Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number:	**2023/9629**
Re:	**Jarrod Trez Raiden Rangiuia**
	APPLICANT
And	**Minister for Immigration, Citizenship and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Member R. Maguire**
Date of decision:	**12 March 2024**
Date of written reasons:	**8 April 2024**
Place:	**Brisbane**

Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal **affirms** the decision made by the delegate of the Respondent dated 12 September 2023 to cancel the Applicant's Class TY Subclass 444 Special Category (Temporary) visa.

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

Member R. Maguire

Catchwords

MIGRATION – Review of discretionary cancellation of a Class TY Subclass 444 Special Category (Temporary) visa – where Applicant does not pass the character test – whether there is another reason to revoke the mandatory cancellation decision – consideration of Ministerial Direction No. 99 – decision under review affirmed

Legislation

Administrative Appeals Tribunal Act 1975 (Cth)
Migration Act 1958 (Cth)
Migration Regulations 1994 (Cth)

Cases

Afu v Minister for Home Affairs [2018] FCA 1311
Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd (2015) 255 CLR 352
Briginshaw v Briginshaw (1938) 60 CLR 336
Bugmy v The Queen [2013] HCA 37
DOB18 v Minister for Home Affairs [2019] FCAFC 63; (2019) 269 FCR 636
FYBR v Minister for Home Affairs [2019] FCA 500
FYBR v Minister for Home Affairs [2019] FCAFC 185
Helton v Allen (1940) 63 CLR 329
Lesianawai v Minister for Immigration, Citizenship, and Multicultural Affairs [2024] HCA 6
Miller and Minister for Immigration, Citizenship and Multicultural Affairs [2024] AATA 175
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane [2021] HCA 41
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton [2023] HCA 17
MKNT and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] AATA 4089
Pillay and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] AATA 270.
Plaintiff M1-2021 v Minister for Home Affairs [2022] HCA 17
Suleiman v Minister for Immigration and Border Protection [2018] FCA 594

Uelese v Minister for Immigration and Border Protection [2016] FCA 348

XGHJ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] AATA 3474

YNQY v Minister for Immigration and Border Protection [2017] FCA 1466

Secondary Materials

Ministerial Direction No. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA (3 March 2023)

REASONS FOR DECISION

Member R. Maguire

8 April 2024

INTRODUCTION

1. On 12 March 2024, the Tribunal affirmed the decision under review in this matter. The Tribunal now provides its reasons for doing so.

2. By application made on 20 December 2023 (''**the Applicant**''), a 30 year old citizen of New Zealand, seeks review of a decision a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs (''**the Respondent**'') made on 12 September 2023 pursuant to section 501(2) of the *Migration Act 1958* (Cth) ("**the Act**"), to cancel the Applicant's Class TY Subclass 444 Special Category (Temporary) visa ("**the Visa**") on the ground that the Applicant does not pass the character test pursuant to s. 501(6)(b) of the Act, which provides that a person does not pass the character test if "the Minister reasonably suspects":

    (i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and

    (ii) that the group, organisation or person has been or is involved in criminal conduct.

3. In *Roach v Minister for Immigration and Border Protection* [2016] FCA 750 *(**Roach**)* at [135]-148 Perry J discussed the legislative history of s. 501(6)(b), and observed (at [142]:

> *'I consider that the membership limb of s 501(6)(b) operates in effect as a "deeming provision" whereby a person suspected of being a member of a group or organisation which is suspected of being involved in criminal conduct will fail the character test in the same way that, for example, a person would "automatically" fail the character test if sentenced to a term of imprisonment in excess of a specified minimum period …'*

4. Her honour went on to say (at [145]):

> *'Finally, the construction which I have reached by reference to the ordinary meaning of the provision is confirmed by the Explanatory Memorandum to the Migration Amendment (Character and General Visa Cancellation) Bill 2014 (see s 15AB(1)(a)*

of the Interpretation Act). Specifically, at paragraph 41, the Explanatory Memorandum explained that:

> *"The intention of this amendment is to lower the threshold of evidence required to show that a person who is a member of a criminal group or organisation, such as a criminal motorcycle gang, terrorist organisation or other group involved in war crimes, people smuggling or people trafficking, does not pass the character test. The intention is that membership of the group or organisation* ***alone*** *is sufficient to cause a person to not pass the character test.* ***Further, a reasonable suspicion of such membership or association is sufficient to not pass the character test. There is no requirement that there be a demonstration of special knowledge of, or participation in, the suspected criminal conduct by the visa applicant or visa holder."'***
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> (Emphasis added)

5. The Applicant concedes that he was a member of two separate criminal organisations being the Mongrel Mob, and the Bandidos[1], and that he fails the character test for the purposes of s 501(6)(b) of the Act[2], but argues that the correct or preferable decision is not to exercise the discretion to cancel his Visa under s. 501(2) of the Act.

6. The Tribunal has jurisdiction to review this decision under s. 501(2) of the Act pursuant to s. 500(1)(b) of the Act.

7. The sole question for the Tribunal is therefore whether, having regard to Direction 99 (the Direction) as required by s. 499(2A) of the Act, the discretion to cancel the Applicant's Visa should be exercised.

8. By operation of s 500(6L) of the Act, when an application is made to the Tribunal for a review of a decision under s 501(2) of the Act, if the Tribunal has not made a decision within the period of 84 days after the day on which the person was notified of the decision under review in accordance with 501G(1) of the Act, the Tribunal is taken at the end of that period to have made a decision under s 43 of the *Administrative Appeals Tribunal Act 1975* (Cth) ("**AAT Act**") to affirm the decision under review. At the hearing, it was agreed that for the purposes of this review, and s 500(6L)(c), the 84th day was 12 March 2024.

9. In determining whether to exercise the discretion to cancel a visa under s. 501(2) of the Act, the Tribunal is required by para 5.1(2) of the Direction to have regard to the specific

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[1] Transcript Day 1 p 10 lines 1-3.

[2] Ex A2 p3 par 11.

circumstances of the case. It is further required by para 7(1) of the Direction to give appropriate weight to evidence from independent and authoritative sources in applying both primary and other considerations.

10. The Tribunal must also have regard for the representations made by the Applicant which the Tribunal is required to read, identify, understand and evaluate.[3] Findings of fact by the Tribunal must be based on some evidence or other supporting material, unless the finding is made in accordance with the Tribunal's personal or specialised knowledge or by reference to that which is commonly known. It is open to the Tribunal to adopt the accumulated knowledge of the Department.[4]

11. The Applicant is a 30-year-old citizen of New Zealand. The Applicant migrated to Australia on 27 June 2011, and has resided in Australia since, except for a period of about 15 months in 2015-2016.

12. In his Personal Circumstances Form (PCF) which he completed on 4 April 2022, he gave his relationship status as single, and left blank the name and address of a spouse or partner, and relationship details. He provided an address for his place of residence, and provided a different address for his three children, and scribbled over (so as to render illegible) his response to the question whether he would live with his first born on return to the community and left blank his response in respect of the other two children.

13. The Applicant said that he saw his daughters aged nine, seven , and two almost every day, and said the older two were autistic and “high maintenance”. He described their problems, his participation in their lives, and his personal, financial and emotional support for them. He said it would break their hearts if he was taken away from them. He did not describe any relationships with any other minor children.

14. The Applicant identified his father and two brothers as New Zealand citizens and residents, but no other relatives there, or in Australia.

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[3] *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17, at [22] and [36].

[4] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41 at [17]-[20].

15. The Applicant did not respond to an invitation to describe factors that would explain his offending. He described a DVO in place in respect of “my children’s mother” until 16 April 2023.

16. He ticked the “No” box in response to a question as to whether he had any further charges pending.

17. He described continuous employment since 2016.

18. He did not assert positive contributions he had made to the Australian community, or any hardship that would be suffered by members of the Australian community in consequence of his removal from Australia.

19. He did not describe any health impediments to his return to New Zealand but expressed concerns about his return there as he had left the Mongrel Mob Australia chapter for family reasons, and feared what would happen to him.

20. He said he would face financial, mental, and emotional problems in New Zealand and would be overworked, underpaid, and would suffer mentally and emotionally from separation from his children.

21. The Applicant also provided a number of work and personal references.

22. Mr Warwick Bates, the Applicant’s employer of two years, provided a signed reference dated 1 April 2022[5] in which he stated that the Applicant had always been an upright member in the community, respected for his leadership skills and honesty. Mr Bates also provided a further glowing reference dated 9 January 2024.[6]

23. There was also a very strong signed reference from the Applicant’s partner’s mother Mrs AA, dated 12 April 2022 regarding his character and fatherly role.

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[5] Ex R1 p 97.
[6] Ex A1 p 98.

24. The Applicant's partner, Ms T provided a very strong unsigned reference[7] dated 31 March 2022 in which she spoke positively of his role as an "on call" father and (at the time) ex-partner. She said they had grown stronger over the years since their separation, and described an apparently successful co-parenting arrangement where the Applicant was on call 24 hours a day seven days a week to give support.

25. She said in part:

> *'Raising three High Spectrum needs girls without external family support has been a challenge and can be frustrating and stressful. Therefore, having an understanding, patient and quiet fatherly figure that exudes peace and calm through expressions of time, care, nourishment, and positive enrichment has been a testament to Jarrod's self-development within the dynamics of co-parenting. I have seen a massive transformation in Jarrod's thought processes and self-awareness over the last year and have seen him take accountability by making honest and meaningful life-serving choices that allow him to connect and resonate with his children. His daughters rely on him and his presence as a part of their sense of self and identity. In turn I have witnessed witnessing Jarrod find himself as an individual and magnifying his calling as a selfless and understanding father and friend. He treats me respectfully and respects my personal boundaries regarding my private life and vice versa.'*

26. There was also an email from her dated 6 April 2022 where she recorded his availability, and willingness to assist her when she had to take any of the children to hospital, and his assistance with their strict routines, and his participation in terms of practical and financial support and special days.

27. There was also a statement dated 17 February 2024 from Iyesha Treanor, who had known the Applicant for some 20 years. Ms Treanor, who lives in Mackay, had a son born on the Applicant's birthday in 2019, and with whom the Applicant had an uncle like relationship. She spoke of the "valuable support and mentorship" the Applicant provided to her son and the Applicant's deportation would cause her and her son great emotional stress.

Applicant's statement of 17 February 2024

28. The Applicant also provided a statement dated 17 February 2024[8] in which he recounted his personal struggles and adversities as a child. These included poor literacy, physical

[7] Ex R1 p 100-101.
[8] Ex A1 p 23.

abuse at the hands of his father, and a childhood spent in an area of high crime rate, which led to an early introduction to alcohol and drugs.

29. His suffering included the death of a brother whilst the Applicant was still a child, and the death of his mother with whom he had a good relationship when he was about 21. He had a poor relationship with his father and two surviving brothers and left home at an early age falling into bad company.

30. The Applicant said that he received his Mongrel Mob vest in 2018, but his time with them ended in early 2020. He maintained that he joined the Bandidos shortly after but *"never really considered myself a true member of the Bandidos."*[9]

31. He said that he left the Bandidos shortly after the birth of his youngest daughter[10], and because he did not conform to their expectations such as by owning a motorcycle.

32. With regarding to gang related offending, the Applicant said[11]:

> *'I did not commit any serious criminal offences connected to the Mongrel Mob or Bandidos. My time with these organisations was spent drinking, socialising, and having a laugh with peers.'*

33. The Applicant spoke of his consistent employment and contribution to society through feeding homeless and organising free fitness camps. He and his partner had donated to help the less fortunate.

34. The Applicant said that he was genuinely remorseful for his offending and had completed probation. He listed some 29 courses he had undertaken during his time in immigration detention and said he had focused on substance abuse and pathways to recovery. He had also consulted with a mental health professional and discussed his drug and alcohol abuse, and future plans.

35. The Applicant emphasised that he fully accepted his criminal offending in Australia, and understood the seriousness of his family violence, and acknowledged that any form of family

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[9] Transcript Day 1 p 50 line 4.
[10] Born July 2021; Ex R1 p 96.
[11] Ex A1 p 23 par 10.

violence in Australia is unacceptable. He expressed extreme remorse for his past domestic violence offending.

36. Regarding his ties to Australia, the Applicant emphasised his close loving relationship with his partner as well as their children and acknowledged his partner's struggles since his placement in detention.

37. Regarding his plans if returned to the community, the Applicant said[12]:

> *'If I am returned to the Australian community, it is my priority to provide strong emotional, financial, and practical assistance to my partner and three children.* ***I also plan to return to live with them in the fullness of time.*** *They are my world. They are my everything.'*
>
> (Emphasis added)

38. The Applicant did not elaborate on his immediate residential arrangements should he be returned to the community.

39. The Applicant also planned to continue his association with his partner's family, as well as his uncle like relationship with the son of Ms Iyesha Treanor.

40. The Applicant said he continued to have good relations with other members of the community and had provided statements from persons not associated with criminal organisations.

41. The Applicant said he had no intentions of returning to his past life or affiliations and could return to work immediately and support his family if allowed to stay.

42. The Applicant expressed a range of fears in returning to New Zealand. His employment prospects would be adversely impacted by his criminal record and deportation. He would have no accommodation or contacts which could lead to work opportunities.

43. The Applicant expressed extreme concern for his own mental health if deported, as well as his partner's capacity to cope without his assistance, particularly having regard to his elder two daughters' disabilities.

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[12] At para 28.

Ms T's statement of 17 February 2024[13]

44. Ms T said that she was a citizen of New Zealand, the Applicant's de facto partner, and the mother of his three daughters, the elder two of whom suffered severe autism, and required specialised care and unwavering attention. She and the children had visited the Applicant in detention.

