



Administrative  
Appeals Tribunal

DECISION AND  
REASONS FOR DECISION

Division: GENERAL DIVISION

File Number: 2022/4353

Re: **Dean Buntin**

APPLICANT

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

RESPONDENT

**DECISION**

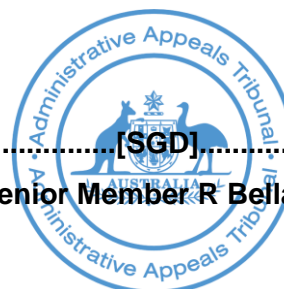
Tribunal: **Senior Member Rebecca Bellamy**

Date of Decision: **1 May 2024**

Date of Reasons: **10 June 2024**

Place: **Brisbane**

On 1 May 2024, the Tribunal set aside the decision made by the delegate of the Respondent on 30 May 2022 and exercised the power contained in section 501CA (4)(b)(ii) of the *Migration Act 1958* (Cth) to revoke the mandatory cancellation of the Applicant's visa.



[SGD]

Senior Member R Bellamy

## **CATCHWORDS**

*MIGRATION – revocation of mandatory cancellation of a Class BS Subclass 801 Partner (Permanent) visa – where Applicant does not pass the character test – where there is another reason to revoke the mandatory cancellation decision – consideration of Ministerial Direction No. 99 – serious domestic violence offences – serious health condition – best interests of minor children – decision under review set-aside*

## **LEGISLATION**

*Migration Act 1958 (Cth)*

## **CASES**

*Minister for Home Affairs v Buadromo [2018] FCAFC 151*

## **SECONDARY MATERIAL**

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

## REASONS FOR DECISION

Senior Member R Bellamy

10 June 2024

1. The Applicant is a 34 year old citizen of the United Kingdom of Great Britain and Northern Ireland. He moved to Australia in 2008 when he was 18 years old. He suffers from Multiple Sclerosis, a debilitating and incurable disease. Unfortunately, he has a history of dealing with emotional turmoil in maladaptive ways. This led him to engage in behaviour that potentially put road users at risk. Further, he committed some serious offences against the mother of his children. As a result of the latter offending, his visa was cancelled. He asked the Tribunal to revoke that cancellation. This has not been an easy decision, because I am of the view that there is a material risk that he will re-offend if he again experiences severe emotional or psychological distress. However, there are compelling reasons to allow him to stay in Australia. The detailed reasons for my decision follow.
2. I sincerely hope the Applicant's mother reads these reasons closely, as her willingness and ability to support and guide the Applicant was crucial in my decision to allow him to have his visa back.

### The legal framework

3. Section 501(3A) of the *Migration Act 1958* (Cth) ('the Act') relevantly provides that the Minister must cancel a visa that has been granted to a person if:
  - the Minister is satisfied that the person does not pass the character test because of the operation of paragraph (6)(a), on the basis of paragraph (7)(a), (b) or (c); and
  - the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.
4. Under s 501(6)(a) of the Act, a person will not pass the character test if they have "a *substantial criminal record*". Section 501(7)(c) of the Act relevantly provides that a person has a substantial criminal record if they have "*been sentenced to a term of imprisonment of 12 months or more*".

5. In August 2021, the Applicant was given two sentences each of two years imprisonment to be served cumulatively. While he was serving that sentence, a delegate of the Minister (“the Respondent”) mandatorily cancelled his visa because he did not pass the character test and he was serving a full time custodial sentence.
6. A mandatory visa cancellation can be revoked under s 501CA(4) of the Act which provides:  
*The Minister may revoke the original decision if:*
  - (a) *the person makes representations in accordance with the invitation; and*
  - (b) *the Minister is satisfied:*
    - (i) *that the person passes the character test (as defined by section 501); or*
    - (ii) *that there is another reason why the original decision should be revoked.*
7. The Applicant made written representations to the Respondent requesting revocation (“revocation request”). The Respondent decided not to revoke the cancellation. That decision was reviewable by the Tribunal pursuant to s 500(1)(ba) of the Act. A differently constituted Tribunal affirmed the decision, however, the Federal Court subsequently remitted the decision for a fresh review which is the subject of this proceeding.
8. It was not in dispute, and I am satisfied, that the Applicant does not pass the character test. Thus, the sole issue is whether there is another reason to revoke the mandatory cancellation of the Applicant’s visa. If there is, I should set aside the original decision.<sup>1</sup>
9. The hearing of this application took place on 19 and 20 March 2024. The Applicant, his mother, his step-father, an aunt, his sister, one of his brothers, and Dr Emily Kwok gave evidence. The Tribunal also received the written evidence that is listed in the attached exhibit list, marked “Annexure A”.

**Determination of Whether There is Another Reason Why the Cancellation of the Applicant’s Visa Should be Revoked?**

10. In applying s 501CA(4) of the Act, the Tribunal is bound by s 499(2A) to comply with any directions made under the Act. In this case, *Direction No 99 – Visa refusal and cancellation*

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<sup>1</sup> *Minister for Home Affairs v Buadromo* [2018] FCAFC 151.

*under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (“the Direction”) applies.

11. For the purposes of deciding whether or not to revoke the mandatory cancellation of a non-citizen’s visa, paragraph 5.2 of the Direction contains several guiding principles. Those principles, as far as they relate to this matter, may be summarised as follows:

- Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to remain in Australia. Being able to 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.
- Non-citizens who engage or have engaged in criminal or other serious conduct should expect to forfeit the privilege of staying in Australia.
- The Australian community expects that the Australian Government can and should cancel a non-citizen’s visa 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 measurable risk of causing physical harm to the Australian community.
- However, Australia 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.
- 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 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 8.5(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.

12. Paragraph 6 of the Direction provides that:

*Informed by the principles in paragraph 5.2, a decision maker must take into account the considerations identified in sections 8 and 9, where relevant to the decision.*

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

- (1) protection of the Australian community from criminal or other serious conduct;
- (2) family violence;
- (3) strength, nature and duration of ties to Australia;
- (4) best interests of minor children in Australia; and
- (5) expectations of the Australian community.

14. Paragraph 9 of the Direction sets out four Other Considerations which must be taken into account. They are:

- a) legal consequences of the decision;
- b) extent of impediments if removed;
- c) impact on victims; and
- d) impact on Australian business interests

15. Paragraph 7(2) provides that the primary considerations should generally be given greater weight than the other considerations, and paragraph 7(3) provides that one or more primary considerations may outweigh other primary considerations.

## **BACKGROUND AND EARLY OFFENDING**

16. I accept the following factual matters which were not in dispute.

17. The Applicant was born in Scotland. His parents had three sons: Michael, then the Applicant, then Jamie. When the Applicant was around three years old, his parents broke up and his mother re-partnered. She and her new partner went on to have a daughter, Erin. The Applicant's biological father was addicted to drugs, and he died of an overdose when

the Applicant was nine years old. As the Applicant had idolised his biological father. He rebelled against his mother and step-father and, in his words, “*didn’t really care if I lived or not*”.<sup>2</sup>

18. At age 10, the Applicant began smoking marijuana, and occasionally taking ecstasy, to suppress his emotions. According to his mother, he engaged in uncontrollable and risky behaviours including drug-taking, not coming home, and hanging around older boys. He was ultimately placed in foster care for his own safety, spending weekends with his family. As a result, he felt unloved and unwanted. He questioned why he was the only child in his family to be in foster care. His mother thought that being taken away from his family affected him deeply. In these proceedings, when referring to his use of drugs to suppress emotions, he referred to the trauma of his foster care experience and abandonment issues. After being in foster care for around a year, he was able to return home. With supports in place, his behaviour improved somewhat.
19. In 2007, his family, except for him and Michael, moved to Australia. He chose to stay in Scotland, and he lived with his girlfriend. However, after a year, he joined his family in Australia. Once in Australia, he stopped using drugs.
20. However, the Applicant engaged in anti-social behaviour involving alcohol. In December 2009, he hit a car as he was leaving a hotel car park. He left the scene and the police caught up with him later. His blood alcohol content was 0.123%.
21. Around a year later, in November 2010, the police intercepted the Applicant after observing him driving at high speed in an erratic manner and drifting lanes. His blood alcohol content was 0.113%. By his own admission, the Applicant had a problem with alcohol at that time. He drank every day after work, caught the bus home, then drove to the pub, had “*a few beers*”, and then drove home. A month after that incident, in December 2010, the Applicant was caught with a small amount of ecstasy.

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<sup>2</sup> Exhibit G, G-Documents, G27, page 176.

