

Review Applicant: Daniel John O'Donnell
Visa Applicant: Timothy John O'Donnell
Respondent: Minister for Immigration and Citizenship
Tribunal Number: 2025/3661

Tribunal: General Member J Papalia

Place: Perth

Date: 7 December 2025

Decision: The Tribunal sets aside the decision under review and, in substitution, decides that the Class FA Subclass 600 Visitor (temporary) visa should not be refused under s 501(1) of the *Migration Act 1958* (Cth).

General Member J. Papalia

Statement made on 07 December 2025 at 4:01pm

CATCHWORDS

MIGRATION – visa refusal – visitor visa – discretionary refusal – whether Applicant passes the character test – rape – spent conviction in the UK – consideration of Direction no. 110 - protection of Australian community – strength, nature and duration of ties to Australia - best interests of minor children in Australia affected by the decision - expectations of the Australian community – legal consequences of decision – Applicant is a 62-year-old national of the United Kingdom of Great Britain and Northern Ireland– Reviewable decision set aside

LEGISLATION

Crimes Act 1914 (Cth)

Migration Act 1958 (Cth)

Migration Regulations 1994 (Cth)

Rehabilitation of Offenders (Jersey) Law 2001

Rehabilitation of Offenders Act 1974 (UK)

Sexual Offences Act 1956 (UK) (repealed)

UK Borders Act 2007 (UK)

CASES

Jattan v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCA 866

Lesianawai v Minister for Immigration, Citizenship, and Multicultural Affairs (2024) 281 CLR 1

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton (2023) 276 CLR 136

Moore v Minister for Immigration and Citizenship [2025] FedCFamC25 723

R (on the application of T) v Chief Constable of Greater Manchester & Ors (2014) 4 All ER 159

RCLN v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCA 876

Re Baldwin and Minister for Immigration and Citizenship (Administrative Review Tribunal, 2025/3865, commenced 3 June 2025)

Secretary of State for the Home Department v Robinson (Jamaica) [2018] EWCA Civ 85

SECONDARY MATERIALS

Direction no. 110 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA (Cth)

Statement of Reasons

THE APPLICATION

1. On 30 January 1988, Mr Timothy John O'Donnell (the Visa **Applicant**) raped a 17-year-old girl down an alley way in central Cardiff. He claims that he had consensual sexual intercourse with the victim. However, on 13 July 1988, at a trial before Circuit Court Judge Rutter and a jury in the Crown Court at Cardiff, the Applicant was found to be guilty of rape. He was convicted and remanded in custody, and, on 29 July 1988, sentenced to four years' imprisonment.
2. The question before the Tribunal is whether, in December 2025 (almost 38 years later), he should be refused a visitor visa for the purposes of spending time with his son (the Review Applicant) and Australian-citizen grandchildren.
3. For the following reasons, the Tribunal considers that the visitor visa should not be refused under s 501(1) of the *Migration Act 1958* (Cth) (**Migration Act**).

BACKGROUND

4. The Applicant is from Wales. In January 1988, he was 24 years old and working as a plant operator. He was married and had two children (a girl and a boy). He also played rugby and American football.
5. The only official records available of the Applicant's conviction and imprisonment in 1988 are held by the Association of Chief Police Officers (**ACRO**) Criminal Records Office, who are the designated authority for providing criminal record certificates for visa and immigration purposes.¹
6. Attempts were made with His Majesty's Courts & Tribunal Service and with the National Archives to obtain further information, however these proved to be unsuccessful, including with the indictment reference number provided by ACRO ('88/0411/17176E').

¹ See Exhibit 1, pp 33, 306.

7. The Respondent, however, located two contemporaneous newspaper articles reporting on the jury trial and the Applicant's sentencing:
 - (a) 'Father of two guilty of rape in alley', South Wales Echo (Cardiff, Wales, 14 July 1988), p 9;² and
 - (b) 'Footballer is jailed for rape', South Wales Echo (Cardiff, Wales, 29 July 1988), p 15.³
8. The Applicant's first marriage survived the extramarital conduct, public trial and the Applicant's subsequent imprisonment. The Review Applicant was born in 1992.
9. The Applicant testified that he was refused leave to appeal against his rape conviction in 1995 by the Court of Appeal for England and Wales because of insufficient prospects of success.
10. The Applicant's first marriage ended by 2002, when the Applicant met his second wife. They were married in January 2007.
11. At some stage prior to 2016, the Review Applicant met and fell in love with an Australian woman (Ms BH) at an exchange programme in the United States of America (**US**). Their first child, Miss E, was born in Western Australia in December 2016.⁴
12. On 2 October 2017, the Applicant applied for the visitor visa, online and as a self-registered user.⁵ He disclosed the rape conviction and that he had been refused a visa for entry into the US in 1998.
13. On 26 May 2018, the Minister's Department sent a notice of intention to consider refusal of the application under s 501(1) of the Migration Act.⁶

² Exhibit 1, pp 285-286

³ Exhibit 1, p 287-288.

