRIMARY CONSIDERATION 2: WHETHER THE CONDUCT ENGAGED IN CONSTITUTED FAMILY VIOLENCE

37. Family violence is described in the Direction as 'violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member) or causes the family member to be fearful'. The direction provides examples of behaviour that may constitute family violence, including an assault, repeated derogatory taunts, or intentionally damaging or destroying property.

38. The applicant's criminal record includes the commission of three offences involving family violence arising out of a single incident, which occurred on 17 November 2013 when he was 24 years old. The following account is taken from the police notes.

---

[25] RTB, 206.
[26] G3, 43.

39. The primary victim of his offending was his mother KC. He is stated to have assaulted her by spitting at her twice. At the time, he had been with his partner PN for about six years. They had two children and were both regular drug users. They were separated at the time of the offending. The applicant was living with his mother KC because PN had asked him to leave the family residence.

40. On 17 November 2013, he went to the house to visit his children. He entered the home and was talking to the children when PN asked him to leave. According to the police notes, she asked him to turn the music down and he responded with verbal abuse. His mother KC arrived at the house. The applicant started yelling abuse at her. According to PN, he then spat at his mother. PN called the police, and the applicant left the house, punching and smashing PN's car windscreen on the way out. He also punched his mother's car windscreen and cracked it. He was subsequently arrested and on 29 January 2014, convicted of three offences, being common assault (DV)-T2, and two counts of property damage (DV). He was fined $500 for each offence and placed on a 12-month good behaviour bond. The three convictions recorded on this occasion are the only recorded instances involving domestic violence.[27]

41. The applicant was asked about this incident at the hearing. He did not deny that it occurred and that he smashed the windscreens. He also admitted to spitting towards his mother but said that he missed.

42. I note that the chronology provided by the Respondent lists various incident reports referring to domestic violence which did not result in any laying of criminal charges. I have studied the police reports relating to these incidents. Some of them are somewhat farcical, such as the description of a bacchanalian party on 6 April 2008 involving drugs, alcohol and a Centralian carpet python. The applicant was upset about a comment made by PN to the owner of the snake, which might be construed as flirtatious, and the argument escalated into him throwing things around the backyard. By the time police attended at half past three in the morning the applicant had left to stay with his mother. PN said she had no concerns for her safety and that she had not been assaulted. She did however want an AVO excluding him from the property when he was drinking.[28]

---

[27] RTB 6, 32-33; G3, 34.
[28] RTB, 42.

43. There are several recorded comments to the effect that his former partner indicated that she had no concerns about her safety and had called the police for family court reasons.

44. I also note the instance involving a fight between the applicant and his nephew, recorded to have taken place on 3 January 2018.[29] However, the police notes are difficult to follow. It appears that the applicant and his partner were living at the address with the 'victim' and another person, described as the 'witness'. An argument erupted over money and dirty dishes. The police notes suggest that the argument descended into blows between the applicant and his nephew. No charges were laid.

45. I also note the entry for 29 July 2018.[30] Again the notes are difficult to comprehend because of redactions but significantly, PN is recorded as saying that '[the applicant] would never do anything to me I know that'. The notes also state that 'the Police do not hold any fears' for her safety.

46. A similar instance is recorded on 21 November 2016.[31] The police notes record that the police attended after a verbal altercation:

> *About 1730 on the 21st of November 2016, the Vic has arrived home with her two children, the PN was in the Kitchen cooking food. The Vic has noticed the PN was intoxicated and could see several cans of Jack Daniels and coke in the lounge room .... The Victim does not like the PN drinking as he becomes abusive towards her, The Victim entered the kitchen and asked the Pn to stay at his mothers. The PN then abused the Vic calling her things like a … The Vic then told the PN to leave the premises, the PN grabbed a few things and left the location. About five minute's [sic] later the Pn returned and continue to abused the victim, the victim then called the police. Police arrived a short time later and obtained details from the victim, police asked the victim if the PN threatened her, she stated no and no too [sic] any assaults or damage to property .... Police then spoke to the Pn who stated he did nothing wrong and he was going to stay at his mothers place for the night. Police sight the children who were both playing in the bedroom and were fine. No offence occurred no further police action required.*

47. The 12-year relationship between the applicant and PN seems to have finally ended in 2016.[32] Although the relationship was volatile, no doubt largely because of alcohol and drugs, it does not appear to have been violent. However, as with many couples there were

---

[29] RTB, 19-21.
[30] RTB 16-17.
[31] RTB 26-27.
[32] RTB 17-18.