45. Ms T described her emotional, financial and practical struggles managing part-time work and caring for her three children. She expressed forgiveness for his DVO offending toward her and said she had noted positive changes in the Applicant, and he had severed all ties with outlawed motorcycle organisations.

46. Ms T detailed her children's special needs and challenges in dealing with them. These appeared compounded through various limitations on her other family members to support her. The Applicant's unavailability to assist her had added to her burdens since he was placed in detention.

47. Ms T said she would remain in Australia if the Applicant is deported as she was concerned about the availability of specialised resources to provide necessary care for her children. His deportation would have a devastating impact on her.

Iyesha Treanor dated 17 February 2024[14]

48. Ms Iyesha Treanor stated that she had a strong friendship with the Applicant whom she had known for 20 years. She expressed knowledge of his now ceased association with outlaw motorcycle gangs and his criminal offending.

49. She expressed concern for the impact his deportation would have on his family, and spoke of his unwavering dedication as a father, and his loving bond with his partner, and her reliance upon him. She expressed concern at the impact his deportation would have on their family unit, and in particular, the children.

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[13] Ex A1 p 30.
[14] Ex A1 p 33-36.

50. She said she had observed first hand the positive changes he had made in his life, and expressed concerns about the impact of deportation on his mental health. She also made observations regarding his past traumas, mental health, commitment to a better future, and the fact that he had not lived in New Zealand for over a decade.

51. Ms Treanor spoke of the bond between her son and the Applicant, and the uncle like role that Applicant played in the life of the child, and expressed concern that the Applicant's deportation would impact the child adversely.

52. She went on to express concerns about the impact his deportation would have, not only on him, and his family, causing "immense emotional upheaval" to them.

Raewyn Davies signed statement dated 17 February 2024[15]

53. Raewyn Davies provided a signed statement dated 17 February 2024, in which she described the Applicant's role as an integral part her husband's business. She spoke of his dedication and work ethic, and reliability. She spoke of his desire to distance himself from negative influences and criminal associations, but disclosed no detailed knowledge of either, or of his past offending. In particular, she disclosed no knowledge at all of his family violence offending.

Matt Russell signed statement dated 30 January 2024[16].

54. Matt Russell provided a signed statement in which he had known the Applicant through his employment for three years and described him as an exceptional man. He disclosed no knowledge of the Applicant's offending or other serious conduct.

Patrick Tipene Angell unsigned statement of 7 February 2024[17]

55. Patrick Tipene Angell, the Applicant's friend of 14 years, provided an unsigned statement dated 7 February 2024, in which he said he was aware of the allegations and charges

[15] Ex A1 p 37-38.
[16] Ex A1 p 99.
[17] Ex A1 p 96-97.

against the Applicant, but said this was out of character, describing the Applicant as a man of integrity and strength, and who was remorseful for the consequences of his actions.

Chance Hemopo signed undated statement[18]

56. Chance Hemopo, the Applicant's friend of eight years, provided a signed statement in which he described the Applicant as polite and courteous, and said he had fed the homeless and donated to charity. They had worked together in the mushroom and turf industries. He described him as an honourable individual, a valuable member of the community, and a good human being in society.

Reio Vaarmets signed statement dated 30 January 2024[19]

57. Reio Vaarmets provided a signed statement dated 30 January 2024, which he said was intended to be presented at "Court for the sentence hearing." The statement demonstrated no knowledge of the Applicant's criminal offending or other serious conduct but spoke positively of his role as a father and hard working colleague.

Evidence at Hearing

58. In evidence before the Tribunal, the Applicant confirmed that his Australian offending covered the period from 28 November 2014 to his last conviction recorded on 18 June 2021. He said he was regretful and remorseful for this, and blamed personal weakness, drugs, and alcohol for his conduct which he described as out of character.

59. The Applicant admitted that he had been connected with two separate criminal organisations, the Mongrel Mob, and the Bandidos.

60. He first became involved with the Mongrel Mob in about 2017 through a free boxing and fitness camp they were running for the public. Around this time he became subject to a DVO, and was drawn to them by the fact that they were Māori and from the same sort of background. He said he thought they were doing positive things for the community. In 2018 he was given a Mongrel Mob vest. He said he got his membership "*because I was starting*

[18] Ex A1 p 94.
[19] Ex A1 p 95.

*to **lead** my own groups for the community, like fitness camps and boxing camps and stuff."*[20] (Emphasis added)

61. The Applicant said that his association with the Mongrel Mob lasted about two years if he could recall[21], and they were non-drugs and non-alcohol, although occasionally they had drinks together.

62. He said that during his time with the Mongrel Mob, he contributed to society by continuing to work, and providing for his family despite the DVO. He regularly socialised with the Mongrel Mob, and they felt like family to him a few of them were in fact his cousins[22] - and he had lost his own family in consequence of the DVO. The Applicant said that the Mongrel Mob "transitioned" to the Bandidos.

63. The Applicant was not certain how long he was with the Bandidos, and his estimates ran from eight months to a year. He said he could not ride a motorcycle, and did not have one. He said that he left the Bandidos following the birth of his youngest daughter in July 2021. The Bandidos had given him a prospect vest. As a prospect he helped arrange catering for Chapter functions attended by partners and children.

64. Dr Donnelly had the following exchange with his client[23]:

> *'DR DONNELLY: Is it possible just to leave a motorcycle gang like the Bandidos? I mean it's well known that they're a criminal organisation. How does that work?*
>
> *APPLICANT: I pretty much – like I said, it was because I couldn't get my – couldn't get myself with a motorcycle. So that's how it ended, and they took my vest off me. …..*
>
> *DR DONNELLY: …Can you put a time on when you left the Bandidos, on your evidence, a month ? a year?*
>
> *APPLICANT: It would have been late 21, early 22.*
>
> *DR DONNELLY: And the next follow up question is, well did you have ongoing connections with these people from the Bandidos or the Mongrel Mob?*
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> *APPLICANT: … No. Once I once the decision was made, I cut ties with everyone pretty much immediately, just to focus solely on myself and my family and kids.'*

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[20] Transcript Day 1 p 10 lines 25-27.
[21] Transcript Day 1 p 10 lines 35-36.
[22] Transcript Day 1 p 11 lines 36-37.
[23] Transcript Day 1 p 13 line 46 – page 14 line 18.

65. The Applicant said he had been working continually since that time. He and his partner had also collected clothes for the Salvation Army and helped feed homeless people.

66. The Applicant described a loving caring relationship with his three daughters, the elder two of whom are autistic and non-verbal, and communicate by using an iPad. The youngest daughter is showing no signs of autism and speaks properly. In hindsight, he did not think membership of the Mongrel Mob or the Bandidos was in their best interests.

67. He and his partner had been planning to marry this year. The Applicant said he was remorseful for his DVO offending against her. He did not consider there was a risk that he would commit acts of family violence in the future.

68. The Applicant said he treated the five year old son of his friend Ayisha Trainor as his own son and was in an uncle-like role with him. He thought that the child was in New Zealand at the moment. He thought the child's grandmother was dying.

69. The Applicant said that he had visited New Zealand in 2015 when his mother passed away. His 68 year old father and two brothers both aged in their 40s are in New Zealand, but he is not close to them, and was uncertain where they lived. He did not think they would help him if he returned. He did not know anyone else there.

70. If he returned to New Zealand, his partner and the children would remain in Queensland. He felt he would suffer emotionally significantly without family or work connections.

71. The Applicant said that if he is successful in regaining his visa, he will return to work landscaping immediately, and continue his plans to get married and give his children the life he never got. If he encounters any of his former associates he would walk away, as he has cut ties.

72. His drug supply charges from February 2023 were dropped at trial on 19 December 2023. He had been charged along with two of his landscaper workmates, and he believed they were going to go to jail for selling an undercover police officer cannabis for about $2,000.

73. In cross-examination, the Applicant told Mr Goodwin that when he lived in New Zealand until he was about 17, and worked in shearing, and played Rugby. He did not maintain contact with people he knew then, other than Ayisha.

74. His father had beaten him until he was 16 and started hitting back.

75. The Applicant agreed that he returned to New Zealand shortly before his mother died in 2015 and stayed for a period of 15 months. For two months, he stayed in Nelson with a cousin who has since had three children, and whom he seldom contacts. His partner then came over with their daughter and they took their own accommodation.

76. The Applicant said he was planning to get qualified as a landscaper. He also held a white card for the construction industry.

77. He first met his partner in 2012, and they had been apart periodically but neither had another relationship since, even though they could not live together during the currency of the DVO[24]. It was necessary for him to find alternative accommodation, and the Mongrel Mob and the Bandidos provided it for him.[25]

78. His drug possession charges were all cannabis, but he had also used methamphetamine. He had not used methamphetamine since his first daughter was born. He most recently used cocaine a friend's birthday around April 2023. He blamed peer pressure for this and said "*So I think it was pretty common in all sort of walks of life. I think everybody takes it."*[26]

79. The Applicant said that he was intoxicated at the time of the DVO breach at 2 am on 22 April 2018, which was six days after the making of the Protection Order, and did not remember properly. He had gone there to collect his belongings.

80. The Applicant recalled the episode where he was charged with obstructing police. He was referred to the Department file note of the incident at G48-49 and said "*I honestly think what they've written up here isn't true".* He claimed to have been punched by a female police

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[24] Ex R1 p 60. The Protection Order was made on 16 April 2018, and expired on 16 April 2023.
[25] Transcript Day 1 p 29 line 38 – p 30 line 15.
[26] Transcript Day 1 p 33 lines 39-40.

officer[27]. He was on a good behaviour bond at the time, and received a further eight month good behaviour bond in respect of this.

81. The Applicant was also referred to further offending on 13 July 2019 involving carrying a prohibited Mongrel Mob jumper. He agreed that this was a further breach of his good behaviour orders.

82. The Applicant was also referred to a contravention of DVO (aggravated offence) charge at G50-51 but said he could not remember details as he was intoxicated at the time.

83. The Applicant was also referred to an episode on 24 December 2020 a contravention of DVO (aggravated offence) charge at G52-53 but said he could not remember details as he was intoxicated at the time.

84. The Applicant could not recall the episodes recorded at Ex R3 pp 24-28, and p 32.

85. The Applicant maintained that when he joined the Mongrel Mob they were doing good work in the community.

86. Asked about the incident of 28 September 2019 when a vehicle was bashed by about six men with baseball bats, the Applicant agreed he had said "*I wouldn't really call it a fight*."[28]

87. The Applicant denied recollection of an episode involving a gathering of Mongrel Mob and Black Power members and denied recollection of ever being the Sergeant at Arms of the Mongrel Mob. Neither did he recall having to be threatened with a taser before he cooperated with police. After prompting, he recalled travelling to Victoria in February 2022 to receive his Bandido prospect vest and being intercepted by Police on his return. The Applicant said that it was not long after this that he decided to leave the Bandidos when he received "*the 501 papers*."[29]

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[27] Transcript Day 1 p 35 lines 5-40.

[28] Transcript Day 1 p 41 lines 40-41.

[29] Transcript Day 1 p 44 lines 22-23. The Notice of Intention to Consider Cancellation under s. 501(2) of the Act, (Ex R1 p61-66) although dated 12 October 2021, was not served until Monday 21 March 2022: Ex R1 p 67.

88. The Applicant was referred to a Department file note dated 8 June 2023 which referred to the Applicant meeting in July 2022 with perpetrators of "*a violent home invasion where there was sustained torture and sexual offences committed against victims of mistaken identity."*[30]

89. After reading the passage containing the above excerpt, the Applicant said *"I heard about this, yes."* The following exchange then occurred[31]:

> *'MR GOODWIN: It says on the next line that you were identified meeting with those people in the days following, and you were suspected of knowing about this offence. So you said you heard about it. How had you heard about it?*
>
> *APPLICANT: Just through the boys getting pinched, getting locked up for it, yes.*
>
> *MR GOODWIN: Yes. And they were – were they other people in the Bandidos?*
>
> *APPLICANT: ---They were all, like, the younger guys.*
>
> *MR GOODWIN: The younger guys?*
>
> *APPLICANT: ---They were all, like, the younger guys.*
>
> *MR GOODWIN: So were they other people that joined the gang at about the same time as you?*
>
> *APPLICANT: ---No.*
>
> *MR GOODWIN: Okay. Sir, I was thinking ?*
>
> *APPLICANT: ---They were a lot – they were a lot younger than me, these guys. I think they're all currently serving time in prison for this.'*

90. The Applicant said that he was served with the Visa cancellation papers at the time he was finishing 12 months' probation.

91. The Applicant denied that the two people charged with supplying drugs to Police were anything to do with the Bandidos or the Mongrel Mob.

92. It was put to the Applicant that none of the rehabilitation courses he had undertaken were specifically directed at Domestic Violence. The Applicant said he could not link up with relevant courses while he was in detention. He did not have enough money to pay for domestic violence courses.

93. The following exchange occurred regarding his Mongrel Mob involvement[32]:

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[30] Ex R1 p 59.

[31] Transcript Day 1 p 44 line 30 – p 45 line 3.

[32] Transcript Day 1 p 50 lines 8-20.

'MR GOODWIN: I want to make it clear that I know that you said that, you know, well the Mongrel Mob did a lot of good work in the community and stuff, but the minister's case is that you were doing more than just socialising and having some beers with, and participating in social groups like the boxing with these guys. There's evidence that we went through before that you started an altercation, that you were involved in an organised fight that had some baseball bats. Do you agree that you were doing more than just socialising with these guys? You were involved in criminal conduct with them?