22. In June 2011, the Applicant and “Ms R” got married after having dated for around three years.
23. In 2011 or 2012, the Applicant started using crystal methamphetamine (which I will refer to as “ice”) on a daily basis with people from his work. He used it daily when he was at work but he did not use it at home. Ms R did not know about it.
24. On 1 August 2011, the Applicant was caught driving disqualified and speeding. In February 2013, he was again caught driving while disqualified. He told the police he thought his disqualification period had finished, but this seems implausible.
25. In October 2013, the Applicant was charged with assault or obstruct police officer. The police had shouted at him to stop from a distance of about 30 metres, but instead he ran away.
26. There were problems between the Applicant and Ms R’s family before they were married. They were Muslim and they did not approve of the Applicant because he was not. The Applicant’s step-father recalled that Ms R’s family ostracised the Applicant. His older brother, Michael, recalled that they threatened to cut off contact with Ms R if she did not end the relationship. The Applicant converted to Islam in an effort to be accepted by Ms R’s family, however he was still ostracised, and this contributed to him feeling that he was “*an outcast*” and “*not good enough*”.
27. There were also problems between the Applicant and Ms R. The Applicant’s step-father described their marriage as being “*up and down*”, and Ms R being “*very dominant*”, often berating the Applicant and speaking down to him in front of his family. The Applicant’s mother said Ms R spoke down to the Applicant a lot and spoke to him with disrespect. Michael also recalled Ms R acting as though she was superior to the Applicant, putting him down and “*back into his place*”. Michael thought that over time, it damaged the Applicant’s mental health. He said he never saw the Applicant treat Ms R with disrespect. Jamie described Ms R speaking down to the Applicant, worsening his state of mind. The Applicant’s mother also referred to the Applicant’s state of mind worsening. She said he ended up feeling worthless and unwanted.



28. In August 2012, the Applicant and Ms R had their first child, "Child A".
29. In late 2013, arguments between the Applicant and Ms R became more frequent and intense. In January 2014, they separated.
30. On 10 January 2014, Ms R returned to the family home to collect clothes and personal items for Child A. She later told the police that when she arrived at the house, the Applicant had "*turned it upside down*". Further, he had let the air out of all four of the car's tyres and done something to the battery so it would not start. She claimed that when she tried to leave, he chased her up the street, pushed her onto the floor, and took her keys and mobile phone. The account the Applicant gave to the police was that Ms R came over and "*went off*" at him, throwing punches and ripping his pants.
31. The police observed that both the Applicant and Ms R had injuries. The Applicant said his were from Ms R grabbing him, and he claimed that half of her injuries were from her throwing herself to the ground. The police were unable to tell who the aggressor was because they were both injured, and they were both semi-aggressive and uncooperative. The police obtained reciprocal protection orders.
32. In the previous Tribunal hearing, the Applicant admitted that he chased Ms R up the street, pushed her onto the floor, and he took the car keys, the keys to her parents' home and her mobile phone. He admitted that he did cause some injury to Ms R. He said he was not using methamphetamines at that time.
33. However, it appears he was using marijuana from 2012 to 2014, and his drug use increased during the period of separation. He stopped using it after experiencing symptoms of paranoia.
34. In July 2014, the Applicant was once again caught driving while disqualified. He also committed an offence of assault or obstruct police officer when he failed to stop for police and instead drove away so fast that when he turned a corner, he left skid marks on the road. He then got out of his vehicle and ran away. He later admitted that he had been driving and that he had fled because he was disqualified from driving.

35. Ms R insisted that the Applicant get help, and he obtained a referral to a psychologist, Dr Travis Gee. He started seeing Dr Gee in September 2014, a month before the birth of his second child with Ms R. It appears that he and Ms R reconciled around this time, and the Applicant abstained from drugs for a period. "Child B" was born in October 2014.
36. In January 2015, the Applicant was dealt with for assault or obstruct police and disqualified driving. The court suspended the Applicant's license for two years. Dr Gee had provided a report to assist the court. He stated that the Applicant was referred to him in September 2014 for treatment of mixed anxiety and depression. He thought the anxiety issues underlay an anger management problem, and that the Applicant impulsively used driving as a means of escaping emotionally difficult situations, such as arguments with his wife. He thought the Applicant's traffic infringements reflected an ill-advised reaction to conflict, wherein he avoided keeping himself in a position where violence might seem like the only other option. He would grab the car keys, storm out of the house to drive around to calm down.
37. Dr Gee reported that the Applicant recognised that he needed to learn to manage conflict if he wanted to reconcile with Ms R and their son, with a second child on the way. Ms R had participated in most of the counselling with the Applicant and Dr Gee. She had acknowledged her own anger issues and contribution to the problem. When asked about this in the hearing, the Applicant said Ms R used to scream, shout and throw things, but she had stopped throwing things after the reciprocal protection orders were made.
38. Dr Gee opined that both the Applicant and Ms R used maladaptive approaches to conflict. Additionally, Dr Gee identified possible attachment issues related to the Applicant's time in foster care. The Applicant's results in an anger assessment test were consistent with Ms R's reports that he frequently overreacted angrily to life's many annoyances, with occasional impulsive outbursts of hostility.
39. Dr Gee administered multiple assessment tools and concluded that the Applicant's problems were primarily behavioural issues rather than arising from an underlying personality disorder or other clinical syndrome. He reported that the Applicant disclosed having some suicidal ideation when he believed Ms R was likely to leave him and take their son with her.

40. Dr Gee assisted the Applicant to be able to identify when his anger was building up to avoid reaching breaking point. Dr Gee thought that over the course of the counselling sessions, the Applicant's strategies in managing conflict had improved more than expected, and there had been a reduction in incidents where the Applicant's impulsivity had created a potentially hazardous situation. Dr Gee recommended periodic check-ins with himself or a Corrections-based psychologist.
41. In the present hearing, the Applicant confirmed that Dr Gee had helped him to understand his triggers and given him techniques to avoid getting in the car and taking off. He learned some anger management strategies such as removing himself from a situation that was making him angry or focussing his mind on something else.
42. In 2015, the Applicant stopped using ice. There were no further reports of domestic violence or traffic infringements between 2015 and 2017.
43. In 2016 or 2017, the Applicant was diagnosed with Multiple Sclerosis ("MS"). MS is a chronic neurological disease in which the body's immune system attacks the myelin around the body's nerves, resulting in a range of symptoms affecting motor function, thinking and memory, and the ultimate degeneration of nerves. MS is currently incurable, and there are limited treatment options for progressive MS. MS is associated with various psychological problems, including depression and anxiety.
44. The Applicant's symptoms included fatigue, memory loss, difficulty walking, concentration problems, altered sensation, and reduced interest in normal activities. He was told he could wake up paralysed. His diagnosis affected his mental state and he "*went to a dark place*". He said it changed his whole character. He was diagnosed with depression.
45. The Applicant's third child, "Child C", was born in June 2017.
46. The Applicant did not give consistent evidence about the timing and order of the following events, but it seems that around late 2017 or 2018, he lost his job, which led to financial stress and arguments with Ms R. Following an argument with Ms R, and he resumed using ice, unbeknown to her. After a short period, he stopped.

47. In May 2018, the Applicant was caught speeding. His fourth child, “Child D”, was born in August 2018. He was caught speeding again in February and June 2019. In June 2019, the Applicant’s marriage broke down. Initially, he and Ms R remained living in the family home. It appears that he had resumed using ice by this time.
48. Two weeks later, the Applicant texted a photo to Ms R that showed pills in his hand. Ms R wrote back “*stop doing this, good night*”.<sup>3</sup> He replied to the effect that he might not be there in the morning. She told him he was seeking attention. He then texted a photo of pills in his mouth. The pills were Mirtazapine, an anti-depressant that assists with sleep. The Applicant swallowed the pills but survived.
49. The next day, Ms R told the police that the Applicant was seen near her car at their child’s school, and he was possibly damaging it. However, the car was undamaged. The Applicant told the police he had tried to call Ms R several times as she had changed their banking password and he needed money to pay for petrol. As she did not answer, he parked next to her car at the school and tried to find her. He ended up borrowing money from a friend.
50. Ms R told the police that after she and the Applicant had separated, he said if he could not have her, then no-one else could. The Applicant told the police he had taken 12 pills as he was suffering, and that he was still contemplating suicide and would likely make further attempts. The police arranged for a mental health assessment, and the Applicant was taken to Logan Hospital. Nothing came of this in terms of further supervision or treatment.
51. In the hearing, the Applicant confirmed that his overdose was not a cry for help but a genuine attempt to kill himself as he thought he “*had nothing left*”.<sup>4</sup> The Applicant’s mother was told about it, and she took to calling and texting him to check on him and encourage him to see a doctor. He recalled telling her he was going to see a doctor but then not going.
52. On 2 July 2019, a Domestic Violence Order (“DVO”) was made against the Applicant. He was present in court when it was made. The order prohibited him from entering, attempting

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<sup>3</sup> Exhibit R1, Remittal Bundle, R3, page 264.