heated arguments about custody arrangements for the two children, as borne out by the entry on 17 July 2018.[33] This entry clearly shows that the applicant's daughter was deeply affected by separation from her father. On that occasion PN called the police because she was uncertain whether he had strapped the child properly into a car seat. The notes state:

> *The Victim ..... and the POI [the applicant] have been in a [sic] off and on relationship for the past 12 years. The eventually broke up for the last time in 2016 and have remained separate. They have two children as a result of their relationship ..... aged 11 and ..... aged 6. Since separating 2 years ago ..... and [the applicant] have had a verbal agreement only in regards to custody and visitation of the children. This has not been a problem and there has been no issues up until recently where [the applicant] has been more absent from the children's life. This has upset the daughter ..... as she wants to see more of her father but he has not been available. Being it school holidays it was agreed that ..... would visit with [the applicant] for a week and then swap with her brother ..... for the second week. ..... decided that ..... was not coping with this arrangement as she believed she was only staying to please her father so wanted to pick her up early and take her home leaving ..... She has contacted ..... by phone on the evening of 16th July 2018 and told her this. Changing the arrangement has upset ..... and she stated that she wanted to stay with her father as she was not sure when she would see him again. ..... believe this was not healthy and told ..... that she need to come back home with her and let her brother have a turn with her father ..... arrived at [the applicant's] residence at .... about 10am on Tuesday 17th July 2018. Also residing at the location is [the applicant] mother, father and brother ..... has gone inside with ..... and spoken to [the applicant]. ..... was informed by ..... that she would be going home with her and ..... was to stay. With this ..... has run to her bedroom and started crying.*
>
> *. . . . . has gone outside to get ready to leave while ..... was packing her bag and having a quick shower. At this time [the applicant] has come out of the house and started arguing with ..... about upsetting .... stated that [the applicant] was yelling and swearing at her and they continued to argue over custody arrangements involving the children. To remove himself from the situation [the applicant] has put ..... in a vehicle and driven off from the location ..... has phone 000 as she was concerned for ..... and did not see him put into a child seat ..... and ..... have attended Wentworthville Police Station a short time later.*
>
> *Upon attending the station ..... stated she wanted to make a report for family law court reasons and wanted a record only. She stated she had no fears for her safety and the main reason she rang was because she didn't see a child seat and she believed they all needed to attend mediation. Police asked if she was concerned for ..... being in [the applicant's] care to which she stated, "No not at all. That was the arrangement. I was just worried as I did not sea [sic] a child seat in the car." Police asked if she was sure there was no child seat but ..... stated she could not say for sure. Throughout ..... 'S conversation with police the incident all seemed to be related to child custody problems and a verbal argument only. ..... . stated to police that [the applicant] said once that he would bash her boyfriend but she refused to supply the boyfriends details to police as she said she spoke to him and neither of*

[33] RTB 17-18.

them were worried about it. She said [the applicant] often says things to try and hurt people. Police asked again if they could have the boyfriends details to check he wanted no action but she refused and said he wanted no part in it. Police asked ..... if what [the applicant] said about her boyfriend caused her fears or she found it intimidating but she said no it did not.

No further police action in relation to matter as it was a verbal argument only. No fears held.

…

At 18:30 on the 17th of July 2018, Police attended and spoke with the POI [the applicant]. [The applicant] stated that he had a verbal argument with his ex-partner ..... about custody of their children. [The applicant] stated that he was upset because this week he was supposed to have custody of both children, and was annoyed when ..... arrived to pick up his daughter ..... early. No concerns for the welfare of the POI's son ..... [the applicant], as he was in good spirits, and would be staying the night at a local friend's house as planned earlier in the week. No offence detected. No further police action.

48. The police notes highlight the unhealthy nature of the relationship between the applicant and PN, but they also highlight the degree of his commitment to his children. Although there is a recorded conviction of assault against his mother which occurred some ten years ago, and some property damage inflicted on PN's property at the same time, there is a conspicuous absence of violence directed towards PN, who repeatedly told police that she had no fears for her safety.

49. I consider that the record does not show that this consideration should count against the applicant. I consider that it should be regarded as neutral.

PRIMARY CONSIDERATION 3: THE STRENGTH, NATURE AND DURATION OF TIES TO AUSTRALIA

50. The Respondent accepts that this consideration weighs in favour of revocation.[34]

51. His ties are extensive and include his two children GC and MC, his mother KC, his brother, and other relatives.

52. His formative years were spent in Australia. KC resides in Sydney and holds Australian citizenship. His daughter lives with his mother in Sydney. His son lives with his mother PN

[34] RSFIC, [57]-[59].

in Queensland. His mother and daughter gave evidence in these proceedings in his favour. Other relatives provided letters of support to the same effect.