***APPLICANT: Yes**. As I mentioned for that case, I wouldn't have even called it a fight. Like, they just met up at the park. And then nothing really got sorted out. But while they were talking, their cars got damaged by, you know, the young guys.'*

(Emphasis added)

94. Following cross-examination, the Applicant told the Tribunal that Ayisha's son was back in New Zealand with his great grandmother. He was not sure how long the child had been there. It was three years since he had been in the physical presence of the five year old. His involvement with him was substantially before he turned two years old, by which time he has seen him about 20 times.

95. The Applicant told the Tribunal that he knew that the Bandidos were an illegal organisation when he joined.

96. After cautioning the Applicant by the Tribunal the following exchange took place[33]:

'TRIBUNAL: Well, were you at any time, while you were a member of either gang, aware of criminal activity carried on by either gang?

APPLICANT---No.

TRIBUNAL: Okay. Thank you very much. And so there's many pages of activity set out between pages 110-195, exhibit R1, which the Commonwealth Government purports[34] pertaining to the activity carried on by outlaw motorcycle gangs. ***So in the same vein, bearing in mind that caution I just gave you, you say you weren't aware of any such activity. Is that right?---Not within the chapter, no. There was none in the chapter, no.'***

(Emphasis added)

Evidence of Ms T

97. Following her affirmation. Ms T confirmed the veracity of her statement of 17 February 2024.

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[33] Transcript, p 51, lines 32-40.

[34] This is an error in the transcript and should read "reports".

98. Ms T gave evidence consistent with her statement, and emphasised the overwhelming financial, physical and emotional struggles she faces alone with three young children, two of whom are autistic and non-verbal, and do not understand why their father is not coming home.

99. The witness detailed the support the Applicant has given her in managing the children and her own physical and emotional health.

100. The Applicant's deportation would present a huge change to the lives of their children, as their routine has been the same for four years, and they do not handle change well. It would also have a huge impact on her. She gets no support from her family.

101. The witness blamed her nagging of the Applicant for leading to the DVO.

102. She had met with the Mongrel Mob, and said they were not a motorcycle gang. She said[35]:

> *'They are just a community group that got together for fitness, health, they did run a fitness group for the community. And I did – I was, sorry – I was invited to eat with them once a month with my children. And neither of us ever felt in danger to this group of people.'*

103. The witness was not aware if the Applicant had ever been a member or associate or connected with any other motorcycle gang.

104. If the Applicant is deported, she will stay in Australia because she is scared for her children, and how they would suffer from the move.

105. In cross-examination, the witness agreed with a suggestion by Mr Goodwin that there had been a period of three or four years when the Applicant was living with people from the Mongrel Mob or the Bandidos, and there were other times when he was not living with her.

Closing submissions

106. Dr Donnelly submitted that regarding protection of the Australian community, the Applicant's criminal offending, particularly his domestic violence offending is deemed by the Direction

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[35] Transcript Day 1 p 62 lines 16 – 20.

to be very serious, and these weighed considerably against him, particularly given the multiple breaches of the DVO.

107. Dr Donnelly submitted that the Tribunal could take the Applicant's New Zealand offending into account as other conduct, and that they should be given less weight having regard to his age at the time.

108. Being a member of outlaw motorcycle organisations was obviously not in his favour as "*a criminal organisation such as Bandidos in particular pose a considerable risk of harm to the Australian community. So you won't hear me say anything against that."*[36]

109. Dr Donnelly submitted that there was insufficient probative evidence to allow the Applicant to be "pinned to the "very serious allegations" of the episodes on 15 September 2019 (the fight between the Mongrel Mob and Black Power) and 28 September 2019, (the fight with baseball bats involving damage to vehicles) having regard to Briginshaw principles.

110. The Applicant's suspected knowledge of the torture episode in July 2022 did not establish that he was part of any criminal enterprise.

111. Dr Donnelly nevertheless submitted that outlaw motorcycle gangs are unacceptable organisations in the Australian community. The nature and seriousness of the Applicant's offending and the repetitive family violence matters weighed very seriously against the Applicant.

112. Dr Donnelly submitted that if the Applicant engaged in further episodes of family violence offences that could cause emotional physical and financial harm, as could drug offending.

113. It was further submitted in relation to assessing the risk of future harm that there had been no serious offending since 2021. There was evidence that he was still involved with the Bandidos until at least 2022 and took drugs in April 2023.

114. Had it not been for his gang memberships, it was unlikely his Visa would have been cancelled. The birth of his third child and the notice of intention (NOICC) to consider

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[36] Transcript Day 1 p 69 lines 3-5.

cancellation of his Visa had been the catalyst for his departure from the Bandidos, and lack of serious offending since.

115. Dr Donnelly submitted that if the Applicant were considered such an unacceptable risk to the Australian community, it would not have taken the Department two years to cancel his Visa and three months to notify him of the cancellation.

116. Dr Donnelly accepted that the Applicant had not done rehabilitation expressly tailored to family violence but said that the evidence was that the Applicant now understood the serious nature of family violence and had insight into it. He now understood family violence was unacceptable. There had been a strong nexus between drug and alcohol use and his episodes of family violence. He had not engaged in family violence since 2021.

117. Family violence nevertheless weighed against the Applicant.

118. Regarding the strength, nature and duration of the Applicant's ties to Australia, Dr Donnelly submitted that this weighed in favour of the Applicant, particularly having regard to the serious health disabilities of his children and the hardships faced by his partner, which would be exacerbated should he be deported. The Applicant had strong ties to Australia after 10 years but had considerable ties to criminal organisations. This should weigh in his favour notwithstanding his gang association.

119. Regarding the best interests of minor children, Dr Donnelly submitted that the Tribunal should distinguish between the interests of the Applicant's two older children, and his younger one, and Ayisha's son.

120. Having regard to the disabilities of the older two children the Tribunal could give very significant weight to this consideration. His capacity to support the children from New Zealand depended on his re-integration. They needed significant emotional and practical support.

121. Dr Donnelly submitted that the expectations of the Australian community weighed against the Applicant.

122. There was no refugee or similar claim in this case. A legal consequence of the decision is legal banishment from Australia.

123. There will be no practical assistance from family or friends on his return to New Zealand. Emotional strain may impede his progress in New Zealand and could be with him for the rest of his life.

124. The Applicant's partner had forgiven him, and is not fearful of her, and things have been hard for her while he has been in detention.

125. Mr Goodwin submitted that the protection of the Australian community was the strongest reason to affirm the decision under review. The Applicant had not undergone targeted rehabilitation in respect of family violence. The orders had not been effective in the past. Neither have good behaviour bonds, nor probation periods. He remained involved with the Mongrel Mob after they became a declared illegal organisation. He willingly got involved with the Bandidos, which he knew to be an illegal organisation. He used cocaine just last year, and showed little insight into why that was bad. He showed no insight into why it became illegal. His gang involvement was beyond mere social. The Applicant has not shown evidence of surrounding himself with good influences. The Applicant still uses cannabis and alcohol. Primary consideration 1 weighed overwhelmingly in favour of affirming the decision under review.

126. The Applicant's family violence offending had been frequent and cumulative offending against his partner, and there had been no targeted rehabilitation. There was no evidence he had sort this before, or that he was doing it in the future. The family violence consideration weighed heavily against the Applicant.

127. Mr Goodwin submitted that the strength, nature and duration of the Applicant's ties to Australia weighed in his favour, but his association with the Mongrel Mob and the Bandidos counted against him, and he had spent a good portion of his formative years outside Australia.

128. The best interests of minor children also weighed in favour of the Applicant. It was open to the Tribunal to give greater weight to the interests of the elder two children, of whom he had a unique understanding. The best interests of the youngest child was also important.

However there had been extended periods of absence from their lives, including three or four years when he was living with people in the Mongrel Mob or the Bandidos, and he had been in Villawood for the past ten weeks which was a substantial amount of time for a two year old.

129. The children have a constant caring figure in their mother, who was obviously stressed, but her care for them would probably continue. It was open to the Tribunal to find that they would continue to be okay, because they had before. There was no reason why the Applicant could not support them financially from New Zealand. The Applicant was young, a good worker, had been involved in landscaping a lot, and wanted to get qualified. He managed to pick up a job quickly when he went back to Wellington last time.

130. It was open to the Tribunal to give low weight to the Applicant's relationship with the Ayisha's son. Phone contact and presents could be maintained from New Zealand.

131. As a whole, the best interests of minor children weighed in favour of the Applicant.

132. Regarding the expectations of the Australian community, the factors in paragraph 8.5(2) (a) and (d) raised the normative expectation, and this weighed strongly in favour of affirmation.

133. Impediments to his return weighed in favour of the Applicant. He would have access to similar social welfare systems as are in Australia. There were no language barriers, and no reason he could not find work.

134. Regarding impact on victims, Mr Goodwin submitted that his partner had been the victim of some "*pretty serious family violence*". It was nevertheless open to the Tribunal to give this consideration weight in favour of the Applicant.

135. Mr Goodwin confirmed to the Tribunal that he was submitting in terms of clause 8.1.2(1) that the Applicant's 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 was unacceptable.

136. In reply, Dr Donnelly submitted that this was an interesting case, in that despite the very serious risk factors, the Applicant's last criminal conviction was in 2021, and the service of the NOICC to consider cancellation of his Visa had scared him and led him to cut off his

criminal ties, and work for his family. Two years later his Visa was cancelled, on 12 September 2023, and he was not given notice of this until just before Christmas.

CONSIDERATION

137. Before turning to the specifics of the Primary and Other considerations provided in the Direction, the Tribunal will consider the Applicant's evidence. It will also consider the Applicant's gang involvement, which is regarded as "other serious conduct" for the purposes of the Direction. The Tribunal will also consider the impact of the High Court's decision in *Isaac Lesianawai v Minister for Immigration, Citizenship, and Multicultural Affairs*[37] which was delivered after the hearing.

138. The Applicant's evidence contained numerous inconsistencies, minimisations, and contradictions.

139. On the one hand he claimed to accept responsibility for his offending, yet he suggested a police report of an incident was untrue[38].

140. He sort to distance himself from, and minimise - perhaps even trivialise - an incident on 28 September 2019 when he was present when six men bashed vehicles with baseball bats, saying:

> *'I wouldn't even call it a fight to be honest. Like, they just met up at the park. And then nothing really got sorted out. But while they were talking, their cars got damaged by, you know, the young guys.'*[39]

141. The Tribunal notes that the Applicant was one of the occupants of one of the cars intercepted by police leaving the scene, and which contained baseball bats. In blaming "*the young guys"* for the vehicle damage, it was as if to suggest that the most sinister interpretation that could be placed on his presence was that he just coincidentally and innocently happened to be there, and otherwise took no part in the episode other than perhaps offering some moral support.

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[37] [2024] HCA 6.

[38] Transcript Day 1 p 35 lines 8-9.

[39] Transcript Day 1 p 41 lines 31-34.

142. The Applicant had said that he had been "starting to lead his own groups"[40] in the Mongrel Mob, and that Black Power whom he described as "the opposition" did not like the Mongrel Mob being in the same area. In short, the incident can be seen as part of a "turf war."

143. The Applicant did not offer any explanation for the decision of he and his fellow Mongrel Mob members to travel to the scene in the first place, or for the presence of the two rival gangs at the same time, and given all the circumstances, clearly this was not a chance meeting, particularly having regard to the brawl that had occurred between them two weeks earlier.

144. Neither did the Applicant offer any explanation for his continued presence while the vehicles were being smashed with baseball bats, what he was doing while this was happening, or for being in a car containing baseball bats which was intercepted by police at the scene.

145. It seems probable that the Applicant travelled to the scene in the same vehicle, and that the baseball bats were in that same vehicle, and that the Applicant knew the destination and reason the for the journey. It seems implausible that the Applicant was somehow unaware of the presence of the baseball bats in the vehicle, and improbable that he did not know why the baseball bats were in the car, particularly having regard for the fact that there is no evidence that anyone had a baseball.

146. This episode was clearly an organised fight as is recorded in the documentation before the Tribunal[41]. The Tribunal considers the Applicant was a willing attendee, and participant in this activity, although there is little clear evidence of his specific acts.

147. It is open to the Tribunal to conclude that the Applicant has committed a criminal offence according to the civil standard of proof in the course of making a decision. This is so even in the absence of a criminal conviction: *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd*[42]; or even in the face of an acquittal: *Helton v Allen*[43]. However,

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[40] Transcript Day 1 p 10 line 26.
[41] Ex R1 p 54.
[42] (2015) 255 CLR 352.
[43] (1940) 63 CLR 329.

it is clear from the decision in *Roach*, that no such finding is necessary in order to find a reasonable suspicion for the purposes of s. 501(6)(b).

148. Clearly, this episode involved serious criminal conduct. Having regard to the test in *Briginshaw v Briginshaw*[44], the Tribunal is not comfortable to conclude that the Applicant committed a criminal offence on that day, but he was however clearly involved by his presence in serious offending by persons unknown, and involvement in conduct of this nature is viewed very seriously by this Tribunal.

149. The Applicant also sort to minimise his role in the Bandidos when he told the Tribunal he had not even considered himself to be *a true member* of the Bandidos because he did not live up to their expectations by owning a motorbike.[45] The Tribunal finds this assertion unconvincing, as the Applicant's lack of ownership of a motorbike presented no obstacle to his acceptance as a prospect.