⁴ See Exhibit 1, p 233.

⁵ See Exhibit 1, pp 34-44.

⁶ See Exhibit 1, pp 45-47.

14. The Review Applicant and Ms BH lived in Wales from 2017 to 2020 (whilst the visitor visa application was being considered), including at one stage with the Applicant and his second wife. The second relevant grandchild, Miss V, was born in Cardiff in September 2020.⁷
15. The Review Applicant and Ms BH returned to Australia in September 2021. Their third child, Miss P, was born in Western Australia in February 2025.⁸
16. On 1 May 2025, the Minister's delegate refused to grant the Applicant the visitor visa relying on s 501(1) of the Migration Act.⁹
17. On 19 May 2025, the Review Applicant sought review by the Tribunal.¹⁰ The application was lodged within the 28-day timeframe set by s 18(1) of the *Administrative Review Tribunal Act 2024* (Cth) (**ART Act**), read with r 5(3) of the *Administrative Review Tribunal Rules 2024* (Cth).
18. The delegate's decision is merits reviewable because the Review Applicant would have been entitled to seek review of the decision under Part 5 of the Migration Act if the refusal decision had been made on another ground.¹¹
19. The Tribunal held a Case Management Directions Hearing in June 2025, where the matter was programmed to a substantive hearing scheduled for October 2025.

THE HEARING AND THE EVIDENCE

20. The parties appeared before the Tribunal on 7 October 2025. The Applicant was represented by Associate Professor Dr Jason Donnelly of counsel, instructed by Ms Wan of Wan & Co Lawyers. The Respondent was represented by Mr Keith Sypott of counsel, instructed by Ms Rezae of Sparke Helmore Lawyers.
21. The following documents were marked as exhibits:

⁷ See Exhibit 1, pp 234-235

⁸ See Exhibit 1, p 53.

⁹ See Exhibit 1, p 27.

¹⁰ See Exhibit 1, pp 8-22.

¹¹ See Migration Act, ss 338(7) 500(1)(b), 500(3).

- (a) Joint Hearing Bundle, including the parties' respective submissions (440 pages) (**Exhibit 1**).
22. At the substantive hearing of the review, the Applicant was advised, in simple terms, of his right to invoke the privilege against self-incrimination prior to his giving evidence.¹²
23. The Tribunal took oral evidence from the Applicant, the Review Applicant and Ms Delphine Bostock, forensic psychologist.
24. The Tribunal received post-hearing submissions on 1 December 2025 regarding the potential application of s 85ZR of the *Crimes Act 1914* (Cth) (**Crimes Act**) and the proper construction of UK legislative provisions regarding the Applicant's conviction.

LEGAL FRAMEWORK

25. The question for determination by the Tribunal is whether the decision to refuse to grant the Applicant a visitor visa is the 'correct or preferable' decision on the material before the Tribunal.¹³
26. In reviewing decisions of this kind, the Tribunal must comply with *Direction no. 110 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (the **Direction**)¹⁴ given by the Minister under s 499(1) of the Migration Act.¹⁵ This is a legislative constraint on the Tribunal's process of reasoning.¹⁶ However, as identified in *Singh v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 296 FCR 582,¹⁷ the principles stated in *Drake (No 2)*¹⁸ regarding the application of governmental policy, and the Tribunal's ability to depart from it where appropriate, remain applicable.

¹² See *Bainbridge v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 1080, [64]-[65].

¹³ See ART Act, ss 9, 54, 56(1)(a).

¹⁴ Direction, cl 1.

¹⁵ Direction, cl 5.1(4); Migration Act s 499(2A).

¹⁶ See *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 98 ALJR 610, [33].

¹⁷ *Singh v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 46; (2023) 296 FCR 582, [23], [81].

¹⁸ *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* [1979] AATA 179; (1979) 2 ALD 634.