<sup>4</sup> Transcript, page 48, line 28.

to enter or approaching to within 100 meters of where Ms R lived, worked or frequented, without her permission. Ms R gave the Applicant permission to live in the family home, thinking he was getting help with his mental health. When she later revoked permission, he refused to move out.

53. On 1 August 2019, the Applicant sat in his car, filling the garage with fumes. As Ms R tried to open the garage door, he kept closing it. The Applicant drove off and Ms R put her car into the garage. He then returned, parked her in and drilled a hole in her tyre. She told him he was not welcome and not to return. She told him to collect his belongings, leave and not come back. She told him again by text message. However, he did return and tried to enter the house through the front door, back door and garage.
54. On 2 August 2019, Ms R was in her car with the children. As she started to open the garage door, the Applicant entered. He said he only wanted to have a shower. Ms R said she would call the police if he was still there when she returned. He left after 15 minutes. Ms R drove to a police station, saying she was too frightened to return home.
55. The following morning, on 3 August 2019, Ms R was woken by the Applicant banging on the front screen door and calling out something about the dog escaping the yard. However, the dog was in the yard. The Applicant then drove off. Later that morning, the Applicant returned, turned the power off at the external power box, and ran away. Some hours later, Ms R saw the Applicant walking towards the house.
56. The following day, the Applicant surrendered to the police. He was released after signing a bail undertaking.
57. On 5 August 2019, the DVO was varied to add the children as named persons and to add conditions including that the Applicant not contact the children and not contact Ms R through other people. The varied order was not served on him until after the incident on 14 August 2019.
58. The Applicant could not stay with his family as his parents were visiting Scotland and his sister was in the process of moving house. He lived in his car. When he was homeless, he

hung around anti-social people, which led to increased use of ice. He thinks his heavy substance abuse numbed him and impacted his decision-making, which contributed to his subsequent offending.

## **THE FAMILY VIOLENCE OFFENCES AND RELATED OFFENCES**

59. On 14 August 2019, at around 12.30am, Ms R saw that the Applicant was tampering with an outdoor ceiling light. She shouted at him to leave. He left. She went outside to try and fix the light and to block the driveway with some rubbish bins to stop him from returning. He walked towards her. She told him not to go inside and grabbed him by his shoulder to stop him. He turned and grabbed her left hand and squeezed it. He then grabbed her by the throat and pushed her against the front door, tightening his grip so that she could not breathe. That lasted for about 30 seconds before he released his grip. Ms R later told the attending ambulance officer she had difficulty breathing and shortness of breath. One officer saw minor redness and a bruise on her neck. A GP noted some tenderness in the left neck muscle and some muscular spasms on the left side of her neck.
60. When the police caught up with the Applicant, he falsely denied having been at Ms R's house or having strangled her. He said her version of events was "*delusional*".<sup>5</sup>
61. In the hearing, the Applicant said Ms R grabbed him on the shoulder and he grabbed her. He said he let go when he realised what he had done. He said it was an automatic reaction, however, I find it hard to believe that grabbing her by the throat for 30 seconds was automatic, so I reject that explanation. The Applicant acknowledged that he should not have done it, and it would have caused Ms R a lot of trauma. He acknowledged that he made her afraid in her own home which should have been a safe place for her and their children.
62. On 22 August 2019, the Applicant was remanded in custody. In breach of the DVO, he contacted Ms R from prison. Further, two other prisoners, whom Ms R did not know, attempted to add her to their call lists. I infer they did that at the Applicant's instigation.

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<sup>5</sup> Exhibit R1, Remittal Bundle, R4, page 490.

63. While the Applicant was on remand, Ms R started visiting him with the children, and they resumed their relationship. Towards the end of his period on remand, the Applicant started using Suboxone illicitly around once per week. Suboxone is a medication used to assist with drug withdrawal symptoms, and it is available on prescription. However, the Applicant did not have a prescription.
64. On 18 March 2020, the Applicant was granted bail. Ms R gave consent for him to live at the family home and to contact her. He initially did not use drugs. However, he believed Ms R had been involved with other men while he had been in prison, and this led to him using ice again after around a month.
65. On 6 May 2020, Ms R revoked her consent for the Applicant to live with her and contact her. A few days later, the Applicant went to the family home, seemingly under the influence of drugs. He put up some bunk beds, but Ms R told him the relationship was over.
66. Over the following days, the Applicant tried to contact Ms R by calling or texting multiple times each day. On 12 May 2020, Ms R blocked his phone number. On 24 May 2020, she unblocked his number after his mother called to ask if he could see his children. Between 24 May and 16 June 2020, the Applicant stalked Ms R. For example, on 26 May 2020, he sent her 24 text messages. In some, he indicated he was watching her from outside her property. He also accused her of being with someone else. She later found him passed out in his car outside her house.
67. The Applicant engaged in similar behaviour over the following days. In addition, on 29 May 2020, he slashed the tyre of a person who visited the family home. On 30 May 2020, Ms R returned after having visited the Applicant's mother. The following day, she noticed that her makeup, perfume, underwear, a packet of condoms and her vibrator were missing from her draw. The Applicant later returned all but the condoms and vibrator. The Applicant scratched "SLUT" into Ms R's car.

68. The Applicant told the first Tribunal that, at the time, he was high on meth and he was trying to “*play games*” with Ms R’s head.<sup>6</sup> He denied having scratched “*slut*” into her car and suggested her boyfriend had done it. I reject that explanation and note that there is no reliable evidence that Ms R had a boyfriend at that time.
69. On 1 June 2020, the Applicant went to Ms R’s home, but he did not go inside. The next day he sent 30 text messages, and on the day after that, he sent over 100 messages. Over the following days, he sent multiple messages each day, with one message including a photo of a person at Ms R’s door.
70. On 9 June 2020, the Applicant tried, unsuccessfully, to open the fly screen door to Ms R’s home. By this time, he was living with his mother and step-father. On 10 June 2020, his mother reported him missing as he had not been home. He had posted numerous messages on Facebook about suicide and not wanting to live, putting the blame on Ms R.
71. Between 30 May 2020 and 12 June 2020, Ms R replaced four padlocks on her side gate which had each been cut. One of her car tyres had also been punctured in four places. It can readily be inferred that the Applicant was responsible for this as there is no suggestion that anyone else was targeting Ms R or the family home. A District Court Judge mentioned that the Applicant had cut “*a padlock*” to the side gate.<sup>7</sup> The Applicant continued to do things that contravened the DVO and his bail conditions.
72. On 16 June 2020, the Applicant was apprehended in relation to his repeated violations of the DVO. The police found that he was in possession of marijuana, drug related utensils including a glass pipe, and a knife. He admitted to using ice by smoking it through a glass pipe, but he denied any knowledge of the particular pipe found by police. He said the knife was for protection because he was being followed by unknown persons. In subsequent accounts, he said the knife was part of a bottle opener that his friend had left in his car after

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<sup>6</sup> Transcript, page 20, line 14.

<sup>7</sup> Exhibit R1, Remittal Bundle, R4, page 493.



they has been drinking together in the car. In this proceeding, he said that what he told the police was “*probably untrue*”.<sup>8</sup>

73. The Applicant continued to breach the DVO and his bail conditions. On 29 July 2020, he was again remanded in custody. He stopped using drugs while in custody, but after around two and a half months, he started to use unprescribed suboxone again. He used it two or three times per week.
74. When the Applicant was later interviewed by Dr Kwok for the purposes of a risk assessment, he did not disclose his illicit suboxone use. Nor did he volunteer that information to the Tribunal when his barrister asked how long he was using drugs. Instead, he said he stopped using drugs when he went into custody. When this important omission was raised with him, he said he did not think of suboxone use as illicit drug use.
75. While on remand, the Applicant continued to contact Ms R in breach of the DVO. For example, he sent her a letter and he sent a letter to his children that contained messages to her such as a request that she bring the children to visit him. He also indicated in the letter that the children would eventually resent Ms R for what she had done to him. In the hearing, the Applicant acknowledged that he had used contact with his children to breach the DVO and that this would have had a negative impact on them.<sup>9</sup> The Applicant also used other inmates to send Ms R letters throughout October, November and December 2020.
76. In August 2021, the Applicant was sentenced, following guilty pleas, for:
- choking suffocation strangulation domestic relationship – domestic violence offence (on 14 August 2019)
  - unlawful stalking contravene/threatens to contravene an order/injunction – domestic violence offence (between 24 May and 17 June 2020)
  - contravention of domestic violence order x 4
  - breach of bail condition x 3
  - possessing dangerous drugs

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<sup>8</sup> Transcript, page 40, line 3.