150. Dr Donnelly asked the Applicant whether one could simply leave a criminal gang such as the Bandidos[46]:

> *'DR DONNELLY: Now, although I've done many of these cases, I can't put words in your mouth. So excuse my ignorance, I mean, is it possible just to leave a motorcycle organisation like the Bandidos? I mean, they – I mean, it's well-known that they're a criminal organisation. How does that work?*
>
> *APPLICANT: I pretty much – like, I said, it was because I couldn't get my – couldn't provide myself with a motorcycle. So that's pretty much how that ended, they took my vest off me, which was a blessing to be honest because I, you know, I was looking for a way out just to get back to my family sort of thing, if that makes sense. Because like I said, me and my partner we had a child in 2021, which – she's like, you know, changed my perspective on life, that sort of thing if that makes sense.*
>
> *DR DONNELLY: So when did you – can you put a time period when you left the Bandidos, on your evidence, a month - - -?*
>
> *APPLICANT: ---It would have been - - -- - - a year? It probably would have been late 21, early 22'.*

151. The Applicant made a series of vague and inconsistent claims as to when he joined and departed the Mongrel Mob and the Bandidos.

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[44] (1938) 60 CLR 336.

[45] Transcript Day 1 p 50 lines 3-6. See also para 8 of the Applicant's statement of 17 February.

[46] Transcript Day 1 p 13 line 46 p 14 line 13.

152. He told the Tribunal that he was only in the Mongrel Mob for two years[47] and that he left the Mongrel Mob in 2020 to join the Bandidos that year[48]. This evidence is rejected, as the totality of the evidence shows that the Applicant's period of association with the Mongrel Mob continued until February 2022, and was clearly closer to five years than it was to two.

153. He also told the Tribunal that he left the Bandidos in 2022 after taking steps to leave in 2021. The Applicant also claimed that he cut off contact with gangs "*shortly after"* the birth of his youngest daughter[49], but that child was born in July 2021. He also told the Tribunal that he cut off all contact with Bandido members in early 2022.

154. The Tribunal rejects this evidence. It is clear that he was still a member of the Mongrel Mob in February 2022 at which time he was accepted as a prospect of the Bandidos. Certainly in February 2022, the Applicant was taking no steps to sever his contact with the Bandidos, but was in fact taking steps to escalate it.

155. He was of course served with the *NOICC* on 21 March 2022, by an officer of *Tactical Operations Taskforce Maxima – Organised Crime Gangs Group Crime and Intelligence Command, Queensland Police Service*[50] and one would have thought that this would have provided great incentive to immediately sever all contact with the Bandidos, but clearly it did not. The Applicant continued to meet with associates of members of the Bandidos until at least July 2022. When questioned in relation to this incident, he did not deny that it occurred, or in any way dispute the details recorded.

156. There is no independent credible evidence that this Applicant severed his ties with the Bandidos in or about early 2022, or at all. There is on the other hand, information from a member of the Queensland Police Service set out at G 59, - cast in the present tense- that (at least as at 8 June 2023) "*Mr RANGIUIA **is** a confirmed member of the Bandidos OMCG".*

157. This information, (as well as all other information before the Tribunal based on reports of the Queensland Police Service and factsheets and reports from the Australian Intelligence

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[47] Transcript Day 1 p10 line 35.
[48] Ex A1 p24 par 8.
[49] Ex A1 p3 par 11; Ex A1 p 24 par 9.
[50] Ex A1 p67.

Crime Commission[51]) is, having regard to paragraph 7(1) of the Direction, from what the Tribunal considers to be independent and authoritative sources, and the Tribunal is required to give it "appropriate weight".

158. Having regard to the gravity of the information from each of those sources, the Tribunal considers that the appropriate weight to be given to the information is very heavy.

159. The Applicant also claimed that he did not commit any serious criminal offences connected to the Mongrel Mob or the Bandidos[52]. He made this claim notwithstanding uncontested evidence that he himself was convicted of obstructing a police officer in gang related circumstances on 23 May 2019, and he was present when motor vehicles were wilfully damaged by gang members in September of that year. The Applicant's claim that he did not commit any serious criminal offences connected to the Mongrel Mob is rejected.

160. Whilst he admitted to Mr Goodwin that he had engaged in gang related criminal conduct[53] he soon after contradicted himself when he denied any awareness criminal activity by either gang[54]. The Tribunal rejects the Applicant's claim that he was unaware of criminal activity by members of either gang. He himself was engaged directly in such activity in regard to his charge of obstructing a police officer, and he was clearly present when (on his evidence) others damaged vehicles with baseball bats. At the hearing, the Applicant also demonstrated awareness of the serious criminal offending described as having occurred in July 2022 in the Departmental note dated 8 June 2023 of advice from a member of Queensland Police an extract of which follows:

> *'The referral stated that Mr RANGIUIA* ***is*** *a* ***confirmed member of the Bandidos OMCG and was a former member of the Mongrel Mob adult street gang.*** *It is submitted that Mr RANGIUIA has a history of violence and has shown a* ***continued and escalating association with criminal organisations. Mr RANGIUIA has convictions of violence and drugs as well as significant involvement in domestic violence offences.***
> ***Queensland Police submit that the Bandidos OMCG are a declared criminal organisation in Queensland and have a long history in violence and drug offences. The referral reports that there are recorded instances involving members of this chapter being involved in robbery and home invasion***

[51] ExR1 p 108-195.
[52] Ex A1 p24 para 10.
[53] Transcript Day 1 p50 lines 16-17.
[54] Transcript Day 1 p 51 lines 32-33.

offences in which the victims have declined to pursue the matter due to fear of the OMCG.
According (sic) the Queensland Police member, CCTV footage from the Logan City clubhouse was seized and reviewed and showed that numerous members would return to the club house armed with bats and hammers in the late evening and would unload suspected stolen property.
In July 2022, a stolen vehicle depicted in this CCTV led to the commencement of Uniform LIN. This identified six members or associates had committed a violent home invasion where there was sustained torture and sexual offences committed against victims of mistaken identity. The gang members tagged "LCB" on property during this offence to claim the offence and instil fear in witnesses and victims. The referral submits that this offending poses a high risk to the community and is difficult to prosecute due to the public's fear of OMCG and their threats of violence.
[The Applicant] was identified meeting with primary offenders in the days following this and is suspected of having knowledge of this offence.
The referral submits that it is in the public interest that confirmed members of the OMCG should be considered for cancellation due to the risk posed to the community.'[55]
(Emphasis added)

161. These various matters lead the Tribunal to conclude that the Applicant is not a reliable witness, and to generally give his evidence little weight.

162. The unsatisfactory evidence of the Applicant generally, and the rejected claim that he had cut off ties with the Bandidos in early 2022 in particular, leaves the Tribunal unable to accept the Applicant's evidence that the landscapers with whom he worked, and who were charged with him in relation to the sale of cannabis to police on 10 February 2023 were not gang members, although the Tribunal makes no finding that they were. The Tribunal nevertheless observes that this incident involved a Covert Operations Unit investigation of the use of Facebook to sell 222 grams of cannabis for $2,200 and is consistent with the types of offences attributed to gangs in the material before the Tribunal.

163. The Applicant said he initially joined the Mongrel Mob because he felt "drawn" to it, as they were the same sort of people as he was and from the same sort of backgrounds, and culture. He had "a few cousins" who were members, and there is no evidence that those cousins have ceased to be gang members. There is no clear evidence that the Applicant's attraction to gang culture has arisen in consequence of any drug or alcohol issues he may

[55] Ex R1 p59.

have, or have had, or that this would be cured by any rehabilitation he has undergone or proposes.

164. The duration of his gang involvement would suggest that he was in his comfort zone, and he can be assumed to have been substantially immersed in gang lifestyle, particularly during the period of three to four years when he shared accommodation with gang members. There is evidence that the Applicant can be influenced by peer pressure.

165. The Applicant said that if permitted to remain in the community, he intended to live with his partner and children "in the fullness of time." However, he was unclear as to his living arrangements in the interim, and the Tribunal is concerned that if permitted to stay, he may succumb to peer pressure, or for some other reason gravitate back to gang life and accommodation.

166. The Applicant claimed that he succumbed to peer pressure when he used cocaine at a birthday party in April 2023 of a friend who had no gang involvement[56]. Whether or not this lack of gang involvement is true, it is clear if the Applicant's evidence is to be accepted, that the host condoned and encouraged the use of an illicit substance.

167. Of great concern to the Tribunal is that when questioned about cocaine's illegality the Applicant showed that he was fairly blasé about illicit drug use, and gave some insight into the mores of the society he keeps[57]:

> *'**So I think it was pretty common in all sort of walks of life, I think. I think everybody takes it.**'*
> (Emphasis added)

168. This case has its origin in the reasonable suspicion that the Applicant was a member of or had an association with a gang that had been or was involved in organised crime. That reasonable suspicion has now been overtaken by certainty.

169. The Applicant has said that he "lead" his own groups within the Mongrel Mob, and there is evidence (albeit not denied, but not recalled by him) that he was Sergeant at Arms of that

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[56] Transcript Day 1 p 33 lines 15-16.
[57] Ibid lines 39-40.

group. This is consistent with the Departmental note dated 8 June 2023 of advice from Queensland Police that the Applicant *"has shown a continued and escalating association with criminal organisations".*[58] It is clear that he shared accommodation for an extended period of years with gang members, and it can be assumed that he was willingly involved in gang life continuously throughout at least that period. It can readily be inferred that he was sympathetic with, supportive of, all of its conduct and activities. The Tribunal is left to the conclusion that the Applicant's involvement has been quite substantial over a period of about five years at least, and he has admitted that he was involved in criminal activity. The nature, degree and frequency of the Applicant's involvement, together with its duration create very strong character concerns, and this conduct weighs very heavily in favour of exercising the discretion to cancel.

Lesianawai v Minister for Immigration, Citizenship, and Multicultural Affairs

170. The hearing of this case took place on 1 and 4 March 2024. On 6 March 2024, the High Court handed down its decision in *Isaac Lesianawai vi Minister for Immigration, Citizenship, and Multicultural Affairs*[59] which extended the Queensland specific decision in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton*[60] to comparable circumstances in New South Wales. The clear terms of s. 85ZR make it plain that there is clear scope for the extension of these authorities to appropriate cases of juvenile offending under foreign law.

171. This Tribunal had before it evidence of juvenile offending by the Applicant in New Zealand, but did not have the benefit of any expert evidence or submissions on the specifics of the applicable sentencing law. At the hearing, Dr Donnelly submitted that it was unclear how the Tribunal should deal with those matters, and Mr Goodwin made no submission on the point. On the afternoon of 11 March 2024, (the 83rd day in this case) Mr Goodwin helpfully drew the Tribunal's attention to the High Court's decision and submitted that the Minister made no submission that the Applicant's juvenile offending should be taken into consideration by the Tribunal.

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[58] Ex R1 G59.
[59] [2024] HCA 6.
[60] [2023] HCA 17.

172. In the circumstances, the Tribunal disregards the Applicant's juvenile offending in New Zealand as either criminal offending or other conduct.

Departmental delays

173. Dr Donnelly made written[61] and oral[62] submissions that the Applicant was not an unacceptable risk to the Australian community. In support of this submitted that if the Applicant was an unacceptable risk to the community, and a danger to the community, it would not have taken the Department two years to cancel his Visa, and several months to actually give him notice of that cancellation. This submission is superficially attractive.

174. On 21 March 2022, the Applicant was served[63] with a *NOICC* of his Visa dated 12 October 2021 by an officer of the Organised Crime Squad, Queensland Police Service. However, documents which should have been attached to the *NOICC* were omitted. This was rectified, on 20 April 2022, and an extension of time granted to the Applicant to respond until 18 May 2022[64].

175. A decision was made on 13 September 2023 to cancel the Applicant's Visa, and this decision was communicated to the Applicant by means of a letter delivered by hand on 19 December 2023, at which time the Applicant was taken into detention.

176. The Minister has not provided any explanation for the delays complained of, or responded to the contention that they reflect a lack of concern as to the risks and dangers which the Applicant presented to the community.

177. The Tribunal is aware from career experience that great caution is exercised in such circumstances lest confidential investigation methods may be inadvertently compromised. The Tribunal notes the contents of Annex A, Section 2 paragraph 3(6) of the Direction which refers to statutory protection from disclosure of information concerning association, and the importance of not disclosing information that might put the life or safety of informants or other people at risk. Moreover, s. 86 of the Queensland *Criminal Code* creates an offence

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[61] Ex A1 p8 par 36-37.
[62] Transcript Day 1 p 71 lines 19-26.
[63] Ex R1 p67.
[64] Ex R1 p 86.

of *Obtaining or disclosure of secret information about the identity of an informant* punishable by up to ten years imprisonment. The Tribunal therefore draws no adverse inference from the Minister's lack of response to this issue.

178. The Tribunal is also aware from career experience advising government in relation to the conduct of investigations, and the actual conduct of investigations, that investigations of this nature involving the exercise of a statutory discretion are a continuing process until the discretion is exercised, and the decision communicated.

179. Regarding the delay in service of the initially defective notice, the Tribunal notes that this matter involved a discretionary cancellation, not a mandatory one. It is clear that the Applicant has been the subject of ongoing surveillance by Queensland Police for some time, and it is clear from the material before the Tribunal that this surveillance did not cease as at the date of the *NOICC*. The process of building such a case is ongoing, and involves regular review of the state of evidence, and this sometimes includes evidence of possible or anticipated further developments. Waiting for these developments to eventuate can from time to time require putting matters in abeyance pending further developments.

