



Administrative  
Appeals Tribunal

DECISION AND  
REASONS FOR DECISION

Division: GENERAL DIVISION

File Number: **2023/8963**

Re: **Andrew Michael Rowe**

APPLICANT

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

RESPONDENT

**DECISION**

Tribunal: **Member D. Cosgrave**

Date: **21 February 2024**

Date of written reasons: **5 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 28 November 2023 not to revoke the cancellation of the Applicant's visa.



## **Catchwords**

*MIGRATION – Mandatory visa cancellation – failure to pass the character test – criminal offending involved threats to distribute intimate images and visual recordings – contravention of domestic violence order– Ministerial Direction 99 applied -whether there is another reason why the mandatory visa cancellation should be revoked — decision under review affirmed.*

## **Legislation**

*Acts Interpretation Act 1901 (Cth)*

*Administrative Appeals Tribunal Act 1975 (Cth)*

*Migration Act 1958 (Cth)*

*Migration Amendment (Character and General Visa Cancellation) Act 2014 (Cth)*

*Migration Regulations 1994 (Cth)*

## **Cases**

*Arachchi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 1311

*Bale v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 646

*Bartlett and Minister for Immigration and Border Protection* [2017] AATA 1561

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

*BOE21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 99

*Buntin v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1055

*Bushell v Repatriation Commission* (1992) 175 CLR 408

*Coker v Minister for Immigration and Border Protection* (2017) 160 ALD 588

*Demir V Minister For Immigration, Citizenship And Multicultural Affairs* [2023] FCA 870

*Dzik v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 78

*EPL20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 173

*Fehoko v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 1471

*Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250

*FYBR v Minister for Home Affairs* (2019) 272 FCR 454

*FYBR v Minister for Home Affairs and Anor* [2020] HCA Trans 56

*Gaspar v Minister for Immigration and Border Protection* (2016) 153 ALD 338

*GJJF and Minister for Home Affairs (Migration)* [2019] AATA 930

*Holloway V Minister For Immigration, Citizenship And Multicultural Affairs* [2022] FCA 1126

*Ibrahim v Minister for Home Affairs* (2019) 270 FCR 12

*Ismail v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 2

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

*Kayo Rerekura and Minister for Home Affairs (Migration)* [2019] AATA 153

*Khalil v Minister for Home Affairs* (2019) 271 FCR 326

*Matthews v Minister for Home Affairs* [2020] FCAFC 146

*Minister for Immigration and Ethnic Affairs v Baker* (1997) 73 FCR 187

*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v ERY19* [2021] FCAFC 133

*Minister for Immigration and Ethnic Affairs v Guo* [1997] HCA 22; (1997) 191 CLR 559

*Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160

*Murphy v Minister for Home Affairs* [2018] FCA 1924

*Nathanson v Minister for Home Affairs* [2022] HCA 26

*Sabharwal v Minister for Immigration and Border Protection* [2018] FCA 10

*Shi v Migration Agents Registration Authority* (2008) 235 CLR 286

*Sillars v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 174

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

*Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424

*Tera Euna and Minister for Immigration and Border Protection* [2016] AATA 301

*Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 125

*Roberts and Minister for Home Affairs (Migration)* [2018] AATA 3970

*Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531

**Secondary Materials**

*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 D. Cosgrave**

**5 April 2024**

### INTRODUCTION

1. Mr Rowe seeks review of the Respondent's delegate's 28 November 2023 decision not to revoke the mandatory cancellation of his Class BB Subclass 155 Five Year Resident Return visa (**the Visa**).<sup>1</sup> For the purposes of these reasons, the decision made on 28 November 2023 by a delegate of the Respondent will be referred to as the '**decision under review**.'
2. The hearing was held by audio visual link in Brisbane on Wednesday 7 and Friday 9 February 2024. Dr Donnelly of counsel represented Mr Rowe. Mr Hawker of Sparke Helmore Lawyers represented the Respondent.
3. On 21 February 2024, the Tribunal met its 84-day statutory obligation<sup>2</sup> by providing a short form decision in which it affirmed the decision under review.<sup>3</sup> The Tribunal now gives its reasons for its decision.
4. Unless the context indicates otherwise, passages quoted in bold font have been emphasised by the Tribunal.

### FACTS

5. Mr Rowe is a 52-year-old<sup>4</sup> citizen of the United Kingdom (UK) who first arrived in Australia on 22 October 2002.<sup>5</sup>

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<sup>1</sup> Exhibit R1: G documents, G3, page 14. G documents are so named because they are provided under s 501G of the *Migration Act 1958* (Cth). They consist of documents in the possession or control of the Respondent relevant to the making of a reviewable decision. They usually accompany the Minister's written notice regarding a visa cancellation, refusal, or non-revocation.

<sup>2</sup> Pursuant to s 500(6L) of the *Migration Act 1958* (Cth).

<sup>3</sup> *Khalil v Minister for Home Affairs* (2019) 271 FCR 326 [41]–[48]. This decision emphasises that there is a distinction between the Tribunal's decision, publication of which discharges the obligation under s 500(6L) of the Act and the Tribunal's written reasons which can be delivered later.

<sup>4</sup> Exhibit R1: G2, page 5.

<sup>5</sup> Exhibit R1: G10, page 52.

6. On 27 February 2023, Mr Rowe was sentenced by the Hervey Bay Magistrates Court for *threats to distribute intimate image or prohibited visual recording - domestic violence offence* and *contravention of domestic violence order (aggravated offence)* (**Index Offending**). He appealed his sentence in the Brisbane District Court and was resentenced to 12 months on each offence. He was granted immediate parole upon re-sentencing.<sup>6</sup>
7. On 17 March 2023, Mr Rowe's Visa was cancelled under s501(3A) of the *Migration Act 1958* (Cth) (**the Act**) because he did not pass the character test given his '*substantial criminal record*'.<sup>7</sup> As a result of this cancellation decision, Mr Rowe was invited to make representations to the Respondent's Department towards getting his Visa cancellation decision revoked. Mr Rowe made the requisite representations to the Respondent's Department on 25 March 2023.<sup>8</sup>
8. On 28 November 2023 a delegate of the Respondent decided not to revoke the mandatory cancellation decision made on 17 March 2023.<sup>9</sup>
9. Section 501(7)(c) of the Act provides that for the purposes of the character test a person has a '*substantial criminal record*' if the person has been sentenced to a term of imprisonment of 12 months or more.

## **OFFENDING HISTORY**

10. Mr Rowe has been convicted of 7 different offences.<sup>10</sup>
11. His offending can be categorised as follows:<sup>11</sup>
  - The Index Offending described above.
  - Unlawful stalking.
  - Distributing intimate images.

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<sup>6</sup> Exhibit R1: G6, page 39.

<sup>7</sup> Exhibit R1: G3, page 18 and pursuant to ss 501(6)(a) and 501(7)(c) of the Act.

<sup>8</sup> Exhibit R1, G14, pp 59-62.

<sup>9</sup> Exhibit R1: G3, page 14.

<sup>10</sup> Exhibit R1: G6, pages 39 – 40.

<sup>11</sup> Exhibit R1: G6, pages 39 – 40.

- Contravening domestic violence orders

## LEGISLATIVE FRAMEWORK

12. Section 25(1)(a) of the *Administrative Appeals Tribunal Act 1975* (Cth) (“**the AAT Act**”) and Section 500 of the Act are the sources of the Tribunal’s jurisdiction in this matter.
13. Section 501(3A) of the Act, read with section 501(6), obliges the Respondent Minister to cancel a person’s visa if the Minister is satisfied the person does not pass the **character test** because they are serving a full-time sentence of imprisonment. The **character test** is defined in s 501(6) of the Act.
14. Under s 501CA(4), the Respondent Minister may revoke the original decision if:
  - (a) representations have been made by the person in accordance with the invitation;<sup>12</sup> and
  - (b) the Minister is satisfied that:
    - (i) the person passes the character test;<sup>13</sup> or
    - (ii) there is another reason why the original decision should be revoked.<sup>14</sup>

## MATTERS FOR CONSIDERATION

15. Mr Rowe’s Visa was cancelled on the basis that he had failed the character test once the delegate considered and then applied section 501(6)(a) to the facts of this matter.
16. The Tribunal’s first task is to consider whether Mr Rowe fails to pass the character test.
17. If Mr Rowe fails the character test, then the Tribunal’s second task is to consider the issue of whether, under section 501CA(4)(b)(ii) of the Act, it is satisfied of there being another

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<sup>12</sup> Pursuant to s 501CA(4)(a) of the Act.

<sup>13</sup> Pursuant to s 501CA(4)(b)(i) of the Act.

<sup>14</sup> Pursuant to s 501CA(4)(b)(ii) of the Act.

reason to revoke the mandatory cancellation decision.<sup>15</sup> The Tribunal “*stands in the shoes of the original decision-maker*” but with regard for the situation as at the time of its consideration.<sup>16</sup>

18. To assist its consideration, the Tribunal has created the following summary chronology of events:

Date	Event
14 March 2019	The Hervey Bay Magistrates’ Court heard a charge of <i>Contravention of Domestic Violence Order (between 8 February 2019 and 12 February 2019)</i> against Mr Rowe. No conviction was recorded, with a recognisance of \$300 imposed and a good behaviour period of 6 months.
11 April 2019	The Hervey Bay Magistrates’ Court heard a charge of <i>Contravention of Domestic Violence Order (between 30 January 2019 and 8 March 2019)</i> against Mr Rowe. No conviction was recorded, Mr Rowe was fined \$500 and given 28 days to pay.
19 September 2019	His Honour Magistrate Guttridge of the Hervey Bay Magistrates’ Court heard charges of <i>Unlawful Stalking – Domestic Violence Offence (between 24 December 2018 and 26 March 2019)</i> , <i>Distributing Intimate Images (between 20 February 2019 and 25 April 2019)</i> , <i>Contravention of Domestic Violence Order (Aggravated Offence) (between 19 April 2019 and 25 April 2019)</i> , <i>Contravention of Domestic Violence Order (Aggravated Offence) (between 7 March 2019 and 22 March 2019)</i> and <i>Contravention of Domestic Violence Order (Aggravated Offence) (between 30 March 2019 and 6 April 2019)</i> .

<sup>15</sup> *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 125, [3]-[5] (Katzmann J); [24] (Derrington J) [103] (O’Byrne J).

<sup>16</sup> *Nathanson v Minister for Home Affairs* [2022] HCA 26 (“**Nathanson**”); *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250 at 271 [51]; *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at 299 [40], 315 [100], 324-325 [134]; *Bushell v Repatriation Commission* (1992) 175 CLR 408, 425 (Brennan J); *Dzik v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 78, [10]-[11] (Logan, Perry, and Beach JJ).



	<p>In relation to the <i>Unlawful Stalking – Domestic Violence Offence (between 24 December 2018 and 26 March 2019)</i> charge, Mr Rowe was convicted, then sentenced to 3 months’ imprisonment suspended for 12 months.</p> <p>In relation to the other charges, Mr Rowe was convicted and given a probation period of 12 months.</p>
27 February 2023	<p>Her Honour Magistrate McGarvie of the Hervey Bay Magistrates’ Court heard charges of <i>Threats to distribute intimate images or prohibited visual recording Domestic Violence Offence (on 9 November 2022)</i> and <i>Contravention of Domestic Violence Order (Aggravated Offence) (between 16 November 2022 and 25 November 2022)</i>.</p> <p>Mr Rowe pled guilty<sup>17</sup> and was convicted on both charges and sentenced to 15 months’ imprisonment.</p>
20 June 2023	<p>Mr Rowe appealed his sentence. On 20 June 2023 the Brisbane District Court allowed his appeal and reduced <b><u>his term of imprisonment to 12 months</u></b> (Emphasis added).</p>

19. Mr Rowe’s record of Queensland traffic offending is also relevant.<sup>18</sup> It shows five speeding offences between 2009 and 2022. Each offence is the same – “*Exceed speed limit in speed zone by at least 13 KM/H not more 20 KM/H*”. This is an unusual consistency of traffic offending.
20. The Tribunal finds that Mr Rowe fails the character test as a matter of law.<sup>19</sup> He has received, after appealing, a sentence of imprisonment of 12 months or more and thus has a ‘*substantial criminal record*’ which compels this Tribunal to find that he is a person who does not pass the character test.<sup>20</sup>

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<sup>17</sup> Exhibit R1: G5, page 36.

<sup>18</sup> Exhibit R3: Tender Bundle 6, page 246.

<sup>19</sup> *Harrison and Minister for Immigration and Citizenship* [2009] AATA 47; (2009) 106 ALD 666 at [63].

<sup>20</sup> Sections 501(7)(c) and 501(6)(a) of the Act.

## IS THERE ANOTHER REASON WHY MR ROWE'S VISA CANCELLATION SHOULD BE REVOKED?

21. The Tribunal's second task is to consider whether, under section 501CA(4)(b)(ii) of the Act, it is satisfied of there being another reason to revoke the mandatory cancellation decision. The Tribunal's substantive task here is to understand and evaluate the evidence, oral testimony and representations made by Dr Donnelly and Mr Hawker as to why there was 'another reason' for the cancellation of Mr Rowe's Visa to be revoked and to then determine, on the merits, whether it is satisfied that there is another reason.<sup>21</sup>
22. The Full Court of the Federal Court in *Bettencourt v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 172 at [27], approving Justice Colvin's reasoning in *Viane*,<sup>22</sup> identified the following principles as being relevant to the statutory task conferred by Section 501CA(4):
- 'If representations are made to the Minister, a statutory obligation arises on the part of the Minister to form a state of satisfaction as to whether the person passes the character test or there is 'another reason' why the original decision should be revoked.*
- The state of satisfaction must be formed by reference to the representations such that a failure to consider the representations as a whole would be a failure to consider a mandatory relevant consideration.*
- The individual matters raised in the representations are not each mandatory relevant considerations and therefore do not need to be brought to account in the making of the decision such that they must form part of the considerations that give rise to the required state of satisfaction.*
- However, a state of satisfaction that is formed without considering a substantial or significant and clearly expressed claim made in the representations that there is a particular reason why the visa cancellation decision should be revoked is not a state of satisfaction of the kind required by the statute.*
- Further, there must be a real and genuine consideration of each such substantial or significant and clearly expressed claim.*
- If the state of satisfaction is formed that there is 'another reason' why the original decision cancelling the visa should be revoked then the Minister must revoke the cancellation....'*
23. When the Tribunal assesses and considers the factors weighing for and against setting aside a visa cancellation, section 499(2A) of the Act requires it to comply with *Direction 99*

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<sup>21</sup> *Amodu v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 10 at [5] (Colvin J).

<sup>22</sup> *Viane v Minister for Immigration and Border Protection* (2018) 263 FCR 531, [64] (Colvin J).

– *Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA (the Direction).*<sup>23</sup>

## THE DIRECTION

24. The Direction contains mandatory and aspirational considerations guiding the exercise of statutory power under the Act.<sup>24</sup>
25. The following principles in paragraph 5.2 of the Direction inform the decision-making process:<sup>25</sup>
- 1 *Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*
  - 2 *Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*
  - 3 *The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measureable risk of causing physical harm to the Australian community.*
  - 4 *Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, or by other non-citizens who have been participating in, and contributing to, the Australian community only for a short period of time.*
  - 5 *With respect to decisions to refuse, cancel, and revoke cancellation of a visa, Australia will generally afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age. The level of tolerance will rise with the length of time a non-citizen has spent in the Australian community, particularly in their formative years.*
  - 6 *Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations*

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<sup>23</sup> See *Gaspar v Minister for Immigration and Border Protection* [2016] FCA 1166 at para [38].

<sup>24</sup> *BOE21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 99, at [22], citing with approval *Matthews v Minister for Home Affairs* [2020] FCAFC 146, at [45].

<sup>25</sup> Paragraph 5.2 of the Direction.

*may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation. In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mentioned in paragraph 8.55(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.*

26. Paragraph 6 of the Direction provides that, informed by the above principles, a decision-maker must consider the Primary and Other considerations described in Paragraphs 8 and 9 of the Direction where relevant to their decision making.
27. Paragraph 7(1) of the Direction provides that appropriate weight should be given to 'information and evidence from independent and authoritative sources.'
28. Paragraphs 7(2)-(3) of the Direction state that '*Primary considerations should generally be given greater weight than the other considerations,*' and '*One or more primary considerations may outweigh other primary considerations.*'
29. Paragraph 8 of the Direction provides the following primary considerations:
  - protection of the Australian community from criminal or other serious conduct;
  - whether the conduct engaged in constituted family violence;
  - the strength, nature and duration of ties to Australia;
  - the best interests of minor children in Australia; and
  - expectations of the Australian community.
30. Paragraph 9 of the Direction identifies the following non-exhaustive list of other considerations to be considered where relevant:
  - legal consequences of the decision;
  - extent of impediments if removed;
  - impact on victims; and
  - impact on Australian business interests.

31. The Tribunal is not precluded from finding that a consideration specified under Paragraph 9 of the Direction has equivalent or greater weight than a consideration specified under Paragraph 8 of the Direction. This depends on each matter's specific circumstances.<sup>26</sup> The weighing process is substantively left to the individual decision maker exercising the relevant power under section 501 of the Act.<sup>27</sup>

## **EVIDENCE**

32. The following is an overview of the evidence tendered or adduced before the Tribunal in this matter. The evidence referred to below includes documentary evidence collated for the purposes of section 501G of the Act, documents tendered by the Respondent and Mr Rowe's lawyers as well as testimony given by Mr Rowe, Dr Emily Kwok, Ms Angela Miller, Mr Mark Goulding and Mr Steven Jones.

### ***Documentary evidence***

33. The Tribunal received written evidence during the hearing, which is **attached** to this Decision and **marked** 'Annexure A'. The following documents were tendered into evidence and considered by the Tribunal:
- G Documents.<sup>28</sup>
  - Mr Rowe's statement of facts, issues and contentions (**SFIC**).<sup>29</sup>
  - The Respondent's SFIC (**RSFIC**).<sup>30</sup>
  - Mr Rowe's 29 December 2023 statement.<sup>31</sup>
  - Mr Rowe's tender bundle.<sup>32</sup>
  - Ms Angela Miller's 29 December 2023 statement.<sup>33</sup>

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<sup>26</sup> *Suleiman v Minister for Immigration and Border Protection* (2018) 74 AAR 545, at [23] and [28] (Colvin J); *FHHM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 19.

<sup>27</sup> *Jagroop v Minister for Immigration and Border Protection* (2016) 241 FCR 461, at [57].

<sup>28</sup> Exhibit R1.

<sup>29</sup> Exhibit A2.

<sup>30</sup> Exhibit R2.

<sup>31</sup> Exhibit A1.

<sup>32</sup> Exhibit A3.

<sup>33</sup> Exhibit A4.

- Ms Evelyne Goulding’s 29 December 2023 statement.<sup>34</sup>
- Mr Mark Goulding’s 29 December 2023 statement.<sup>35</sup>
- Mr Steven Jones’ 29 December 2023 statement.<sup>36</sup>
- Dr Emily Kwok’s 31 January 2024 report.<sup>37</sup>
- Mr Rowe’s reply to Respondent’s SFIC.<sup>38</sup>
- The Respondent’s tender bundle.<sup>39</sup>

### ***THE TRIBUNAL’S ASSESSMENT OF MR ROWE AS A WITNESS***

34. In his closing submission, Dr Donnelly contended that Mr Rowe was a credible witness, who was forthright in his evidence and who did not try to evade questions.<sup>40</sup> In contrast, Mr Hawker contended that the Tribunal should be slow to accept much of what Mr Rowe has said and that he was, in some important junctures, evasive on being questioned.<sup>41</sup>
35. The Tribunal observed Mr Rowe as he gave his testimony. When answering questions about his businesses and his skills, he appeared honest and forthright. This did not appear to be the case when he was answering questions about his ties to Australia, his relationships and his offending. He did not appear credible on these aspects of the matter.

### **PRIMARY CONSIDERATIONS**

#### **Primary Consideration 1: Protection of the Australian community from criminal or other serious conduct**

36. When considering this Primary Consideration 1, paragraph 8.1 of the Direction requires decision-makers to keep in mind that the Australian Government is committed to protecting

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<sup>34</sup> Exhibit A5.

<sup>35</sup> Exhibit A6.

<sup>36</sup> Exhibit A7.

<sup>37</sup> Exhibit A8.

<sup>38</sup> Exhibit A9.

<sup>39</sup> Exhibit R3.

<sup>40</sup> Transcript, page 73, lines 6-10.

<sup>41</sup> Transcript, page 82, lines 12-18.

the Australian community from harm because of criminal activity or other serious conduct by non-citizens.

37. Decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that this country confers on non-citizens with the expectation that they are, and have been, law abiding, that they will respect important institutions and that they will not cause or threaten harm to individuals or the Australian community.
38. In determining the weight applicable to Primary Consideration 1, paragraph 8.1(2) of the Direction requires decision-makers to consider:
- (a) the nature and seriousness of the non-citizen's conduct to date; and
  - (b) the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

***The nature and seriousness of Mr Rowe's conduct***

***Paragraph 8.1.1(1)***

39. This paragraph states that, in considering the nature and seriousness of the non-citizen's '*criminal offending or other conduct to date*', decision-makers '*must have regard to the following*':
- (a) *without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:*
    - (i) *violent and/or sexual crimes;*
    - (ii) *crimes of a violent nature against women or children, regardless of the sentence imposed;*
    - (iii) *acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed;*
  - (b) *without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:*
    - (i) *causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;*
    - (ii) *crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government*

*representatives or officials due to the position they hold, or in the performance of their duties;*

- (iii) any conduct that forms the basis for a finding that a non-citizen does not pass an aspect of the character test that is dependent upon the decision-maker's opinion (for example, section 501(6)(c));*
  - (iv) where the non-citizen is in Australia, a crime committed while the non-citizen was in immigration detention, during an escape from immigration detention, or after the non-citizen escaped from immigration detention, but before the non-citizen was taken into immigration detention again, or an offence against section 197 A 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 reoffended 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.*

***Tribunal's Consideration: The nature and seriousness of Mr Rowe's conduct***

40. The Tribunal has considered both parties' respective submissions as summarised below and the other relevant material before it in this matter.
41. In summary, Dr Donnelly on behalf of the Applicant contends that:
- Mr Rowe's offences, including his threats to distribute intimate images and stalking, may not directly classify as violent or sexual crimes but certainly border on violence, especially given their context in domestic settings.
  - His repeated offences, predominantly in the form of threats and stalking, are crimes against women.
  - His offences, particularly his contraventions of domestic violence orders, directly indicate acts of family violence.