27. The Direction indicates, at cl 5.1(2), the trite proposition that the Tribunal must consider the specific circumstances of the case in deciding whether to exercise the discretion to refuse to grant the visa.
28. Informed by the principles set out in cl 5.2 of the Direction, the Tribunal must 'take into account' the factors identified in cls 8 and 9 of the Direction (where relevant) in deciding the application.¹⁹ In this review, those relevant factors are:
- (a) the protection of the Australian community from criminal or other serious conduct;
 - (b) the strength, nature and duration of ties to Australia;
 - (c) the best interests of minor children in Australia;
 - (d) the expectations of the Australian community; and
 - (e) the legal consequences of the decision.

CONSIDERATION

Character test

29. The Tribunal must decide whether the Applicant passes the character test as defined by s 501 of the Migration Act.²⁰ Failure to pass the character test arises as a matter of law.²¹
30. Section 501(6)(a) of the Migration Act sets out that a person does not pass the character test if 'the person has a substantial criminal record (as defined by subsection (7))'.²² The term 'substantial criminal record' includes when 'the person has been sentenced to a term of imprisonment of 12 months or more'.²³
31. On 29 July 1988, the Applicant was sentenced to four years' imprisonment by Circuit Court Judge Rutter, sitting in the Crown Court at Cardiff, for the offence of rape contrary to s 1 of

¹⁹ Direction, cl 6.

²⁰ Direction, cl 5.1(3) and Annexure A; See also *Smith v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 652, [40] (not disturbed on appeal, [2025] FCAFC 78).

²¹ See *Re Harrison and Minister for Immigration and Citizenship* (2009) 106 ALD 666, [63].

²² See also Direction, Annex A, ss 1(1)-(5), 2(1).

²³ Migration Act, s 501(7)(c).

the *Sexual Offences Act 1956* (UK) (repealed). The maximum sentence for that offence was life imprisonment.

32. For the purposes of s 501(7) of the Migration Act, it is immaterial that the Applicant was convicted and sentenced to imprisonment by a UK court in respect of an offence in the UK.²⁴

33. The parties agreed that the Applicant, from July 1996, and for the purposes of the *Rehabilitation of Offenders Act 1974* (UK) (**UK Spent Convictions Act**), was to be treated 'as a rehabilitated person' in respect of that conviction and the conviction for the purposes of that Act was to be treated as 'spent'.²⁵

34. The hearing initially proceeded on the basis, put forward by the parties, that the Tribunal could consider the historical rape conviction (and associated sentence of imprisonment) because of ss 85ZZH(c) and (d) of the Crimes Act provide that the Federal Spent Conviction regime found in Div 3 of Pt VIIC of that Act does not apply to the disclosure of information to, or the taking into account of information by, the Tribunal for the purposes of making a decision under the Migration Act. However, following review of ss 85ZR(2)(b) and 85ZS of the Crimes Act, and the terms of s 4 of the UK Spent Convictions Act, the Tribunal invited submissions from the parties as to whether it was required to treat the Applicant 'as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for' the rape conviction.

35. Sections 85ZR(2)(b) of the Crimes Act provides:

Despite any other Commonwealth law ..., where, under a ... foreign law a person is, in particular circumstances or for a particular purpose, to be taken never to have been convicted of an offence under a law of that ... foreign country:

...

(b) the person shall be taken, in any State ..., in corresponding circumstances or for a corresponding purpose, by any Commonwealth authority in that State ..., never to have been convicted of that offence.

36. Section 85ZS of the Crimes Act provides:

²⁴ See *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Darnia-Wilson* [2022] FCAFC 28; (2022) 289 FCR 72, [29].

²⁵ See *Rehabilitation of Offenders Act 1974* (UK), ss 1(1), 4, 5(1)(a)(i), 5(2).

(1) Subject to Division 6, but despite any other Commonwealth law or any State law or Territory law, where, under section 85ZR, a person is, in particular circumstances or for a particular purpose, to be taken never to have been convicted of an offence:

...

(d) anyone else who knows, or could reasonably be expected to know, that section 85ZR applies to the person in relation to the offence shall not:

...

(ii) in those circumstances, or for that purpose, take account of the fact that the person was charged with, or convicted of, the offence.

(2) Subsection (1) does not affect the generality of section 85ZR.

37. This Tribunal is a 'Commonwealth authority' in the State of Western Australia.²⁶ Foreign law means 'a law of a foreign country',²⁷ which would include UK law.²⁸

38. Section 4 of the UK Spent Convictions Act provides:

(1) Subject to sections 7 and 8 below, a person who has become a rehabilitated protected person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction; and, notwithstanding the provisions of any other enactment or rule of law to the contrary, but subject as aforesaid—

(a) no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in England and Wales Scotland to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and

(b) a person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto.