180. On 26 March 2021, the Applicant was placed on 12 months' probation for a range of serious offences[65]. Had he breached that probation, it is possible that he might have been sentenced to a period of imprisonment such as would have attracted mandatory cancellation of his visa, rather than discretionary. In his evidence, the Applicant noted that he was served with the notice around the time that his probation ended. The Tribunal considers that on this basis alone, the delay in service was reasonable and consistent with good administration.

181. The Tribunal considers that it is also quite possible that intelligence was provided to the Department after the date of the *NOICC*, 12 October 2021 of an anticipated significant development in the case, i.e. the Applicant's travel to Melbourne to obtain a prospect vest for the Bandidos, which occurred on the weekend of 5 and 6 February 2022. The Tribunal notes that the *NOICC* was served on 21 March 2022, relatively soon after this incident. Clearly if the *NOICC* had been served at or about the time that it was issued, the significant

[65] Ex R1 p 42.

development which strengthened the case for cancellation would most likely not have eventuated. Napoleon Bonaparte's famous advice "Never interrupt your enemy when he is making a mistake" may well have been applied. In such circumstances, a delay in service of the *NOICC* so as to allow the gathering of valuable intelligence would have underscored Departmental concerns as to the risks and dangers of the Applicant's presence in Australia rather than reflected any diminution in such concerns.

182. For similar reasons, the delay in the final decision until 13 September 2023, and service of notice of it until 19 December 2023 would have been justified by the fact that on 10 February 2023 the Applicant was charged with the very serious offence of supplying a dangerous drug to undercover police. Had the Applicant been convicted of that offence, it may well be that a head sentence of twelve months or more imprisonment would have been imposed. Of course, in such a circumstance the Applicant would have been immediately liable to mandatory cancellation by operation of s. 501(3) of the Act. It would be entirely understandable if going down that route was a more attractive option to the Department than that of s. 501(2).

183. In evidence before the Tribunal, the Applicant said that this charge was dropped at court on 19 December 2023[66]. Until that time, it remained an option for the Applicant to enter a plea of guilty on that day, but this was not to eventuate. It would seem that the Department anticipated this outcome, and, having delayed service just in case the Applicant pleaded guilty at the last minute, served the notice of cancellation that very day.

184. The Tribunal considers that there are therefore likely very sound reasons of good public administration for the delays complained of by Dr Donnelly. His submission that the delays show that they support a finding that the Applicant is not an unacceptable risk or danger to the Australian community is rejected.

185. The Tribunal now turns to the specific considerations provided by the Direction.

[66] Transcript Day 1 p 22, lines 11-13.

PRIMARY CONSIDERATION 1: PROTECTION OF THE AUSTRALIAN COMMUNITY

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

186. When assessing the nature and seriousness of a non-citizen's criminal offending or other conduct to date, paragraph 8.1.1(1) of the Direction specifies that decision-makers must have regard to the following:

> *(a) without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:*
>
> *(i) violent and/or sexual crimes;*
>
> *(ii) crimes of a violent nature against women or children, regardless of the sentence imposed;*
>
> *(iii) acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed;*
>
> *(b) without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:*
>
> *(i) causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;*
>
> *(ii) crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the possession 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

187. With regard to the specific sub-paragraphs in Paragraph 8.1.1 (Primary Consideration 1), the Applicant has made the following submissions at paragraphs 16-22 of Exhibit A1:

- 16. Cl 8.1.1(1)(a). The Applicant has committed acts of family violence involving contraventions of domestic violence orders (x 3) and a wilful damage offence. The victim of the Applicant's family violence offending was a female.
- 17.Cl 8.1.1(1)(b). The Applicant has committed one offence of obstruct police officer.
- 18.Cl 8.1.1(1)(c). The Applicant has received various convictions, fines, probation, imprisonment and good behaviour period.
- 19.Cl 8.1.1(1)(d). The Applicant was before the court in 2014, 2017, 2018, 2019 (x 2), 2020 and 2021 (x 2). It can be concluded that the Applicant's offending has been frequent. There is a slight increase in the trend of increasing seriousness in relation to the Applicant's offending. Between 2014 and early 2019, no convictions were recorded for the Applicant's offending. Between 2019 and 2021, the Applicant was convicted of various offences.
- 20.Cl 8.1.1(1)(e). The Applicant's offending has largely been of a minor nature. The Applicant never received any serious period of imprisonment. However, it can be accepted that the Applicant's offending has wasted resources on prosecuting the Applicant. The Applicant's family violence offending would have also caused emotional harm to the victim.
- 21.The Applicant's breach of various orders tends to undermine the administration of justice. The Applicant's possession of drug offences is victimless crimes but are certainly not matters that weigh in the Applicant's favour.
- 22.Cl 8.1.1(1)(f). In three separate incoming passenger cards in 2011, 2012 and 2016, the Applicant ticked 'no' to the question of whether he had any criminal convictions. The question is whether these declarations were false or misleading.

Paragraphs 8.1.1

Subparagraph (a) The range of conduct considered very serious

188. Subparagraph (a) of para 8.1.1(1) does not limit the range of conduct that may be considered very serious.

189. Paragraph 4(2) of the Direction defines "serious conduct" as follows:

> *(2) In this Direction,* ***serious conduct*** *includes behaviour or conduct of concern that does not constitute any criminal offence*

190. This definition provides examples of such conduct as follows:

> ***Examples: public act that could incite hatred towards a group of people who have a particular characteristic, such as race; intimidatory behaviour or behaviour that represents a danger to the Australian community; involvement in activities indicating contempt or disregard for the law or human rights, or a history of serious breaches of immigration law.***

191. Association with, or membership of a criminal gang is clearly *"involvement in activities indicating contempt or disregard for the law".* The seriousness of such involvement must be viewed as escalating having regard to the extent and duration of that involvement.

192. For the reasons set out above, the Tribunal finds that the admitted Applicant's long term association with, and membership of the Mongrel Mob and the Bandidos is of itself very serious "other conduct" which by itself, weighs very heavily in favour of cancellation of his Visa.

193. Since coming to Australia, the Applicant has had eight sentencing appearances in the years 2014 to 2021 on a total of 17 offences. The last seven of those sentencing appearances occurred over a period of four and a half years.

194. The Applicant has three instances of findings of guilt or conviction for contravention of a Domestic Violence Order (DVO) made in favour of his partner and their two elder children (all of whom were members of his family for the purpose of the Direction) which was current from 16 April 2018 to 16 April 2023.

195. No conviction was recorded in respect of the first breach which occurred at about 2 am on 22 April 2018, when the Applicant, who was heavily intoxicated attended at their residence,

and banged loudly and aggressively on the front door and windows. He left when police arrived, but returned an hour later and resumed his behaviour. When eventually interviewed by Police about a month later he was considered to be genuinely remorseful of his conduct.

196. The Applicant resumed living at the residence in December 2019 owing to shared custody of their children. On 30 April 2020, he damaged property there, and was asked to leave, but refused. A report to the Department regarding conduct on 10 May 2020 includes the following[67]:

> *'The aggrieved has also provided police with recordings from the defendant that were sent to her on the 10 of May 2020 in which the defendant can be heard calling the aggrieved a 'Dog', 'Dumb Cunt', 'Fucken Dog Snitch' and to 'Go Fucken Die, Bitch!'.* ***The Aggrieved is actively fearful of the defendant and has avoided reporting the defendant due to fears of retribution.'***
>
> (Emphasis added)

197. The Tribunal notes with great concern that the aggrieved had not reported the Applicant's conduct in breach of the order for fear of retribution. Her fear of the Applicant denied her the protection of the law, and no less importantly denied her children the protection of the law.

198. The Applicant was convicted of a breach of the DVO on 13 August 2020 in respect of his conduct over the period from 30 April 2020 to 10 May 2020, and fined $750.

199. A further incident of breach of the DVO occurred on 24 December 2020, when the Applicant attended at the aggrieved's residence whilst intoxicated. An extract of a Department file note includes[68]:

> *'At approximately 11:45pm on the 23rd of December 2020 police were called to attend the aggrieved's residence at (redacted) in relation to reports of a male and female arguing at the unit address. Police arrived a short time later and located the aggrieved out the front of her residence. Police obtained a version from the aggrieved. The aggrieved stated she had an argument with the defendant after he had arrived at her place intoxicated a short time ago. The aggrieved stated the defendant had thrown a few of her household items onto the floor on the inside of her residence and had then moved her car to the middle of the road inside the complex and had taken her keys and had then locked her out of her house'*

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[67] ExR1 p 50-51.

[68] ExR1 p 52-53.

200. In respect of this conduct, the Applicant received another conviction for breach of the DVO on 26 March 2021, at which time he was given twelve months' probation by way of penalty for that and other offences including drug possession, wilful damage, public nuisance and trespass.

201. On 23 May 2019, in the course of obstructing police officer in the performance of his duties, the Applicant, abused, and threatened the officer whilst resisting arrest until he was threatened with a taser.[69]

202. Less than four months later, on 15 September 2019, police again had to threaten to use a taser in order to get the Applicant to be compliant.[70] This was while police were attending an altercation between the Mongrel Mob and Black Power gangs. The Applicant does not appear to have been charged in respect of this episode, which the Tribunal nevertheless regards as serious conduct.

203. The Applicant does not appear to have been chastened by this episode, as three days later, on 18 September 2019, at Eagleby Plaza shopping centre, the Applicant and another member of the Mongrel Mob encountered a Maori male whom they mistook for a member of the Black Power gang, and made gang related threats against him, causing him to flee whilst being chased by the Applicant's companion who had produced a knife .[71] This resulted in a charge of public nuisance.

204. Ten days later, on 28 September 2019, the Applicant was involved in the organised fight between the Mongrel Mob and Black Power[72] involving vehicles being smashed with baseball bats.

205. The Applicant has also had four charges of possessing dangerous drugs over a period of seven years.

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[69] Ex R1 p 5.
[70] Ex R1, p 55.
[71] Ex 3, p 9.
[72] Ex 1, G54.

206. It might be said that some of the Applicant's offences, viewed in isolation might be considered relatively minor. However, their seriousness increases cumulatively and having regard to their frequency. Not only did the Applicant commit nine offences on five different days between 29 August 2020 and 23 May 2021, he committed four offences on one day on 29 November 2020.

207. The Applicant breached the DVO on 22 April 2018, again between 30 April 2018 and 10 May 2018, and again on 24 December 2020.

208. The Applicant has committed crimes of a violent nature against his partner and his two children who were under the protection of the DVO. These crimes weigh heavily against him for the purposes of para 8.1.1(1)(a)(ii) and (iii) of the Direction.

209. The totality of the Applicant's offending and other serious conduct in Australia is viewed very seriously.

210. For the purposes of para 8.1.1(1)(a), the Applicant's offending and conduct weighs very heavily in favour of exercising the discretion to cancel the Applicant's Visa.

Subparagraph (b) crimes against officials in the performance of duty

211. The Applicant has obstructed a police officer in the performance of her duty, and this is viewed seriously having regard to para 8.1.1(1)(b)(ii) and weighs heavily in favour of this Tribunal exercising the discretion to cancel the Applicant's Visa.

Sub-paragraph (c) – the sentences imposed.

212. Disregarding the sentences imposed in respect of crimes mentioned in sub-paragraphs (a)(ii), (a)(iii) and (b)(i) as is required by the Direction, the Applicant has received various sentences which are considered to be light, and which weigh commensurately in favour of this Tribunal exercising the discretion to cancel the Applicant's Visa.

Subparagraph (d) frequency of offending and any trend of increasing seriousness

213. As will be seen from reasons below, the Tribunal has found that the Applicant has committed a number of offences in respect of which he was never charged. His history of offending in

Australia therefore extends from 2014 to 2023. Although he was not successfully charged by police with any offence after 2021, the Tribunal has found that he continued offending up to the time of his placement in immigration detention. The Tribunal considers that the Applicant's offending has been frequent, and although much of his offending might be regarded as low level, its frequency and continuance escalates its seriousness.

214. This weighs heavily in favour of this Tribunal exercising the discretion to cancel the Applicant's Visa.

Subparagraph (e) the cumulative effect of the Applicant's repeated offending

215. The Applicant has failed to appear in accordance with his undertakings to the court and has on three occasions committed serious breaches of a DVO. He has shown contempt for the court and the laws which they administer, and denied persons the protection of the law to which they were entitled. He has been charged with dangerous drug offences four times over a period of seven years, and committed other drug offences in respect of which he was not charged.

216. He has shown defiance of, and physically resisted police, and placed them in fear for their own safety so as to lead them to threaten the use of tasers. He has also intimidated his partner so as to deter her from seeking the protection of the law.

217. The cumulative effect of the Applicant's offending is viewed very seriously and weighs very heavily in favour of this Tribunal exercising the discretion to cancel the Applicant's Visa.

Subparagraph (f) – Provision of false or misleading information

218. At issue here, is the Applicant's thrice denial of criminal convictions in separate Incoming Passenger Cards.

219. In each of the Incoming Passenger Cards, the Applicant responded "No" to the categorical question "Do you have any criminal convictions?" Nowhere in the report of his New Zealand offending does the word "conviction" appear, and there is no clear evidence before the Tribunal that convictions were recorded against him in New Zealand. A finding of guilt by itself, does not constitute a conviction. Having regard to his age at the time, and the fact that he appeared in a Youth Court, it is not unreasonable to conclude that convictions were

not recorded. The Tribunal is not satisfied that the Applicant's answer was false. Neither is the Tribunal satisfied that having regard to the categoric nature of the question posed, that the Applicant's answer was misleading.