- His sentences, including imprisonment and probation, reflects the seriousness with which the courts view his offending.
- His criminal history of repeated and escalating domestic violence-related offences evidence a concerning offending trend. His repeated offences also demonstrate a pattern implying a continued threat.
- There is no evidence to suggest that Mr Rowe has provided false information to the Respondent's Department, that he received a formal warning about the consequences of further offending in terms of his migration status before offending or that he has committed an offence in another country.
- Considering the above, it is evident that Mr Rowe's criminal conduct, primarily comprising domestic violence offences, is of a serious nature and viewed gravely by both the Australian Government and community. The pattern of his offences, their severity, and the implications they hold in terms of public safety and the values upheld by Australian society necessitate a stringent review of his migration status. The recurring nature of his offences, especially against women, also aligns with the types of conduct the government and community consider very seriously.
- Given his history of domestic violence, including threats to distribute intimate images and stalking, the primary concern is harm to individuals, particularly his intimate partners or family members. Such conduct can lead to significant psychological, emotional, and potentially physical harm to victims.
- The Australian community values safety, particularly in domestic settings. The nature of the applicant's offences undermines these values and could instil fear and unease, particularly among victims of domestic violence and the broader community aware of his history.
- His criminal history shows a pattern of repeated offences, suggesting an escalating aspect to his conduct. This raises concerns about the potential severity of future offences and the increased risk of physical harm. Continued offences by Mr Rowe could strain public resources, including law enforcement and judicial systems, which are already burdened with addressing domestic violence cases.

- Based on past conduct, further offending by Mr Rowe could involve serious psychological harm to his victims. The nature of his offences also suggests a potential for escalation to more physically violent acts.<sup>42</sup>

42. In essence the Mr Hawker on behalf of the Respondent contends that:

- Mr Rowe's convictions arise in circumstances where he has produced over 1000 intimate images and videos of his ex-partner during their relationship.<sup>43</sup> Once this relationship has broken down, he threatened the victim, her father and her current partner with the public release of those intimate images.<sup>44</sup>
- After the relationship broke down, he engaged in a campaign of harassment against the victim, her new partner and her father. He sent a large volume of emails, texts and left letters at the victims' address threatening and taunting to disseminate the images. In one instance, he threatened to hold 'a *viewing party with the boys*' and invited her father to attend the viewing party.<sup>45</sup>
- During this period, Mr Rowe also engaged in unlawful stalking by continuously appearing at the workplace and at the residence of the victim and her partner.<sup>46</sup> He has also breached a temporary domestic violence order when he offered to pay the victim \$10,000 to withdraw her application for a protection order.<sup>47</sup>
- For two of his threats to release intimate material (against the victim's father and partner) and the unlawful stalking, he was sentenced to 12 months' imprisonment. For the remaining threat to release intimate material (against the victim) and the breach of a domestic violence protection order, he was sentenced to 15 months' imprisonment.<sup>48</sup> On 20 June 2023, Mr Rowe successfully appealed his sentence of 15 months' imprisonment. The District Court of Queensland re-sentenced him to 12 months' imprisonment.<sup>49</sup>

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<sup>42</sup> Exhibit A2: Applicant's SFIC paras [10] – [24].

<sup>43</sup> Exhibit R3: Tender Bundle 2, page 13; Tender Bundle 3, page 30.

<sup>44</sup> Exhibit R1: G7, page 42.

<sup>45</sup> Exhibit R3: Tender Bundle 2, pages 17-19.

<sup>46</sup> Exhibit R3: Tender Bundle 4, pages 60 and 71.

<sup>47</sup> Exhibit R1: G7, page 43 and Exhibit R3: Tender Bundle 2, page 16.

<sup>48</sup> Exhibit R1: G7, page 45.

<sup>49</sup> Exhibit R3: Tender Bundle 1, page 6.

- Mr Rowe also has a traffic history containing five instances of speeding.<sup>50</sup> The Respondent contends that driving offences, which have the potential to injure and possibly kill innocent road users, are serious.
- Ten of the twelve applicant's criminal convictions were committed in the context of family violence, which should be viewed very seriously.
- The other two convictions for which Mr Rowe was sentenced to 12 months' imprisonment, should be viewed seriously as custodial sentences are the last resort in the sentencing hierarchy.
- Regard must also be had to the frequency and cumulative effect of Mr Rowe's offending. The Respondent contends that his offending has been frequent, as he has committed 12 offences over a three-year period. Further, there has been a trend of increasing seriousness which has escalated from affecting a single victim to another victim's family. His offending has had serious mental, emotional and physical impact on its victims.<sup>51</sup>

43. The Tribunal has considered both parties' respective submissions on Paragraph 8.1.1 above and now turns to the individual elements of paragraph 8.1.1.

***Paragraphs 8.1.1(1)(a)(i), 8.1.1(1)(a)(ii) and 8.1.1(1)(a)(iii)***

44. These paragraphs require the Tribunal, when considering this matter, to have regard to, and acknowledge that, violent and/or sexual crimes, crimes of a violent nature against women or children and acts of family violence are viewed very seriously by the Australian Government and the Australian community.

45. The Tribunal concludes, having considered the evidence, that Mr Rowe's stalking offences constitute acts of family violence as that term is defined in the Direction.<sup>52</sup>

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<sup>50</sup> Exhibit R3: Tender Bundle 6, page 246.

<sup>51</sup> Exhibit R3: Tender Bundle 4, pages 144 and 187 and Exhibit R2: RSFIC Paras [25] – [32].

<sup>52</sup> Paragraph 4(1)(c) of the Direction.

46. Considering his other offences, it is less certain whether they constitute violence per se. While the offences clearly involved Mr Rowe's former female partners (and their family in one set of circumstances) they did not involve physical violence.
47. A substantial component of Mr Rowe's offending involved threatening to distribute intimate images or actually distributing such images.
48. The chapeau to paragraph 8.1.1(1)(a) provides that conduct described in its three subparagraphs is viewed '*very seriously*' by the Australian Government and the Australian community. There is little or nothing to dispute with the finding that Mr Rowe has committed family violence falling within the auspices of paragraph 8.1.1(1)(a)(iii) of the Direction. The Tribunal finds that applying the '*very serious*' descriptor to Mr Rowe's offending is validated on the basis of the evidence. This paragraph carries a degree of weight in favour of affirming the delegate's decision to not to revoke the mandatory cancellation of Mr Rowe's Visa.

***Paragraph 8.1.1(1)(b)(i)***

49. This paragraph is not relevant. The Tribunal did not see any evidence that Mr Rowe has committed any offences involving causing a person to enter into or to otherwise become a party to a forced marriage. There is no reference in the material to any formal conviction to such offending nor is there any reference to such conduct in an independent and/or authoritative police narrative or similar document.

***Paragraph 8.1.1(1)(b)(ii)***

50. This paragraph is enlivened and relevant. Having considered the evidence of the totality of Mr Rowe's offending, the Tribunal further considers that Mr Rowe has committed crimes against vulnerable members of the community – in this case, women, based on the reasoning applied by the Full Court of the Federal Court in *Garland v Minister for Immigration, Citizenship and Multicultural Affairs* at paragraphs [45] to [48].<sup>53</sup>
51. The Tribunal finds that this paragraph, considered by itself, consequently supports a finding that Mr Rowe's offending has been of a serious nature. This paragraph carries a degree of

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<sup>53</sup> *Garland v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 144.

weight in favour of affirming the delegate's decision to not to revoke the mandatory cancellation of Mr Rowe's Visa.

**Paragraphs 8.1.1(1)(b)(iii) and (b)(iv)**

52. This paragraph refers to conduct forming "...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". The Tribunal finds that this paragraph is not relevant to its assessment of the nature and seriousness of Mr Rowe's conduct. Given the formulation of the character test referable to the instant decision, which test Mr Rowe fails as a matter of law,<sup>54</sup> the Tribunal is not required to make any finding about whether any of his conduct forms the basis for a finding that he does not pass an aspect of the character test that is dependent on my opinion.<sup>55</sup> Paragraph 8.1.1(1)(b)(iv) is not relevant as the material contains no reference to any crime committed by Mr Rowe during his time in immigration detention.

**Paragraph 8.1.1(1)(c)**

53. In applying this paragraph, the Tribunal is precluded from considering sentences imposed on Mr Rowe for:
- (i) any violent offending that he may have committed against women or children;
  - (ii) acts of family violence; and
  - (iii) any sentence he received relating to conduct whereby he caused a person to enter into (or to become a party to) a forced marriage.
54. Mr Rowe's 27 February 2023 convictions included charges of *Threats to distribute intimate images or prohibited visual recording Domestic Violence Offence* against his former partner's father and then current partner. Acknowledging that his former partner's father may be considered to fall within the broad concept of 'family', the threat to his former partner's then current partner remains relevant and enlivens this paragraph.

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<sup>54</sup> See para [20].

<sup>55</sup> See paragraph 8.1.1(1)(b)(iii) of the Direction.

55. The Tribunal finds that the sentences imposed by the courts for this crime supports a finding that Mr Rowe's offending has been of a very serious nature. This paragraph carries a degree of weight in favour of affirming the delegate's decision to not to revoke the cancellation of Mr Rowe's Visa.

***Paragraph 8.1.1(1)(d)***

56. This paragraph raises two specific factors around the characteristics of a non-citizen's offending for consideration: the offending's frequency and/or whether there is any trend of increasing seriousness.

***Frequency***

57. Mr Rowe's criminal history<sup>56</sup> and convictions between 2019 and 2022 demonstrate that he has been a frequent offender in the period between 2018 and 2022.

***Trend of increasing seriousness***

58. The Tribunal considers that Mr Rowe's criminal history<sup>57</sup> and convictions demonstrate a trend of increasing seriousness which has escalated from affecting a single victim to that victim's father, her current partner and the ex-partner's animal.

59. The Tribunal finds that Mr Rowe's criminal history<sup>58</sup> and convictions have been frequent and have demonstrated a trend of increasing seriousness. The Tribunal further finds that this sub-paragraph 8.1.1(1)(d) contributes substantively to characterising the totality of Mr Rowe's offending in Australia as very serious.

60. This paragraph weighs in favour of affirming the delegate's decision to not to revoke the mandatory cancellation of Mr Rowe's Visa.

***Paragraph 8.1.1(1)(e)***

61. This paragraph addresses the cumulative effect(s) of Mr Rowe's repeated offending.

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<sup>56</sup> Exhibit R1: G4, pages 35-36.

<sup>57</sup> Exhibit R1: G4, pages 35-36.

<sup>58</sup> Exhibit R1: G4, pages 35-36.

62. The cumulative effects of Mr Rowe's offending on the Australian community involve him imposing disproportionate and material financial and resourcing imposts and costs on the policing, judicial and jail systems.

63. The cumulative effects of Mr Rowe's offending on his victims have likely involved significant emotional, psychological and social costs. While untested before the Tribunal, one of his victim's police witness statements contains the following description of these costs:

*[37] As a result of Andy's [the Applicant] actions, I am in a situation where firstly I do not believe that Andy has deleted any of the explicit photos/videos of myself. Secondly, I do not have any control over what Andy does with these images. I am fully aware that these images have the ability to severely compromise my new personal relationship, my work environment and my family relationships. I have never at any point given Andy consent to display, exhibit, show or otherwise distribute any of these explicit photos/videos of myself to any other person. Andy threatening to do this is a very serious threat to myself, and it has had a number of impacts on my life.*

*[38] As a direct result of Andy's behaviour and threats to myself, I now suffer from a heightened level of anxiety requiring stronger medication than what I have previously taken. I have had to take off a considerable amount of time from work, which has resulted in a loss of my income. I am now paranoid about where Andy is and what he is doing. I find myself looking over my shoulder whilst completing normal everyday tasks such as shopping etc. In fact, I avoid going out as much as I possibly can. I have had to re-structure my work environment in order appropriately respond to any of Andy's actions whilst I am at work. I am not sleeping well, and cannot remember the last time I had a good night's sleep. I am very embarrassed about the situation that I now find myself in. I feel like dignity has been totally stripped from my life. My self-worth has been affected and my relationship with my parents has been strained because of what Andy has done. I have experienced a number of migraines in the past month in particular. I feel helpless and vulnerable whenever I think about the events described in this statement'.<sup>59</sup>*

64. The Tribunal is also cognisant that once intimate images of the type involved in Mr Rowe's offending are distributed digitally, his victims are likely to have little to no control over who sees the images.

65. The Tribunal's consideration of this paragraph supports a finding that the totality of Mr Rowe's repeated offending in this country has been of a very serious nature.

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<sup>59</sup> Exhibit R3: Tender Bundle 4, pages 186-187.

66. This paragraph weighs in favour of affirming the delegate's decision to not to revoke the mandatory cancellation of Mr Rowe's Visa.

**Paragraphs 8.1.1(1)(f), (g) and (h)**

67. There is no evidence before the Tribunal that enlivens these paragraphs.

68. Consequently, these paragraphs are not relevant to any assessment of the nature and seriousness of Mr Rowe's conduct.

**Tribunal's finding: The nature and seriousness of Mr Rowe's conduct**

69. The Tribunal has sought above to apply and consider each of the relevant sub-paragraphs appearing in paragraph 8.1.1(1) of the Direction.

70. With reference to the relevant and applicable paragraphs referred above, the Tribunal finds after a holistic consideration of Mr Rowe's offending that it should be characterised as very serious.

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

71. This aspect of the Direction requires the Tribunal to assess the risk Mr Rowe poses to the Australian community if he reoffends or engages in other serious conduct, taking into consideration the nature of any consequential harm and its probability.

**Paragraphs 8.1.2(1) and 8.1.2(1)**

72. Paragraph 8.1.2 (1) states:

*'In considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government's view that the Australian community's tolerance for **any** risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.'*

(Emphasis added)

73. Paragraph 8.1.2 (2) provides that, in considering the risk to the Australian community, a decision-maker must have regard to the 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.*

***Tribunal’s Consideration: Risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.***

74. In considering the risk to the Australian community, the Tribunal has assessed the parties’ submissions and the relevant information and evidence before it in this matter in relation to paragraph 8.1.2.

75. Dr Donnelly contends:

- Mr Rowe attributes his past offending to a confluence of personal stressors. These include father’s death in November 2022, extensive work hours (12 to 14 hours daily), and infidelity in his relationships.
- Mr Rowe’s cousins’ submissions highlight his emotional turmoil following his father’s cancer diagnosis during the COVID-19 pandemic, a situation compounded by travel restrictions preventing a final farewell.
- In 2022, Mr Rowe experienced significant physical exhaustion and stress, adversely impacting his health and decision-making capabilities, as evidenced by substantial weight loss.
- Mr Rowe experienced the emotional impact of a relationship dissolution in October 2022, exacerbating his distress given the financial and housing support he had provided her.
- Mr Rowe acknowledges acting impulsively in response to the end of an earlier relationship in 2019, a decision he now recognises as misguided.

- While his father's illness and death caused significant emotional strain, his pattern of offending predates these events, as documented in the National Criminal History Check dated 24 March 2023. This chronology suggests that other factors contributed to his earlier offences.
- His history of disseminating or threatening to disseminate intimate images appears closely linked to relationship breakdowns, driven by feelings of betrayal and a desire for retaliation, as per his own representations.
- It is evident that his actions were often motivated by a desire for revenge and manipulation. Although the death of his father in November 2022 was a factor, it does not fully account for his earlier pattern of behaviour.
- He professes deep regret for his actions and the distress they have caused. The sentencing remarks from 27 February 2023 set out his guilty plea, indicative of some level of acknowledgment of his offences.
- He has completed various online courses addressing relevant issues like domestic violence and stress management and engaged in domestic violence intervention sessions.
- Mr Rowe presents a minimal risk of recidivism, as evidenced by a lack of an enduring lifelong criminal history. He has demonstrated a significant commitment to rehabilitation, indicating a sincere effort to rectify past misconduct. The implications of Visa cancellation, coupled with the applicant's tenure in immigration detention and the looming possibility of future Visa revocations, collectively constitute formidable deterrents, effectively mitigating the likelihood of any future offences.

76. Summarising the Respondent's arguments:<sup>60</sup>

- Mr Rowe's criminal history has directly affected his former partners and in one instance, their family. As the sentencing judge outlined, his conduct subjected its victims to *'a campaign that was designed as being emotionally and psychologically*

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<sup>60</sup> Exhibit R2: RSFIC, [33] - [35.7].

*abusive* and was *'disreputable conduct that was designed to make the aggrieved feel scared'*.<sup>61</sup>

- His victims have outlined lingering emotional and psychological issues stemming from his conduct.<sup>62</sup> Any future offending of a similar nature would have the potential to cause psychological or emotional injury and/or financial harm to members of the Australian community. Any risk of his reoffending in a similar nature is completely unacceptable.
- There is insufficient evidence to support a conclusion that Mr Rowe is now rehabilitated. The Tribunal should instead conclude that the risk of his further offending is unacceptable. In this regard the following matters are relevant:
  - In 2019, Queensland Corrective Services (**QCS**) conducted a risk assessment which scored Mr Rowe as a 7 out of 20 for his risk of reoffending.<sup>63</sup> QCS also assessed him as having a high risk level as a domestic violence perpetrator in 2019. In that assessment, it was noted that the applicant was unwilling to attend counselling and believed he would not benefit from it.<sup>64</sup> During his most recent time in custody, QCS assessed Mr Rowe's risk of reoffending, scoring his risk as 13 out of 22.<sup>65</sup>
  - The entirety of Mr Rowe's criminal conduct has involved him engaging in forms of family violence with an intention to coerce and control his former partners. This pattern has occurred in two separate relationships. The applicant states that when his second relationship broke down in 2022, he was under extreme work stress, he had invested a lot of money to support his partner at the time and his father had died.<sup>66</sup> He provides a limited explanation regarding the circumstances of his first relationship which broke down in 2019. He states *'[the applicant] was extremely hurt, felt disrespected, and resentment, about being lied to...'*<sup>67</sup>

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<sup>61</sup> Exhibit R1: G7, page 42.

<sup>62</sup> Exhibit R3: Tender Bundle 4, pages 144 and 186-187.

<sup>63</sup> Exhibit R3: Tender Bundle 5, page 225.

<sup>64</sup> Exhibit R3: Tender Bundle 5, page 221.

<sup>65</sup> Exhibit R3: Tender Bundle 5, page 216.

<sup>66</sup> Exhibit R1: G16, page 90.

<sup>67</sup> Exhibit R1: G16, page 89.

- Mr Rowe has provided a report dated 19 May 2023 from a psychologist, Mr Bruce Hamilton, which outlines Mr Rowe's engagement with Mr Hamilton for three one-hour intervention sessions in May 2023.<sup>68</sup>
- Mr Hamilton did not provide an expert assessment of Mr Rowe's risk factors or treatment for such risk factors. While this demonstrates an engagement with rehabilitation, the Respondent contends that less weight should be given in circumstances where a central motivation of an applicant's engagement with rehabilitation was to support his Visa application instead of a genuine desire to reform. Mr Hamilton's report states that '*He was referred for treatment with specific regard to his domestic violence offending, with an understanding that he was seeking to address his offending behaviour and obtain the option of remaining within Australia*'.<sup>69</sup> The history of Mr Rowe's offending, imprisonment and detention means that the efficacy of his rehabilitation efforts has not been tested in the community.
- He has also engaged in a range of online course, including a domestic violence course.<sup>70</sup>
- Mr Rowe's core explanation as to why he offended was that his decision-making process was affected by stress relating to his father's November 2022 death and an extreme work commitment.<sup>71</sup> His sister stated that he was unable to see his sick father during the COVID-19 pandemic which contributed to his stress.<sup>72</sup> Mr Rowe began his offending before the 2020 pandemic and before his father died. The Respondent contends that this explanation is inadequate to account for his pre-2020 offending and should raise doubts about his insight and causes of his 2022 offending. In the absence of clinical insight into what causes Mr Rowe's offending, the Tribunal should not be satisfied that he has adequately identified the factors influencing his offending and has taken appropriate steps to reduce his risk.

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<sup>68</sup> Exhibit R1: G33, page 119.

<sup>69</sup> Ibid.

<sup>70</sup> Exhibit R1: G36, pages 281-287.

<sup>71</sup> Exhibit R1: G16, page 90.

<sup>72</sup> Exhibit R1: G36, page 164.

- During the supervision period for his 2019 offending, QCS highlighted that Mr Rowe had showed an unwillingness to engage with rehabilitation.<sup>73</sup> Mr Rowe resisted attending intervention throughout the order and reported his new relationship (his second victim) was going well at the time.
- Traditional protective factors are not present for Mr Rowe. His work cannot serve as a protective factor, as it was a central risk factor which significantly contributed to his offending. He has no family where he plans to reside and his group of friends should be treated cautiously given their threatened role in the '*boys viewing party*'.<sup>74</sup> Furthermore, while Mr Rowe has an existing domestic violence order active until 2028, it is the Respondent's position that the previous orders have been ineffective in deterring Mr Rowe. His offer of \$10,000 to the victim to get her to withdraw her complaint suggests a degree of awareness about the potential consequences of a further domestic violence order.<sup>75</sup>
- Mr Rowe has expressed remorse on several occasions, but it is the Minister's position that any remorse and insight should be treated cautiously.<sup>76</sup> He has displayed a complete disregard for what effect his actions have on his victims and he asserted in the 2019 QCS assessment that he did not believe his actions '*constituted the Order being placed and denied that his actions would have caused distress to the victim*'.<sup>77</sup> In this assessment, he characterised his conduct as an attempt to reconsider and recommence their relationship. This was alongside a consistent attempt to blame exterior factors via a break-up and work stress.

77. Summarising the following additional contentions contained in Dr Donnelly's Reply in relation to paragraph 8.1.2:<sup>78</sup>

- In relation to Mr Rowe's motivation for undertaking rehabilitation, the distinction between intrinsic and extrinsic motivation is important, but it does not diminish the

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<sup>73</sup> Exhibit R3: Tender Bundle 5, page 221.

<sup>74</sup> Exhibit R1: G7, page 42.

<sup>75</sup> Exhibit R1: G7, page 43.

<sup>76</sup> Exhibit R1: G16, page 90.

<sup>77</sup> Exhibit R3: Tender Bundle 4, page 221.

<sup>78</sup> Exhibit A9.

value of the rehabilitation efforts. His motivation to engage in rehabilitation, even if initially influenced by the desire to support his Visa application, does not negate the potential benefits of the rehabilitation process. The fact that he has taken concrete steps towards addressing the issues, regardless of the initial motivation, is itself commendable and indicative of a positive change in behaviour.