53. He has previously run his own business laying floating floorboards, which came to an end when his tools were stolen.

54. The Tribunal gives considerable weight to this consideration in favour of revoking the mandatory cancellation, as it is required to do under the Direction.

PRIMARY CONSIDERATION 4: THE BEST INTERESTS OF MINOR CHILDREN IN AUSTRALIA

55. The applicant's child GC was born shortly before his 18th birthday. His second Child, MC, was born when he was 23 years old. GC and MC are presently 17 and 13 years old respectively. GC gave evidence in these proceedings. She was an impressive witness. I am satisfied that she would be deeply affected by a decision to remove her father from Australia.

56. The applicant has not had physical contact with his son for many years. There is evidence that until mid-2018 they had a very close relationship, that was interrupted by the twin impacts of MC's relocation to Queensland with his mother, and the incarceration of the applicant arising from the serious offence in respect of which his visa stands cancelled. The applicant said that he had been able to maintain telephone communication with his son with the assistance of his daughter. He expressed the hope that if released to the community he would be able to re-engage with his son. Given that the parties previously had an informal arrangement for shared custody, this is not an unreasonable expectation.

57. The Tribunal also heard from NP, his cousin's wife. She is the mother of four children identified by the applicant as potentially affected by a decision to remove him. NP spoke of the caring relationship that the applicant has with these children.

58. I am satisfied that this consideration weighs heavily in favour of revocation of the mandatory consideration.

PRIMARY CONSIDERATION 5: EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

59. The applicant accepts that this consideration weighs against the applicant. However, given the principles referred to above, some allowance must be made for the fact that the applicant has resided in Australia since his formative years.

60. One of the principles identified in the Direction is that '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'.[35]

61. In all respects other than his lack of citizenship, he is an Australian raised in the western suburbs of Sydney. Although this consideration weighs against the applicant, its weight is moderated by his long residence in Australia.

OTHER CONSIDERATIONS

62. The section 9 'other considerations' are as follows:

- Legal consequences of decision under section 501 or 501CA (OC1)
- Extent of impediments if removed (OC2)
- Impact on victims (OC3)
- Impact on Australian business interests (OC4)

The legal consequences of the decision

63. The legal consequence a decision not to revoke the mandatory cancellation decision is that the applicant will be detained for the purpose of removal under section 189 of the Act.

64. This consideration is neutral.

---

[35] Paragraph 5.2(5).

Extent of impediments if removed

65. The applicant has no viable family relations in New Zealand. His mother has three cousins, but she does not have a close relationship with them. The applicant has no relationship with them and as noted above, no relationship with his biological father.

66. I accept that the applicant has transferable skills, no significant physical health problems, and is culturally adept. However, the emotional trauma of separation from his family, and especially his mother and his daughter, is likely to be profound. Given his history of mental illness and drug use, this is a serious consideration. I accept that there is a real possibility that if removed to New Zealand and away from his family in Australia, there is a real prospect that his dependency on drugs will grow, and his mental and physical health will decline. In this context, his biological father, who has substance dependency issues, will be of little or no assistance.

Impact on victims

67. There is no evidence before the Tribunal with regard to the impact upon victims of a decision to remove the applicant. I do however note that his mother KC was the victim of an assault by the applicant some ten years ago. She has clearly forgiven him and gave evidence that she would be 'destroyed' by a decision to remove him to New Zealand.

Impact on Australian business interests

68. There is evidence in relation to this consideration which is neutral.

Other 'other' considerations

69. Dr Donnelly points to a combination of factors that provide another reason for revoking the mandatory cancellation. He referred to the following comments by the learned sentencing judge made in sentencing the applicant.

> *As an adult he has a conviction for common assault, destruction of property, drug offences and traffic matters. Clearly his record disentitles him to leniency.*
>
> *A report was received from Dr Sam Calvin, Forensic Psychiatrist. The offender's parents separated when he was five years old and he moved from New Zealand to Sydney with his mother. She commenced a new relationship and he has a half-sibling. As a child the offender suffered from ADHD and Oppositional Defiant Disorder. He struggled at school and often truanted. He suffered physical*

mistreatment by his stepfather and experienced symptoms of depression and anxiety which he attributed to this. The offender left home at the age of 13 years and used drugs and alcohol to cope. The offender would self-harm, cutting himself and had occasional thoughts of suicide. According to the report the offender spent two nights in juvenile detention when he was 13 years old and was sexually assaulted. He told Dr Calvin that he had been plagued by thoughts of this recently. He described his mood at present as depressed.