<sup>9</sup> Transcript, page 40, lines 44 to 47.

- possess utensils or pipes etc for use
- possession of a knife in a public place
- contravention of domestic violence order x 16

77. The Applicant was sentenced to imprisonment for two years for the strangulation offence and another two years imprisonment for the stalking offence, to be served cumulatively. The 601 days he had served on remand were declared as time already served under those sentences. He was not further punished for the other offences. He became eligible to apply for parole that day.

78. When passing sentence, the learned Judge remarked:

*“There are a lot of problems in our community with domestic violence. And choking in particular is an extremely serious offence, it is seen as a precursor to – well, serious violence including homicide, which is why it is now an offence [in itself]; it carries a maximum penalty of seven years imprisonment. It is, of course, an aggravating feature that you were on a protection order at the time. You were remanded in custody for a period before being released on bail.*

*We then come to the second indictment involving unlawful stalking...All of this would occur at any hour of day or night almost every day for the period charged of 24 May 2020 to 16 June 2020. And the stalking only stopped when you were apprehended and arrested.*

*There is no victim impact statement, but there is no doubt that your conduct both in the choking incident and the stalking incidents clearly would have had a significant adverse effect on the complainant, and perhaps the children.*

*...Stalking is also an extremely serious offence...It is serious conduct because it just wears down the victims’ mental health and their feelings of safety and wellbeing. So it is, again, a particularly serious offence. Of course, you breached bail and you breached court orders, which has always been viewed as serious by the courts.”<sup>10</sup>*

79. His Honour advised the Applicant that he had extended the DVO to 5 August 2026, adding that:

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<sup>10</sup> Exhibit G, G-Documents, G5, pages 60 to 61

*“If you are stupid enough to breach that order when you are released into custody, or commit any further offences, you are at risk of the parole simply being suspended or cancelled and returned to prison, all right?”<sup>11</sup>*

80. On 20 August 2021, the Applicant’s visa was cancelled. On 3 September 2021, he submitted a revocation request. On 9 November 2021, he was granted parole and transferred to immigration detention.
81. A week later, on 16 November 2021, the Applicant made a Facetime call to the parent of a child who was in the same class as one of his children, and he asked that person to put his child on the phone. She lowered her phone. The Applicant’s child recognised the Applicant’s voice and gave the phone back, saying he was not allowed to speak to the Applicant because of the DVO. Ms R later reported this to the police. The other parent refused to make a statement to the police saying she was not on speaking terms with Ms R and that Ms R *“knows she is up to no good.”*
82. In December 2021, the Applicant commenced on the Queensland Opioid Programme whereby he was prescribed and given suboxone under supervision to support his abstinence from illicit substances.
83. On 30 May 2022, the Respondent declined to revoke the mandatory cancellation of the Applicant’s visa.
84. In a form he submitted to the Respondent’s department, the Applicant said about the family violence in 2019, that he had no prior history of family violence. He was unable to explain why he said that despite the prior episode in 2014, merely offering that he was overwhelmed and did not think about that incident.<sup>12</sup>
85. There had been limited rehabilitative courses available to the Applicant in prison, and he was unable to do any courses during a period in immigration detention when he was accommodated in a hotel before being transferred to a detention centre. However, once at

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<sup>11</sup> Exhibit G, G-Documents, G5, page 64.

<sup>12</sup> Transcript, page 44, lines 25 to 28.

the centre, he made efforts to rehabilitate. His rehabilitative efforts include counselling and programs dealing with substance abuse, stress management, domestic violence, anger management, and courses supporting self-esteem, well-being, managing thoughts, feelings and behaviours, leading a balanced life, interpersonal and communication skills, and prioritising respectful relationships. He engaged with tools provided by Narcotics Anonymous, and he listens to podcasts that address drug addiction and abstinence. He uses "Family Connect" which is a tool made available by Relationships Australia to help foster family connections and support, emphasising respectful relationships and emotional well-being. He has completed a basic parenting course. The Applicant has continued to use suboxone under supervision and has not used illicit drugs or alcohol while in detention.

86. Since September 2023, the Applicant has been engaged in Alcohol and Other Drug treatment with The Link Foundation. A letter from that organisation states that the Applicant has demonstrated commendable dedication, self-reflection, and a resolute commitment to altering maladaptive behaviours. The sessions have dealt with various Cognitive Behavioural Therapy approaches including communication techniques, behaviour modification strategies, identification of triggers, handling cravings and unexpected challenges, relapse prevention tactics, consequential thinking, and assertive refusal methods. The Applicant is proactive in group discussions, consistently sharing his personal insights and experiences relating to his own recovery journey.
87. The Applicant recently arranged for two domestic violence counsellors who have helped him via Facetime sessions to come to the detention centre to help other detainees. As a group, they each speak about their situation, follow a work booklet, and learn various strategies and coping mechanisms to deal with emotions and feelings.
88. The Applicant has apologised to Ms R many times. According to Michael, Ms R's religion requires her to accept his apology and move on, so she has, although she will never forget what he did to her. Ms R has been in contact with the Applicant since December 2021. They speak once or twice per week. The Applicant now has enough of a relationship with Ms R that she contacts him to discuss concerns with their children, and they plan to work together to co-parent.

## **PRIMARY CONSIDERATION 1: PROTECTION OF THE AUSTRALIAN COMMUNITY**

89. Paragraph 8.1 of the Direction requires decision-makers to keep in mind the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. The Direction provides that “serious conduct” includes behaviour or conduct that does not constitute a criminal offence.
90. In determining the weight applicable to this Primary Consideration, paragraph 8.1(2) of the Direction requires me to give consideration to:
- a) The nature and seriousness of the Applicant’s conduct to date; and
  - b) The risk to the Australian community should the Applicant commit further offences or engage in other serious conduct.

### ***The Nature and Seriousness of the Applicant’s Conduct to Date***

91. The two episodes of violence and the stalking offences are deemed by the Direction to be very serious regardless of the sentences imposed or whether there was a conviction. The learned sentencing Judge eloquently identified the harm caused by the strangulation and stalking offences, and noted that strangulation is regarded as a precursor to domestic homicide. In the Applicant’s efforts to victimise and torment Ms R, he victimised other people including his own children and a person who visited the family home. He was persistent in his offending, showing no respect for bail undertakings or court orders.
92. Where an offence is committed in breach of a bail undertaking or court order, that circumstance tends to add a dimension of seriousness to it. In this case, the 2019 family violence and the stalking offences are certainly made more serious by the fact that they were all committed in contravention of a DVO. Protection orders are designed to protect a person directly, by prohibiting harmful behaviour, and indirectly by preventing situations from arising in which harmful behaviour may occur. Had the Applicant abided by the DVO, he would not have been at Ms R’s home on 14 August 2019, no conflict would have occurred, and he would not have squeezed her hand or choked her.

93. The DVO breaches are serious due to both the number of breaches and their harassing, intrusive nature.
94. Opinions differ about whether disobeying the police, of itself, constitutes offending *against* government representatives or officials due to the position they hold or in the performance of their duties. I do not think the Direction intends that result as it would force a decision maker to treat offending that is not inherently harmful as serious regardless of the facts and circumstances of the offending. The drug possession offences are quite minor and their only real significance in terms of harm to the Australian community is that the Applicant's drug use contributed to his commission of other offences which were serious. These offences attracted very light penalties, and one did not attract a recorded conviction or punishment.
95. The traffic offences whereby the Applicant drove drunk and/or in a careless manner are serious as he was putting other road users at increased risk of a collision. The cumulative effect of those offences was that the Applicant potentially placed many road users at risk over the years.
96. The Applicant's most serious offending occurred in 2019, and he then went on to commit a string of less serious offences. That is, the seriousness of the offending reduced but the frequency increased. The cumulative impact of the Applicant's offending against Ms R was that she could not feel safe in her own home, her privacy and property rights were constantly breached, and she could not live her life without his interference. As the learned sentencing Judge observed, stalking wears down the victim's mental health and their feelings of safety and wellbeing. While there is no evidence from Ms R before me, it is reasonable to infer that the Applicant wore down Ms R's mental health.
97. The Applicant provided misleading information to the Department when asking for the cancellation of his visa to be revoked: he represented that he had not committed any family violence prior to 2019. He offended after he had received written notice that his visa had been cancelled due to his offending and he had written to the Department asking for the cancellation to be revoked. He knew that further offending could affect his migration status. These matters weigh against him.