- The primary goal of rehabilitation is to bring about behavioural change and ensure compliance with societal norms. If Mr Rowe has successfully completed a rehabilitation program and demonstrated a change in behaviour, this is a positive outcome that serves the interests of both the individual and the community, irrespective of the initial motivation.
- Mr Hamilton's report indicates that Mr Rowe was seeking to address his offending behaviour. This acknowledgement in a professional assessment should carry significant weight. The report does not explicitly state that the sole motivation for seeking treatment was Visa retention, rather it suggests a broader goal of addressing the offending behaviour.
- It is not uncommon for individuals to have multiple motivations for engaging in rehabilitation. The desire to remain in Australia could have been a catalyst for Mr Rowe to take the necessary steps towards reform. This does not necessarily detract from the genuineness of their efforts or the sincerity of their desire to reform.
- The focus should be on the outcomes of the rehabilitation and the potential for future conduct. If Mr Rowe has shown improvement and a lower likelihood of reoffending, these are the critical factors that should be weighed in assessing their rehabilitation efforts.
- Engaging in rehabilitation, regardless of the initial motivation, serves a preventive function. It demonstrates Mr Rowe's willingness to comply with legal and social expectations and reduces the risk of future offenses.
- In conclusion, while the Respondent raises concerns about Mr Rowe's motivations, the key consideration should be the effectiveness of the rehabilitation in bringing about behavioural change and reducing the risk of future offences. His engagement in the rehabilitation process, as evidenced by Mr Hamilton's report, is

a positive step towards this goal and should be given appropriate weight in assessing their case.

- The Respondent submitted as follows:<sup>79</sup>

*'It is the Minister's position that this explanation is inadequate to account for his pre-2020 offending and should raise doubts about his insight and causes of his 2022 offending. In the absence of clinical insight into what causes the applicant's offending, the Tribunal should not be satisfied that the applicant has adequately identified the factors influencing his offending and has taken appropriate steps to reduce his risk.'*

- The Tribunal now has the benefit of Dr Emily Kwok's 31 January 2024 report.<sup>80</sup> Dr Kwok has opined that it is likely that Mr Rowe was suffering from Major Depressive Disorder with anxious distress at the time of his more recent criminal offences.
- It is contended that the Tribunal assign diminished weight to Mr Rowe's recent criminal offences, in light of their association with his mental health concerns (**the Mukiza contention**). The Mukiza contention is not a prohibited consideration for the purposes of s501 CA(4)(b)(ii) of the Act: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR24 at 40.
- In *Mukiza and Minister for Home Affairs (Migration)* at [44], the Tribunal concluded:<sup>81</sup>

*'On that basis, it is proper to conclude, in accordance with well accepted principles of criminal justice, the criminal behaviour of a person who is affected by mental illness and whose mental health contributed to his offending in a material way, should be regarded as less culpable than an ordinary person so unaffected: R. v Hemsley [2004] NSWCCA 228 at [33] per Sperling J. The Tribunal takes the view that this is the proper approach to take when considering the seriousness of the Applicant's offending.'*

- The precedent set in *Hemsley* acknowledges that individuals affected by mental illness, who commit offences influenced by their condition, should be considered less culpable. Here, there is a real prospect Mr Rowe's more recent offending was materially linked to his ongoing mental health issues.
- As Dr Kwok explained:<sup>82</sup>

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<sup>79</sup> Exhibit R2: RSFIC, paragraph [35.4].

<sup>80</sup> Exhibit A8.

<sup>81</sup> *Mukiza and Minister for Home Affairs (Migration)* [2019] AATA 4445.

<sup>82</sup> Exhibit A8, at [88].

*'Based on his pattern of emotional responses to stressors, it is likely that he was suffering from Major Depressive Disorder with anxious distress as defined by the Diagnostic and Statistical Manual of Mental Disorders - 5th Edition (DMS- V) at the time of his more recent criminal offences. He stated that his symptoms at the time also included significant weight loss, fatigue and loss of energy, and diminished ability to exercise rational thinking and judgement.'*

***Tribunal's Consideration: The nature of the harm to individuals or the Australian community were Mr Rowe to engage in further criminal or other serious conduct.***

78. The Tribunal considers that the evidence before it demonstrates the nature of the harm to both the victims and the Australian community arising from Mr Rowe's past offending is both significant and material.<sup>83</sup>
79. If Mr Rowe was to reoffend in the same manner as his past convictions for *Distributing Intimate Images (between 20 February 2019 and 25 April 2019)* and *Threats to distribute intimate images or prohibited visual recording Domestic Violence Offence (on 9 November 2022)*, the nature of the resulting psychological and emotional harm and the consequences for affected individuals would be extremely serious and of likely indefinite duration. The secondary consequences of such offending in terms of counselling, policing and any court proceedings would have an impact on the Australian community.

***Tribunal's Finding: The nature of the harm to individuals or the Australian community were Mr Rowe to engage in further criminal or other serious conduct.***

80. The Tribunal finds that further future criminal conduct of the categories Mr Rowe has previously engaged in could result in extremely serious and long-term psychological, emotional and financial harm for the likely victims and, to a lesser but still material extent, the Australian community.

***Tribunal's Consideration: the likelihood of the non-citizen engaging in further criminal or other serious conduct.***

81. The Tribunal has holistically considered the totality of the parties' contentions, oral testimony and documentary evidence addressing the likelihood of Mr Rowe engaging in further criminal or serious conduct.

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<sup>83</sup> See Exhibit R3: Tender Bundle 4, pages 186-187.



82. The issues surrounding the consideration of risk under s.501(6)(d) of the Act, from which paragraphs 8.1.2(1) and (2) are drawn, have been extensively considered by the Tribunal and superior courts.<sup>84</sup>

83. The Full Court of the Federal Court in *Minister for Immigration and Ethnic Affairs v Baker* (1997) 73 FCR 187 (**Baker**), at 194 stated that the reference to ‘*criminal conduct*’ is:

*‘...not concerned with whether the conduct has had some temporal result, such as the incurring of a conviction, **but with the light that the conduct throws on the actor’s character**. Of course, in the absence of a prosecution and conviction, satisfaction that criminal conduct has occurred will not be attained on slight material.’*

(Emphasis added)

84. The Direction’s clear legislative intention is that the threshold is whether there is ‘a’ risk.<sup>85</sup> The *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth) specifically removed the word ‘*significant*’ from s 501(6)(d) leaving it as ‘a’ risk.<sup>86</sup> On this occasion the Explanatory Memorandum to the *Migration Amendment (Character and General Visa Cancellation) Act 2014* stated (at [46]):

*‘The purpose of this amendment is to clarify the threshold of risk that a decision maker can accept before making a finding that the person does not pass the character test in relation to paragraph 501(6)(d) of the Migration Act. The intention is that the level of risk required is more than a minimal or trivial likelihood of risk, without requiring the decision-maker to prove that it amounts to a significant risk.’*

85. In *Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160 (**Sabharwal**), the Full Court of the Federal Court (Perram, Murphy and Lee JJ) stated at [2]:

*‘... Section 501(6)(d)(i) provides that a person does not pass the character test if “in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would ... engage in criminal conduct in Australia”. The section requires an evaluative judgment by the decision-maker, in the present case the Minister personally, as to whether the decision-maker is satisfied that there is such “a risk.” Then, if the decision-maker is so satisfied, the decision-maker has a discretion to refuse to grant a visa to the person.’*

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<sup>84</sup> See, for example, *Rahman and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2020] AATA 888 (20 April 2020); *QKVH and Minister for Home Affairs* [2020] AATA 4431 (**QKVH 2020**); *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424; *GJJF and Minister for Home Affairs (Migration)* [2019] AATA 930 (17 May 2019); *Kayo Rerekura and Minister for Home Affairs (Migration)* [2019] AATA 153.

<sup>85</sup> See the discussion in *GJJF and Minister for Home Affairs (Migration)* [2019] AATA 930 (17 May 2019) at [48]–[52].

<sup>86</sup> See the discussion in *Roberts and Minister for Home Affairs (Migration)* [2018] AATA 3970 at [27].

86. In *Sabharwal* the Full Court noted that the Minister said he ‘*could not rule out the possibility of further offending by Mr Sabharwal.*’<sup>87</sup> The Full Court, citing Justice Moshinsky’s decision in *Coker v Minister for Immigration and Border Protection* (2017) 160 ALD 588, 608 [62], found that the Minister’s statement was, in substance, a finding that there was a risk of Mr Sabharwal re-offending.

87. In *Minister for Immigration and Ethnic Affairs v Guo* [1997] HCA 22; (1997) 191 CLR 559 (**Guo**) Chief Justice Brennan, Justices Dawson, Toohey, Gaudron, McHugh and Gummow of the High Court observed as follows (at 574-575):<sup>88</sup>

*‘The course of the future is not predictable, but the degree of probability that an event will occur is often, perhaps usually, assessable. Past events are not a certain guide to the future, but in many areas of life proof that events have occurred often provides a reliable basis for determining the probability – high or low – of their recurrence. **The extent to which past events are a guide to the future depends on the degree of probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity.** In many cases, when the past has been evaluated, the probability that an event will occur may border on certainty. In other cases, the probability that an event will occur may be so low that, for practical purposes, it can be safely disregarded. In between these extremes, there are varying degrees of probability as to whether an event will or will not occur. But unless a person or tribunal attempts to determine what is likely to occur in the future in relation to a relevant field of inquiry, that person or tribunal has no rational basis for determining the chance of an event in that field occurring in the future.’*

(Emphasis added)

88. Justice Mortimer explored the notion of risk and its nexus to future possibilities in *Murphy v Minister for Home Affairs* [2018] FCA 1924, [37], where Her Honour noted:<sup>89</sup>

*‘That is, part of the Tribunal’s task was to decide not only whether the Applicant might engage in further offending conduct if he were permitted to stay, but what level of risk any such conduct might pose to the Australian community, the possible level of violence of the conduct being at least one measure (but not the only measure) of how serious the risk was, or whether the risk should be “tolerated”.’*

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<sup>87</sup> *Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160, [58] (“**Sabharwal (FC)**”).

<sup>88</sup> *QKVH and the Minister for Home Affairs (“QKVH 2020”)* [2020] AATA 4431 (2 November 2020) at [5].

<sup>89</sup> *Murphy v Minister for Home Affairs* [2018] FCA 1924, [37].

89. Consequently, applying the reasoning described in **Baker**, **Sabharwal** and **Guo** to this matter, the Tribunal's task is to assess whether there is "a risk" or a likelihood of Mr Rowe engaging in further future criminal or serious conduct.
90. In conducting this assessment, the Tribunal has the benefit of Dr Kwok's 31 January 2024 report, the QCS September 2019 Risk of Re-Offending Assessment<sup>90</sup> and the QCS 1 March 2023 Risk of Re-Offending Assessment<sup>91</sup>. Chronologically, the 2019 QCS report scored Mr Rowe as 5 out of 20 in terms of his risk of re-offending, the 2023 QCS report scored him at 13 out of 22 with a high risk of perpetrating domestic violence<sup>92</sup> and Dr Kwok found that Mr Rowe presented with a moderate risk of reoffending that would reduce to a low risk if he followed and responded to a recommended treatment plan if he returned to the community.
91. A consideration of the risk or likelihood of Mr Rowe engaging in further criminal or serious conduct should encompass the factors that:
- (a) facilitate the risk; or,
  - (b) conversely, hinder or retard the risk.
92. Conducting this analysis enables the Tribunal, in making its assessment, to consider Justice Mortimer's question as to "*whether the risk should be "tolerated"*".

***Factors that facilitate the risk***

93. Based on the evidence and the contentions it appears to the Tribunal that while workload and personal stress (for example, his father's November 2022 death) present as risk factors for Mr Rowe, they are relevant but not essential to his reoffending risk crystallising. His 2019 convictions demonstrate that he offended without these factors between December 2018 and March 2019.<sup>93</sup> This is supported by Dr Kwok's observations:<sup>94</sup>

*'According to Mr Rowe, he committed the offences because he "was mentally exhausted" and was "not coping" with the separation, his partner entering a new*

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<sup>90</sup> Exhibit R3: Tender Bundle 5, page 225.

<sup>91</sup> Exhibit R3: Tender Bundle 5, page 216.

<sup>92</sup> Exhibit R3: Tender Bundle 5, page 223.

<sup>93</sup> Transcript, page 25, line 45.

<sup>94</sup> Exhibit A8 at [80].

*relationship, his father's death, and other work-related stressors. However, since Mr Rowe's offending began before his father passed away, it is reasonable to suggest that other factors also contributed to his problematic behaviours. Among other similar offenders, some of the motives behind the threats and actual sharing of images include getting back at an ex-partner for dumping them, proving status in the relationship, exposure of ex-partner, repairing their damaged sense of masculinity, desire for humiliation and degradation of the ex-partner, and desire for control over the ex-partner.'*

94. The witness statement from his former partner that was not contested in the Tribunal hearing suggests that he likes to take intimate images in a relationship.<sup>95</sup>

*'[5.] In October 2019 Andy [the Applicant] and I were engaged to be married. I proposed to him and he accepted. We jointly purchased the engagement ring.*

*[6.] I would routinely go to bed before Andy, because he liked to stay up late. One night I went to sleep and I was only sleeping fairly lightly. I heard the noise of a photograph being taken. I stirred and saw that Andy was taking a photograph of me whilst I was sleeping. I asked him what he was doing and he told me that I looked so beautiful whilst I was sleeping that he wanted a photo. I found this to be unusual, but believed him.*

*[7.] In 2020, our relationship changed in that Andy occasionally asked me for naked photos of myself. This gradually changed to the point where Andy expected me to walk around the house naked, where he could take photographs of me in this state whenever he wanted to. It became a feature of our relationship that Friday nights and Saturday nights were 'naked nights'. Andy would purchase lingerie for me, and I was expected to model these items. Then he would expect me to parade naked before him, in front of his wood-fire, lounge and kitchen. He expected sex from me, and would take more photos of me and then us having sex together. I also knew from time to time that Andy would take videos of me in this state. He would make me hang out the washing whilst I was nude. There were a couple of times that he wanted me to cook whilst I was nude.*

*[8.] I spoke to Andy numerous times about these photos and videos, and asked him to delete them. He always told me that they were for his eyes only. He would often show me his phone, and I could see that they had been removed from his phone and digital camera. I did not know that prior to deleting them from his phone and camera that he had downloaded them to his Ipad(s) [sic].'*

and

*'[13.] After about a month, Andy apologised to me and offered that I could come back to live with him until I found a place of my own. I accepted this offer and moved back into his place. Having said that, I did not take much in the way of property back to Andy's place, because it was only going to be a short-term arrangement. This would have occurred roughly in November 2021.*

*[14.] Andy was not shy about demanding that I pose for more naked photos and videos as soon as I moved back in. I reluctantly gave in to him. I offered to pay rent*

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<sup>95</sup> Exhibit R3: Tender Bundle 4, pages 181 – 184; See also Exhibit R3: Tender Bundle 2, Agreed Facts, pages 8 – 10.

*to stay there, but he declined my offer. We slept in separate beds at opposite ends of the house.'*

and

*'[20.] Andy still came to my place up until about my daughter's wedding in April 2022. The last time that I went to his place was in May/June 2022. Our sex-life had dramatically decreased. We totally stopped having sex about May/June 2022. Andy was still holding it over my head that I owed him money and that the bank still had the title of his place for collateral for my home-loan. As I mentioned in paragraph 17, Andy communicated that he wanted me to send me nude photographs of myself via a series of emails and texts. Andy was angry that I didn't make myself available for producing explicit 2 minute videos of myself.*

*[21.] A feature of Andy's messages to me were his use of emojis. I knew that if Andy sent me emojis of glasses of beer, a tv, a fireplace, black 8 balls, a camera and a pair of round eyes, that what he meant was that he wanted to see me naked, take photos/videos of me whilst I was naked, drink alcohol and have sex.*

*[22.] Some strategies that I used (unsuccessfully) to deal with this were that I would send him old photos of myself, but he would then complain that he already had a photo of me with that particular pose and lingerie. Another strategy that I tried was by telling him that I was out with the girls and couldn't communicate with him then. He walked to my place and saw that I was home and then he was very upset with me.'*

95. The Tribunal questioned Dr Kwok about Mr Rowe's behaviour in terms of releasing or threatening to release intimate images as follows:<sup>96</sup>

*'Tribunal: Appreciating this is going outside the scope of your report, and you've qualified your report appropriately, and I thank you for that, but would you consider that to be a form of coercive control?*

*Dr Kwok: It may be. It may be a form of him wanting to still have an element of control in situations where he felt he has lost his control.'*

96. The Tribunal considers, based on this information, that the key risk factor for Mr Rowe is his entering into and being in an intimate relationship.

97. Mr Rowe addressed this risk factor in his oral testimony:

*'Dr Donnelly: What confidence can the tribunal have that you won't commit further offences, particularly family violence-related offences?*

*Mr Rowe: Say that again, please.*

*Dr Donnelly: What confidence can you have – what confidence can the tribunal have that you won't commit further offences if you're returned to the community?*

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<sup>96</sup> Transcript, page 49, lines 41 – 45.

*Mr Rowe: I will absolutely – there will not be any further domestic violence offences, there will be no further involvement with police full stop.*

*Dr Donnelly: Can you explain to the tribunal a bit more about that assertion? I mean, that's your view, but what confidence can the tribunal have apart from your assertion of that?*

*Mr Rowe: My main aim is just to get back to work and get on with my – sort out my health, and my mental health. That is my main concern.<sup>97</sup>*

And

*'Mr Hawker: But you don't intend to spend the rest of your life avoiding relationships. There's a possibility that you might end up in a relationship in the future, correct?*

*Mr Rowe: I've got no intention of ever being in a relationship again.*

*Mr Hawker: But there's a possibility that you might end up in a relationship?*

*Mr Rowe: No. It would be next to zero. I've got no interest now. I'm too old.*

*Mr Hawker: You accept, don't you, that the evidence suggests that there is a risk that you'll reoffend, on the current state of the material?*

*Mr Rowe: I believe there's zero risk. There's absolutely – there is no risk.*

*Mr Hawker: All right. So you don't accept your own psychologist's opinion?*

*Mr Rowe: No, I do. I accept her report, but I'm just saying from me personally, there is – it will never ever happen again.<sup>98</sup>*

98. The High Court's reasoning in **Guo** that 'the extent to which past events are a guide to the future depends on the degree of probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity' can be applied here.
99. The Tribunal has assessed Mr Rowe's credibility above. It notes from the material before it that Mr Rowe has been in at least three relationships since he arrived in Australia. Combining these factors with the principle drawn from **Guo** above regarding past conduct, the Tribunal finds it plausible that Mr Rowe will again enter into an intimate relationship, despite his assertions in his oral testimony, and consequently recreate what has been identified as his key risk factor.
100. The Tribunal identifies, from the evidence and Dr Donnelly's contentions in this matter two other interlinked risk factors involved in Mr Rowe's offending – the impact of stress on Mr

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<sup>97</sup> Transcript, page 6, lines 22-34.

<sup>98</sup> Transcript, page 35, lines 1-20.

Rowe and his tendency to work long hours and for long periods without breaks. While Mr Rowe asserts that he will be more conscious of these factors in the future, there is no evidence to support his claim beyond his assertion. To the contrary, Mr Rowe made it clear in his oral testimony regarding his work that from since Christmas 2013 until presumably his imprisonment he worked seven days a week.<sup>99</sup> As noted above, the Tribunal found Mr Rowe most credible when he was giving oral testimony about his businesses and his work.

***Factors that hinder or retard the risk – Rehabilitation, Remorse and Risk Management Factors***

101. Mr Rowe provided oral testimony and presented extensive documentary evidence<sup>100</sup> asserting the extent and nature of his rehabilitation, his enrolment in or undertaking rehabilitation courses<sup>101</sup> and his expressions of remorse about his offending:

*Dr Donnelly: All right. And what has life been like for you in Pinkenba the detention centre?*

*Mr Rowe: Very restrictive, but I have done a lot of courses and rehabilitated since I've been in here.*

*Dr Donnelly: All right. Well, let's turn to those briefly. So at paragraph 9 to 15 of your statement, you refer to a number of the programs that you've undertaken. Now I just want you to bring that up on your laptop or iPad there. Let me know when you've done that, Mr Rowe?*

*Mr Rowe: Yes. My statement?*

*Dr Donnelly: Yes. Paragraph 9. So there's reference to completing – sorry – participating in the Family Violence Foundation program and there's also reference to the IDAS at paragraph 10, it's basic awareness online training. And some other courses that are family violence-based. What brought you to do these rehabilitation program?*

*Mr Rowe: I just realised that I needed to change, my whole outlook needs to change. I need to show more consideration for others and more empathy to make sure I don't repeat, which I won't, I will not repeat the same – make the same mistake again.*

*Dr Donnelly: So can you tell the tribunal what, if anything, you learned from these family violence programs?*

*Mr Rowe: Why I did them?*

*Dr Donnelly: No. What, if anything, did you learn from these family violence programs that you completed?*

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<sup>99</sup> Transcript, page 9, lines 4-10.

<sup>100</sup> Exhibit A3.

<sup>101</sup> Ibid.

*Mr Rowe: Just to show more empathy, more consideration and more respect. And have concerns for other people.*

*Dr Donnelly: When you say (audio malfunction) are you referring to a particular kind of people, are you referring to (audio malfunction)?*

*Mr Rowe: What was that sorry?*

*Dr Donnelly: When you refer to show more empathy, more respect - - -?*

*Mr Rowe: Yes.*

*Dr Donnelly: Is that – give me some more context to that, what are you referring to?*

*Mr Rowe: Just have more consideration for other people, show them the respect that they deserve.*

*Dr Donnelly: (Audio malfunction)?---(Audio malfunction) go on.*

*Dr Donnelly: Sorry, go on, I missed that?*

*Mr Rowe: I just want to make this the turning point in my life.*

*Dr Donnelly: How many programs do you think you've done in immigration detention?*

*Mr Rowe: Since I've been in detention?*

*Dr Donnelly: Yes?*

*Mr Rowe: Overall, it's about 25 or 26.*

*Dr Donnelly: And this is – in what area, what (audio malfunction) sort of rehabilitation have you been doing?*

*Mr Rowe: What sort of rehabilitation?*

*Dr Donnelly: Yes?*

*Mr Rowe: The majority are domestic violence, but also listening skills, there's plenty of them. Hang on, I can get them out.*

*Dr Donnelly: No. I don't want you off the phone, that's fine. So let's just come back to the listening skills, what was the listening skills program about?*

*Mr Rowe: Just about taking other people's considerations into thought before you make your own up and go in the wrong direction.*

*Dr Donnelly: All right. Tell the tribunal how much time you think you've spent on rehabilitation in detention in terms of days or months or hours?*

*Mr Rowe: On rehabilitation alone?*

*Dr Donnelly: Yes?*

*Mr Rowe: It would be months, literally months. Because some of the courses are two and a half hours, some are eight hours, but fitting that in along with activities, yes, it takes a long time to do them.<sup>102</sup>*

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<sup>102</sup> Transcript, page 4, line 32 – page 5, line 46.