The offender's drug usage was of cannabis and benzodiazepine from 15 to 20 years of age. From 20 years he started using methylamphetamine and occasionally MDMA. From 18 years of age the offender would drink alcohol daily. Dr Calvin said the offender recognised the impact of his drug usage on his mental health. There had been one hospital admission for psychosis and the offender indicated he was willing to accept treatment.

Dr Calvin noted the offender's history of disadvantage, periods of homelessness and a lack of social supports which all impacted on his mental health. The offender meets the criteria for drug and alcohol disorders. He requires ongoing treatment for his mental health and addiction. A custodial sentence was said to be counterproductive as it would be likely to further alienate the offender from the community. His prognosis was said to hinge on his abstinence from drugs, ongoing psychiatric treatment and involvement in a meaningful vocation.

While in custody the offender has completed the Remand Addictions Course, according to his Certificate of Attendance he self-referred to this course and his participation was seen as demonstrating a genuine desire to overcome his alcohol and other drug issues.

The offender gave evidence on sentence. He confirmed the accuracy of the information provided to Dr Calvin. He said he had not used drugs in the three months before his arrest, he was drinking alcohol but did not believe he has a problem with alcohol. He did the Remand Addictions Course because of his drug history. The offender has not seen his children since his arrest and is unable to contact them. He has been told that they have moved to Queensland and that his daughter did not want to go. This upset him because there is nothing he can do being in custody.

He has found being in custody difficult because of his history of abuse while in juvenile custody. He has suffered with anxiety and depression. He is on a waiting list to see a psychologist.

His mother was visiting him weekly but this was stopped due to the COVID-19 restrictions. [The applicant] said he would accept treatment and would continue with counselling in relation to his drug addiction. The offender explained that he only heard voices at a time when he was using methylamphetamine. In cross-examination he said he had used methylamphetamine once while in custody. His relationship with his stepfather was bad when he was young and he would be hit about twice a month. He lived on the streets from the ages of 13 years until about the time when he became a father when he was 17 years old…[36]

70. Dr Donnelley submits:

---

[36] G3, 40-43.

As outlined by Judge Herbert, based on the report from Dr. Sam Calvin, the applicant has endured a tumultuous childhood characterised by family breakdown, displacement, mental health disorders, abuse, and lack of support, all of which have cascaded into a pattern of substance abuse, self-harm, and offending.

Significant Hardship and Trauma. The applicant's early separation from his father, relocation, and the subsequent physical and emotional abuse suffered at the hands of his stepfather have had a profound and enduring impact on his mental health and behaviour.

The onset of ADHD and Oppositional Defiant Disorder during his childhood, compounded by the lack of adequate intervention, set the stage for the subsequent difficulties encountered in his adolescence and adulthood.

Impact on Mental Health. The experiences of homelessness, lack of social supports, and the traumatic events experienced in juvenile detention have significantly impaired the applicant's mental health, contributing to his diagnoses of drug and alcohol disorders, depression, and anxiety. These conditions, as noted by Dr. Calvin, have directly influenced the applicant's offending behaviour.

Criteria for Revocation. The circumstances detailed above go beyond the typical parameters of character considerations and highlight a complex interplay of socio-psychological factors that have contributed to the applicant's criminal conduct.

It is submitted that these factors provide a compelling basis for considering the revocation of the visa cancellation as they present a clear case of exceptional circumstances that warrant a departure from the mandatory cancellation provisions.

Given the profound impact of the applicant's early life experiences and mental health issues, it is respectfully submitted that the mandatory cancellation of the applicant's visa be revoked. The unique and severe circumstances presented in this case constitute "another reason" within the meaning of the legislation for revoking the mandatory cancellation, allowing for a more nuanced and compassionate consideration of the applicant's right to remain in Australia.

The revocation would not only serve the interests of justice by acknowledging the complex factors underlying the applicant's offending but also facilitate the continued rehabilitation and integration of the applicant into society.

71. I accept that these factors should be given some weight in favour of revoking the mandatory cancellation decision.

CONSIDERATION

72. The parties agree that three of the primary considerations weigh against revocation of the mandatory cancellation decision: protection of the Australian community (PC1), family violence committed by the non-citizen (PC2), and the expectations of the Australian community (PC5).

73. The Tribunal accepts that PC1 weighs heavily against revocation; however, I consider that PC2 is at most neutral for the reasons given above. PC3 weighs against the applicant but does not weigh heavily.