***The Risk to the Australian Community Should the Applicant Commit Further Offences or Engage in Other Serious Conduct***

98. Here, I 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.<sup>13</sup>
99. I must have regard to the following relevant factors on a cumulative basis:
- (a) the nature of the harm to individuals or the Australian community should the Applicant engage in further criminal or other serious conduct; and
  - (b) the likelihood of the Applicant engaging in further criminal or other serious conduct, taking into account available information and evidence on the risk of him re-offending, and evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since the most recent offence.
100. Should the Applicant re-commence driving under the influence or otherwise driving carelessly, the potential harm includes very serious physical and psychological injuries, and sometimes death. I note that he has not committed any offences of that kind since 2014.
101. The harm from the sort of family violence the Applicant engaged in includes physical injuries, immediate and long term psychological harm, property damage and theft. Choking is particularly concerning as it is seen as a precursor to domestic homicide. In the Applicant's case, I do not accept that any further family violence would necessarily involve an escalation of physical violence. That is because, after attacking Ms R, the Applicant spent several months on bail in which he had opportunities to physically attack her, and he did not. Instead, he stalked and harassed her: he attacked her mentally. I do not think the evidence indicates that further offending against Ms R or anyone else would potentially include homicide or grievous bodily harm.
102. Stalking behaviour is well known to have a debilitating and detrimental impact on victims' mental health. Their lives may become very small as they try to avoid the stalker, they may

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<sup>13</sup> Paragraph 8.1.2(1) of the Direction.

become hypervigilant, and a sense of powerlessness sets in. These impacts can be long-lasting. The stalking may impact others such as family, friends and colleagues.

103. The Applicant's offending in 2019 and 2020 was persistent. So was his drug use. He even did the wrong thing in gaol, using suboxone without a prescription. His good behaviour since December 2021 has all been in a controlled environment where drugs are not as readily available and there is much more surveillance than in the wider community. The Applicant's ability to remain drug free and refrain from offending has not been tested in the wider community. However, he has shown some commitment to his rehabilitation by proactively seeking out programs and counselling.
104. The Applicant's family all speak well of him. There are also some character references from friends before the Tribunal. They described him in very positive terms and one couple said he was, at the core "*a good person who can contribute positively to both his family and the wider community in general*".<sup>14</sup> A Mr Bowen is happy to have the Applicant live with him and his family if it helps his rehabilitation. The Applicant's family said the Applicant has stopped making excuses for his behaviour, he listens to advice from others, and he has been working hard to become a better person. His sister said she had never seen him put in effort, such as doing rehabilitation courses, before, and this is how she knows he is genuine about changing himself for the better. In addition to apologising to Ms R for his offending, the Applicant has apologised to his family.
105. Dr Kwok conducted a risk assessment, provided a report and gave evidence in the hearing. She used the Ontario Domestic Assault Risk Assessment ("ODARA") to assess the risk of further domestic violence offending. The ODARA is known to be valid when predicting violence in marriage and other intimate relationships. The Applicant was in risk category 5. Approximately 39% of individuals within this risk category commit another assault against their partner (or future partner) that results in a conviction within an average of about five years in the community. The obvious limitation of the ODARA is that it does not pick up unreported or unprosecuted re-offending. Given that, Dr Kwok agreed that it is possible that more than 39% of individuals in that risk category go on to commit another assault against

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<sup>14</sup> Exhibit G, G-Documents, G23, page 148



an intimate partner within around five years. Nor does the ODARA take protective factors, such as counselling or family support, into account. Dr Kwok said such factors need to be considered when determining the overall risk of re-offending.

106. Dr Kwok used other assessment tools and her clinical judgment to conclude that the Applicant did not meet the criteria for a mental disorder or illness. However, she thought he continued to be affected by abandonment issues.
107. According to Dr Kwok, methamphetamine use significantly increases the risk of violent offending particularly if the individual uses the drug frequently. She opined that, as a consequence of chronic methamphetamine use, the Applicant was likely experiencing elevated psychopathological harms such as depression, agitation, hostility, disorganised behaviours, and aggression around the time of his offending. She pointed out that the Applicant's sobriety has occurred in a controlled environment which, although it has its own stress, differs from living in the wider community where he would experience a range of psychosocial stressors. She concluded that, if he continued to engage with drug treatment in the community, he would have a low risk of further offending. However, if he did not engage in the treatment he needed, his risk would increase to at least a moderate level. Her assessment regarding domestic violence took the ODARA into account whereas her assessment regarding general offending did not. Specifically with respect to domestic violence offending, she thought he needed domestic violence counselling from a psychologist.
108. Dr Kwok added that relapse into drug use would increase the risk of other psychosocial difficulties such as inability to maintain stable employment, interpersonal problems, and inability to demonstrate sufficient parenting capacity.
109. One shortcoming with Dr Kwok's evidence was that she did not have all of the relevant information when she wrote her report. For example, she did not know about the 2014 domestic violence or the Applicant's illicit use of suboxone in gaol. Nor was she aware of positive matters such as the Applicant's efforts to bring domestic violence counsellors to the detention centre to assist in the rehabilitation of other detainees.

110. I think a complete picture would have cast the Applicant in a worse light. When given further information about the Applicant's drug use, Dr Kwok opined that he would need at least a year of drug treatment in the community. When told about the 2014 incident, she said he would require targeted domestic violence counselling in the community. These recommendations do not go beyond the treatment that the Applicant already intends to do. He plans to continue with SMART Recovery and Circuit Breaker, and continue seeing his counsellor in the community. Additionally, he wants to become a course facilitator so he can help other people who are in his situation.
111. The Applicant acknowledged that he has done wrong. He expressed remorse for his offending, particularly towards Ms R. He described it as embarrassing, out of character, and not consistent with the person he wants to be. While acknowledging the contribution of his drug use to his offending, he accepted that he was ultimately responsible for it. He described his driving offences as unacceptable. He acknowledged that it was his own actions that separated him from his children so that he cannot be the father he wants to be for them. He is scared to lose his children and the detrimental impact that will cause them. He said he wants to be a better person so he can co-parent his children and have his family circle around him.
112. With respect to the Applicant's vulnerability to drug use, he has one injection of suboxone per month and this is supervised. He is confident that staying on the program will help him stay away from other drugs until he is stable and able to stay off drugs altogether. He has strategies he can use to avoid further family violence and stalking behaviour, such as removing himself from a risky situation, speaking with respect rather than shouting, and reaching out to supportive people, including his GP and mental health professionals.
113. I do not think the Applicant is an inherently violent or predatory person. Rather, it seems that from a young age, he could not cope with severe emotional turmoil in an appropriate way. Dr Gee identified this at a time when the Applicant was engaging in irresponsible driving behaviour as a maladaptive way of avoiding violent conflict. With Dr Gee's help, the Applicant was able to deal with the stress within his marriage appropriately for a few years. He only relapsed into drug use after he was diagnosed with MS, and he developed depression. The family violence followed those events and the break-down of his marriage.

114. The Applicant clearly needs more than rehabilitation courses: he needs to address this underlying vulnerability. He has been doing that. He engaged in psychological counselling in immigration detention. He then switched to a private psychologist whom he consults remotely every two to three weeks to deal with his feelings of childhood abandonment, the depression he felt following the MS diagnosis, and his mental health in general. He intends to obtain a mental health plan in the community so he can keep seeing this psychologist.
115. One concern I have is that a consistent theme in the Applicant's dealings with police, the Respondent's department and the Tribunal was his reluctance to admit to the full extent of his offending behaviour, to the point where he told lies. It does not bode well for his rehabilitation if he will not fully grapple with his offending or be completely honest with other people about his behaviour. I think he is going to need supervision from someone with influence over him to make sure he properly addresses his life-long inability to cope with emotional turmoil in an appropriate way. He will need family support to ensure he remains engaged with rehabilitation services even when he is under stress and feeling low. His mother is willing to perform that role, and his aunt, Nicole, can help too.
116. The Applicant's mother was involved in the preparation of his Relapse Prevention Plan. She is in frequent contact with him and is now more aware of his struggles and offending. She previously tried to help him to change for the better and has expressed commitment to helping him going forward. She is more aware of resources that can assist him, and she will help him to engage with those resources. I believe she has shown her commitment to helping the Applicant by paying for psychological counselling, despite the fact she said money is tight.
117. The Applicant plans to live with his mother and step-father, who are also supportive and better informed now about how to support him. Importantly, the Applicant's mother has a working relationship with Ms R. Ms R reached out to her after the Applicant attacked her, she helps to look after the children, and Ms R is comfortable with her facilitating change-overs between Ms R and the Applicant. I asked whether, if there was any further trouble between the Applicant and Ms R, she would feel a sense of responsibility to try to help and she said she would. I asked what action she would take if the Applicant were to offend again, and she said she would contact Ms R and the police.