102. Mr Rowe describes the courses he has undertaken in his statement:<sup>103</sup>

*[9.] Since my conviction have embarked on a transformative journey, dedicating myself to various rehabilitation programs to address the root causes of my past behaviours. For example, I participated in the "Family Violence Foundations" program in early December 2023. This course opened my eyes to the complexities and deep-seated issues surrounding family violence. It provided me with foundational knowledge about the dynamics of domestic abuse, helping me understand the impact of my actions on victims and their families.*

*[10.] Subsequently, I completed the "IDAS Domestic Abuse Basic Awareness Online Training" and the "Responding to Domestic and Family Violence" courses. These programs were instrumental in deepening my understanding of domestic abuse. They taught me how to recognise the signs of domestic violence and the importance of responding appropriately to such situations. This was complemented by the "Know Domestic Violence Course," which further enhanced my awareness and sensitivity towards the issue, broadening my perspective on the different forms domestic violence can take.*

*[11.] In mid-December, I took the "Listening Skills 101" course, which was a turning point in my rehabilitation taught me the value of active listening, empathy, and effective communication, skills that I lacked in the past. This course helped me realise how crucial it is to understand and respect others' perspectives and feelings, a realisation that has been fundamental in my personal growth.*

*[12.] I also participated in the "White Ribbon Australia: Prevention of Violence Against Women for Workplaces" program, which educated me about the importance of creating safe and respectful environments, especially in professional settings.*

*[13.] Towards the end of December, I engaged in more specialised training, including "Violence Against Women and Domestic Violence" and the "Fundamentals of Domestic Violence and Abuse" courses. These programs offered in-depth insights into the societal and psychological aspects of violence against women and domestic abuse. They equipped me with the knowledge to not only refrain from such behaviour but also to advocate against it in my community.*

*[14.] Finally, by way further example, I completed the "Level 1 and Level 2 Screening Tools" and the "Level 2 Safety Planning Tool" courses from the Queensland Domestic and Family Violence Common Risk Framework were particularly impactful. They provided me with practical tools to identify and assess the risk of domestic violence, as well as strategies for safety planning. These skills are invaluable, not only for my personal development but also in contributing positively to society by helping others who might be in similar situations.*

*[15.] Through these comprehensive educational efforts, I am earnestly working towards becoming a responsible, informed, and empathetic individual, dedicated to making amends and preventing the recurrence of such harmful behaviours.'*

103. The Tribunal observes that Mr Rowe's rehabilitation efforts, while extensive, are relatively recent in relation to his 2018-2022 offending and have not been tested in terms of an

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<sup>103</sup> Exhibit A1.

intimate relationship or in the general community. A further complexity is added by Mr Rowe's oral testimony when asked by Dr Donnelly about his offending:

*'Dr Donnelly: In terms of your offending against females, particularly the threats to release pornographic images and so forth, are you aware of those?*

*Mr Rowe: Yes*

*Dr Donnelly: What could possibly invoke you to do that?*

*Mr Rowe: **I've read back over the charges and I really cannot understand my (indistinct) thinking back then.** So again, that's a further indication of mental health problems which I need to address and have addressed with the rehabilitation programs.'*<sup>104</sup>

(Emphasis added)

104. The Tribunal is particularly concerned at Mr Rowe's apparent lack of insight into his thinking and decision-making leading into his offending.
105. Dr Donnelly makes what he terms '*the Mukiza contention*'.<sup>105</sup> As the Tribunal understands it, this contention argues that the Tribunal should assign diminished weight to Mr Rowe's recent criminal offences in view of their association with Mr Rowe's mental health concerns. The contention is based on the decision in *Mukiza and Minister for Home Affairs (Migration)* and His Honour Justice Sperling's judgment in *R v Hemsley* [2004] NSWCCA 228.
106. Addressing this contention, the Tribunal acknowledges that the Respondent, in response, cited Deputy President Pascoe's decision in *Sarpur and Minister for Immigration, Citizenship and Multicultural Affairs (Migration)*<sup>106</sup> at [87] to [89]:

*'[87] The Tribunal's attention was brought to two cases previously heard in the Tribunal, namely Mukiza and Minister for Home Affairs [2019] AATA 4445, and Mukiza and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] AATA 1448, to support an argument that the link between the Applicant's mental health and his offending reduced his moral culpability and therefore this first consideration should be given less weight.*

*[88] Every case before the Tribunal turns on its own facts, and in those cases the facts and evidence before the Tribunal are significantly different to those in this case. In particular, I note that while there were some similarities, the Applicant in those cases also suffered a serious psychiatric illness, and the offences of that Applicant were considered by the Tribunal in the first instance to be 'largely personal to the Applicant rather than offending which involved and affected other people at large'.*

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<sup>104</sup> Transcript, page 14, lines 2-9.

<sup>105</sup> Exhibit A9: Applicant's Reply at [12].

<sup>106</sup> *Sarpur and Minister for Immigration, Citizenship and Multicultural Affairs (Migration)* [2024] AATA 17.

*The Tribunal is not faced with similar circumstances in this matter. Rather, in this case the Applicant's offending caused harm to other people, including a minor. Accordingly, I give this argument no weight.*

*[89] Whilst I do not accept the argument that the Applicant is of low risk of reoffending, I am of the view that the level of risk should be assessed as being at the high end of moderate to high, given the Applicant's efforts to address his mental health issues and substance abuse, which must be weighed against the lack of an up to date psychological assessment, and the fact that the Applicant has not undergone specific counselling to deal with his sexual offending.'*

107. In *Mukiza and Minister for Home Affairs [2019] AATA 4445*, the Tribunal found that Mr Mukiza had been treated for schizophrenia since he was a teenager.
108. In *R v Hemsley*, Justice Sperling observed that Ms Hemsley had been sexually abused as a child by her father, had been diagnosed with Hodgkin's Lymphoma at the age of 21 years, had surgery including a mastectomy as well as also having radiation and chemotherapy, had a borderline personality disorder and suffered major depression.
109. Justice Sperling also offered the following analysis in *Hemsley*:

*'[33] Mental illness may be relevant – and was relevant in the present case – in three ways. First, where mental illness contributes to the commission of the offence in a material way, the offender's moral culpability may be reduced; there may not then be the same call for denunciation and the punishment warranted may accordingly be reduced: Henry at [254]; Jiminez [1999] NSWCCA 7 at [23]; Tsiaras [1996] VicRp 26; [1996] 1 VR 398 at 400; Lauritsen [2000] WASCA 203; (2000) 114 A Crim R 333 at [51]; Israil [2002] NSWCCA 255 at [23]; Pearson [2004] NSWCCA 129 at [43].*

*[34] Secondly, mental illness may render the offender an inappropriate vehicle for general deterrence and moderate that consideration: Pearce (NSW CCA, 1 November 1996, unreported); Engert (1995) 84 A Crim R 67 at 71 per Gleeson CJ; Letteri (NSW CCA, 18 March 1992, unreported); Israil at [22]; Pearson at [42].*

*[35] Thirdly, a custodial sentence may weigh more heavily on a mentally ill person: Tsiaras at 400; Jiminez at [25]; Israil at [26].'*

110. Dr Kwok found it likely that Mr Rowe had Major Depressive Disorder with anxious distress at 'the time of his more recent criminal offences'.<sup>107</sup>
111. Considering these authorities and the evidence before it, the Tribunal considers and finds that this matter aligns more with the context of *Sapor* than with *Mukiza* or *Hemsley*. Mr

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<sup>107</sup> Exhibit A8: Dr Kwok's report at [88].

Rowe's actions harmed other people. The Tribunal is also not satisfied, on the information and evidence before it, that the linkage between Mr Rowe's likely Major Depressive Disorder and his offending is fully made out or established by the evidence.

112. In terms of Mr Rowe demonstrating remorse, the Tribunal notes the following:

- There is no suggestion of Mr Rowe demonstrating remorse in either of the two sentencing (19 September 2019 and 27 February 2023) decisions.<sup>108</sup>
- There is no evidence before the Tribunal as to whether or not Mr Rowe has deleted the intimate images which are the subject of his convictions.
- Mr Rowe's 29 December 2023 statement includes the following:

*'I am remorseful for the pain I've inflicted.'*<sup>109</sup>

and

*'My past actions cannot be undone, but I can and will work tirelessly to ensure that my future actions reflect the lessons I've learned and the remorse I feel.'*<sup>110</sup>

- Dr Kwok's 31 January 2024 report observes:

*'He expressed regret and remorse for his offending behaviours, and communicated an understanding of the impact of his behaviours on his victims.'*<sup>111</sup>

- His expressions of remorse in his oral testimony had a general and rote quality to them, as observed by the Tribunal, that did not go into the details of his offending and instead had a generic quality not unlike the recitation of a shibboleth.<sup>112</sup>
- Under questioning by the Tribunal:

*'Tribunal: Thank you. And appreciating the limitations, but have you ever tried to take any actions to show your remorse for your actions?'*

*Mr Rowe: It'd be nice if I could write them a letter, but again, I'm not allowed to until after the DVAs are run out.'*<sup>113</sup>

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<sup>108</sup> Exhibit R1: G7 and G8.

<sup>109</sup> Exhibit A1: At [4].

<sup>110</sup> Exhibit A1: At [8].

<sup>111</sup> Exhibit A8 at [83].

<sup>112</sup> Transcript, page 4, line 32 – page 5, line 46.

<sup>113</sup> Transcript, page 39, lines 5-8.

### ***Risk Analysis and Consideration***

113. The evidence identifies several static and dynamic risk management factors for Mr Rowe. These include a network of friends and family and the practices and insights he has gained from his pursuit of rehabilitation while in immigration detention.
114. Mr Rowe's extensive rehabilitative efforts have not been tested in the general community. This is especially pertinent given that the key risk factor identified above is Mr Rowe entering or being in an intimate relationship with a woman. This scenario is obviously not available to Mr Rowe in immigration detention.
115. Mr Rowe's embrace of rehabilitation is relatively recent.<sup>114</sup>
116. The QCS records are pertinent here:
- 17 September 2020:<sup>115</sup>

*'Employment Risk Note:*  
*Still working 8-12 hour days, 6 days a week.*

*Substance Abuse Risk Note:*  
*Mr Rowe reports to having "a drink or two" every now and then. Only on some of his shorter work days. When he works long days he just wants to crash and go to sleep.*

***Relationships Risk Note:***  
***Still not wanting to engage in DV counselling or be referred. Reports there are no issues at home.'***
  - 10 August 2020:<sup>116</sup>

*'Employment Risk Note:*  
*Works up to 12 hours per day*  
*fixing earth moving equipment*

*Substance Abuse Risk Note: Nil disclosed.*

***Relationships Risk Note: Denied any issues within his relationship with his partner- have been getting along well. Highly resistant towards intervention.'***

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<sup>114</sup> Exhibit R1: G16 at page 90, on 31 May 2023.

<sup>115</sup> Exhibit R3: Tender Bundle 5, page 200.

<sup>116</sup> Exhibit R3: Tender Bundle 5, page 200.

- 5 May 2020:

*'Employment Risk Note:*

*His work continues to be busy even through COVID.*

*Mental Health Risk Note:*

*Nil issues to report.*

*Relationships Risk Note:*

***DV check - Rowe is still resistant to undertaking the UCC Men Choosing Change program. He advised that he has not had contact with his Ex and she has not contacted him either. He advised that his current relationship continues to go well.***

*They communicate well together. **Denied any DV**'.*<sup>117</sup>

- 25 October 2019:

*'Mr Rowe advised that his Partner, [name redacted], is his main support. He noted that he also has a few friends he does go to for advice adding that **however he is typically prefers to rely on himself***'<sup>118</sup>

and

*'Mr Rowe is currently listed in a no contact DVO with person) 05/03/2019-04/03/2024. Mr Rowe advised that the Order was placed after moved onto a new partner. Mr Rowe advised that he was sending her emails to reconsider and recommence their relationship and as a result the Order was placed.*

***Mr Rowe reported that he does not believe his actions constituted the Order being placed and denied that his actions would have caused distress to the victim.***

*Mr Rowe reported that he has moved on and no longer noted that he doesn't want anything to do with her or her new partner. **Mr Rowe reported that he does not think he would benefit from counselling and is unwilling to attend***'<sup>119</sup>

(Emphasis added)

117. In her 27 February 2023 sentencing remarks, Magistrate McGarvie stated:<sup>120</sup>

*'On the 19 of September 2019, you were dealt with for further domestic violence offences. Those offences did breach the terms of the good behaviour order. Those offences were stalking between the 24 of December 2018 and the 26 of March 2019. Disturbingly, again, distributing intimate images between the 20th of February 2019 and the 25 of April 2019. And three breaches of a domestic violence protection order. For that offending, you were sentenced to a term of imprisonment which was wholly*

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<sup>117</sup> Exhibit R3: Tender Bundle 5, page 201.

<sup>118</sup> Exhibit R3: Tender Bundle 5, page 221.

<sup>119</sup> Exhibit R3: Tender Bundle 5, page 221.

<sup>120</sup> Exhibit R12: G7, page 43, lines 22 – 31.

*suspended for a period of 12 months and you were also offered an opportunity to participate in probation.*

***Despite that, I am told, you have not engaged in any behavioural change programs.***

(Emphasis added)

118. Mr Hamilton's 19 May 2023 report states in regard to Mr Rowe:<sup>121</sup>

*'He was referred for treatment with specific regard to his domestic violence offending, with an understanding that he was seeking to address his offending behaviour and obtain the option of remaining within Australia.'*

119. None of the rehabilitation courses appear to address Mr Rowe's general resilience to stress or his tendency to work long hours for long periods.

120. Mr Rowe's expressions of remorse, demonstrations of which are set out above, appear to be relatively recent. Additionally, Mr Hawker observed in his closing submissions that Mr Rowe had only made bare assertions of remorse. The Tribunal agrees with this observation, noting that Mr Rowe did not identify his victims or make specific expressions of remorse about any individual victim.

121. A further consideration is Mr Rowe's traffic offending. In isolation, it is effectively characterised by Dr Donnelly. However, when considered in conjunction with his criminal offending and DVO breaches, the combination suggests that Mr Rowe has a problematic approach to complying with laws.

122. Notwithstanding Mr Rowe's assertions in his oral testimony and acknowledging its findings about his credibility above, the Tribunal finds no certainty as to whether Mr Rowe would continue with his rehabilitation efforts if allowed to stay in Australia.

123. As the Respondent contended:

*'Traditional protective factors are not present for Mr Rowe. His work cannot serve as a protective factor, as it was a central risk factor which significantly contributed to his offending. He has no family where he plans to reside and his group of friends should be treated cautiously given their threatened role in the 'boys viewing party'.<sup>122</sup> Furthermore, while Mr Rowe has an existing domestic violence order active until*

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<sup>121</sup> Exhibit R1: G33, page 119.

<sup>122</sup> Exhibit R1: G7, page 42.

*2028, it is the Respondent's position that the previous orders have been ineffective in deterring the applicant. His attitude towards those orders was contemptuous given he attempted to pay \$10,000 to the victim to not seek such an order.*<sup>123</sup>

124. The Tribunal has considered the evidence above, applying **Guo** that the extent to which past events are a guide to the future depends on the degree of probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity.
125. Based on Mr Rowe's past, risk factors such as intimate relationships, stress and work pressure increase his risk of engaging in problematic behaviour which manifests as a risk of reoffending. Acknowledging his evident rehabilitation efforts, the Tribunal cannot be satisfied that these are sufficient to compensate, manage or neutralise the risk factors. If the Tribunal decided to set aside the Visa cancellation decision it is cognisant that Mr Rowe would, more likely than not based on his evidence of his work habits, work long hours for much of the week to re-establish his businesses.

***Tribunal's finding: Risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.***

126. The Tribunal finds that the risk to the Australian community should Mr Rowe commit further offences or engage in other serious conduct both exists and is a material risk.

**Conclusion: Primary consideration 1: Protection of the Australian community**

127. With reference to the weight attributable to this consideration:
- (a) The Tribunal finds that the nature and seriousness of the totality of Mr Rowe's conduct to date has been very serious;
  - (b) The Tribunal finds that recommitment of almost any aspect of Mr Rowe's criminal offending has the very real potential for the occasioning of physical, psychological and even catastrophic harm to potential victims. Ancillary to this finding the Tribunal finds, pursuant to paragraph 8.1.2(1) of the Direction, that any of Mr Rowe's conduct

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<sup>123</sup> Exhibit R1: G7, page 43.



and the harm that would be caused, if it were to be repeated, is so serious that any risk of its recommission is likely unacceptable to the Australian community; and

- (c) The Tribunal finds that Mr Rowe represents a material recidivist risk if returned to the community.

128. This consideration weighs very heavily and substantively in favour of affirming the delegate's decision not to revoke the mandatory cancellation of Mr Rowe's Visa.

#### **PRIMARY CONSIDERATION 2: FAMILY VIOLENCE COMMITTED BY THE NON-CITIZEN.**

129. Paragraph 8.2 of the Direction states:

- 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) *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 noncitizen's migration status, should the non-citizen engage in further acts of family violence.*

130. Paragraph 4 of the Direction defines family violence as:

*'... violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the **family member**), or causes the family member to be fearful. Examples of behaviour that may constitute family violence include:*

- (a) an assault; or*
- (b) a sexual assault or other sexually abusive behaviour; or*
- (c) stalking; or*
- (d) repeated derogatory taunts; or*
- (e) intentionally damaging or destroying property; or*
- (f) intentionally causing death or injury to an animal; or*
- (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or*
- (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or*
- (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or*
- (j) unlawfully depriving the family member, or any member of the family member's family, or his or her liberty.'*

131. Summarising Dr Donnelly's contentions on this consideration:<sup>124</sup>

- Mr Rowe's criminal history, notably from 2019 to 2023, includes multiple instances of family violence, including threats to distribute intimate images, unlawful stalking, and contravention of domestic violence orders. This pattern indicates a concerning frequency of offences.
- The offences span various forms of family violence, with an observable trend of increasing severity, especially considering the repetitive nature of these crimes.

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<sup>124</sup> Exhibit A2.

- The repetitive nature of Mr Rowe's offences likely caused escalating psychological and emotional distress to the victims, particularly in a domestic setting. Such repeated acts undermine the values and safety norms upheld within the community, contributing to a broader negative impact.
- Mr Rowe's completion of numerous rehabilitation programs indicates a degree of acceptance of responsibility for his actions. This is crucial for meaningful rehabilitation.
- His undertaking courses such as "Listening Skills 101" and "Know Domestic Violence Course" suggest an effort to comprehend the impact of his actions on victims, especially considering the focus on empathy and understanding in these programs.
- His engagement in specific courses like "White Ribbon Australia: Prevention of Violence Against Women for Workplaces" reflects an effort to address the underlying factors contributing to his conduct. The Tribunal would also consider and note the various other rehabilitation programs completed by Mr Rowe outlined under the primary consideration of the protection of the Australian community.
- It is important to take into account that the issuance of a protection order and subsequent court appearances regarding breaches of that order should have served as a clear deterrent to Mr Rowe against engaging in additional acts of family violence. Despite this, he continued to partake in such conduct subsequent to these warnings. The fact that he proceeded to commit acts of family violence even after explicit admonitions from law enforcement and judicial authorities is particularly troubling and merits serious consideration.
- While Mr Rowe's criminal history reveals a concerning pattern of family violence, his recent rehabilitation efforts indicate a commitment to addressing and rectifying his behaviour. The completion of various courses demonstrates an acknowledgment of the seriousness of his actions and a willingness to reform. This commitment to rehabilitation, coupled with no known re-offending since the last warning, suggests a positive direction in his behaviour. However, it is imperative to balance these rehabilitation efforts against the severity and frequency of his past actions. The seriousness of his offences, particularly their cumulative impact on victims and the community, cannot be overlooked.

- This primary consideration weighs against Mr Rowe.
132. Summarising Dr Donnelly's contentions in his Reply:<sup>125</sup>
- The Respondent contended that another cumulative effect of family violence conduct is the allocation of public resources required to deal with such conduct. This should be considered again in light of Her Honour Justice Meagher's judgment in *Buntin v Minister for Immigration, Citizenship and Multicultural Affairs*<sup>126</sup> [2023] FCA 1055 and specifically at paragraph [105].
133. Summarising the Respondent's contentions on this consideration
- Family violence includes violent, threatening or other behaviour by a person that coerces or controls a member of the person's family or causes the family member to be fearful. The Respondent contends that 10 out of Mr Rowe's 12 convictions were for family violence related conduct.
  - In terms of whether the victim was a member of Mr Rowe's family, paragraph 4(1) of Direction 99 provides that a '*member of the person's family for the purposes of the definition of family violence, includes a person who has, or has had an intimate personal relationship with the relevant person*'. Given the length of the relationship, its intimate nature and financial support Mr Rowe provided, it is the Respondent's contention that his ex- partners were members of his family.
  - However, the two remaining offences of *threats to distribute intimate image of prohibited visual recording to another person domestic violence offence* were committed against the victim's current partner and her father. They cannot be considered members of Mr Rowe's family.
  - An application for a protection order is available from 2019. This application shows a pattern of behaviour where Mr Rowe has used intimate photos to coerce the victim and harassed her in excess over a period of three days.<sup>127</sup> The victim reported feeling stressed and stalked by Mr Rowe.<sup>128</sup>

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<sup>125</sup> Exhibit A9.

<sup>126</sup> *Buntin v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1055.

<sup>127</sup> Exhibit R3: Tender Bundle 4, pages 72-74.

<sup>128</sup> Exhibit R3: Tender Bundle 4, page 71.

- The most recent application for a protection order contains similar conduct as mentioned in the previous 2019 order. The victim states that she was fearful of what Mr Rowe would do to her and what he would do with the information he had.<sup>129</sup> The victim provides a comprehensive record of his conduct against her, which details Mr Rowe’s threats to release the intimate images, threats to have the victim’s cat sold or killed and the various times he has appeared in-person or trespassed on the victim’s property.<sup>130</sup> The Respondent contends that this is evidence from an independent source indicating that Mr Rowe has been involved in the perpetration of family violence.
- Mr Rowe has breached domestic violence orders on six occasions. He breached these by continuing to contact the victims, their families, their workplaces and interacted with them in-person.<sup>131</sup>
- This consideration weighs in favour of non-revocation of the Visa cancellation decision because of the nature of the conduct and because it has been repeated and escalated (paragraph 8.2(3)(a) of Direction 99). Mr Rowe had been repeatedly warned several times with various domestic violence protection orders, which were breached on an ongoing basis (paragraph 8.2(3)(d) of Direction 99).
- The cumulative effect of repeated acts of family violence (paragraph 8.2(3)(b) of Direction 99) was aptly described by Deputy President Kendall (as his Honour then was) in *XFKR and Minister for Immigration and Border Protection* at [45], as follows:<sup>132</sup>

*“...violence that is gendered and directed at women (and which seeks to degrade and dehumanise women on the basis of sex) ...normalises those socially enforced gender imbalances that allow sex based inequalities and violence to arise in the first place. The impact this has, socially, on systemic equality between the sexes cannot be underestimated.”*
- Another cumulative effect of family violence conduct is the allocation of public resources required to deal with such conduct (paragraph 8.2(3)(b) of Direction 99).