220. The question posed in the Incoming Passenger Card is not addressed to prior offending, a far broader concept than conviction. Para 8.1.1(1) (f) concerns itself with false or misleading information regarding criminal offending. But the Applicant was not asked about his offending, he was asked about his convictions, and the Tribunal is not satisfied that the answers he provided were either false or misleading.

221. Moreover, as noted above, Mr Goodwin made no submission that the Applicant's juvenile offending be taken into consideration.

222. Accordingly, this consideration weighs neutrally.

Subparagraph (g) – reoffending after warning

223. No submission has been made that this consideration arises, and it is given no weight.

Subparagraph (h) – Overseas offending

224. For reasons set out above, this consideration is given neutral weight.

Conclusion Paragraph 8.1.1

225. Overall, a consideration of paragraph 8.1.1 of the Direction leads the Tribunal to conclude that the nature and seriousness of the Applicant's criminal offending and other conduct is viewed as very serious, and this weighs heavily in favour of this Tribunal exercising the discretion to cancel the Applicant's Visa.

The risk to the Australian community should the Applicant commit further offences or engage in other serious conduct

226. **Sub-paragraph 8.1.2(1)** provides that in considering the risk to the Australian community, a decision-maker 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 of it being repeated may be unacceptable.

227. **Sub-paragraph 8.1.2(2)** provides that in considering the risk to the Australian community, a decision-maker must have regard to the three following factors on a cumulative basis:

> *(a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and*
>
> *(b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:*
>
> *(i) information and evidence on the risk of the non-citizen re-offending; and*
>
> *(ii) evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since the most recent offence; and*
>
> *(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.*

Paragraph 8.1.2(1) – Risk to the community

228. The nature of the harm to the Australian community should the Applicant engage in further offending or other serious conduct includes further episodes of family violence, and breach of domestic violence orders, property damage, drug related offending, and offences against police in the performance of their duties. Family violence and victims of gang crime might be exposed to emotional, physical, psychological and financial harm, and be too frightened of retribution to complain to Police. Police might be fearful of performing their duty.

229. Should the Applicant continue involvement with the organised crime gangs such as the Bandidos, this would pose, as was conceded by Dr Donnelly in the context of the Applicant's admitted past conduct "a considerable risk of harm to the Australian community,"[73] and "are ***unacceptable*** criminal organisations in the Australian community.[74] This could have quite far-reaching consequences which are well documented in the various reports placed before the Tribunal beginning at page 108 of Exhibit R1.

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[73] Transcript Day 1 p 69 lines 3-5.

[74] Transcript Day 1 p 70 lines 6-7.

230. When victims of family violence offences or gang violence are too scared to report serious crimes or conduct, they are intimidated into denying themselves the protection of the law, and the perpetrators are emboldened. The best efforts of the parliaments, the police and the courts count for nothing. When police are fearful for their own safety to the point where they are reticent to perform their duties, this also emboldens perpetrators and corrodes the fabric of law enforcement, leaving society vulnerable. The seriousness of the potential harm is such that the Australian community's tolerance of it would be very limited.

231. The Tribunal considers that any risk of the occurrence of either or both situations is unacceptable in Australian society.

Information and evidence of risk of re-offending

232. There is no expert evidence before the Tribunal as to the risk of the Applicant reoffending or continuing to associate or again associating with a criminal group.

233. It was submitted on behalf of the Applicant that the Applicant's last conviction was on 18 June 2021, and that the nearly three years since that time represented a "significant period of good behaviour" and told against a material risk of reoffending.

234. The passing of nearly three years since his last conviction, on the face of things does weigh against a material risk of reoffending, but this does not necessarily equate to a "significant period of good behaviour". The Applicant was still associating with Bandidos well after he said he had severed his contact and was still regarded by Queensland Police Service as a member on 8 June 2023.

235. It is open to the Tribunal to conclude that the Applicant has committed a criminal offence according to the civil standard of proof in the course of making a decision. This is so even in the absence of a criminal conviction: *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd*[75]; or even in the face of an acquittal: *Helton v Allen*[76].

236. The Applicant has a documented drug history going back to 2014.

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[75] (2015) 255 CLR 352.
[76] (1940) 63 CLR 329.

237. The Applicant admitted to using cocaine at a party in April 2023, and he was obviously in possession of it in order to use it. The Tribunal considers that this was an offence even though he was never charged over it. He also told Mr Goodwin that he has not been smoking "weed" since being detained, which was around Christmas 2023. His reference to "weed" was a reference to cannabis. Fairly obviously, one must first possess cannabis in order to smoke it. Based on this evidence the Tribunal finds that the Applicant was in possession of cannabis at the unstated times he used it, up until Christmas 2023 and at those times, was committing an offence.

238. The Tribunal is therefore satisfied that the Applicant has committed numerous drug offences during 2023 and gives little weight to the time spent in the community since his last conviction was recorded. Even if the Tribunal had not found that the applicant had committed these offences, it would have taken the view that the relevant conduct was very serious conduct, and similarly lessened the weight to be attributed to the applicant's time in the community since his last conviction.

239. There is documentary evidence before the Tribunal that the Applicant has completed a large range of courses aimed at his rehabilitation since being placed in immigration detention just before Christmas in 2023, a period of about two months.

240. The extent to which two months of rehabilitation achieved any rehabilitation of consequence remains a matter of uncertainty as it is not the subject of expert evidence, and the extent of the Applicant's rehabilitation has not been tested in the community, particularly having regard for the fact that he has been a long term drug user. The Tribunal is concerned that the Applicant has stated that he has in the past succumbed to peer pressure regarding use of cocaine, and that he seems to move in circles where, on his evidence:

> *'So I think it was pretty common in all sort of walks of life. I think everybody takes it.'*[77]

241. The Tribunal is concerned that if released into the community the Applicant may continue to move in such circles and succumb to peer pressure to engage in further illicit drug use.

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[77] Transcript Day 1 p 33 lines 39-40.

242. The Applicant expressed remorse for the full extent of his criminal offending, and a strong focus on his partner and their three children, the elder two of whom are severely disabled. If allowed to stay in the community he maintains he has strong protective factors in the form of a strong work history and future work prospects, safe and stable family accommodation, and an apparent devotion to his children.

243. The Tribunal accepts that the Applicant has a strong work history and is well regarded by his various work colleagues and friends in the community. However, his work history in the past has not prevented his gang association.

244. The Tribunal also accepts that the Applicant is genuine in his desire to play a positive role in the lives of his children and to provide wide ranging and much needed support to his partner in that regard.

245. He has stated an intention to move back in with his partner and children “in the fullness of time”, but his plans in the interim remain a mystery.

246. It is now some three years and two months since the Applicant committed his last DVO breach. The DVO expired on 18 April 2023, without having been extended since its date of original issue. The evidence is that the Applicant now has a harmonious respectful relationship with his former partner, and says that they intend to marry, although his partner made no mention of this.

247. The Tribunal accepts that the Applicant has not been convicted of any offences (DVO or general criminal) alleged to have been committed in the past three years during which time, he has for the most part been at liberty in the community. The Applicant has however, continued his drug use until relatively recently. He has completed a significant amount of drug and alcohol rehabilitation courses in a short space of time, but it is too soon to confidently say that he has achieved requisite rehabilitation after a drug habit which appears to span some ten years.

248. The Tribunal considers that the Applicant remains a moderate risk of committing further drug and drug related offences.

249. The Tribunal accepts that the Applicant has not engaged in any rehabilitation specifically targeted at family violence, but on the face of things he has in recent years abstained from family violence, and the Tribunal gives this weight. It is now nearly three and a half years since the Applicant last committed a contravention of the DVO, and that DVO expired without renewal. Whilst the Tribunal holds some concerns about reports of unreported DVO breaches in the past, the Tribunal assessed the Applicant's risk of reoffending in regard as low to moderate.

250. Of great concern to the Tribunal is the prospect of the Applicant's ongoing involvement with the Bandidos, with its very serious attendant risks. His history of gang association and membership does not appear to have stemmed from drug or alcohol use, but from the fact that he simply felt "drawn" to the types of people who comprised such gangs. This is not a factor which the Tribunal considers would be ameliorated by any amount of drug or alcohol counselling or rehabilitation, or mental health intervention.

251. The Applicant's work history has not proven in the past to be a protective factor in respect of his drug use or gang involvement.

252. The Tribunal accepts that the Visa cancellation may have been "a wake up call" to the Applicant, but the mere threat of it was not, and there is clear evidence of his meeting with gang members after he received the notice. He appears to have embraced gang lifestyle over a long period of time. The Applicant stated his intention to move back in with his partner and their children "in the fullness of time." The Tribunal is concerned that in the interim period, or even at a later date if he moves in and things don't work out, the Applicant will gravitate back to gang involvement (assuming that he has in fact severed contact with the gang, which is a finding that the Tribunal has not been prepared to make.)

253. The Tribunal concludes that there is a moderate to high risk of the Applicant continuing to associate with the Bandidos or some other similar organisation.

254. The Tribunal accepts Mr Goodwin's submission that as provided in paragraph 8.1.2 of the Direction, the Applicant's 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 is unacceptable.

255. Having regard to the need to protect the Australian community, Primary Consideration 1 weighs very heavily in favour of this Tribunal exercising the discretion to cancel the Applicant's Visa.

Conclusion: Primary Consideration 1

256. The Tribunal finds that Primary Consideration 1 weighs very heavily in favour of this Tribunal exercising the discretion to cancel the Applicant's Visa.

PRIMARY CONSIDERATION 2: FAMILY VIOLENCE

257. Paragraph 8.2 of the Direction provides:

> *1 The Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia. The Government's concerns in this regard are proportionate to the seriousness of the family violence engaged in by the non-citizen (see paragraph (3) below).*
>
> *2 This consideration is relevant in circumstances where:*
>
> *(a) a non-citizen has been convicted of an offence, found guilty of an offence, or had charges proven howsoever described, that involve family violence; and/or*
>
> *(b) there is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence, and the non-citizen being considered under section 501 or section 501CA has been afforded procedural fairness.*
>
> *3 In considering the seriousness of the family violence engaged in by the non-citizen, the following factors must be considered where relevant:*
>
> *(a) the frequency of the non-citizen's conduct and/or whether there is any trend of increasing seriousness;*
>
> *(b) the cumulative effect of repeated acts of family violence;*
>
> *(c) rehabilitation achieved at time of decision since the person's last known act of family violence, including:*
>
> *(i) the extent to which the person accepts responsibility for their family violence related conduct;*
>
> *(ii) the extent to which the non-citizen understands the impact of their behaviour on the abused and witness of that abuse (particularly children);*
>
> *(iii) efforts to address factors which contributed to their conduct; and*
>
> *(d) Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware by a Court, law enforcement or other authority, about the consequences of further acts of family violence,*

noting that the absence of a warning should not be considered to be in the non-citizen's favour. This includes warnings about the non- citizen's migration status, should the non-citizen engage in further acts of family violence.

Has the Applicant committed Family Violence?

258. The definition of "*family violence*" relevantly provided in Paragraph 4 of the Direction states:

> ***family violence*** *means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the* ***family member)*** *or causes the family member to be fearful. Examples of behaviour that may constitute family violence include:*
>
> *(a) An assault ...*
>
> *(b) stalking ...*
>
> *(c) repeated derogatory taunts;*
>
> *(d) intentionally causing death or injury to an animal;…*
>
> *(e) intentionally damaging or destroying property..."*

259. The chapeau to this definition would indicate that an episode of "violent, threatening or other behaviour" is not sufficient to attract the descriptor "family violence" unless such conduct is accompanied by resulting coercion, control, or fear. The definition provides examples of what *may* constitute family violence, not what will. In doing so, it provides examples of items of conduct which if accompanied by coercion, control or fear may constitute family violence.

260. Before the Tribunal it was conceded that the Applicant's partner and the two daughters who were the subject of the DVO, were members of his family for the purpose of the Direction and that his conduct in each of the three instances constituted family violence for the purpose of the Direction and would have caused fear.

261. The facts of the various DVO breaches are adequately stated above. The Tribunal notes that on the first instance, the Applicant expressed what appeared to be genuine remorse. Drugs and alcohol have been involved in this conduct, and the Applicant has recently undertaken drug and alcohol counselling and consulted with a mental health professional. He was warned as to the effect of the order when it was served on him, yet went on to breach his obligations. The last two occasions occurred after a finding of guilt had been made by the Court in respect of his first breach.

262. Whilst this consideration weighs against the Applicant, the Tribunal has offset the weight attributed to it in consequence of the Applicant's stated remorse, and apparent insight into family violence, attempts at drug and alcohol rehabilitation, and the low sentences which were imposed.

263. However, the Direction requires that acts of family violence, regardless of whether a sentence or conviction for an offence is imposed, are viewed seriously by the Australian Government. Notwithstanding the Tribunal's concerns about the possibility of unreported episodes of family violence, the Tribunal gives weight to the fact that it appears to be a considerable time since the Applicant's last known act of family violence.

264. This consideration is given moderate weight in favour of this Tribunal exercising the discretion to cancel the Applicant's Visa.

Conclusion: Primary Consideration 2

265. Primary Consideration 2 weighs moderately in favour of this Tribunal exercising the discretion to cancel the Applicant's Visa.

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

266. Paragraph 8.3(1) of the Direction requires consideration of 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.

267. Paragraph 8.3(2) of the Direction requires consideration of a non-citizen's ties to Australia. More weight should be given to a non-citizen's ties to his or her child and/or children who are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.