118. The Applicant's mother is distraught at the prospect of the Applicant having to live in Scotland, away from his family, while suffering from MS. I think she is powerfully motivated to do what she can to keep him on the right path. I am satisfied that the Applicant has done significant rehabilitation and is committed to continuing. I am also satisfied that his mother will guide and support him, which will be important in times of stress and emotional difficulty.
119. The Applicant's aunt, Nicole, is a registered mental health nurse. As his aunt, she feels somewhat responsible for making sure he does not relapse into drugs and crime, and she is able to recommend some alcohol and drug resources.
120. If the Applicant returns to the wider community, he will have employment with Michael's partner in his landscaping business. The business will accommodate his MS, for example by giving him administrative work when he is having a "flat day".<sup>15</sup> I accept that employment in a supportive family environment will give the Applicant stability and a feeling of being valued, which both tend to be protective factors.
121. Overall, I am satisfied that there is a low risk that the Applicant will re-offend. This risk will increase if he does not stick to his rehabilitation plan, however I think he will.
122. Even a low risk of the choking or stalking is a strong reason not to give the Applicant his visa back. Taking that, and the nature and seriousness of the Applicant's offending, into account, Primary Consideration 1 weighs heavily against revocation of the cancellation of the Applicant's visa.

## **PRIMARY CONSIDERATION 2: FAMILY VIOLENCE**

123. Paragraph 8.2 of the Direction provides that the Government has serious concerns about conferring the privilege of entering or remaining in Australia on non-citizens who engage in family violence. The Government's concerns in this regard are proportionate to the seriousness of the family violence engaged in by the non-citizen.

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<sup>15</sup> Transcript, page 22, lines 1 to 5.

124. The Direction defines family violence to include violent, threatening or other behaviour by a person that coerces or controls a member of the person's family or causes them to be fearful. The Direction provides that a member of a person's family includes a person who has, or has had, an intimate personal relationship with the relevant person. Ms R was at all relevant times a member of the Applicant's family. His physical attacks on her in 2014 and 2019 were acts of family violence. Some of his harassment of Ms R (captured by the stalking and contravene DVO offence) was also family violence as it caused fear.
125. I have already addressed the relevant criteria under this Primary Consideration in my discussion under Primary Consideration 1. I apply the relevant parts of my analysis to this Primary Consideration.
126. Primary Consideration 2 weighs heavily against revocation of the cancellation of the Applicant's visa.

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

127. Paragraph 8.3 of the Direction provides that I am to consider any impact of the decision on the Applicant'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. I should also consider the strength, duration and nature of any family or social links generally with persons in that category. I should give more weight to the Applicant's ties to children in that category.
128. In addition, I should consider the strength, nature and duration of any other ties the Applicant has to the Australian community. In particular, where a non-citizen has been ordinarily resident in Australia during and since their formative years, that warrants considerable weight in their favour regardless of when their offending commenced and the level of that offending. The length of time a non-citizen has resided in Australia should be given more weight if they have contributed positively to the Australian community in that time. Less weight should be given where the non-citizen was not ordinarily resident in Australia during their formative years and the non-citizen began offending soon after arriving in Australia.

129. The Applicant did not spend his formative years in Australia. He has lived here for some 13 years. His contribution to the Australian community includes consistent employment until he was imprisoned and the payment of income tax. He regularly assisted the homeless in the community, donated toys to charities and rescued animals. He made himself useful in prison, working as a groundsman, Senior Industry Worker, laundry worker and senior cleaner. As previously noted, he assisted other detainees to access domestic violence rehabilitation, which, if it helps, is positive for the community generally.
130. The Applicant's mother, step-father, two brothers and sister live in Australia with the right to permanently reside here. I accept that he has close, loving relationships with all members of his family. He is in regular contact with them all, they each wrote letters of support, and four of them gave evidence in the hearing.
131. The Applicant's brother-in-law (Michael's partner) wrote a letter of support and is willing to employ the Applicant. The Applicant's sister-in-law (Jamie's partner) has never met the Applicant, but she wrote a letter of support. I think this is indicative of a cohesive family.
132. The Applicant's mother developed depression and anxiety as a result of the Applicant's offending and the predicament he finds himself in. She felt ashamed of his offending and worried that he would be deported. She also suffers more frequently from migraines due to the stress of the situation. She is now on medication. She indicated that she would be devastated, and she thought her mental health would decline, if the Applicant were deported to Scotland. She is worried that he would have a break down and end up homeless there.
133. The Applicant's step-father indicated that, over time, he had rebuilt his relationship with the Applicant. He said the stress of the Applicant's predicament was unbearable for the family, and he feared that his wife might never get over losing the Applicant.
134. The Applicant's mother looks after his children sometimes to help Ms R, for example, when she is sick. According to her, Ms R has indicated that she is happy for the Applicant to help with the children. Having the Applicant in the community would take some pressure off his mother, as he could look after his children (with Ms R's consent).

135. The Applicant's younger sister was recently diagnosed with borderline personality disorder on top of major depression and anxiety disorder. She was only 18 years old when she became pregnant with her son. The Applicant helped her to break the news to her parents, and he provided financial, practical and emotional support to her and her son. She indicated that the Applicant's deportation would cause "*great depression*" to herself and her family.
136. The Applicant's brothers indicated that his deportation would be upsetting. Michael indicated that he is resilient, and he would be able to get on with his life. It is not so easy for Jamie, who suffers from autism and schizophrenia, and has relied on the Applicant's support. He thinks he would struggle, especially emotionally, and become overwhelmed. He finds the constant threat of losing the Applicant crippling to his wellbeing. Jamie's partner is also concerned about the impact on him.
137. I am satisfied that the Applicant's family members could occasionally visit Scotland, money allowing, and they could communicate with him via phone and electronic means. However, it is not the same as having the Applicant here in person, and the time difference would make it hard to keep in touch. Further, they are worried that he will not cope in Scotland without family support. While the Applicant's aunt, Nicole, indicated that the family and extended family could provide some financial assistance, they cannot physically be there all the time to help him.
138. I accept that the Applicant's deportation would cause emotional hardship to his immediate family, especially his mother and Jamie. Further, his mother's mental and physical health would likely deteriorate.
139. The Applicant has three aunts, three uncles and four adult cousins in Australia. None live in Brisbane, where his family live. Although, he has limited contact with them, I accept he has positive relationships with them. His aunt, Nicola, said she would feel very upset if he were deported.
140. The Applicant has friends in the Australian community. Mr Bowen said it would affect him and his family deeply if the Applicant's visa remains cancelled, although he did not elaborate.

141. I accept that the Applicant's friends and extended family members would be saddened if he were to be deported.
142. The Applicant has four biological children, two minor cousins, one minor nephew and one minor niece. I discuss these children in Primary Consideration 4, and I will not repeat that discussion here. Suffice to say, I accept that he has important relationships with his own children and his nephew, and I have allocated weight with respect to those children.
143. This Primary Consideration weighs heavily in favour of revoking the cancellation of the Applicant's visa.

#### **PRIMARY CONSIDERATION 4: BEST INTERESTS OF MINOR CHILDREN IN AUSTRALIA**

144. Here, I must determine whether a non-revocation decision is or is not in the best interests of a child affected by the decision. Where there is more than one child affected, the best interests of each child should be given individual consideration to the extent that their interests may differ.<sup>16</sup>
145. Paragraph 8.4 of the Direction sets out a number of factors to take into consideration, which relevantly include:
- the nature and duration of the relationship between the child and the Applicant. Relevantly less weight should generally be given where there have been long periods of absence or limited meaningful contact, including where an existing Court order restricts contact;
  - the extent to which the Applicant 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;
  - the impact of the Applicant's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;

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<sup>16</sup> Paragraph 8.3 of the Direction.