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<sup>129</sup> Exhibit R3: Tender Bundle 4, page 86.

<sup>130</sup> Exhibit R3: Tender Bundle 4, pages 88-98.

<sup>131</sup> Exhibit R3: Tender Bundle 4, pages 117-135 and 152-187.

<sup>132</sup> *XFKR v Minister for Immigration and Border Protection* [2017] AATA 2385.

- Mr Rowe has expressed some sentiments of remorse and insight into his family violence conduct (paragraphs 8.2(3)(c)(i) and (ii) of Direction 99), but as noted above, these sentiments ought to be treated cautiously.
- Mr Rowe's efforts to address the factors which contributed to his family violence conduct (paragraph 8.2(3)(c)(iii) of Direction 99) have been limited. He has expressed that he has engaged in counselling, but his engagement is limited.

### **Tribunal's Consideration**

134. The parties agree that Mr Rowe has committed offences and acts of 'family violence' as defined in the Direction. There is also agreement in terms of the likely cumulative effects of his family violence offending upon his victims.
135. The Tribunal notes the discussion in the evidence of an earlier DVO involving a third woman in 2014. Dr Donnelly contended that this circumstance had not been tested in court. Acknowledging this, the Tribunal has not considered this specific circumstance in its consideration of family violence.
136. There is disagreement between the parties in terms of the other cumulative effects and also in terms of the mitigation to be considered in light of his rehabilitation efforts.
137. Addressing the specific consideration set out in paragraph 8.2(3):
- Based on the evidence in the information before the Tribunal and the contentions of the parties, there is a frequency to Mr Rowe's family violence and a trend of increasing seriousness.
  - In terms of rehabilitation under paragraph 8.2 (3)(c), Mr Rowe have only relatively recently actively pursued rehabilitation. His evidence and oral testimony demonstrate at the least a basic understanding of the impact of his behaviour on his victims. Applying the consideration given above to his efforts to address his risk factors and the factors which contributed to his conduct, it is observed that some progress has been made in terms of family violence but not on other key risk factors.
  - Mr Rowe reoffended since being formally warned in his 2019 sentencing regarding the serious nature of family violence.

138. In relation to the cumulative effects of the family violence, both parties agree in terms of the impact on the victims.

139. In terms of the cumulative effect on the Australian community, Dr Donnelly qualifies the position by reference to Her Honour Justice Meagher's decision in *Buntin v Minister for Immigration, Citizenship and Multicultural Affairs* at [105]:

*'The applicant submitted, and I accept, that the primary purpose of the revocation power is to protect the Australian community from harm and it is not concerned with the expenditure of public funds.'*

140. The complete paragraph [105] reads as follows:

*'The applicant submitted, and I accept, that the primary purpose of the revocation power is to protect the Australian community from harm and it is not concerned with the expenditure of public funds. The applicant submitted that while the considerations in Direction 90 are not exhaustive, the revocation power is concerned with a person's "character" and the harm they might cause, and the consideration of the cost to the taxpayer is irrelevant to a person's character. There is much force in this submission. **In taking into account future potential costs associated with the possible incarceration of the applicant while considering the nature of the harm to individuals or the Australian community were the applicant to engage in further criminal or other serious conduct, the Tribunal has had regard to an irrelevant consideration.**'*

(Emphasis added)

141. Observing the qualification above in Justice Meagher's paragraph, the Tribunal notes that neither party has contended or raised the costs of Mr Rowe's incarceration as part of the cumulative effects of his offending. The prison system is also distinguishable from the policing and judicial systems.

142. The Tribunal considers it reasonable to acknowledge the cumulative allocation of resources of the police and justice systems, as distinct from the incarceration system, required to address Mr Rowe's family violence offending but also considers these are greatly outweighed by the cumulative effects of his acts of family violence upon his victims.

***Tribunal's Finding: Family Violence Committed by The Non-Citizen.***

143. The Tribunal finds that Mr Rowe has perpetrated acts of family violence and has been convicted of family violence offences.

**Conclusion: Primary consideration 2: Family Violence committed by the non-citizen**

144. This consideration weighs very heavily and substantively in favour of affirming the delegate's decision not to revoke the mandatory cancellation of Mr Rowe's Visa.

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

145. Paragraph 8.3 of the Direction provides:

- 1 *Decision-makers must consider any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.*
- 2 *In considering a non-citizen's ties to Australia, decision-makers should give more weight to a non-citizen's ties to his or her child and/or children who are Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely.*
- 3 *The strength, duration and nature of any family or social links generally with Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely.*
- 4 *Decision-makers must also consider the strength, nature and duration of any other ties that the non-citizen has to the Australian community. In doing so, decision-makers must have regard to:*
  - (a) *the length of time the non-citizen has resided in the Australian community, noting that:*
    - (i) *considerable weight should be given to the fact that a noncitizen has been ordinarily resident in Australia during and since their formative years, regardless of when their offending commenced and the level of that offending; and*
    - (ii) *more weight should be given to the time the non-citizen has resided in Australia where the non-citizen has contributed positively to the Australian community during that time; and*
    - (iii) *less weight should be given to the length of time spent in the Australian community where the non-citizen was not ordinarily resident in Australia during their formative years and the noncitizen began offending soon after arriving in Australia.*

146. Dr Donnelly made the following contentions in respect of this consideration:<sup>133</sup>

- When considering this paragraph, a decision-maker is obliged to prioritise the evaluation of an individual's ties to Australia, considering the strength, nature, and

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<sup>133</sup> Exhibit A2.



duration of these connections, encompassing familial, social, and economic aspects.

- Mr Rowe's immediate family network in Australia includes his sister, daughter, aunt, uncle and cousins. He has described these relationships as integral to his life, underscoring their emotional significance.<sup>134</sup>
- Ms Miller's testimony depicts Mr Rowe as a figure of altruism and kindness. The emotional ramifications for her and potentially other family members if the delegate's decision is affirmed are considerable.<sup>135</sup>
- Mr Rowe's broader social circle, including his cousins and friends, vouch for his reliability and positive attributes. Their perspectives provide insight into his role within their lives and the broader community.<sup>136</sup>
- The letters from Mr Rowe's friends and associates testify to his character and highlight the void that would be left in the community and their personal lives if he is deported.<sup>137</sup>
- Economic Contributions and Professional Standing. Mr Rowe's entrepreneurship, specifically in the hydraulic fitting and earthmoving sectors, is a significant economic contribution to the local area. The specialised nature of his services underlines his value to the local economy.<sup>138</sup>
- Testimonials from a wide range of professional contacts affirm the applicant's reputation as a skilled, hardworking, and trustworthy individual in his industry.
- The local businesses' dependency on Mr Rowe's services, and the difficulties faced during his detention, illustrate the economic ripple effect of his potential deportation.
- Mr Rowe's property ownership, including vehicles and machinery, and his active participation in charity events, demonstrate his commitment to and integration in

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<sup>134</sup> See Direction, paragraphs 8.3 (2) and (3).

<sup>135</sup> Ibid.

<sup>136</sup> See Direction, paragraphs 8.3 (3) and (4).

<sup>137</sup> Ibid.

<sup>138</sup> See Direction, paragraph 8.3 (4).

the Australian community. They are considerable positive contributions to the Australian community.<sup>139</sup>

- Having spent over two decades in Australia, Mr Rowe's life experiences, relationships, and contributions are deeply interwoven with the Australian society, culture, and economy.
- A detailed examination of Mr Rowe's extensive ties to Australia, encompassing his familial connections, social and professional networks, economic contributions, and long-standing residency, collectively advocate for a re-evaluation of the decision to cancel his Visa.
- While his formative years were not spent in Australia, his profound integration and contributions over 21 years present a strong case for reconsidering the cancellation of his Visa. This analysis underscores the significant impact his removal would have not only on his personal life but also on the lives of his family, friends, professional acquaintances, and the broader community.<sup>140</sup>
- This primary consideration weighs in Mr Rowe's favour.

147. The Respondent contends that:<sup>141</sup>

- Mr Rowe has several family members in Australia. His sister, daughter, uncle, aunt and three cousins reside in Australia. He has expressed that he would be unable to see his family members if removed.<sup>142 143</sup>
- Mr Rowe's sister, Ms Miller, resides in Victoria. She expressed that they share a strong connection as siblings.<sup>144</sup> She states that her children would be affected if Mr Rowe were removed.<sup>145</sup>

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<sup>139</sup> See Direction, paragraphs 8.3 (3) and (4).

<sup>140</sup> See Direction, paragraph 8.3 (4)(a).

<sup>141</sup> Exhibit R2.

<sup>142</sup> Exhibit R1: G13, page 72.

<sup>143</sup> Direction, paragraph 8.3(1).

<sup>144</sup> Exhibit R1: G36, page 163.

<sup>145</sup> Exhibit R1: G36, page 164.

- Mr Rowe's daughter is 18 years old and has not provided a statement. She lives independently of her father in rural Victoria.<sup>146</sup> Ms Miller expressed the view that Mr Rowe and his daughter share a strong bond, although he has not referred to his daughter in his statements.<sup>147</sup>
- However, this contrasts with the October 2019 QCS records that record Mr Rowe as stating that he has not been in contact with his former partner or daughter since their relationship ended 12 years ago.<sup>148</sup>
- While more weight ought to be allocated to Mr Rowe's Australian daughter, it is the Respondent's position that any weight should be minimal given the non-existent nature of their relationship.<sup>149</sup>
- The Respondent acknowledges that Mr Rowe has provided some statements of other social links he has within the community.<sup>150</sup>
- Mr Rowe moved to Australia permanently in 2002 as a 30-year-old and has lived here for 21 years. This not a case where an applicant has been ordinarily resident in Australia during and since his formative years.<sup>151</sup> The Respondent accepts that Mr Rowe has made some positive contribution to the Australian community through his employment.<sup>152</sup>
- The Respondent accepts that this primary consideration weighs in the applicant's favour, but submits that it does not outweigh the first, second and fifth primary considerations weighing heavily against revocation.

148. The Tribunal now considers these contentions and evidence through the lens of each sub-paragraph in paragraph 8.3:

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<sup>146</sup> Exhibit R1: G36, page 164.

<sup>147</sup> Exhibit R1: G36, page 164 and Direction, paragraphs 8.3(1) and (2).

<sup>148</sup> Exhibit R3: Tender Bundle 5, page 221.

<sup>149</sup> Direction, paragraph 8.3(2).

<sup>150</sup> Direction, paragraph 8.3(3).

<sup>151</sup> Direction, paragraph 8.3 (4) (a) (i).

<sup>152</sup> Direction, paragraph 8.3 (4) (a) (ii).

**Paragraph 8.3(1)**

149. Mr Rowe has a daughter, a sister, a niece, a nephew, an aunt, an uncle and three cousins in Australia who appear to have children who are Mr Rowe's second cousins.<sup>153</sup>
150. The evidence about the strength, duration and nature of his ties to his daughter are specifically considered below.
151. In relation to his sister and her children – Mr Rowe's niece and nephew – Mr Rowe's statement contains the following:<sup>154</sup>

*'[17.] In the event of my deportation from Australia, it would critically disrupt my capacity to fulfill a significant role as an uncle to my niece, FG (14 years old), and my nephew, JE (12 years old). My sister, Angela Miller, strongly advocates for my continued presence in Australia to build an active and influential part in their lives, a sentiment I deeply share.'*

152. Mr Rowe gave the following testimony in cross-examination:<sup>155</sup>

*'Dr Donnelly: And what kind of relationship do you have with FG and JE?*

*Mr Rowe: I speak to my sister and her kids on the phone.*

*Dr Donnelly: Once a week, once a month, what's the kind of contact you have with them?*

*Mr Rowe: It'd be about once a month.*

*Dr Donnelly: And if you're released into the Australian community, do you have plans to continue in your uncle role for your niece and nephew?*

*Mr Rowe: Do I have plans for what sorry?*

*Dr Donnelly: To continue with your uncle role to your niece and nephew?*

*Mr Rowe: Yes. Absolutely.'*

153. In cross-examination, Mr Rowe stated as follows:<sup>156</sup>

*'Mr Hawker: When did you last see your sister?*

*Mr Rowe: That'll be probably 10 years ago, 12 years ago, before I moved to Queensland.*

*Mr Hawker: How old are her two children?*

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<sup>153</sup> Exhibit R1: G13, page 72; Exhibit A4: Statement of Angela Miller, at [4] and Transcript, page 53, lines 11-14.

<sup>154</sup> Exhibit A1: Mr Rowe's 29 December 2023 statement at [17].

<sup>155</sup> Transcript, page 9, lines 15 – 26.

<sup>156</sup> Transcript, page 20, lines 35 – 44.

*Mr Rowe: I think they're 13 and 11.*

*Mr Hawker: Have you met them in person?*

*Mr Rowe: No*

*Mr Hawker: If they're 11 and 13 and you haven't met them in person, it's at least 13 years since you've seen your sister.*

*Mr Rowe: Yes, it'll be 13 years, yes. As I say, it's before I moved to Queensland.'*

154. Mr Rowe also gave the following testimony about his relationship with his sister's children:<sup>157</sup>

*'Mr Hawker: I want to be really clear about whether or not you've actually met any of these children?*

*Mr Rowe: Yes.*

*Mr Hawker: The first two you list are your sister's children, JE and FG?*

*Mr Rowe: M'umm.*

*Mr Hawker: You haven't met them?*

*Mr Rowe: No.'*

155. Ms Miller gave the following testimony under examination by Dr Donnelly:<sup>158</sup>

*'Dr Donnelly: I understand you're the mother of two children in Australia that you mentioned previously?*

*Ms Miller: That's right, yes.*

*Dr Donnelly: And at paragraph 10, you mention their names: FG and JE?*

*Ms Miller: Yes.*

*Dr Donnelly: What kind of relationship does your brother have with your children?*

*Ms Miller: Well, he's never met them, so there isn't really anything strong there. They're dying to meet him. They're absolutely dying to meet him. So it's one that can develop, basically, and should develop.*

*Dr Donnelly: Does he have contact with your children on the telephone or by other means?*

*Ms Miller: No, he doesn't at the moment.*

*Dr Donnelly: At the moment he doesn't have contact?*

*Ms Miller: No.*

*Dr Donnelly: Has he had contact with them previously?*

*Ms Miller: I don't think he – I don't know what the last – when I spoke to him, if they might have been in the room when there was a FaceTime call, but I think, cause*

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<sup>157</sup> Transcript, page 21, lines 5-10.

<sup>158</sup> Transcript, page 53, lines 11-30.

*they used to spend a lot of time with their father, so probably the calls that I had with Andrew were when they weren't there.*

*Dr Donnelly: Does he have contact with your children on the telephone or by other means?*

*Ms Miller: No, he doesn't at the moment.*

*Dr Donnelly: At the moment he doesn't have contact?*

*Ms Miller: No.*

*Dr Donnelly: Has he had contact with them previously?*

*Ms Miller: I don't think he – I don't know what the last – when I spoke to him, if they might have been in the room when there was a FaceTime call, but I think, cause they used to spend a lot of time with their father, so probably the calls that I had with Andrew were when they weren't there.'*

156. Later in these reasons, the Tribunal will review the evidence about the extent to which it is in the best interests of the minor children, JE and FG, for Mr Rowe to remain in Australia in accordance with the requirements of paragraph 8.4 of the Direction.
157. For present purposes, the Tribunal finds that Mr Rowe's ties with JE and FG do, at best, slightly support the allocation of a moderate level of weight in favour of Mr Rowe pursuant to this consideration. The weight of this finding is heavily qualified by the admissions made by Mr Rowe and Ms Miller in their testimony to the effect that Mr Rowe has never met JE and FG and the frequency of his contact with them.
158. This finding is subject to the requirement in paragraph 8.3(1) of the Direction that both JE and FG are Australian citizens, Australian permanent residents and/or that they have a right to remain in Australia indefinitely.
159. In relation to Mr Rowe's cousins, his testimony gives the best detail available to the Tribunal:<sup>159</sup>

*'Mr Hawker: You then list five people you describe as second cousins?*

*Mr Rowe: Yes.*

*Mr Hawker: Two in Sydney and three in Tasmania?*

*Mr Rowe: Correct.*

*Mr Hawker: The two in Sydney, their names are nominated as EM and (indistinct)?*

*Mr Rowe: Correct.*

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<sup>159</sup> Transcript, page 21, line 12 – page 22, line 28.

*Mr Hawker: How old are they?*

*Mr Rowe: I'm not sure of their ages at the moment. I'm not 100 per cent sure.*

*Mr Hawker: Have you met them in person?*

*Mr Rowe: I have met them, yes. I actually got photos at home of them.*

*Mr Hawker: I didn't ask you about photos. When did you last see them in person?*

*Mr Rowe: That would be – that would – yes, that'd probably be about 10 years ago.*

*Mr Hawker: All right. The other three – sorry, staying with them, so I take it you can't assist in finding their dates of birth then if you not know their ages?*

*Mr Rowe: Pardon?*

*Mr Hawker: You can't assist in finding out their dates of birth?*

*Mr Rowe: I don't know how old they are, no.*

*Mr Hawker: Because there's no dates of births that you've given in the table?*

*Mr Rowe: No, I don't know.*

*Mr Hawker: It's possible that they could have turned 18 by now, isn't it?*

*Mr Rowe: It's possible, yes.*

*Mr Hawker: We just don't know because you can't give evidence?*

*Mr Rowe: No. I'm not 100 per cent sure of their ages now.*

*Mr Hawker: The other three second cousins from Tasmania that you've named is XE - - -?*

*Mr Rowe: Yes*

*Mr Hawker: AS and FA?*

*Mr Rowe: Correct.*

*Mr Hawker: Have you met them in person before?*

*Mr Rowe: I have before, yes.*

*Mr Hawker: When did you last see them in person?*

*Mr Rowe: That would be over 10 years ago.*

*Mr Hawker: It's possible that they've turned 18 as well?*

*Mr Rowe: Not all of them, no.*

*Mr Hawker: What are their dates of birth?*

*Mr Rowe: Again, I don't know their dates of birth.*

*Mr Hawker: Is it a fair comment to say that your contact with these family members is very limited?*

*Mr Rowe: It's, again, the majority of the phone calls are by – it's either phone calls or text messages.*

*Mr Hawker: But you're not suggesting that you do a call around to all of your second cousins and niece and nephews?*

*Mr Rowe: What's that, sorry?*

*Mr Hawker: Your response to me was (indistinct) and suggests your contact had been telephone and text message?*

*Mr Rowe: That's with my cousins, yes.*

*Mr Hawker: Yes, but not their children?*

*Mr Rowe: Not their children, no.*

*Mr Hawker: And you understand I'm asking you questions about their children?*

*Mr Rowe: Yes.*

*Mr Hawker: Your relationship with them really is very remote, the children; correct?*

*Mr Rowe: With the children, yes.*

*Mr Hawker: And that is a fair description of your relationship with all of those minor children listed in that table. It's very remote?*

*Mr Rowe: Yes.'*

160. As stated above, the Tribunal finds that Mr Rowe's ties with JE and FG do, at best, slightly support the allocation of a moderate level of weight in favour of Mr Rowe pursuant to this consideration. The Tribunal also finds that Mr Rowe's ties with his sister Ms Miller support a moderate level of weight in favour of Mr Rowe.
161. The Tribunal finds that Mr Rowe's ties with his second cousins are insufficiently evidenced to provide any weight in favour of Mr Rowe. This set of ties will be treated as neutral.

### **Paragraph 8.3(2)**

162. Mr Rowe has a daughter, Jessica, who is either 18 or 19:<sup>160</sup>

*'Andrew has a daughter Jessica Rowe, who has just turned 18, who is independent, and moved out of home, and lives in rural Victoria just outside of Ballarat. Andrew was in a relationship with Jessica's mother when she was young, and they lived together as a family bringing her up together and rebuilding a home on a large block of land. Jessica idolised him, and he her, she was a little mini me, following him around and being just like dad. The relationship with Jessica's mother fell apart when Jessica was around four or five, and he was then no longer involved in bringing her up.'*

163. In relation to his ties to Australia, Mr Rowe's 29 December 2023 statement includes the following:<sup>161</sup>

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<sup>160</sup> Exhibit R1: G36, page 164 at [10] Statement of Angela Miller dated 9 June 2023.

<sup>161</sup> Exhibit A1.



*[16.] My connection to Australia is very strong; it's deeply rooted in the strong and loving relationships I maintain with my family here. This bond with my family is a cornerstone of my identity and plays a pivotal role in my life. My sister, who resides here, has been a constant source of support and guidance. Our relationship has strengthened over the years, and she has been instrumental in helping me navigate the challenges I've faced. We share a deep bond, rooted in mutual care and understanding, making my connection to Australia all the more significant.*

...