268. Paragraph 8.3(3) requires consideration of the non-citizen's 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.

269. Paragraph 8.3(4) requires consideration of the strength, nature and duration of any other ties that the non-citizen has to the Australian community. In doing so, decision makers must have regard to:

> *(a) The length of time the non-citizen has resided in the Australian community, noting that:*
>
> *(i) Considerable weight should be given to the fact that a non-citizen has been ordinarily resident in Australia during and since their formative years, regardless of then their offending commenced and the level of that offending; and*
>
> *(ii) more weight should be given to the time the non-citizen has resided in Australia where the non-citizen has contributed positively to the Australian community during that time; and*
>
> *(iii) less weight should be given to the length of time spent in the Australian community where the non-resident was not ordinarily in Australia during their formative years and the non-citizen began offending soon after arriving in Australia.*

270. The Applicant has lived in Australia since the age of 17 years apart from a period of some 15 months spent in New Zealand. It is clear from his evidence and the various statements and letters filed on his behalf that he has strong ties to the Australian community, although this is offset to a significant degree by his offending and long term gang involvement over this period. He has worked in the community and can be taken to have contributed at times in a positive way.

Consideration of paragraph 8.3(1) Impact on Immediate Family

271. The Applicant's immediate family are all in Australia - his partner and their three infant children, the elder two of whom are autistic and non-verbal, and all of them have a right to remain in Australia indefinitely. It will be many years before the Applicant's children reach the age of 18 years. The Tribunal accepts the evidence of the strength of his relationship with his partner, her dependence upon him, and his relationship with, and commitment to his children, and their dependence upon him.

272. The Tribunal accepts that an adverse outcome for the Applicant in this case will have a huge and undeserved impact directly on his partner, and their children as outlined in the evidence of Ms T and that she will suffer very significant emotional, financial and practical hardship in taking care of their three children, just as she has while the Applicant has been in detention.

273. She will completely lose the significant benefits that Applicant provides in their co-parenting arrangement, and there does not appear to be anyone in her immediate family who can fill the void which will be created. The Tribunal acknowledges that Ms T's mother's arthritis condition will likely prevent her assisting her daughter in the care and management of her grandchildren. Likewise, the children's maternal grandfather will be unlikely to assist as he works remotely in mines. Ms T's sister works two jobs and is pregnant, and her brother travels in and out of the country for work. Ms T will have to manage a huge load with little family assistance, whilst endeavouring to maintain her own part-time employment.

274. Equally, the Tribunal accepts that an adverse outcome for the Applicant will also cause long term significant emotional, financial and practical hardship to each of the Applicant's minor children, particularly the elder two. The Tribunal also accepts the evidence of Ms T's mother, Mrs AA in regard to the Applicant's important and positive role in the lives of his children, and their mother.

275. The Tribunal also accepts that an adverse outcome for the Applicant will have an adverse impact on his partner's extended family.

Conclusion paragraph 8.3(1)

276. Paragraph 8.3(1) of the Direction weighs very heavily in favour of this Tribunal not exercising the discretion to cancel the Applicant's Visa.

Consideration of paragraph 8.3(2) Ties to Children

277. The Tribunal gives increased weight to the interests of the Applicant's three children, and to the interest of his namesake claimed "nephew".

278. In respect of all of these children, the Tribunal accepts that electronic contact is no substitute for physical contact.

279. The Tribunal gives greatest weight to the interest of the Applicant's two elder autistic daughters. His relationship with them and ability to interact with them appears to be irreplaceable. The Tribunal also accepts that even were it not for their special needs, an enforced separation from their father at such delicate ages may well have adverse impacts for them in later life, on top of the immediate adverse impacts asserted on their behalf. The

Tribunal also accepts that their special needs are such that it is highly unlikely that they would be able to travel to New Zealand to visit their father even in the unlikely event that finances permitted.

280. The Tribunal also gives great weight to the interests of the Applicant's youngest daughter, who may also suffer adverse impacts in later life on top of the immediate impacts asserted on her behalf. The Tribunal also accepts the unlikelihood that this child is likely to be able to travel to New Zealand to visit her father for at least many years.

281. The Tribunal accepts that there is some relationship with the Applicant's "nephew", however in recent years there has been no physical contact and only electronic communication, which the Applicant could continue from New Zealand. The Tribunal accepts that this child may suffer adversely from the Applicant's deportation, but nowhere near to the extent that his elder daughters or youngest daughter will. The Tribunal nevertheless gives this child's interests weight in favour of not exercising the discretion to cancel.

282. The Tribunal gives added weight to the Applicant's ties to his children.

Conclusion paragraph 8.3(2) Ties to Children

283. Paragraph 8.3(2) of the Direction weighs very heavily in favour of this Tribunal not exercising the discretion to cancel the Applicant's Visa.

Consideration of paragraph 8.3(3) Family or Social Links

284. The Tribunal accepts that the Applicant has strong long standing family and social links to Australia as can be seen from the various letters and statements filed on his behalf, however the weight to be attributed to this is diminished by his long term gang association and membership.

Conclusion paragraph 8.3(3) Family or Social Links

285. Paragraph 8.3(3) of the Direction weighs very heavily in favour of this Tribunal not exercising the discretion to cancel the Applicant's Visa.

Consideration of paragraph 8.3(4) ties to the Australian Community

286. The Applicant has lived in Australia for about 12 years, since, but not during his formative years. He can be seen to have contributed positively in some ways to the community, and the Tribunal gives this more weight in his favour. He did not commence offending until some three years after his arrival, and this does not lessen the weight to be given to his time in the Australian community. The weight to be attributed to this consideration is lessened in consequence of his long term gang involvement.

Conclusion of paragraph 8.3(4) Ties to the Australian Community

287. Paragraph 8.3(4) of the Direction weighs moderately in favour of this Tribunal not exercising the discretion to cancel the Applicant's Visa.

Conclusion: Primary Consideration 3

288. Primary Consideration 3 weighs very heavily in favour of this Tribunal not exercising the discretion to cancel the Applicant's Visa.

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

289. Paragraph 8.4(1) of the Direction compels a decision-maker to make a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA is in the best interests of a child affected by the decision. Paragraphs 8.4(2) and 8.4(3) respectively contain further stipulations. The former provides that for their interests to be considered, the relevant child (or children) must be under 18 years of age at the time when a decision about whether or not to refuse or cancel the Visa or not to revoke the mandatory cancellation decision is being made. The latter provides that if there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

290. The Direction sets out a number of factors to take into consideration with respect to the best interests of minor children in Australia. Those include, relevantly:

> *(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.'

Nature and duration of relationship

291. The Applicant has three daughters born in 2014, 2016, and 2021. He is in a co-parenting relationship with their mother and contributes to all aspects of their care and needs, although he does not live with them.[78]

Elder two daughters

292. With regard to para 8.4(4)(a) of the Direction, as discussed above, the Applicant has something of a unique relationship with the elder two who suffer autism, and for this reason their interests are given greater weight than those of their younger sister. He appears to have had a period of absence from their lives during the currency of the DVO when he was residing with fellow gang members, but has had greater involvement in recent years, and there is no existing court order which limits his contact with them or their younger sister.

[78] Ex A1 par 97.

293. With regard to para 8.4(4)(b) of the Direction, if the Applicant has been truthful in his evidence (which the Tribunal has not found) and abstains from acts of family violence and gang association, there is a very real prospect of his playing a positive parental role in the future.

294. With regard to para 8.4(4)(c) of the Direction, there is no clear evidence that the Applicant's past conduct has had a negative impact on the children other than that it has led to the DVO which has required them to live apart for a significant period of time.

295. With regard to para 8.4(4)(d) of the Direction, the likely effect of separation from the Applicant is likely to be very great indeed, and the Tribunal is not satisfied that this could be cured or diminished by electronic contact.

296. With regard to para 8.4(4)(e) of the Direction, the children's mother fulfils a parental role in relation to the children, but it is clear that for the reasons set out above, she struggles to do so even with the Applicant's assistance.

297. With regard to para 8.4(4)(f) of the Direction, the views of the children are not known, however the Tribunal is prepared to infer that they would very strongly urge the non-exercise of the discretion to cancel the Applicant's visa.

298. With regard to para 8.4(4)(g) of the Direction, there is no evidence to enliven this consideration.

299. With regard to para 8.4(4)(h) of the Direction, there is no evidence to enliven this consideration.

Conclusion best interests of elder daughters

300. The best interests of the Applicant's elder daughters weigh very heavily against this Tribunal exercising the discretion to cancel the Applicant's visa.

Best interests of youngest daughter

301. With regard to para 8.4(4)(a) of the Direction, the Applicant is in a parental role with the child, who suffers a highly sensitive immune system, which has in the past required

hospitalisation. The duration of any periods of his absence from her life (other than while he has been in immigration detention) is unclear. However, he has now been in immigration detention for a period of over three months which is a long time in the life of a child just short of three years old.

302. With regard to para 8.4(4)(b) of the Direction, if the Applicant has been truthful in his evidence (which the Tribunal has not found) and abstains from acts of family violence and gang association, there is a very real prospect of his playing a positive parental role in the future.

303. With regard to para 8.4(4)(c) of the Direction there is no clear evidence that the Applicant's past conduct has had a negative impact on this child other than that it has led to the DVO which has required them to live apart for a period of time.

304. With regard to para 8.4(4)(d) the Tribunal accepts that an enforced separation from the Applicant will have a range of emotional, financial and psychological adverse outcomes for the child, and some of these may not be apparent for some time. Circumstances are unlikely to permit her to travel to New Zealand to visit him for many years. Electronic contact, with its acknowledged inadequacies will be possible, but remains a poor substitute for physical presence.

305. With regard to para 8.4(4)(e) the child's mother presently fulfils a parental role, but is clearly struggling with the burden of parenthood, even when she has had the assistance of the Applicant.

306. With regard to para 8.4(4)(f) there is no evidence of the views of the child, but the Tribunal is prepared to infer that she would not want the Tribunal to exercise its discretion to cancel the Applicant's Visa.

307. With regard to para 8.4(4)(g) there is no evidence before the Tribunal so as to enliven this consideration.

308. With regard to para 8.4(4)(g) there is no evidence before the Tribunal so as to enliven this consideration.

Conclusion – best interests of younger daughter

309. The best interests of the Applicant's younger daughter weigh very heavily in favour of this Tribunal not exercising the discretion to cancel the Applicant's Visa.

Best interests of the son of Ms Iyesha Treanor – the "nephew"

310. With regard to para 8.4(4)(a) the Applicant's relationship with this child is non-parental, and he has not been in the presence of the child for some three years. Only electronic contact has occurred during this time. This consideration lessens the weight to be given to this child's interests.

311. With regard to para 8.4(4)(b) this child will not turn 18 for another fifteen years. He is not the child of the Applicant, and there is therefore no scope for the Applicant to play a parental role as such. The child is presently in New Zealand and his plans to return to Australia (if any) are not clear to the Tribunal. In Australia the child lives in Mackay in Queensland, many hundreds of kilometres from where the Applicant has lived in recent years. To the extent that the Applicant says he plays the role of an uncle to the child, it may be assumed that any ongoing role would be limited as it has been for the past three years.

312. With regard to para 8.4(4)(c) there is no evidence before the Tribunal so as to enliven this consideration.

313. With regard to para 8.4(4)(d) if the Applicant is returned to New Zealand the child's contact with him would be substantially the same as it has been for the past three years.

314. With regard to para 8.4(4)(e) the child's mother fills the parental role and there has been no suggestion that she does so inadequately.

315. With regard to para 8.4(4)(f) the Tribunal is prepared to infer that the child would not want the Tribunal to exercise its discretion to cancel the Applicant's visa.

316. With regard to para 8.4(4)(g) there is no evidence before the Tribunal so as to enliven this consideration.

317. With regard to para 8.4(4)(h) there is no evidence before the Tribunal so as to enliven this consideration.

Conclusion: Best interests of the son of Ms Iyesha Treanor – the "nephew"

318. This child's best interests weigh lightly in favour of this Tribunal not exercising the discretion to cancel the Applicant's Visa.

Conclusion of best interests minor children in Australia

319. Overall, the best interests of minor children in Australia weighs very heavily in favour of this Tribunal not exercising the discretion to cancel the Applicant's Visa.

PRIMARY CONSIDERATION 5: EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

The relevant paragraphs in the Direction

320. In making the assessment for weight to be allocated to Primary Consideration 5, paragraph 8.5(1) of the Direction provides that 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 he 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.

321. Paragraph 8.5(2) of the Direction directs that a 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 are such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:

> *(a) acts of family violence; or*
>
> *(b) causing a person to enter into, or being party to (other than being a victim of), a forced marriage;*
>
> *(c) commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual nature, as well as other serious crimes against the elderly or other*

vulnerable persons in the form of fraud, extortion, financial abuse/material exploitation or neglect;

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

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

(f) worker exploitation.

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

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

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

324. Paragraph 8.5(4) is consistent with the decision of the Full Court of the Federal Court in *FYBR v Minister for Home Affairs* [2019] FCAFC 185 at [68] ("**FYBR**") which affirmed the approach established in previous authorities that it is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an Applicant's circumstances or evidence about those expectations. While *FYBR v Minister for Home Affairs* [2019] FCAFC 185 [97] (FYBR) provides that the "deemed community expectation" will in most cases, justify refusal or cancellation, ultimately *"the question of whether it is appropriate to act in accordance with the deemed community expectation is in all cases left for the decision-maker to determine".*

325. In *XGHJ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (Migration) [2021] AATA 3474 (28 September 2021) ("**XGHJ**") addresses FYBR. At [396] of XGHJ, the Tribunal stated *"it is not the case that, when taking into account the expectations of the Australian community, a decision-maker will always weigh in favour of non-revocation. In an appropriate case a decision-maker, when carefully weighing up the material presented, may determine that the expectations of the Australian community do*

weigh in favour of revocation. Each case must be governed by the evidence presented – DKXY v Minister for Home Affairs [2019] FCA 495 at [29] – [31]."