- the likely effect that any separation from the Applicant would have on the child, taking into account the child's or Applicant's ability to maintain contact in other ways;
  - whether there are other persons who already fulfil a parental role in relation to the child;
  - any known views of the child (with those views being given due weight in accordance with the age and maturity of the child); and
  - evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the Applicant.
146. The Applicant's children are eleven, nine, six and five years old, respectively. He has not seen them in person since 2019. There is no evidence that the children witnessed any of the family violence perpetrated by the Applicant. Ms R fulfils the parental role for the children, although sometimes she needs help.
147. The Applicant claimed to have been an attentive, hands-on father to the older three and he recalled various things he used to do with each child. His parents and siblings corroborated his evidence. I accept that he was a loving, involved parent to his oldest three children. Child D was still very young when the DVO was made, so the Applicant had limited in-person involvement in her life. When he was not living with the family, he paid \$100 per week in child support. He had a part-time job at that stage, having lost his full-time job due to his MS.
148. The Applicant speaks with his children every week. The DVO expires in August 2026 and, until that time, the Applicant needs Ms R's permission to contact his children. He described Child B and Child D as both loving to chat with him. The children ask him when he is coming home. The Applicant's mother confirmed that the children talk excitedly about the Applicant often and discuss what they will do when he is released. She said Child A is concerned about losing his dad and he has said he cannot live without him forever. There is a letter from Child A which he wrote a few years ago saying that he cannot wait until the Applicant gets out.
149. The Applicant accepted that his behaviour had been detrimental to his children. He indicated that he now has a better understanding of how to behave in the best interests of

his children, regardless of his relationship with their mother. He added that it is necessary to be amicable so the children see that both parents can be separate and happy.

150. If the Applicant refrains from offending, there is great potential for him to play a positive role in each of his children's lives. Ms R is prepared to allow him to have contact with them and there is no suggestion that she would change her mind while the Applicant behaves appropriately. He has already proven to be a devoted, engaged father. He has maintained his relationships with his three older children, and developed his relationship with Child D, while in detention. His priority is to be a good father to them. At the same time, he is willing to abide by Ms R's wishes and engage in mediation, if appropriate. If mediation does not work, he would engage with the family law system, although it does not look like it will come to that. The children are young and there are many years for the Applicant to provide them with love and support.
151. If the Applicant relapses into drug use and offending, that would negatively impact the children, although it is unlikely that he will.
152. Currently, the children want the Applicant in the community. The Applicant does not think that, if he is deported to Scotland, Ms R would facilitate visits. He thinks communicating with them would be difficult due to the time difference. While that is not an insurmountable problem, long-distance communication is no substitute for the Applicant's physical presence.
153. I am satisfied that the Applicant's deportation would be detrimental to the children, particularly Child A. In addition to that, it would deny them the benefit of his physical presence in their lives over many years.
154. The same could be said for the Applicant's nephew, 'Child V'. Child V is eight years old. He lives with his mother, Erin, and the Applicant's mother. His father was not involved in his life until he was five years old. He occasionally spends time with his father, whom he does not like.

155. According to Erin, the Applicant served as a father figure in Child V's early years, providing care and affection. She described a "*beautiful bond*" between Child V and the Applicant, and said Child V is worried about the Applicant and wants him to come home.<sup>17</sup> Child V visits the Applicant in detention (with Erin) and they talk almost daily. When Child V wants to speak with the Applicant, he sends him a message in the Kids Messenger App, and the Applicant phones him.
156. I am satisfied that the Applicant has a close quasi-parental relationship with Child V, that he made a significant positive contribution to his life when he was in the community, that he has maintained their relationship in custody and he will make a positive contribution for years to come if he is returned to the community.
157. The Applicant has a 12 year old male cousin who lives interstate, and a minor female cousin who lives in central Queensland. He chats to them on the phone occasionally. They are each cared for by their respective pair of parents, and they do not seem to have suffered any detriment from the Applicant's detention. I am satisfied that the Applicant has been a good, but distant, uncle to each child and would continue to be if he were returned to the community. I allocate only marginal weight in relation to these two children.
158. The Applicant's niece (Jamie's daughter) is four years old, and they only really know each other through phone calls. She is cared for by her parents. I am satisfied she and the Applicant have a positive relationship and there is potential for him to make a positive contribution to her childhood for many years to come if he is returned to the wider community. I allocate only limited weight in relation to this child.
159. Taking into account the best interests of each of the children mentioned above cumulatively, this Primary Consideration weighs heavily in favour of the revocation of the cancellation of the Applicant's visa.

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<sup>17</sup> Exhibit G, G-Documents, G22, pages 144 to 146.

## PRIMARY CONSIDERATION 5: EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

160. Paragraph 8.5 of the Direction says that the Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has engaged in serious conduct in breach of this expectation, the Australian community, as a norm, expects the government not to allow the non-citizen to enter or remain in Australia.<sup>18</sup>
161. Non-revocation of the mandatory cancellation of a visa may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through acts of family violence and serious crimes against women (among other things). These expectations apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.<sup>19</sup>
162. Paragraph 8.5(4) of the Direction provides the following guidance on how the expectations of the Australian community are to be determined:
- 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.*
163. The Applicant's offences include family violence perpetrated against a woman. His offending, as a whole, showed lack of respect for the law, court orders and the safety of members of the Australian community. I reduce the weight I would otherwise allocate to this Primary Consideration on the basis that the Applicant's most serious offending occurred in the context of a crushing medical diagnosis and consequent depression, which led to a relapse into drug use and the break-up of his marriage, which was highly traumatic for him.

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<sup>18</sup> Paragraph 8.5(1) of the Direction.

<sup>19</sup> Paragraph 8.5(3) of the Direction.

164. Primary Consideration 5 weighs moderately against revocation of the cancellation of the Applicant's visa.

### **OTHER CONSIDERATIONS**

165. It is necessary to look at the Other Considerations listed at paragraph 9 of the Direction. I will now consider each of the four stipulated sub-paragraphs.

#### **Other Consideration (a) – Legal Consequences of the Decision**

166. Affirming the reviewable decision would mean that:

- the Applicant would be liable to be removed from Australia as soon as reasonably practicable and he would be held in immigration detention until that time;<sup>20</sup>
- the only foreseeable matter that would delay his removal is an appeal against the decision; and
- he would not be able to apply for another visa while in Australia (with the exception of a protection visa or a Bridging visa).<sup>21</sup>

167. This is the way the legislative scheme is intended to work.

168. No particular hardship was identified with respect to the Applicant's accommodation in immigration detention. This Other Consideration is neutral.

#### **Other Consideration (b) – Extent of Impediments if Removed**

169. I must take into account the extent of any impediments that the Applicant may face if removed from Australia to Scotland in establishing himself and maintaining basic living standards (in the context of what is generally available to other citizens of Scotland). I must take into account:

- (a) the Applicant's age and health;

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<sup>20</sup> Sections 189 and 198 of the Act.

<sup>21</sup> Section 501E of the Act

- (2) whether there are any substantial language or cultural barriers; and
  - (3) any social, medical and/or economic support available to the Applicant in Scotland.
170. The Applicant is a 34 year old man who suffers from MS and does not currently suffer from any mental health problems. Dr Kwok said he needs domestic violence counselling from a psychologist, but I do not accept that this means he has a mental health condition. She expressly said he does not currently meet the criteria for a mental disorder or illness.<sup>22</sup>
171. As the Applicant lived in Scotland until he was 18 years old, and he completed his schooling there, I do not accept that he would face any substantial language or cultural barriers.
172. The Applicant's work experience included a milk run when he was at school, tyre fitting and bottling water in a factory. These jobs all involve physical labour, although the water bottling seems less physical. I accept that a job that involves consistent manual labour is not realistic, given the Applicant's medical condition.
173. According to the Applicant's treating neurologist, the Applicant suffers from relapsing remitting multiple sclerosis ("RRMS"). RRMS is progressive and incurable and requires long term neurology care. His current symptoms include limb weakness, neuropathic pain, gait instability and fatigue. MS is also associated with a significant mental health burden, including anxiety and depression. The Applicant's long term management requires regular reviews by a neurologist in a specialised MS clinic and multidisciplinary therapies including physical and medical therapies, especially physiotherapy and psychological support. His neurologist opined that on-going close family support is preferable for an optimal treatment outcome.
174. According to the Applicant, he has good days and bad days. Bad days occur two or three times per week. He lacks energy, and his legs start to drag, with one leg slower than the other, which makes walking harder. He gets numbness and tingling, and sometimes it is hard to grip objects. He gave an example of an instance when he was walking out the

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<sup>22</sup> Exhibit A6, Expert Report of Dr Kwok dated 11 February 2024, page 9].

warehouse at his work and he "*just fell over, landed on my face*".<sup>23</sup> He is no longer able to take the medication he took for back spasms because it is not compatible with suboxone. I am satisfied that the only realistic employment for the Applicant would be a sedentary job where he can take days off without notice. That will be hard for him to come by, especially with his lack of experience in such work. The Applicant's MS will also sometimes impede his ability to participate in other aspects of life as, without a car, he will need to walk to places and deal with stairs and public transport.