*[18.] I hold a deep affection for my daughter, and her welfare is of utmost importance to me. Should I face deportation from Australia, it would significantly impede my capacity to maintain regular and meaningful contact with her, given the substantial time zone differences and geographical distance involved. Remaining in close proximity to my daughter in Australia is essential for both our well-being and the continuation of our strong familial bond.*

*[19.] My extended family, including my aunty, uncle, and cousins, also reside in Australia, further strengthening my connection to the nation. These relationships provide a sense of belonging and community that is irreplaceable. Family gatherings, shared experiences, and mutual support within this close-knit family network are integral to my sense of identity and belonging. They have stood by me during difficult times, offering support and understanding, which has been crucial in my journey towards rehabilitation.*

*[20.] Moreover, I have formed strong connections with various minor children in my extended family, playing an active role in their lives as a mentor and a positive influence. These relationships are built on love, trust, and a shared heritage, further anchoring my commitment to Australia. Being part of their lives, watching them grow, and contributing to their well-being is a privilege that I hold dear. It is a responsibility that I take seriously, and it motivates me to be a better person.'*

164. In cross-examination Mr Rowe made the following concessions in contrast to his 29 December 2023 statement:

*'Mr Hawker: And after the breakup you initially had contact fortnightly for about six months before you then moved to Queensland?*

*Mr Rowe: Correct.*

*Mr Hawker: Then once you moved to Queensland, contact was very rare and you maybe spoke once a year with your daughter?*

*Mr Rowe: What was that, sorry?*

*Mr Hawker: Once you moved to Queensland contact was very rare with your daughter?*

*Mr Rowe: Correct.*

*Mr Hawker: And you spoke maybe once a year?*

*Mr Rowe: Once or twice a year, correct.*

*Mr Hawker: And after moving to Queensland when your daughter was four or five years of age, have you seen your daughter since?*

*Mr Rowe: No*

*Mr Hawker: And when was the last time you spoke with your daughter?*

*Mr Rowe: About three weeks ago. We're in contact every three to four weeks because phone calls, text messages constantly going.*

*Mr Hawker: So she's aware that this proceeding is underway?*

*Mr Rowe: Yes.*

*Mr Hawker: And she hasn't provided a statement in your support; correct?*

*Mr Rowe: That's correct.*

*Mr Hawker: And so you haven't seen your daughter since she was four or five years of age?*

*Mr Rowe: Correct.*

*Mr Hawker: But you're seriously suggesting to the tribunal that you would still call or text every three to four weeks?*

*Mr Rowe: We do.*

*Mr Hawker: It seems a little implausible?*

*Mr Rowe: Pardon?*

*Mr Hawker: Your daughter lives in this country and you haven't seen her since she was four or five years of age?*

*Mr Rowe: That's correct.*

*Mr Hawker: She knows that this proceeding is on but she hasn't provided a support statement for you?*

*Mr Rowe: That's correct.*

*Mr Hawker: And she lives in Victoria still?*

*Mr Rowe: Yes.*

*Mr Hawker: And you accept that there's no evidence at all before the tribunal to confirm what you're now saying about speaking to your daughter every three to four weeks?*

*Mr Rowe: There's no evidence about me speaking to my daughter? Yes?*

*Mr Hawker: I'll happily put that as a consideration. But you accept, for example, you haven't given to this tribunal things like phone records, or a statement from your daughter, or a statement from your daughter's mother to assist the tribunal to understand the relationship you have with your daughter; correct?*

*Mr Rowe: That's correct.*<sup>162</sup>

165. The Tribunal finds that Mr Rowe's relationship, such as can be drawn from the testimony and evidence, with Jessica supports the allocation of some small weight in favour of the Applicant pursuant to this consideration. The weight of this finding is heavily qualified by the

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<sup>162</sup> Transcript, page 15, line 14 – page 16, line 15.

admissions made by Mr Rowe about his absence from Jessica's life since she was four or five and the fact that their current contact is by telephone.

166. This finding is subject to the requirement in paragraph 8.3(2) of the Direction that Jessica is an Australian citizen, Australian permanent resident and/or that she has a right to remain in Australia indefinitely.

***Paragraph 8.3(3)***

167. Mr Rowe has friendships with Mr Goulding, Ms Goulding, Mr Jones, Mr Cristiano, Ms Cristiano, Mr Ian Graham Smith, Mr Lobegeier, Mr Fry, Mr Carsburg, Mr Bradley Alan Smith, Mr Murray, Mr Mellor, and Mr Garner based on a reading of their oral testimony (where applicable) and statements.<sup>163</sup> He also appears to have positive bonds with the Cristiano children.
168. Based on the evidence and testimony, Mr Rowe appears to have a broad network of friends based on his business activities and his charity work.
169. The Tribunal accords this consideration a degree of weight in favour of Mr Rowe under the proviso that the people named above are either Australian citizens, Australian permanent residents or have a right to remain in Australia indefinitely.

***Paragraph 8.3(4)***

170. Mr Rowe was not in Australia during his formative years, arriving as a 30 year old in 2002. He has essentially spent the intervening period until today – some 22 years – residing in Australia. Consequently, the Tribunal cannot find that he has been ordinarily resident in Australia during his formative years. This component of paragraph 8.3(4) of the Direction does not assist Mr Rowe.
171. During that intervening 22 year period, the evidence and information referenced above in this matter show that he has contributed positively to the Australian community through his employment, entrepreneurial, charity and volunteer activities. This means that this

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<sup>163</sup> Exhibit R1: G21, G18, G29, G36, G37, G38; Exhibit A6; Exhibit A7; Transcript pages 57 – 67.

component of paragraph 8.3(4) of the Direction affords a moderate level of weight towards a finding about the strength of his ties to Australia, having regard to the nature and extent of his contributions during the time he has spent here.

172. Mr Rowe's first recorded offence in Australia was in 2019. This is some 17 years after his initial arrival in 2002. A period of 17 years cannot be viewed as '*offending soon after arriving in Australia*'. Consequently, this factor does not temper the overall weight allocable to this Primary Consideration.
173. The evidence and information referenced above show that (excluding his relationship with the mother of his daughter Jessica) Mr Rowe has broad social ties and friendships extending from 2011 to today.<sup>164</sup> This paragraph offers some weight in support of Mr Rowe.

#### **Tribunal's Consideration**

174. The Tribunal considers that the impact of a decision to affirm the delegate's decision cancelling Mr Rowe's Visa would, in light of the ties assessed above, have adverse emotional consequences for Mr Rowe's sister, Ms Miller, her two children and Mr Rowe's daughter, Jessica.
175. The Tribunal considers that Mr Rowe's removal will have an adverse impact on his friends and social ties described above, as well as his professional network. Mr Rowe has made tangible positive business and charitable contributions to the Australian community in the period between arriving in 2002 and his subsequent imprisonment and detention.

#### **Conclusion: Primary consideration 3: The Strength, Nature and Duration of Ties to Australia.**

176. The Tribunal has referred to and assessed the four relevant components of this Primary Consideration. The Tribunal finds, after having analysed the evidence relevant to each of those four components, that the totality of the evidence points to a significant level of weight in favour of a finding that this Tribunal should set aside the decision to not revoke the mandatory cancellation of Mr Rowe's Visa.

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<sup>164</sup> Exhibit R1: G18 and G21.

**PRIMARY CONSIDERATION 4: BEST INTERESTS OF MINOR CHILDREN IN AUSTRALIA AFFECTED BY THE DECISION.**

177. This primary consideration requires the Tribunal to consider what impact a decision to refuse or not revoke cancellation of Mr Rowe's Visa will have on children who are and will continue to be under the age of 18 years of age at the time of the decision.<sup>165</sup> The Direction further requires that the best interests of each child must be considered individually if there are more than one minor child identified.
178. In considering each identified child's best interests, the Direction requires the following factors at paragraph 8.4(4) to be considered where relevant:
- (a) *the nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);*
  - (b) *the extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;*
  - (c) *the impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;*
  - (d) *the likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;*
  - (e) *whether there are other persons who already fulfil a parental role in relation to the child;*
  - (f) *any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);*
  - (g) *evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the non-citizen, or has otherwise been abused or neglected by the non-citizen in any way, whether physically, sexually or mentally;*
  - (h) *evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.*

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<sup>165</sup> Direction, Paragraphs 8.4(1) and 8.4(2).

179. The Direction requires that the Tribunal determine whether non-revocation under section 501CA is, or is not, in the best interests of each child in Australia who will be affected by the decision.
180. The initial point of the Tribunal's analysis of the primary consideration is described by Justices Tamberlin, Keifel (as she then was) and Emmett in *Sebastian v Minister for Immigration and Multicultural and Indigenous Affairs* at [14]:<sup>166</sup>

*'The starting point adopted by the Tribunal is one which reflects an assumption generally held by members of the Australian community, namely that in most cases a child's interests are best served by remaining with their parents. That view is a reflection of the various matters to which Allsop J referred to in Perez, relating to the various aspects of a child's development. It seems to us that there would be no rational basis for denying the Tribunal the adoption of that assumption, at least initially. As the community would recognise, there may be factors which are to be weighed against that assumption...'*

#### **Identification of relevant minor children**

181. Based on the consideration above about Mr Rowe's ties to Australia, the Tribunal considers it safe to find on the available evidence and information before it that there are two relevant minor children falling within the ambit of this primary consideration. They are:
- Mr Rowe's niece, FG (14 years old); and
  - Mr Rowe's nephew, JE (12 years old).

#### **The parties' contentions**

182. Summarising Dr Donnelly's contentions on this consideration:<sup>167</sup>
- Mr Rowe has articulated that his familial network in Australia includes a nephew, a niece, and five second cousins who are minors. He expresses concern about the unlikely prospect of seeing them again if he were to be deported.
  - His sister has stated that her children, aged 12 (JE) and 14 (FG), have no other relatives in Australia besides Mr Rowe. She highlights the emotional impact that losing Mr Rowe would have on her children.

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<sup>166</sup> *Sebastian v Minister for Immigration And Multicultural And Indigenous Affairs* [2005] FCAFC 31 (14 March 2005).

<sup>167</sup> Exhibit A2: Applicant's SFIC, [72] - [79].

- Revoking the Visa cancellation would allow the aforementioned children to sustain their familial relationship with Mr Rowe. This factor is vital in considering the minor children's emotional and familial stability.
- While recognising that maintaining these relationships is in the children's best interests, it is also noted that Mr Rowe does not play a parental role in these minors' lives.
- In evaluating the circumstances, the Tribunal would determine that, on balance, setting aside the decision to cancel Mr Rowe's Visa is in the minor children's best interests. This decision recognises the importance of familial bonds and the potential emotional impact on the minor children.
- Although this aspect is significant, the absence of a parental role by Mr Rowe necessitates a measured approach in its influence on the final decision regarding setting aside the decision to cancel the Visa.
- In conclusion, the analysis takes into account the Direction's requirement to prioritise the welfare of minor children affected by the decision, Mr Rowe's family ties to minor relatives in Australia, and the emotional implications of his potential deportation. The decision to set aside the Visa cancellation, while mindful of Mr Rowe's non-parental role, ultimately places a considered emphasis on maintaining the stability and emotional well-being of the minor children in his extended family.
- This primary consideration weighs in Mr Rowe's favour.

183. Summarising the Respondents contentions on this consideration:<sup>168</sup>

- Mr Rowe does not have minor children of his own in Australia. He has declared a niece, a nephew and five second cousins whose interests would be affected.<sup>169</sup> It is the Respondent's position that a revocation decision may be in the best interests of these minor children, but the Minister contends that minimal weight should be placed on this consideration in circumstances where:
  - Mr Rowe has a non-parental relationship with these children with long periods of absence whilst in criminal custody, immigration detention and

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<sup>168</sup> Exhibit R2, paragraph 55.

<sup>169</sup> Exhibit R1: G13, page 70.

separated by states. No evidence is available to reflect a meaningful contact.<sup>170</sup>

- Given the distance separating Mr Rowe from the minor children and the role of current parents, he is unlikely to play a positive parental role in the future.<sup>171</sup>
- There is no independent evidence of the effect that any separation would have on the children.<sup>172</sup> Nor is there any obvious impediment to Mr Rowe having contact with the children via electronic means.
- The minor children all reside with their respective parents who fulfil the parental role.<sup>173</sup>

#### **Consideration of the factors at paragraph 8.4(4) of the Direction to Child JE and Child FG**

184. The Tribunal notes and relies on Dr Donnelly limiting the minor children to JE and FG.
185. **Sub-paragraph (a):** despite Mr Rowe's narrative in his written statement (as quoted above)<sup>174</sup> the real-life situation is markedly different as demonstrated in his oral testimony (quoted above). The relationship between him and the two relevant minor children is non-parental. He has not physically met either JE or FG. Contact is by telephone or video call. That is not to say there is no existing relationship between them, but the undeniable reality is that Mr Rowe's relationship with the two children can be better characterised as intermittent and with absences. Paragraph 17 of his statement is more a forward looking statement, closing with the phrase, "*to build an active and influential part in their lives*". At best, this sub-paragraph militates in favour of the allocation of a moderate level of weight in favour of setting aside the Visa cancellation decision.
186. **Sub-paragraph (b):** Child JE is fourteen. Child FG is twelve. There is something in the order of ten years of cumulative parenting time until both children attain the age of 18 years.

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<sup>170</sup> Direction, paragraph 8.4(4)(a).

<sup>171</sup> Direction, paragraph 8.4(4)(b).

<sup>172</sup> Direction, paragraph 8.4(4)(d).

<sup>173</sup> Direction, paragraph 8.4(4)(e).

<sup>174</sup> Exhibit A1.



The actual extent and likelihood of Mr Rowe taking on some kind of parental role in that window of time, acknowledging that his sister is already in a parental role with the children in Victoria, seems negatively correlated with his stated desire to return to his businesses in Hervey Bay, Queensland and his testimony to the fact that he has never met the children and not seen his sister in person in 13 years.<sup>175 176</sup> At best, this sub-paragraph militates in favour of the allocation of a moderate level of weight in favour of restoration of the Applicant's Visa status to remain here.

187. **Sub-paragraph (c):** there is no evidence before the Tribunal about any extent to which Mr Rowe's prior conduct has affected either JE or FG. This sub-paragraph will be treated as neutral for present purposes.
188. **Sub-paragraph (d):** there is nothing before the Tribunal about the effect on these children of Mr Rowe being physically separated from them if he returns to the United Kingdom. There is evidence that he has communicated with the children via telephone and video conferencing means and there is nothing to suggest he would not be able to do so from the United Kingdom. This sub-paragraph will be treated as neutral for present purposes.
189. **Sub-paragraph (e):** The Tribunal finds that Ms Miller already fulfills a parental role for JE and FG. Mr Rowe's proposed parental role in the lives of both children is aspirational and remains to be defined. This sub-paragraph will be treated as neutral for present purposes.
190. **Sub-paragraph (f):** Neither JE or FG have expressed any such views either on their own account or via a clinician. This sub-paragraph will be treated as neutral for present purposes.
191. **Sub-paragraphs 8.4(4)(g) and (h):** The material before the Tribunal contains no evidence referable to either of these sub-paragraphs. Both sub-paragraphs will be treated as neutral for present purposes.

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<sup>175</sup> Transcript, page 13, lines 16 -37.

<sup>176</sup> Transcript, page 20, lines 35 – 44.

**Conclusion: Primary consideration 4: Best interests of minor children in Australia affected by the decision.**

192. The Tribunal has assessed and allocated weight to the best interests of both JE and FG by analysing the extent to which the evidence speaks to the relevant sub-paragraphs of paragraph 8.4(4) of the Direction. It will be noted that respective levels of weight were allocated to each of the relevant sub-paragraphs. Having regard to these respective weights referable to both relevant children deriving from the relevant sub-paragraphs of paragraph 8.4(4) of the Direction, the Tribunal finds that this consideration carries a moderate weight in favour of setting aside the non-revocation decision.

**PRIMARY CONSIDERATION 5: EXPECTATIONS OF THE AUSTRALIAN COMMUNITY**

193. Paragraph 8.5(1) of the Direction provides:

*'The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia.'*

194. In addition to the guidance provided by paragraph 8.5(1) of the Direction, 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 in question are such that the Australian community would expect that the person should not be granted or continue to hold a visa.

195. 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 because of conduct in Australia or elsewhere, of the following kinds:

- (a) *acts of family violence;*
- (b) *causing a person to enter into, or being party to (other than being a victim of), a forced marriage;*
- (c) *commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual nature, as well as other serious crimes against the elderly or other vulnerable persons in the form of fraud, extortion, financial abuse/material exploitation or neglect;*
- (d) *commission of crimes against government representatives or officials due to the position they hold, or in the performance of their duties;*

- (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;*
- (f) *worker exploitation.*

196. Paragraph 8.5(3) of the Direction provides that the above expectations apply, regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.
197. As with Paragraph 8.5(4) of the Direction, this consideration is ‘*about the expectations of the Australian community as a whole*’, and decision makers are to proceed based on the Government’s views as articulated in the Direction, without independently assessing the community’s expectations.
198. Clause 8.5(4) of the Direction correlates with the reasoning of the Full Court of the Australian Federal Court (**FCAFC**) in *FYBR v Minister for Home Affairs* (2019) 272 FCR 454 (“**FYBR**”).
199. Notwithstanding the different pathways in judicial reasoning, the plurality of the Court in *FYBR* held that “*Expectations of the Australian community*” is a deeming provision with normative principles, ascribing to the community an expectation aligning with that of the executive government.<sup>177</sup>
200. The reasoning in *FYBR* establishes that the ‘*deemed community expectation*’ will in most cases call for cancellation, but ‘*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*’.<sup>178</sup>
201. The Tribunal notes the High Court of Australia refused an application for special leave to appeal from the orders in *FYBR*, holding at [301]–[303] that ‘*there is no reason to doubt the correctness of the decision of the majority of the Full Court of the Federal Court*’.<sup>179</sup>

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<sup>177</sup> *FYBR* (2019) 272 FCR 454 (“**FYBR**”), at 471–2 [66] (Charlesworth J), and 476 [91] (Stewart J).

<sup>178</sup> *Ibid* at 473 [75]– [76] (Charlesworth J).

<sup>179</sup> *FYBR v Minister for Home Affairs and Anor* [2020] HCA Trans 56.

202. Observing the norm stipulated in paragraph 8.5(1), the Tribunal now considers the guidance provided by paragraphs 5.2(2) to (6) of the Direction:

- 2 *Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*
- 3 *The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measureable risk of causing physical harm to the Australian community.*
- 4 *Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, or by other noncitizens who have been participating in, and contributing to, the Australian community only for a short period of time.*
- 5 *With respect to decisions to refuse, cancel, and revoke cancellations of a visa, However, Australia will generally may afford a higher level of tolerance of criminal or other serious conduct by non- citizens who have lived in the Australian community for most of their life, or from a very young age. The level of tolerance will rise with the length of time a non-citizen has spent in the Australian community, particularly in their formative years.*
- 6 *Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation. In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mentioned in paragraph 8.55(2) 8.4(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measureable risk of causing physical harm to the Australian community.*

203. Summarising Dr Donnelly's contentions for consideration:<sup>180</sup>

- Mr Rowe has a significant record of domestic violence-related offences, as evidenced by multiple convictions recorded by the Queensland courts. These include:
  - Threats to distribute intimate images or prohibited visual recordings.
  - Unlawful stalking.

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<sup>180</sup> Exhibit A2: Applicant's SFIC, paragraphs [82] – [90].

- Contravention of domestic violence orders (including aggravated offences).
- The nature of these offences - acts of family violence and contravention of domestic violence orders - falls within the category of conduct that the Australian community would likely deem unacceptable for a non-citizen to engage in, warranting visa cancellation.
- Mr Rowe's history of domestic violence raises serious character concerns, aligning with the types of conduct that the community expects should lead to refusal of entry or visa cancellation.
- The Australian community's expectations, as outlined, apply irrespective of Mr Rowe's risk of physical harm to the community.
- Considering his repeated engagement in conduct that significantly breaches the community's expectations, particularly related to family violence and contravention of domestic violence orders, his offending actions align with the types of serious character concerns that the Australian community and government deem unacceptable. This aligns with the norms and expectations outlined in paragraph 8.5, which suggest that non-revocation of mandatory cancellation may be appropriate in such instances.
- The Tribunal can consider Mr Rowe's specific circumstances when attributing weight to this primary consideration.<sup>181</sup>
- The Tribunal should moderate the adverse attribution of weight to this primary consideration based on the following matters:
  - Extended Duration of Residency. Mr Rowe has an extensive history of residence in Australia, marked by a prolonged and continuous period of domicile within the nation of Australia.
  - Substantial Australian Connections and Contributions. Mr Rowe possesses robust ties to Australia, evidenced by a range of positive contributions to the Australian community, encompassing civic, social, and possibly economic aspects.

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<sup>181</sup> *Ali v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 559 and *Kelly v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 396.

- Low Risk of Recidivism. Mr Rowe presents a minimal likelihood of reoffending, as indicated by factors such as past behaviour, current circumstances, and any relevant interventions.
- Significant Rehabilitation Efforts. Mr Rowe has undertaken considerable rehabilitation measures, demonstrating a commitment to reform and alignment with societal norms and legal expectations.
- This primary consideration weighs against the applicant.

204. Summarising the Respondents contentions on this consideration:<sup>182</sup>

- Observing the norm stipulated in paragraph 8.5(1), and in accordance with the guidance provided by Principles 5.2(1)-(5) of Direction 99, the Australian community would expect that Mr Rowe should not continue to hold a Visa on account of his serious and persistent offending in the past and the risk of further offending and infliction of harm.
- Overall, the Respondent contends that this primary consideration weighs heavily against revocation.

205. The next question is whether there are any factors which modify the Australian community's expectations. This question is informed by the principles in paragraphs 5.2(4) to (6) of the Direction. In summary these are:

- (a) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa.
- (b) The Australian community has a low tolerance of criminal or other serious conduct by non-citizens who have been participating in, and contributing to, the Australian community for only a short period of time.
- (c) In relation to decisions to refuse, cancel and revoke cancellations of visas, Australia will generally afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life or from a very young age.

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<sup>182</sup> Exhibit R2: RSFIC, paragraphs [56] – [60].

- (d) The level of this tolerance will rise with the length of time a non-citizen has spent in the Australian community, particularly in their formative years.
  - (e) The nature of a non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify a visa outcome that is not adverse to the non-citizen.
  - (f) In particular, the inherent nature of certain types of conduct mentioned in paragraph 8.5(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.
206. Paragraph 8.5(3) provides that the Australian community's expectations apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community. The Direction further explains at Paragraph 8.5(4):
- 'This consideration is about the expectations of the Australian community as a whole, and in this respect, decision – makers should proceed on the basis of the Government's views as articulated above, without independently assessing the community's expectations in the particular case.'*
207. Sub-paragraph 5.2(4) uses the term '*limited stay visa*' which is not defined in the Act. The Act does however create a taxonomy of visas. Relevantly for present purposes, Section 30 of the Act contemplates both (1) '*permanent*' visas, which permit a right to remain, '*indefinitely*'; and (2) '*temporary visas*', which provide a conditional right to remain. '*Limited stay*', as used in the Direction, seems to be a reference to non-permanent or '*temporary*' visas.

### **Tribunal's Consideration**

208. Mr Rowe held a Class BB Subclass 155 Five Year Resident Return visa. This is a permanent visa permitting the holder to travel to and enter Australia for 5 years from the date the visa was granted.<sup>183</sup>

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<sup>183</sup> *Migration Regulations 1994* (Cth), reg 155.511.