74. Dr Donnelly identified the following factors favouring revocation of the cancellation decision: the strength, nature, and duration of ties to Australia (PC3), the best interests of minor children in Australia affected by the decision (PC4), and the extent of impediments if removed (OC2).

75. Dr Donnelly also identifies the legal consequences of decision under section 501 or 501CA (OC1), and the impact on victims (OC3) as potentially in his favour. Finally, he pointed to various factors associated with family breakdown, mental health issues, trauma, and systemic disadvantage as favouring revocation of the cancellation decision.

76. The Minister's representative did not discount that some of these factors might weigh in favour of the applicant. He submitted that the Tribunal should prioritise the safety of the community and the government's expectations regarding misconduct by non-citizens involving violent crime and domestic violence.

77. Under the Direction decision-makers must have regard to the length of time the non-citizen has resided in the Australian community, noting that *considerable weight* should be given to the fact that a noncitizen has been ordinarily resident in Australia during and since their formative years, *regardless of when their offending commenced and the level of that offending*. This constitutes a significant amendment to the previous Direction,[37] which treated ties to Australia as a consideration but not as a *primary* consideration.[38] This change of policy responded to lobbying by the New Zealand government at the highest level.[39] The increased emphasis to be applied to this consideration under the Direction applies to all non-citizens, not merely those holding New Zealand citizenship.

---

[37] Direction No. 90.

[38] See *NHBK and Minister for Immigration, Citizenship, and Multicultural Affairs (Migration)* [2023] AATA 364, at [122].

[39] *ABC News Immigration minister orders changes to assessments for New Zealanders facing deportation* < Immigration minister orders changes to assessments for New Zealanders facing deportation - ABC News> accessed 14 March 2024; SBS News, *Australia makes changes to 'corrosive' New Zealand deportation policy* <Immigration: Australia makes changes to 'corrosive' New Zealand deportation policy | SBS News> accessed 14 March 2024.

78. I also note the important principle contained in paragraph 5.2(5) previously referred to that 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.[40]

79. The applicant was brought to this country as an infant and became an absorbed member of the Australian community. He has lived here for three decades. Clearly these aspects of the Direction apply with full force to the applicant.

80. Having heard from the witnesses who gave evidence to the Tribunal, I am satisfied that the applicant's removal from Australia to New Zealand would have profound and devastating impacts on his immediate family in Australia, especially his mother KC, his daughter GC, his son MC, his brother, and other close family members. They are all Australian citizens.

81. The Tribunal is satisfied that the applicant has no family in New Zealand, other than his estranged father and distant relatives on his mother's side. The applicant does not know his father, who lives in New Zealand.[41] A Discharge of Access Order of District Court of NZ was made on 21 March 1994, suspending access of the applicant's father to the applicant.[42]

82. While the applicant has a lengthy criminal record, it was relatively low level until the offending in 2019 for which he received what can only be described as a substantial sentence. He told the Tribunal that it was all a result of the victim, who was known to his co-offender, supplying low grade drugs. The trial seemed to have proceeded on the basis that the victim was a stranger to the two offenders. In any event it was a very serious offence. By contrast, his domestic violence offending stands at the lower end of the scale, and did not involve the infliction of bodily harm, as detailed above. Although no offending can be regarded as trivial, the other entries in the criminal record, none of which attracted a custodial sentence, would be regarded by comparison as minor. His conviction for kidnapping in company stands alone as attracting a custodial sentence.

---

[40] Paragraph 5.2(5).
[41] G3, 59.
[42] G3, 134-137.

83. The Tribunal performs its task erroneously by focussing on each consideration in isolation without properly weighing them against one another.[43] The preferred approach is one of synthesis, whereby the Tribunal determines whether any factor or combination of considerations counters the combined force of those considerations favouring non-revocation.

84. After weighing all considerations, I have decided to revoke the mandatory cancellation decision.

DECISION

85. The decision by the Minister's delegate dated 4 January 2024 is set aside and in substitution, it is decided that the cancellation of the applicant's Class TY Subclass 444 Special Category (Temporary) visa is revoked under subsection 501CA(4) of the *Migration Act 1958* (Cth).

[43] *CRNL v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 138 at [26]-[28].

I certify that the preceding 85 (eighty-five) paragraphs are a true copy of the reasons for the decision herein of Emeritus Professor P A Fairall, Senior Member

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

Associate

Dated: 27 March 2024

Dates of hearing:	**12 and 13 March 2024**
Counsel for the Applicant:	**Dr J. Donnelly**
Solicitors for the Respondent:	**Mr T. Eteuati, Australian Government Solicitor**