175. The Applicant participated in a clinical trial involving a form of chemotherapy in 2018 and 2019. The treatment alleviated the worst of his symptoms, being numbness on left side of his face and leg. Since 2019 he has not received more treatment, possibly because he has been incarcerated, but he has been monitored for any increase in active lesions. Currently, there are active lesions, but their progress has slowed. He thinks that if more lesions were to be detected he would have more chemotherapy, although he did not seem certain about this. He has an MRI every six months along with monthly blood and urine tests to measure his liver and kidney function. As far as the Applicant knows, the trial was conducted in the United States of America and Australia, and he does not know if there is an equivalent treatment in Scotland.
176. In Scotland, the Applicant will be entitled to free healthcare, and the medication he requires is available on prescription. There is information before the Tribunal that suggests that Scotland's health care system is comparable with Australia's. Further, a Public Health Scotland publication indicates that 87.2% of patients are contacted by an MS Specialist nurse within 10 working days of diagnosis, and there are 17 different kinds of treatment available in Scotland for MS. I note that as a citizen of Scotland, the Applicant would have the same access to social, medical and economic support as other citizens.
177. In addition to the Applicant's MS, he has a history of depression and anxiety. He is currently medicated (Avanza) and engaged with a psychologist. I accept that he could obtain appropriate medication in Scotland, and he could consult remotely with his psychologist, although it will be much more difficult given the time difference. The Applicant currently has

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<sup>23</sup> Transcript, page 18, lines 1 to 2.

the support of his family in Australia, which includes visits and phone calls. He will not have his family in Scotland and phone contact will be hard because of the time difference. It will also be hard if he does not have a job and has to rely on welfare payments, which may not cover the cost of a phone and internet service.

178. I accept that the Applicant's mental health is likely to deteriorate if he is deported because he will lose all hope of being with his children and his family. About this he said "*I cannot imagine my life without these individuals in it. They are my life*".<sup>24</sup>
179. According to Dr Kwok, Scotland has the highest rate of problem drug use among European countries, and it also has the highest number of drug-related deaths in Europe. She said this would contribute to the risk of relapsing, whereas a positive social context is protective against relapse. She opined that, based on the drug culture in Scotland, the applicant would have a higher risk of relapse in Scotland than in Australia, taking into account lack of supportive family there.
180. The Applicant has made three suicide attempts at times of emotional turmoil in the context of a drug addiction. In addition to the two I have already described, there was a third when he took pills without telling anyone, and he later woke up in his car. According to Dr Kwok, a previous suicide attempt, even one that may not look like a serious attempt, increases the risk of a future fatal attempt. I am satisfied that these three suicide attempts were not stunts designed to manipulate Ms R. I am satisfied that the Applicant was in a very bad way mentally on each occasion.
181. I accept that these past attempts increase the risk that the Applicant will take his life in the future if he again feels distraught and hopeless, especially if he has relapsed to drug use. I think it is likely that his mental health will deteriorate if he is returned to Scotland. There is also a risk of relapse into drugs which Dr Kwok thinks would be higher for the Applicant in Scotland.

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<sup>24</sup> Exhibit R1, Remittal Bundle, page 561.



182. The Applicant's only relatives in Scotland are his maternal grandparents. He last spoke with them on his birthday. They have a positive, but distant, relationship. His grandparents are pensioners who own a small house, but there is not a vacant room that he could stay in. They have told his mother that he could stay with them, but only for a couple of days.
183. It is reasonable to infer that the Applicant will struggle financially if he is unemployed or can only secure casual or part-time employment in Scotland. The Applicant's mother said money is very tight, so it would be hard to provide the Applicant with financial assistance. I asked the Applicant's aunt, Nicole, if she would be willing to provide him with financial support, such as payment for accommodation or periodic assistance to pay for a psychologist, while he waits for his welfare payment to come though, and she said he would. She thinks other relatives would also help. This may alleviate some financial stress, but I do not think it is a long-term solution.
184. Given the Applicant's RRMS, which will only get worse, and the mental health issues and other challenges I have discussed, I am satisfied that it will be very difficult for the Applicant to establish himself in Scotland and maintain basic living standards in the context of what is generally available to other citizens of Scotland. I am also concerned that there is a real risk that he will take his own life.
185. This Other Consideration weighs heavily in favour of revocation of the mandatory cancellation.

#### **Other Consideration (c) – Impact on victims**

186. Paragraph 9.3(1) of the Direction relevantly states:

*“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.”*

187. There is no evidence about how the decision would impact any victim of the Applicant's offences. This Other Consideration is neutral.

### **Other Consideration (d) – Impact on Australian business interests**

188. Paragraph 9.4 of the Direction says the Tribunal must consider any impact on Australian business interests of a decision to affirm the reviewable decision. However, the Direction makes clear that this consideration should only be given weight where a decision to cancel the Applicant's visa 'would significantly compromise the delivery of a major project, or delivery of an important service in Australia'.
189. The Applicant's brother-in-law said he would like the Applicant to work for his landscaping business to support its expansion. There is no suggestion that it would be difficult for the business to hire someone else.
190. An impact this slight does not warrant the allocation of weight. This Other Consideration is neutral.

### **CONCLUSION**

191. I am now required to weigh all of the Considerations in accordance with the Direction. I have allocated weight against revocation of the cancellation of the Applicant's visa as follows:
- Primary Consideration 1 – heavy
  - Primary Consideration 2 – heavy
  - Primary Consideration 5 – moderate
192. I have allocated weight in favour of revocation of the cancellation of the Applicant's visa as follows:
- Primary Consideration 3 – heavy
  - Primary Consideration 4 – heavy
  - Other Consideration (b) – heavy
193. This is a finely balanced decision. The stalking and choking offences were terrible and any risk of those being repeated must be taken very seriously. However, there are very compelling countervailing circumstances in this case.

194. First, I do not regard that offending as reflective of the sort of person the Applicant is, but rather it is aberrant behaviour for him. With his family's support, especially the support of his mother, he poses a low risk of re-offending.
195. Second, deportation would mean sending a person with a debilitating, incurable illness to the other side of the world without family support. That, along with long-term separation from his children, and his vulnerable mental health, could realistically result in him taking his own life. That would be tragic in itself, and it would have a devastating impact on his children and immediate family.
196. Separate to that, it is in the best interests of five young children, who are members of the Australian community to have the Applicant physically present in their lives.
197. Application of the Direction therefore favours the revocation of the cancellation of the Applicant's visa.

**DECISION**

198. The decision under review is set aside and the mandatory cancellation of the Applicant's visa is revoked.

*I certify that the preceding 198  
(one hundred and ninety-eight)  
paragraphs are a true copy of  
the reasons for the decision  
herein of Senior Member R  
Bellamy*

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

Associate

Dated: 10 June 2024

Date of hearing: 19 and 20 March 2024

Counsel for the Applicant: Dr Jason Donnelly  
Zarifi Lawyers

Solicitor for the Respondent Mr Chris West  
Sparke Helmore

#### ANNEXURE A: EXHIBIT LIST

EXHIBIT	DESCRIPTION OF EVIDENCE	PARTY	DATE OF DOCUMENT	DATE RECEIVED
G	G-Documents (G1 to G37, 243 pages)	R	Various	15 June 2022
A1	Applicant's Tender Bundle (TB1 to TB28, 412 pages)	A	Various	21 January 2024
A2	Applicant's Supplementary Bundle (7 pages)	A	Various	11 March 2024
A3	Applicant's Volunteer History (2 pages)	A	Undated	31 January 2024
A4	Letter from Department of Neurology (1 page)	A	22 January 2024	31 January 2024
A5	Statement of Applicant	A	29 January 2024	31 January 2024

<b>EXHIBIT</b>	<b>DESCRIPTION OF EVIDENCE</b>	<b>PARTY</b>	<b>DATE OF DOCUMENT</b>	<b>DATE RECEIVED</b>
	(12 pages)			
A6	Expert Report of Dr Kwok (14 pages)	A	11 February 2024	4 March 2024
A7	Applicant's Reintegration Plan (8 pages)	A	Undated	4 March 2024
A8	Letter from Treating Psychologist (1 page)	A	13 March 2024	13 March 2024
R1	Remittal Bundle (796 pages)	R	Various	5 December 2023
R2	Respondent's Tender Bundle (188 pages)	R	Various	20 February 2024
R3	Respondent's Statement of Facts, Issues and Contentions (19 pages)	R	20 February 2024	20 February 2024