209. As the Visa allowed the Applicant to remain in Australia indefinitely until it was mandatorily cancelled on 17 March 2023, it cannot be classified as a limited stay visa. This implies that sub-paragraph 5.2(4)'s low tolerance does not apply.
210. Australia may afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life. Mr Rowe has only lived in Australia for approximately 42% of his life. The Tribunal considers that this allows for higher than usual tolerance of Mr Rowe's criminal conduct.
211. The Tribunal has also found Mr Rowe's offending conduct to be very serious. It involved the commission of serious crimes against women, enlivening paragraph 8.5(2) of the Direction.
212. The Tribunal also observes the requirements of paragraph 8.5(3) of the Direction which dictate that the expectations of the Australian community apply regardless of whether a non-citizen poses a measurable risk of causing physical harm to the Australian community. The Tribunal has found above that Mr Rowe poses a significant risk of re-offending. His offending did not involve causing direct physical harm, although it may have created physical distress.
213. The Tribunal is satisfied that Mr Rowe has breached the Australian community's expectations by his criminal offending which involved serious breaches of Australian laws. Therefore, the Australian community, 'as a norm' expects the Australian Government not to allow him to remain in Australia.
214. Dr Donnelly offered four arguments to moderate the adverse attribution of weight to this primary consideration:
- (i) Extended Duration of Residency.
  - (ii) Substantial Australian Connections and Contributions.
  - (iii) Low Risk of Recidivism.
  - (iv) Significant Rehabilitation Efforts.
215. The Tribunal has considered the duration of Mr Rowe's residency in Australia and his risk of recidivism above.



216. The Tribunal considers that it can assess Mr Rowe's specific personal circumstances where they are relevant to the Australian community's expectations. His connections in and contributions to Australia, as well as his rehabilitation efforts, are not relevant personal circumstances when assessing this primary consideration which goes to the Australian community's expectations.

**Conclusion: Primary consideration 5: Expectations of the Australian community**

217. This consideration carries a significant and material weight in favour of affirming the delegate's decision to not revoke the mandatory cancellation of Mr Rowe's Visa.

**OTHER CONSIDERATIONS**

218. The Tribunal now considers each of the four sub-paragraphs (a), (b), (c) and (d) set out in Other Considerations listed in paragraph 9 of the Direction.

**Other Consideration (a): Legal consequences of the decision**

219. Paragraph 9.1 of the Direction directs a decision-maker to consider the following:
- 1 *Decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable in the circumstances specified in that section, and in the meantime, detention under section 189, noting also that section 197C(1) of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful noncitizen.*
  - 2 *A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act, particularly the concept of 'protection obligations', reflects Australia's interpretation of non-refoulement obligations and the scope of the obligations that Australia is committed to implementing.*
  - 3 *International non-refoulement obligations will generally not be relevant where the person concerned does not raise such obligations for consideration and the circumstances do not suggest a non-refoulement claim.*

**9.1.1 Non-citizens covered by a protection finding**

- 1 *Where a protection finding (as defined in section 197C of the Act) has been made for a non-citizen in the course of considering a protection visa*

application made by the non-citizen, this indicates that non-refoulement obligations are engaged in relation to the non-citizen.

- 2 Section 197C(3) ensures that, except in the limited circumstances specified in section 197C(3)(c), section 198 does not require or authorise the removal of an unlawful non-citizen to a country in respect of which a protection finding has been made for the non-citizen in the course of considering their application for a protection visa. This means the non-citizen cannot be removed to that country in breach of non-refoulement obligations, even if an adverse visa decision under section 501 or 501CA is made for the non-citizen and they become, or remain, an unlawful non-citizen as a result. Instead, the non-citizen must remain in immigration detention as required by section 189 unless and until they are granted another visa or they can be removed to a country other than the country by reference to which the protection finding was made.
- 3 Decision-makers should also be mindful that where the refusal, cancellation or non-revocation decision concerns a protection visa, the person will be prevented by section 48A of the Act from making a further application for a protection visa while they are in the migration zone (unless the Minister determines that section 48A does not apply to them - see sections 48A and 48B of the Act). Further, as a result of a refusal or cancellation decision under section 501 or a non-revocation decision under section 501CA, the person will Page 12 of 24 Direction No. 99 - Migration Act 1958 - Direction under section 499 Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA be prevented from applying for any other class of visa except a Bridging R (Class WR) visa (see section 501E of the Act and regulation 2.12AA of the Regulations).

### **9.1.2 Non-citizens not covered by a protection finding**

- 1 Claims which may give rise to international non-refoulement obligations can also be raised by a non-citizen who is not the subject of a protection finding, in responding to a notice of intention to consider cancellation or refusal of a visa under section 501 of the Act, or in seeking revocation of the mandatory cancellation of their visa under section 501CA. Where such claims are raised, they must be considered.
- 2 However, where it is open to the non-citizen to apply for a protection visa, it is not necessary at the section 501/section 501CA stage to consider non-refoulement issues in the same level of detail as those types of issues are considered in a protection visa application. The process for determining protection visa applications is specifically designed for consideration of non-refoulement obligations as given effect by the Act and where it is open to the person to make such an application a decision-maker, in making a decision under section 501/section 501CA, is not required to determine whether non-refoulement obligations are engaged in respect of the person. Having considered the person's representations, the decision-maker may choose to proceed on the basis that if and when the person applies for a protection visa, any protection claims they have will be assessed, as required by section 36A of the Act, before consideration is given to any character or security concerns associated with them.
- 3 Non-refoulement obligations that have been identified for a non-citizen with respect to a country, via an International Treaties Obligations Assessment or

*some other process outside the protection visa process, would not engage section 197C(3) to preclude removal of the non-citizen to that country. In these circumstances, in making a decision under section 501 or 501CA, decision-makers should carefully weigh any non-refoulement obligation against the seriousness of the non-citizen's criminal offending or other serious conduct. However, that does not mean an adverse decision under section 501 or 501CA cannot be made for the non-citizen. A refusal, cancellation or non-revocation decision will not necessarily result in removal of the non-citizen to the country in respect of which the non-refoulement obligation exists. For example, consideration may be given to removal to another country, or the Minister may consider exercising his/her personal discretion under section 195A to grant another visa to the non-citizen, or alternatively, consider exercising his/her personal discretion under section 197AB to make a residence determination to enable the non-citizen to reside at a specified place in the community, subject to appropriate conditions. Further, following the visa refusal or cancellation decision or non-revocation decision, if the non-citizen makes a valid application for a protection visa, the non-citizen would not be liable to be removed while their application is being determined.*

220. Summarising Dr Donnelly's contentions for consideration:

- The prospect of permanent exclusion from Australia represents a grave legal consequence for Mr Rowe. This outcome, which effectively severs his ability to return to Australia, must be considered a significant factor. Given the severity of this consequence, it is deemed that this aspect of the decision-making process notably weighs in favour of the applicant.<sup>184</sup>
- Mr Rowe relies upon the reasoning of Senior Member O'Donovan in *Miller and Minister for Immigration, Citizenship and Multicultural Affairs (Migration)*<sup>185</sup> as follows:

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

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

- (a) *Irreversible exclusion from re-entering Australia for the applicant; and*
- (b) *The applicant will remain in detention until deportation to the UK and during the process the applicant's liberty will be constrained.*

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<sup>184</sup> Exhibit A2: Applicant's SFIC, paragraphs [93] – [94].

<sup>185</sup> *Miller v Minister for Immigration, Citizenship And Multicultural Affairs (Migration)* [2024] AATA 175.

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

221. Summarising the Respondent's contentions for consideration:

- While not raised by Mr Rowe as "another reason" for why the cancellation decision should be revoked, it is accepted that a consequence of the Tribunal affirming the decision under review is that the applicant will be liable to removal from Australia as soon as reasonably practicable (ss 189 and 198 of the Act), and will not be able to apply for another visa while in Australia (with the exception of a protection visa) in accordance with s 501E of the Act. However, the Respondent submits that this legal consequence neither weighs for nor against revocation particularly in circumstances where no non-refoulement claims have been raised.
- In the recent decision of *Rana and Minister for Immigration, Citizenship and Multicultural Affairs (Migration)*, Senior Member Burford found, in similar circumstances, that:<sup>186</sup>

*'[209] While the Tribunal accepts there will be legal consequences of a decision not to revoke the cancellation of the Applicant's visa, the Tribunal does not consider that these carry weight in favour of revocation, particularly as no non-refoulment claims have been raised and the Applicant did not suggest the legal consequences of cancellation were 'another reason' why the visa cancellation should be revoked. Having regard to the Applicant's circumstances and the information before the Tribunal, the Tribunal gives this consideration neutral weight.'*

### **Tribunal's Consideration**

222. The Tribunal considers that *Miller* can be distinguished from this matter on their separate and distinctive facts regarding Mr Miller and Mr Rowe.

223. The Tribunal further considers that the legal consequences of its decision, in line with *Rana* are either the Applicant's legal re-entry into the Australian community or his deportation to the United Kingdom. These are the intended alternative outcomes and the logical consequence of the Act and its regulations.

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<sup>186</sup> *Rana and Minister for Immigration, Citizenship and Multicultural Affairs (Migration)* [2023] AATA 1327 at [209].

**Tribunal Finding: Other Consideration (a): Legal consequences of the decision.**

224. The Tribunal considers that this consideration (a) carries a neutral weight.

**Other Consideration (b): Extent of impediments if removed.**

225. Clause 9.2(1) of the Direction provides:

- 1 *Decision-makers must consider the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:*
  - (a) *the non-citizen's age and health;*
  - (b) *whether there are substantial language or cultural barriers; and*
  - (c) *any social, medical and/or economic support available to them in that country.*

***The Applicant's contentions***

226. Summarising Dr Donnelly's contentions for consideration:<sup>187</sup>

- Mr Rowe has reported that he is suffering from hyperthyroidism, as indicated in his Personal Circumstances Form dated 7 June 2023.<sup>188</sup>
- It is anticipated that Mr Rowe will encounter minimal linguistic or cultural barriers upon returning to the United Kingdom.
- Mr Rowe has expressed concerns about lacking accommodation, employment, and a bank account in Britain. Additionally, he anticipates difficulties in securing employment due to his age and his prolonged absence from Britain, which he found unfavourable. Ms. Miller has noted that such a relocation could adversely affect Mr Rowe's mental health wellbeing, citing his strong connections in Australia.
- The presence of his mother and brother in the UK is acknowledged. However, the practical extent of the support they could offer Mr Rowe remains uncertain.

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<sup>187</sup> Exhibit A2: Applicant's SFIC, paragraph [95].

<sup>188</sup> Exhibit R1: G13, page 75.

- While Mr Rowe has indeed demonstrated a commendable employment record in Australia, including the establishment of two successful businesses, the transferability of his entrepreneurial skills and business acumen to the United Kingdom market is not guaranteed. The United Kingdom business environment may present unique challenges, market dynamics, and regulatory frameworks that differ significantly from those in Australia.
- Contrary to the delegate's assessment, being 51 years old can pose substantial challenges in the job market. Age can be a significant factor in employment opportunities, with potential ageism and a preference for younger candidates in certain industries. This could impede the applicant's ability to secure employment as readily as he did in Australia. The current economic climate and job market conditions in the United Kingdom must be taken into account. Economic fluctuations, the impact of recent events like Brexit, and the ongoing global economic shifts could affect the applicant's ability to replicate his Australian business successes in the United Kingdom.
- Starting a business involves more than just transferable skills; it requires a deep understanding of local markets, consumer behaviour, and networking connections. Mr Rowe's prolonged absence from the United Kingdom and his lack of recent business experience there could be significant obstacles in re-establishing himself as a successful entrepreneur.
- His professional experience and network are rooted in Australia. His absence from the United Kingdom since 2005 means he may lack current knowledge of the United Kingdom market and recent professional connections, which are crucial for business success.
- According to Robert Half, as of January 2023, the United Kingdom labour market remains tight with unfilled vacancies at historically high levels, indicating that top talent is scarce across sectors. This tight labour market is coupled with an expectation that 47% of workers will be looking for a new job in 2023, placing further pressure on businesses to attract and retain talent. Additionally, there has been a need for companies to adjust remuneration packages in light of the cost-of-living crisis, with wages increasing at the fastest rate in over two decades. However, these increases have not kept pace with inflation, resulting in real terms pay decrease for workers, especially in the public sector.

- The Chartered Institute of Personnel and Development (CIPD) reports that hard-to-fill vacancies are still common in the United Kingdom. This situation is compelling employers to find ways to improve productivity and efficiency, potentially reducing the need for certain roles. The prevalence of hard-to-fill vacancies, particularly in the public sector, where 51% of employers report having such vacancies (compared to 38% in the private sector), suggests a mismatch between available roles and suitable candidates.
- The CIPD also notes that the net employment balance remains positive, indicating a general intention among employers to increase staff levels. However, redundancy intentions have fallen for the first time since winter 2021/22, with 17% of employers planning to make redundancies in the three months to December 2023. This reduction in redundancy intentions might reflect a stabilisation in the labour market following previous turbulent periods.
- Expected pay awards in both the public and private sectors are now aligned at 5%, the highest ever for the public sector in the CIPD's time series. This alignment suggests a convergence in wage growth across sectors, although it is important to note that these increases may not fully offset the rising cost of living.
- In summary, while there are positive indicators such as a generally positive net employment balance and aligned pay increases in both public and private sectors, the United Kingdom labour market also faces challenges including tight labour market conditions, high numbers of hard-to-fill vacancies, and real-term decreases in pay. These factors could present significant impediments to individuals like the applicant in securing employment or establishing a business upon returning to Britain.
- Mr Rowe is expected to have access to health services, treatment, and welfare services in the United Kingdom, comparable to those available to other United Kingdom citizens.
- The emotional and psychological impact on Mr Rowe of separation from family, friends, and established business networks in Australia should not be underestimated. Such a profound change can have lasting effects beyond the initial phase of resettlement.

- Mr Rowe's business success in Australia is rooted in local networks and market understanding. Replicating this success in the United Kingdom, where he has been absent for a significant period, could present substantial long-term challenges.
- Adapting to a different social and economic environment after a long absence could be more challenging than anticipated. This includes navigating the United Kingdom's labour market, business landscape, and possibly different regulatory frameworks.
- The assumption that the hardships faced will be short-term may underestimate the complexity of re-establishing oneself in a different country, especially for someone who has lived away for many years.
- Therefore, while some initial hardships are expected, their impact and duration could be significantly more profound and enduring than the delegate anticipates, potentially impeding Mr Rowe's successful resettlement in the United Kingdom.
- The Respondent has not adduced expert evidence to the contrary.
- This other consideration weighs very heavily in Mr Rowe's favour.

### ***The Respondent's contentions***

227. Summarising the Respondent's contentions for consideration:<sup>189</sup>

- Mr Rowe is 52 years of age and has declared in the past that he suffers from hyperthyroidism.<sup>190</sup> There is nothing to suggest that he would not have access to adequate medical treatment in the United Kingdom.
- While Mr Rowe may face some difficulty in re-establishing himself in the United Kingdom due to his residence in Australia, this would only present as a short-term hardship and would not preclude resettlement.
- There are no substantial language or cultural barriers for him to overcome.

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<sup>189</sup> Exhibit R2: Paragraphs [66] – [70].

<sup>190</sup> Exhibit R1: G13, page 75.



- As a United Kingdom citizen, he has the same access to social, medical and economic support as other United Kingdom citizens.
- He was born and grew up in the United Kingdom and so it cannot be said that it is a country unfamiliar to him. He has also declared that he has some family members living in the United Kingdom, including his mother and brother.<sup>191</sup>
- Mr Rowe contends that the United Kingdom job market is not suited for him and he would struggle at his age to find employment. It is the Respondent's position that Mr Rowe holds a useful trade qualification as a hydraulic fitter and has experience in that position, as a business owner and previously as a mechanic. Despite his age, he holds qualifications, skills and experience that will remain useful in the United Kingdom.
- The Respondent contends that any difficulties Mr Rowe may face in re-establishing himself in the United Kingdom would be temporary and he would be able to establish and maintain a basic living standard. This consideration does not weigh either for nor against revocation and should be of neutral weight in the Tribunal's decision.

228. This aspect of the Direction requires the Tribunal to assess and consider the extent of any impediments that Mr Rowe, if removed from Australia to the United Kingdom, will face in establishing himself and maintaining basic living standards, while taking the specific factors below into account.

***Sub-paragraph 9.2(1)(a) – the non-citizen's age and health***

229. Mr Rowe is 52 years old.

230. As stated by both parties, Mr Rowe suffers from hyperthyroidism. This condition is treated globally with antithyroid drugs, with carbimazole mainly used in the United Kingdom.<sup>192</sup>

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<sup>191</sup> Exhibit R1: G13, page 72.

<sup>192</sup> See Bartalena, L., Piantanida, E., Gallo, D., Ippolito, S., & Tanda, M. L. (2022). Management of Graves' hyperthyroidism: present and future. *Expert Review of Endocrinology & Metabolism*, 17(2), 153-166 and page 154.

231. In his oral testimony, Mr Rowe stated that he suffers from arthritis. This was not contested but neither is there any supporting documentary evidence about his condition in this respect.<sup>193</sup>

232. Dr Kwok's assessment of Mr Rowe found that he experiences a broad range of psychological problems in the face of stressors. This includes an extremely high level of depression and anxiety, feelings of personal inadequacy, sense of devalued self-worth and intrusive distressing thoughts. She stated that cognitive behavioural therapy is an effective treatment for Mr Rowe's condition. In response to the question posed to her and addressed in her report as to the likely impact on Mr Rowe's mental health if he was removed from Australia, Dr Kwok observed that mental health services, including free services, are available across the United Kingdom through charities, private companies and not-for-profit organisations. She qualified this by taking into consideration that Mister Rowe will have competing priorities in the United Kingdom such as finding accommodation and employment which may interfere with his motivation to organise treatment.<sup>194</sup>

233. Mr Rowe said in his 29 December 2023 statement that:<sup>195</sup>

*'In addition to my professional and personal goals, I am focused on working on my health. I recognise that a healthy lifestyle is essential for my well-being and my ability to contribute positively to the community. This includes engaging in regular physical activity, maintaining a balanced diet, and ensuring that I attend to my mental health needs.'*

234. He stated in oral testimony that his mental health was a priority for him:<sup>196</sup>

*'Dr Donnelly: All right. Well, let me put this proposition to you, obviously, it appears you have a good employment history in Australia, Mr Rowe, but the tribunal might be concerned that well, you're going to go back to work, you might work crazy hours again, and your mental health could deteriorate, and you could engage in further criminal offending. How would you respond to that proposition?*

*Mr Rowe: Now what – being around my friends my whole – my whole life now is work and my health and that's it, just solely my work, my house, my health and that's my body health and mental health.'*

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<sup>193</sup> Transcript, page 10, line 47.

<sup>194</sup> Exhibit A8: Paragraphs [88], [91] and [95].

<sup>195</sup> Exhibit A1: Paragraph [39].

<sup>196</sup> Transcript, page 13, lines 30-37.

235. Mr Rowe testified as to his personal assets:<sup>197</sup>

*Mr Hawker: And you've accumulated machinery which is of some worth, \$300,000 to \$400,000 worth of machinery?*

*Mr Rowe: Yes.*

*Mr Hawker: And you own your own house?*

*Mr Rowe: Yes.*

*Mr Hawker: You've paid that off?*

*Mr Rowe: Yes.*

*Mr Hawker: You've got no mortgage on your house?*

*Mr Rowe: No.*

*Mr Hawker: You also say in some of the material that you own all your vehicles, and you say approximately nine vehicles?*

*Mr Rowe: I did have. I've sold some.*

*Mr Hawker: How many have you sold, and how many do you still have?*

*Mr Rowe: One, two, three – I've still got three road vehicles, road registered, and the rest I've – the excavators and stuff I've deregistered because they're just parked in the shed, even though they were a concessional rego anyway.*

*Mr Hawker: And when you say three road vehicles, can you explain to the tribunal what they are, what you mean by three road vehicles?*

*Mr Rowe: I've got my truck that I use for the hydraulic business. I've got the ute, my personal ute, and I've got a classic car.*

*Mr Hawker: Okay. What would you say the total worth of those vehicles are?*

*Mr Rowe: Only – I don't know, maybe a couple hundred thousand (indistinct).*

*Mr Hawker: And that's on top of the three to four hundred thousand worth of machinery?*

*Mr Rowe: No, that price include my hydraulic truck with the work machinery.*

*Mr Hawker: All right, so what would you - - -?*

*Mr Rowe: (Indistinct) the car – my classic car and the ute is probably, I don't know, couple hundred thousand.*

*Mr Hawker: All right. What do you value the current value of the house that you own at?*

*Mr Rowe: I haven't – I've never had it valued to be honest with you. I know what I paid for it back in 2016.*

*Mr Hawker: How much did you pay in 2016?*

*Mr Rowe: Four sixty eight.'*

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<sup>197</sup> Transcript, page 18, lines 1-38.

236. The Tribunal concludes, after looking holistically at the available evidence of Mr Rowe's general state of health in the past and currently, that he does not appear to suffer from any chronic physical health issue that would currently impede his ability to re-settle, then achieve and maintain basic living standards in the United Kingdom.
237. Dr Kwok has identified his mental health issues and Mr Rowe has stated that these are a priority for him. Despite its findings about his general credibility, the Tribunal is inclined to accept his testimony, at least in aspirational terms, in this respect.
238. Given his mental health history and acknowledging the Federal Court's decision in *Holloway v Minister for Immigration, Citizenship and Multicultural Affairs*,<sup>198</sup> the Tribunal considers that Mr Rowe faces a risk that the stresses and emotional hardships he will likely face if removed to the United Kingdom could cause mental health issues. Balanced against this risk is that Mr Rowe, as a United Kingdom citizen, can avail himself of the same level of mental health care as other UK citizens. His personal assets also offer the likelihood that he can afford to pay for additional mental health care and treatment given the priority he places on this aspect of his life, notwithstanding his oral testimony that his mental health would probably deteriorate in the United Kingdom due to waiting times.<sup>199</sup>

***Sub-paragraph 9.2(1)(b) – any substantial language or cultural barriers***

239. The Tribunal considers that, based on the evidence and material before it, Mr Rowe will face few to no linguistic barriers in returning to the United Kingdom.
240. The Tribunal also considers that Mr Rowe is unlikely to face significant cultural issues for the same reason. The Tribunal acknowledges Mr Rowe's contentions of emotional distress but observes that these are more personal than cultural.

***Sub-paragraph 9.2(1)(c) - any social, medical and/or economic support available to them in that country***

241. The Tribunal considers that, based on the evidence and material before it, Mr Rowe would have medical, social and economic support available to him.

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<sup>198</sup> *Holloway v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 1126.

<sup>199</sup> Transcript, page 11, lines 25-26.