326. The Tribunal is to be guided by the Government's views as to the expectations of the Australian community, which are to be found in the Direction.[79]

Analysis – Allocation of Weight to this Primary Consideration 5

327. Insight into the Australian community's heightened expectations and character concerns arising from a visa holder's association with or membership of criminal gangs is clear from the fact even mere reasonable suspicion of such association or membership provides a standalone basis for discretionary cancellation of a visa via s. 501(6)(b) of the Act.

328. Having regard to this, it seems reasonable to assume, that once a decision maker's state of mind has escalated from mere reasonable suspicion to clear certainty, the expectations of the Australian community as articulated in principles 5(1) and 5(3) would also escalate also, as would the expectation in para 8.5(1) that the Government would not allow such a non-citizen to remain in Australia.

329. The Applicant has also failed to meet the expectations of the Australian as stated in para 8.5(1) of the Direction in consequence of his history of offending. He has committed numerous acts of family violence, committed offences against a woman, and he has committed a crime against a government official – a police officer – in the course of performing duty. This conduct is relevant for the purposes of para 8.5(2)(a) and (d).

330. The Applicant has also failed to meet community expectations on a daily basis during the period of years he has been an associate or member of criminal gangs, and the nature of the consequence character concerns is relevant in terms of para 8.5(2) of the Direction.

331. The Tribunal considers that the nature of the character concerns and offences concerning this Applicant are such that the Australian community would strongly expect that this Applicant would not hold a visa.

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[79] See *Uelese v Minister for Immigration and Border Protection* [2016] FCA 348; *Afu v Minister for Home Affairs* [2018] FCA 1311; *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 and *FYBR v Minister for Home Affairs* [2019] FCA 500.

Conclusion: Primary Consideration 5

332. Primary Consideration 5 weighs very heavily in favour of this Tribunal exercising the discretion to cancel the Applicant's Visa.

OTHER CONSIDERATIONS

333. Paragraph 9(1) of the Direction directs a decision-maker to take into account considerations including, but 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.*

Other Consideration (a) Legal consequences of the decision

334. Dr Donnelly submitted that the Applicant made no refugee or similar claims in terms of legal consequences contemplated by the Direction.

335. He submitted that a legal consequence of an adverse decision would be that the Applicant would be legally banished from Australia, and not permitted to return. He submitted that the Tribunal could take this into account and referred the Tribunal to the decision of Senior Member O'Donovan in *Miller and Minister for Immigration, Citizenship and Multicultural Affairs (Migration)*[80].

336. In that case, Senior Member O'Donovan considered that the legal consequences of non-revocation of a cancellation would be irreversible exclusion from re-entering Australia, and the Applicant would remain in detention with his liberty constrained until deportation.

337. The submission of Dr Donnelly on this point is not a legal consequence contemplated by the Direction and is in essence a complaint about the general application of the law. It does nothing more than describe the precise legal consequences of an adverse decision intended by the Parliament. The Applicant has not asserted, or provided any evidence that

[80] [2024] AATA 175 at [131].

the legal consequences of the decision would apply to him any differently than they apply to any other person in a similar position.

338. In consequence of an adverse decision, the Applicant will become an unlawful non-citizen pursuant to s 15 of the Act, and subject to removal as soon as is reasonably practicable pursuant to ss 189 and 198 of the Act. He will of course be precluded from seeking another visa while in Australia other than a protection visa in consequence of s 501E. The Tribunal accepts that the Applicant will effectively be legally banished from Australia, and not permitted to return, but this is clearly the intention of the Parliament.

339. Accordingly, no weight is given to this submission.

Conclusion: Other Consideration (a) Legal consequence of the decision

340. Other consideration (a) is given neutral weight.

Other Consideration (b): Extent of impediments if removed

341. Para 9.2 of the Direction requires the Tribunal to consider the extent of any impediments that the Applicant may face if removed from Australia to his home country, in establishing himself and maintaining basic living standards (in the context of what is generally available to other citizens of that country, taking into account:

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

(b) whether there is any substantial language or cultural barriers; and

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

Paragraph 9.2(1)(a) - Age and health

342. The Applicant is a 30 year old man with a history of drug and alcohol abuse which had led to commission of various crimes in Australia and impacted his relationship with his partner. The Applicant did not assert that his history of drug and alcohol abuse would impair his capacity to work in Australia, where he intended to establish his own landscaping business if permitted, and there is no reason to believe it will impair his capacity to work in New

Zealand, although the Tribunal accepts that as a s.501 deportee, the Applicant may struggle to find work, (and indeed friends) in New Zealand.

343. Return to New Zealand will see the Applicant left to fend for himself by himself, with no identifiable local support other than that which he might access from the New Zealand government.

344. The Tribunal accepts that with all of the physical and emotional upheaval and hardship surrounding his deportation, and his lack of family ties and support from his father and siblings from whom he is estranged, his lack of friends, a support network to help him find work or establish a business, the Applicant may require professional assistance to cope with his mental health and drug and alcohol issues. The Tribunal notes, that with New Zealand having a health care system similar to Australia's, he should be able to obtain all the help he needs to meet his needs should he choose to do so.

Conclusion para 9.2(1)(a)

345. Paragraph 9.2(1)(a) of the Direction weighs heavily against this Tribunal exercising the discretion to cancel the Applicant's Visa.

Paragraph 9.2 (1)(b) - Substantial language or cultural barriers

346. Dr Donnelly submitted that there were no substantial language or cultural barriers to the Applicant's return to New Zealand.

Conclusion para 9.2(1)(b)

347. Paragraph 9.2(1)(b) of the Direction is given neutral weight.

Paragraph 9.2(1)(c) - any social, medical and/or economic support available to that non-citizen in that country.

348. It was not contested that the Applicant would have access to similar level and quality social, medical and economic support as he would have in Australia.

Conclusion para 9.2(1)(c)

349. Paragraph 9.2(1)(c) of the Direction is given neutral weight.

Conclusion Other Consideration (b): 9.2: Extent of impediments if removed

350. Paragraph 9.2 of the Direction weighs heavily in favour of this Tribunal not exercising the discretion to cancel the Applicant's Visa.

Other Consideration (c) 9.3: Impact on victims

351. Regarding impact on victims, Dr Donnelly submitted that the Applicant's family violence victim, his partner, had no fear of him. Her life had become immeasurably more difficult since he entered detention. The raising of three children, two of whom had serious diagnosed disabilities was a lifelong sentence.

352. The Tribunal accepts the evidence of Ms T, and the submissions made by Dr Donnelly regarding the impact on her of raising her three children, all of whom have serious health issues.

Conclusion Other Consideration (c) 9.3: Impact on victims

353. Paragraph 9.3 of the Direction weighs very heavily in favour of this Tribunal not exercising the discretion to cancel the Applicant's Visa.

Other Consideration(d) 9.4: Impact Australian business interests.

354. There is no evidence before the Tribunal so as to engage this consideration.

Conclusion Other Consideration 9.4: Impact Australian business interests

355. Paragraph 9.4 of the Direction is given neutral weight.

Further other consideration 1: Lifelong emotional hardship: The decision in *Hands v Minister for Immigration and Border Protection*

356. Dr Donnelly also submitted that the Applicant would suffer considerable lifelong emotional hardship in being permanently removed from his family and social ties as they would be remaining in Australia. In support of this he referred the Tribunal to *Hands v Minister for*

Immigration and Border Protection[81] which requires the Tribunal to consider the devastating human consequences visited upon people by Tribunal decisions.

357. The Tribunal accepts that the Applicant may well suffer significant lifelong emotional hardship in consequence of forced separation from his partner and children, and this weighs heavily against exercising the discretion to cancel the Applicant's Visa.

Conclusion: Further other consideration 1: Lifelong emotional hardship: The decision in *Hands v Minister for Immigration and Border Protection*

358. Further other consideration 1 weighs heavily against this Tribunal exercising the discretion to cancel the Applicant's Visa.

Further other consideration 2: Suffering during formative years

359. In reliance upon *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane*[82] Dr Donnelly submitted that the Tribunal was not limited by the universe of the Direction, and should take into account a further miscellaneous consideration, namely the significant suffering the Applicant had endured during his formative years[83].

360. In support of this submission, Dr Donnelly referred the Tribunal to *Bugmy v The Queen*[84] where the Court acknowledged that in determining moral culpability for an offence in the context of sentencing, the experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life, and that those effects did not diminish with the passage of time, and should be given full weight in every sentencing decision. The Court also observed that an inability to control a violent response to frustration may increase the importance of protecting the community.

361. The Tribunal respectfully concurs with the observations of Senior Member Bellamy in *Pillay and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [85] that the sentencing exercise conducted by courts is fundamentally different from the assessment

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[81] [2018] FCAFC 225.
[82] [2021] HCA 41.
[83] Detailed at Ex A1 p21, paras 129-130.
[84] [2013] HCA 37.
[85] [2022] AATA 270.

process undertaken by this Tribunal in applications of this nature, although both take into account the protection of the community.

362. The Tribunal considers that the courts which have sentenced this Applicant must be taken to have correctly applied *Bugmy* in determining appropriate sentences, and notes that he has never received a significant sentence. The Tribunal was not referred to any authority binding on it which specifically extended the operation of *Bugmy* to cases of this nature, and its applicability in visa cancellation cases has been described as "unclear"[86], and remains so.

363. The Tribunal has taken those factors into account the Applicant's suffering during his formative years throughout these reasons to the extent that they are relevant, and in weighing the various considerations, particularly further other consideration 1.

364. The Tribunal does not consider that any further weight should be attributed to this miscellaneous consideration.

Conclusion: Further other consideration 2: Suffering during formative years

365. Further other consideration 2 is given no weight.

Findings: Other Considerations

366. Overall, the combined Other Considerations weigh heavily in favour of this Tribunal not exercising a discretion to cancel the Applicant's Visa.

CONCLUSION

367. The Tribunal is now required to weigh all of the Considerations in accordance with the Direction,

368. In considering whether to exercise the discretion under s. 501(2) of the Act to cancel the Applicant's Visa, the Tribunal is required to weigh all of the Considerations in accordance

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[86] *MKNT and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 4089 at [127].

with the Direction and make a decision which is informed by the principles in paragraph 5.2 of the Direction.

369. The Tribunal finds as follows:

- Primary Consideration 1 weighs very heavily in favour of this Tribunal exercising the discretion to cancel the Applicant's Visa.
- Primary Consideration 2 weighs moderately in favour of this Tribunal exercising the discretion to cancel the Applicant's Visa.
- Primary Consideration 3 weighs very heavily against this Tribunal exercising the discretion to cancel the Applicant's Visa;
- Primary Consideration 4 weighs heavily against this Tribunal exercising the discretion to cancel the Applicant's Visa;
- Primary Consideration 5 weighs very heavily in favour of this Tribunal exercising the discretion to cancel the Applicant's Visa.
- Other considerations weigh heavily against this Tribunal exercising the discretion to cancel the Applicant's Visa.

370. The Tribunal has given greater weight to primary considerations than the other considerations. It has done so applying the principles at paragraph 5.2 generally, and in particular 5.2(1), 5.2(2), 5.2(3) and 5.2(6) of the Direction. Having regard to the inherent nature of the Applicant's conduct, in particular his family violence, his violence against women, and his crime against a government official, as well as his long term association with and membership of outlaw gangs, and the character concerns this raises, having regard for paragraph 8.5(2) of the Direction, and principle 5.2(6) the Tribunal has concluded that the Applicant's conduct is so serious that even strong countervailing circumstances are insufficient to justify not cancelling the Applicant's Visa.

371. The Tribunal finds that the combined weight of Primary Considerations 1, 2 and 5 easily outweigh the combined weights allocated to Primary Considerations 3, and 4, together with all of the other considerations relied upon by Dr Donnelly.

372. The Tribunal therefore exercises the discretion in s 501(2) of the Act to cancel that Applicant's Visa.

DECISION

373. Pursuant to section 43 of the Administrative Appeals Tribunal Act 1975 (Cth), the Tribunal affirms the decision made by the delegate of the Respondent dated 13 September 2022 to cancel the Applicant's Class TY Subclass 444 Special Category (Temporary) visa.

I certify that the preceding 373 (three hundred and seventy-three) paragraphs are a true copy of the reasons for the decision herein of Member R Maguire

.....[SGD]…....

Associate

Dated: 8 April 2024

Date of hearing:	**1 March 2024**
Counsel for the Applicant:	**Dr Jason Donnelly (Direct brief)**
	Latham Chambers
Solicitor for the Respondent:	**Mr Tom Goodwin (Lawyer)**
	Australian Government Solicitor

ANNEXURE A

EXHIBIT	DESCRIPTION OF EVIDENCE	DATE OF DOCUMENT	DATE RECEIVED
RESPONDENT SUBMISSIONS			
R1	Section 501G documents	Various	22 December 2023
R2	Statement of Facts, Issues and Contentions	26 February 2024	26 February 2024
R3	Tender bundle	Various	26 February 2024
APPLICANT SUBMISSIONS			
A1	Applicant's bundle of material	Various	20 February 2024