242. In terms of medical support and addressing the potential for Mr Rowe's mental health to become an impediment, the Tribunal again acknowledges the Federal Court's decision in *Holloway v Minister for Immigration, Citizenship and Multicultural Affairs*.<sup>200</sup>

243. The Tribunal must consider both Mr Rowe's health as broadly construed, and any social, medical and/or economic support available to him in the United Kingdom if he is returned there. Quoting from Justice Colvin's decision in *Holloway*:<sup>201</sup>

*'Used in the phrase 'age and health', the word health would ordinarily be understood to mean any aspect of a person's physical wellbeing and would include the overall state of a person's fitness and condition, including underlying health issues and ongoing effects of any past injury. Within ordinary parlance, a person's status as having a history of substance abuse, especially where there was evidence from which it may be concluded that there was a real risk of relapse into misuse of substances to such an extent that it would be an impediment to a person being able to establish and maintain basic living standards, is aspect of that person's overall health.'*

and

*'The error by the Tribunal was to confine the term 'health' to only include currently manifested health issues and difficulties.'*<sup>202</sup>

and

*'Of course, there may be reasons why an underlying condition which is being managed or which is in remission or for which there is effective treatment may not be likely to manifest as an impediment.'*<sup>203</sup>

244. Mr Rowe has identified his mental health as a priority, Dr Kwok has offered suggestions as to what he should do and what treatments to seek and, if returned to the United Kingdom, Mr Rowe can avail himself of the United Kingdom's health system to address his mental health. As observed above, there is also the likelihood that he can afford to pay for additional mental health care and treatment if he wishes.

245. Mr Rowe's social support situation if returned to the UK are more problematic. The Tribunal notes the evidence of an estranged relationship with his brother and the concerns of Mr Rowe and his sister over his mother's health. Balanced against these issues are the Direction's qualification in terms of establishing himself and maintaining basic living

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<sup>200</sup> *Holloway v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 1126.

<sup>201</sup> Op.cit. [12].

<sup>202</sup> Ibid, [13].

<sup>203</sup> Ibid, [15].

standards in the context of what is generally available to other United Kingdom citizens, his likely personal financial resources, and the combination of training expertise and experience that will enable him to earn a living.

246. Addressing the economic aspects of Mr Rowe's return to the United Kingdom and establishing himself there, the Tribunal heard evidence regarding his well-regarded expertise in hydraulic repairs, his work ethic, his commendable approach to customer service, his fabricating of hydraulic parts when spares are not like widely available<sup>204</sup> and his experience and expertise in working with high pressure hydraulic systems.<sup>205</sup> Even if he is unable to start his own business again in the United Kingdom, his training experience and expertise are more likely than not to assure him of employment given the sophisticated nature of the UK economy and the likely usage of hydraulic equipment within it.

**Tribunal finding: Other Consideration (b) Extent of impediments if removed.**

247. Having regard to the analysis referable to each of the three sub-paragraph components of this other consideration (b), the Tribunal considers and finds that Mr Rowe would face varying levels of emotional, practical, financial and medical hardship over the short-term if he was returned to the United Kingdom, achieved a basic standard of living and re-established himself there.
248. While there are risks that these difficulties and hardship may affect Mr Rowe's mental health, the Tribunal considers that his stated focus on improving his mental health and his unquestioned business and technical skills are dynamic protective risk management factors that mitigate and manage these risks if he is returned to the United Kingdom.
249. The Tribunal finds that this consideration carries a moderate weight in favour of revocation of the Visa cancellation decision.

**Other Consideration (c): Impact on victims**

250. Clause 9.3(1) of the Direction states:

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<sup>204</sup> Transcript, page 7, lines 19-36.

<sup>205</sup> Transcript, page 36, lines 12-31. Relevant ISO standards (18752, 19385 and 22547) indicate that 10,000 PSI hydraulic systems are considered to be high pressure.

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

**Tribunal finding: Other Consideration (c): Impact on victims.**

251. The parties submit that there is nothing before the Tribunal that enlivens this consideration. The Tribunal agrees with these submissions.
252. Consequently, the Tribunal finds that this Other Consideration (c) carries neutral weight.

**Other consideration (d) Impact on Australian business interests if Mr Rowe cannot remain here.**

253. Paragraph 9.4 (1) compels an assessment of Mr Rowe's employment links to Australia with reference to any impact his removal may have on, "*Australian business interests*", qualified by the words that *'an employment link would generally only be given weight where the decision under section 501 or 501CA would significantly compromise the delivery of a major project, or delivery of an important service in Australia'*.
254. Summarising Dr Donnelly's contentions in regard to this consideration:<sup>206</sup>
- A decision against revocation would preclude Mr Rowe from resuming operations of his hydraulic fitting and earthmoving businesses in Australia.
  - Reinstating Mr Rowe's businesses would yield significant positive impacts on the Australian community, including the potential for job creation for Australian residents, contributions to the Australian economy, and advantageous outcomes for the construction sector in Queensland (**the business interests' contention**).
  - The business interests' contention is expressed as another reason [***an Additional Consideration***] to revoke the mandatory cancellation decision, regardless of whether it falls strictly within clause 9.4(1) of Direction 99.

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<sup>206</sup> Exhibit A2: Applicant's Reply, Paragraphs [25] – [26].

- The business interests' contention is not an irrelevant consideration for the purposes of s 501CA(4)(b)(ii) of the Act.<sup>207</sup>

255. Summarising the Respondent's contentions in regard to this consideration:

- The making of a decision preventing Mr Rowe from returning to the Australian labour market would not significantly compromise the delivery of a major project or an important service in Australia.
- While Mr Rowe has worked in several different jobs in Australia, his skills and experience are not such that his unavailability as a potential employee would have an adverse impact on Australian business interests more broadly.
- This other consideration should be assigned neutral weight.

256. In their closing submissions, both Dr Donnelly and Mr Hawker elaborated on these contentions at the Tribunal's request.

257. Summarising Dr Donnelly's closing arguments and incorporating the oral testimony he cites:

- The Tribunal should have regard to His Honour Justice Rangiah's decision in *Arachchi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* at [68]-[69], emphasising that the requirement in this consideration is to consider any impact on Australian business interests.<sup>208</sup>
- Mr Rowe's business interests come under this other consideration (d) as well as constituting an additional consideration.
- He has his hydraulic business and his earthmoving business.
- There are several specific and pertinent aspects to Mr Rowe's hydraulic business:
  - Mr Rowe fabricates hydraulic parts that are otherwise unavailable in order to return imported machinery to working order.
  - He works on and repairs high pressure hydraulic systems that no other businesses in the Hervey Bay region are willing to work on, as stated by Mr

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<sup>207</sup> *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40. See further *Tonga v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA1179.

<sup>208</sup> *Arachchi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 1311.



Goulding's testimony. Customers now seeking these skills now travel to Brisbane, some four hours away by road.

- He has a strong sense of customer service and works hard.
- Mr Goulding described Mr Rowe as a 'one stop shop'.<sup>209</sup>
- Mr Jones gave the following oral testimony in cross-examination:<sup>210</sup>

*'Mr Hawker: Thank you. Sorry, Mr Jones. I was just saying, so Mark Goulding was telling us about customers at the moment asking about when Mr Rowe is coming back and what they do in the meantime using the other companies at the moment for what they absolutely need to have done that are keeping some of the other workers - - -?'*

*Mr Jones: Yes.*

*Mr Hawker: Isn't perhaps as urgent on the hope that Mr Rowe comes back. Do you interact with customers in the area or - - -?'*

*Mr Jones: Yes, I have seen that.*

*Mr Hawker: Yes, you've heard that?*

*Mr Jones: No, I don't really do a lot of – react with a lot of the customers, but I have heard a lot of them are waiting for Andy to come back.*

*Mr Hawker: Yes?*

*Mr Jones: Yes.*

*Mr Hawker: We were just asking Mark Goulding about, if he doesn't come back, if he has to go to UK, whether he sees it is an area where the other companies will step in and essentially make a market for themselves. Do you interact with these companies that have been helping some of Mr Rowe's other customers, or that's not something that - - -?'*

*Mr Jones: No.*

*Mr Hawker: You don't speak to those companies?'*

*Mr Jones: No, no. I try to keep to myself and the people around me.'*

258. Summarising Mr Hawker's closing arguments:

- Mr Rowe has the two businesses which are not currently operating. His account of the role and importance of these businesses was exaggerated. The more useful, more objective account comes from his former employees.

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<sup>209</sup> Transcript, page 59, line 21.

<sup>210</sup> Transcript, page 66, line 31 – page 67, line 6.

- Of the two former employees, Mr Goulding’s evidence on this point should be preferred over Mr Jones’ evidence as the latter is a drive-in, drive-out individual.
- Mr Goulding’s evidence is to the effect that there are people who are interested to know if Mr Rowe is coming back to the community. There are a number of untested statements to the same effect in evidence.<sup>211</sup> Mr Rowe’s businesses can be characterised by his work ethic and service levels. Notwithstanding this, Mr Goulding’s evidence in terms of impact of business interests, is that there are other companies that are stepping in to address the need for the services Mr Rowe’s businesses offered. This is an area where conceptually they can then grow their business.
- It should not be the case that someone can be engaged in very serious criminal conduct and leave women threatened or frightened in the Australian community, engage in family violence and then come to the Tribunal and say, *‘I have another reason why my visa cancellation should be revoked. Because I have a business, and it’s been a successful business’*. This is particularly so when a former staff member gives evidence that other businesses are helping out the customers or can step in to offer similar services.
- The Tribunal should note that Mr Goulding has now found other employment.

259. In addressing this consideration, the Tribunal acknowledges His Honour Justice Rangiah’s decision in *Arachchi* at [68]-[70]:<sup>212</sup>

*[68] Paragraph 9.4.2 of Direction 90 commences by stating that, “Decision-makers must consider any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia ...”. The requirement is to consider any impact on Australian business interests. The requirement is not confined to business interests of a particular scale or importance.*

*[69] Paragraph 9.4.2 goes on to state that, “an employment link would generally only be given weight where the decision under section 501 or 501CA would significantly compromise the delivery of a major project, or delivery of an important service in Australia”. Three observations may be made. First, this qualification applies only where there is a relevant “employment link”. Second, even where there is a relevant “employment link”, decision-makers are not relieved from their obligation to consider any impacts on Australian business interests. Third, while “generally” weight will only be given to the impact on business interests where the*

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<sup>211</sup> Exhibit R1: G Documents.

<sup>212</sup> Op.cit.

*cancellation decision would significantly compromise the delivery of a major project or delivery of an important service in Australia, the Direction does not purport to preclude decision-makers from giving weight to impacts on business interests in other circumstances.*

*[70] The expression “employment link” must refer to a link between employment of the former or prospective visa holder and impacts on Australian business interests resulting from the person not being able to engage in such employment as a result of cancellation or refusal of a visa. It is unnecessary, in the absence of argument, to consider precisely what is meant by “employment” in this context, or to consider the nature of the link that is envisaged. It is enough to conclude that, in the present case, the applicant’s claim was not confined to any “employment link” but was that he had an ownership interest in a business and that his removal from Australia would affect his partner’s business interests.’*

260. The parties also cited the Federal Court decisions of *Tonga v Minister for Immigration, Citizenship and Multicultural Affairs* and *JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs*.<sup>213</sup>
261. In assessing this consideration, the Tribunal notes (in no particular order), Mr Rowe’s skill in fabricating parts for imported hydraulic equipment when spare parts are not readily available,<sup>214</sup> his service ethic, his clear expertise in working with high pressure hydraulic systems<sup>215</sup> and the likely relative importance of these characteristics in a regional economy where commercial fishing and earthmoving are relevant industries.
262. The Tribunal considers that a decision to affirm Mr Rowe’s Visa cancellation decision will impact on Australian business interests in different ways, assuming that such a decision will cause Mr Rowe to permanently close his hydraulics and earthmoving businesses. It is relevant to emphasise at this juncture that both businesses are presently not operating.
263. First, the Tribunal finds that Mr Rowe’s two businesses should be distinguished. Earthmoving, as attested to in Mr Goulding’s oral testimony, continues whether Mr Rowe’s business is operating or not.<sup>216</sup> The Tribunal considers and finds that the impact on

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<sup>213</sup> *Tonga v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1179; *JZQQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 168.

<sup>214</sup> Transcript, page 7, lines 19-36.

<sup>215</sup> Transcript, page 36, lines 12-31. Relevant ISO standards (18752, 19385 and 22547) indicate that 10,000 PSI hydraulic systems are considered to be high pressure.

<sup>216</sup> Transcript, page 59, lines 38 – 44.

Australian business interests of this business ceasing if a decision to affirm Mr Rowe's Visa cancellation decision is made is minimal.

264. The testimony of Mr Goulding and Mr Jones indicates that the absence of Mr Rowe's hydraulic business has led some customers to hold off seeking repairs, others to take their business to Brisbane and for some competitors to increase their services. This testimony aligns with the expected operation of general market economics around the supply and demand of services and goods.
265. Turning to Dr Donnelly's business interests' contention, the Tribunal understands the contention to be that if the Tribunal sets aside the Visa cancellation decision, Mr Rowe would put his businesses back into operation. This would result in significant positive impacts on the Australian community, including the potential for job creation for Australian residents, contributions to the Australian economy, and advantageous outcomes for the construction sector in Queensland.
266. The Tribunal considers that this contention does not apply well in terms of the earthmoving business. Earthmoving is somewhat fungible and there was no evidence before the Tribunal to the effect that earthmoving operations in the Hervey Bay region had ceased. Mr Goulding gave oral testimony to the contrary.<sup>217</sup>
267. The Tribunal considers that the impact on Australian business interests of the hydraulic repair and servicing business ceasing if a decision to affirm Mr Rowe's Visa cancellation decision is made is more complex than that of the earthmoving business. In the short-term, as the situation is now with the business not operating, customers will hold back or seek alternatives until the situation resolves.<sup>218</sup> This state of affairs represents, to some extent, a negative impact on Australian business interests that used Mr Rowe's services in line with Dr Donnelly's business interests' contention. Put simply, prices and availability of hydraulic services in the Hervey Bay region will likely already have changed and will continue to change in part due to the absence of Mr Rowe. But the price of a service or goods is a signal wrapped in information. Competitors will see the signal and decide whether to enter and fully commit to the market to replace Mr Rowe over the medium to long-term if a

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<sup>217</sup> Transcript, page 59, lines 38-44.

<sup>218</sup> See transcript, Mr Goulding, page 58, line 45 – page 59, line 36.

decision to affirm Mr Rowe's Visa cancellation decision is made. Simple market economics suggest demand will be met with supply. As Mr Hawker observed, this is a net positive impact for Australian business interests.

268. The Tribunal finds, upon consideration, that the impact on Australian business interests from Mr Rowe's earthmoving business ceasing if he is returned to the United Kingdom is minimal. It further finds that there will likely be a short-term impact on Australian business interests if Mr Rowe's hydraulic repair and servicing business ceases.

**Tribunal finding: Other Consideration (d): the impact on Australian business interests if Mr Rowe cannot remain here.**

269. This consideration provides a slight weight in favour of setting aside the Visa cancellation decision.

**FINDINGS: OTHER CONSIDERATIONS**

270. The Tribunal now summarises the respective weights it has allocated to each of the Other Considerations (specified in the Direction) relevant to the present matter:

- **Other Consideration (a) – legal consequences of the decision:**
  - This consideration has neutral weight.
- **Other Consideration (b) - extent of impediments if removed:**
  - This consideration has a moderate weight in favour of revocation.
- **Other Consideration (c) - impact on victims:**
  - This consideration has neutral weight.
- **Other Consideration (d) – Impacts on Australian business interests:**
  - This consideration has a slight weight in favour of revocation.

## ADDITIONAL CONSIDERATIONS

271. The Direction does not limit the other considerations to those listed in the Direction (paragraph 9(1) of the Direction).<sup>219</sup>
272. Dr Donnelly has contended (**the business interests' contention**) that setting aside the Visa cancellation decision would yield significant positive impacts on the Australian community, including the potential for job creation for Australian residents, contributions to the Australian economy, and advantageous outcomes for the construction sector in Queensland. Dr Donnelly further submitted that this constitutes an additional consideration that the Tribunal should assess.
273. To the extent that there are distinguishing circumstances around the potential future impact on Australian business interests of Mr Rowe's recommencing business operations (as the businesses are currently not operating) if he is allowed to remain in Australia and that these create an additional consideration, the Tribunal considers that its analysis of the business interests and their impact on Australian business interests above under other consideration (d) can be applied to this additional consideration.
274. In addressing this additional consideration, the Tribunal also has regard to the following comments by the High Court in *Viane* at [28]:<sup>220</sup>
- '... Secondly, representations may be received which are no more than bare assertions about a course of future events. The Minister may simply not be persuaded that such assertions can constitute "another reason" for revocation. Such a conclusion does not require the Minister to make any factual findings.'*
275. The suggested significant positive impacts would also likely result from Mr Rowe returning to the United Kingdom and Australian business interests moving to address his customer base once he had permanently left the market.
276. This additional consideration has neutral weight.

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<sup>219</sup> Per *Fehoko v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 1471.

<sup>220</sup> *Minister For Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41.

## CONCLUSION

277. Because of the combined effects of ss 501(6)(a) and 501(7)(c) of the Act, Mr Rowe does not pass the character test.
278. In determining whether there is '*another reason*' to revoke the cancellation decision, the Tribunal has applied the Direction to this matter's specific circumstances.
279. The Tribunal find as follows:
- **Primary Consideration 1 - protection of the Australian community from criminal or other serious conduct:**
    - This consideration weighs very heavily and substantively in favour of affirming the delegate's decision not to revoke Mr Rowe's mandatory Visa cancellation.
  - **Primary Consideration 2 - whether the conduct engaged in constituted family violence:**
    - This consideration weighs very heavily and substantively in favour of affirming the delegate's decision not to revoke Mr Rowe's mandatory Visa cancellation.
  - **Primary Consideration 3 - the strength, nature and duration of ties to Australia:**
    - This consideration carries a significant level of weight in favour of setting aside the delegate's decision not to revoke Mr Rowe's mandatory Visa cancellation.
  - **Primary Consideration 4 - best interests of minor children in Australia affected by the decision:**
    - This consideration carries a moderate weight in favour of setting aside the delegate's decision not to revoke Mr Rowe's mandatory Visa cancellation.
  - **Primary Consideration 5 – expectations of the Australian Community:**
    - This consideration carries significant and material weight in favour of affirming the delegate's decision not to revoke Mr Rowe's Visa cancellation.

- **Additional Consideration**

- The additional consideration has neutral weight.

280. The Tribunal has also set out above the weight attributable to the other considerations and the additional consideration.

281. The Tribunal has assessed and considered the weights it has applied, applying the process outlined in *Demir v Minister for Immigration, Citizenship and Multicultural Affairs* at [21]:<sup>221</sup>

*[21] The metaphor of “weighing” relevant considerations should not be taken too literally. The exercise is not mathematical and cannot depend on the simple aggregation of factors on each side of a ledger. The conclusion as to whether there is “another reason” for the purposes of s 501CA(4)(b)(ii) necessarily involves persuasion of a human decision-maker, whose thought processes cannot be reflected in lines of code, as to what is the right result in the circumstances. That persuasion flows from the decision-maker’s personal understanding as to the significance of each of the factors they are required or permitted to take into account, in the light of all the material they have considered. So much is consistent with the decision-maker’s duty to “call his own attention to the matters which he is bound to consider” (Peko-Wallsend at 39 (Mason J), quoting Wednesbury at 229 (Lord Greene MR)) and to give “proper, genuine and realistic consideration to the merits of the case” (Khan v Minister for Immigration and Ethnic Affairs (unreported, Federal Court of Australia, Gummow J, 11 December 1987; noted [1987] FCA 457; (1987) 14 ALD 291, 292). Correspondingly, the statutory specification of mandatory considerations requires those considerations to be taken into account, but not necessarily to be given any particular degree of weight: Telstra Corporation Ltd v Australian Competition and Consumer Commission [2008] FCA 1758; 176 FCR 153 at [110] (Rares J) (varied on appeal (Australian Competition and Consumer Commission v Telstra Corporation Ltd [2009] FCAFC 68; 176 FCR 203), but not on this point).’*

282. A comprehensive, holistic and integrated view of the weights allocated to the Primary considerations, the Other considerations and the Additional consideration leads this Tribunal to a finding that the weights allocated to Primary Considerations 1, 2 and 5 outweigh the weights allocated to Primary Considerations 3 and 4 and Other Considerations (b) and (d). This led the Tribunal to be satisfied of there not being another reason to revoke the mandatory cancellation of the Applicant’s Visa. Accordingly, the Tribunal makes a finding of affirming the delegate’s decision to not revoke the cancellation of Mr Rowe’s visa.

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<sup>221</sup> *Demir v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 870.



## DECISION

283. 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 28 November 2023 to not revoke the cancellation of Mr Rowe's visa.

*I certify that the preceding two hundred and eighty-three paragraphs (283) paragraphs are a true copy of the reasons for the decision herein of Member D. Cosgrave*

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

Associate

Dated: 5 April 2024

Dates of hearing: **7 and 9 February 2024**

Counsel for the Applicant: **Dr Jason Donnelly (Direct brief)**

**Latham Chambers**

Solicitor for the Respondent: **Mr Matthew Hawker (Partner)**

**Sparke Helmore Lawyers**

**ANNEXURE A – EXHIBIT REGISTER**

<b>EXHIBIT</b>	<b>DESCRIPTION OF EVIDENCE</b>	<b>DATE OF DOCUMENT</b>	<b>DATE RECEIVED</b>
<b>RESPONDENT SUBMISSIONS</b>			
R1	Section 501G documents	Various	11.12.2023
R2	Statement of Facts, Issues and Contentions (' <b>RSFIC</b> ')	18.01.2024	18.01.2024
R3	Tender bundle	Various	18.01.2024
<b>APPLICANT SUBMISSIONS</b>			
A1	Applicant's statement	29.12.2023	9.01.2024
A2	Applicant's Statement of Facts, Issues and Contentions (' <b>SFIC</b> ')	28.12.2023	9.01.2024
A3	Applicant's Tender Bundle Part 1	Various	9.01.2024
A4	Statement from Angela Wendy Miller	29.12.2023	9.01.2024
A5	Statement from Ms. Evelyne Goulding	29.12.2023	9.01.2024
A6	Statement from Mr. Mark Goulding	29.12.2023	9.01.2024
A7	Statement from Mr. Steve Jones	29.12.2023	9.01.2024
A8	Report by Dr Emily Kwok	31.01.2024	2.02.2024
A9	Applicant's reply to Respondent's SFIC	2.02.2024	2.02.2024

ANNEXURE B: SHORT FORM DECISION



# Administrative Appeals Tribunal

ADMINISTRATIVE APPEALS TRIBUNAL

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No: 2023/8963

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GENERAL DIVISION

)

Re: Andrew Rowe  
**Applicant**

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

## DECISION

**TRIBUNAL:** Member D. Cosgrave

**DATE:** 19 February 2024

**PLACE:** Brisbane

**DECISION:** 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 28 November 2023 not to revoke the cancellation of the Applicant's visa.

The Tribunal will give written reasons for this decision within a reasonable time of the decision.

.....[SGD].....  
**Member D Cosgrave**