(2) Subject to the provisions of any order made under subsection (4) below, where a question seeking information with respect to a person's previous convictions, offences, conduct or circumstances is put to him or to any other person otherwise than in proceedings before a judicial authority—

(a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly; and

(b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any circumstances ancillary to a spent conviction in his answer to the question.

(3) Subject to the provisions of any order made under subsection (4) below,—

(a) any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to

²⁶ See Crimes Act, s 85ZL.

²⁷ Crimes Act, s 85ZL.

²⁸ See *Sue v Hill* [1999] HCA 30; (1999) 199 CLR 462, 492 [65].

requiring him to disclose a spent conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another's); and

(b) a conviction which has become spent or any circumstances ancillary thereto, or any failure to disclose a spent conviction or any such circumstances, shall not be a proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment.

(4) The Secretary of State may by order—

(a) make such provision as seems to him appropriate for excluding or modifying the application of either or both of paragraphs (a) and (b) of subsection (2) above in relation to questions put in such circumstances as may be specified in the order;

(b) provide for such exceptions from the provisions of subsection (3) above as seem to him appropriate, in such cases or classes of case, and in relation to convictions of such a description, as may be specified in the order.

(5) For the purposes of this section and section 7 below any of the following are circumstances ancillary to a conviction, that is to say—

(a) the offence or offences which were the subject of that conviction;

(b) the conduct constituting that offence or those offences; and

(c) any process or proceedings preliminary to that conviction, any sentence imposed in respect of that conviction, any proceedings (whether by way of appeal or otherwise) for reviewing that conviction or any such sentence, and anything done in pursuance of or undergone in compliance with any such sentence.

(6) For the purposes of this section and section 7 below “proceedings before a judicial authority” includes, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person having power—

(a) by virtue of any enactment, law, custom or practice;

(b) under the rules governing any association, institution, profession, occupation or employment; or

(c) under any provision of an agreement providing for arbitration with respect to questions arising thereunder;

to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question.

39. Absent proof of UK law, it is presumed that it corresponds with, and is the same as, Australian law.²⁹

40. The effects of the UK Spent Convictions Act were summarised by Lord Reed in the UK Supreme Court decision of *R (on the application of T) v Chief Constable of Greater Manchester & Ors* [2014] UKSC 35; [2014] 4 All ER 159, at [69]-[75].

²⁹ See *Neilson v Overseas Projects Corporation of Victoria Ltd* [2005] HCA 54; (2005) 223 CLR 331, [116], [125].

41. The general position seems to be tolerably clear, an offender who has become a 'rehabilitated person' is 'to be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction' (s 4(1)). That deeming provision is stated to apply 'notwithstanding the provisions of any other enactment or rule of law to the contrary', with evidence of the former conviction not being admissible in proceedings before any court or tribunal, and the rehabilitated person being immune from answering questions relating to the past events covered by the former conviction. However, the operation of this provision is stated to not affect the powers or processes specified in s 7, including those excluded by any order made by the Secretary of State (s 7(4)).³⁰

42. The Minister identified a separate piece of UK legislation, s 56A of the *UK Borders Act 2007* (UK) (**UK Borders Act**), which provides that:

(1) Section 4(1), (2) and (3) of the Rehabilitation of Offenders Act 1974 (effect of rehabilitation) do not apply—

(a) in relation to any proceedings in respect of a relevant immigration decision or a relevant nationality decision, or

(b) otherwise for the purposes of, or in connection with, any such decision.

(2) In this section—

"immigration officer" means a person appointed by the Secretary of State as an immigration officer under paragraph 1 of Schedule 2 to the Immigration Act 1971,

"relevant immigration decision" means any decision, or proposed decision, of the Secretary of State or an immigration officer under or by virtue of the Immigration Acts, or rules made under section 3 of the Immigration Act 1971 (immigration rules), in relation to the entitlement of a person to enter or remain in the United Kingdom (including, in particular, the removal of a person from the United Kingdom, whether by deportation or otherwise),

"relevant nationality decision" means any decision, or proposed decision, of the Secretary of State under or by virtue of—

(a) the British Nationality Act 1981,

(b) the British Nationality (Hong Kong) Act 1990, or

(c) the Hong Kong (War Wives and Widows) Act 1996,

in relation to the good character of a person.

43. It was accepted by the Court of Appeal in *Secretary of State for the Home Department v Robinson (Jamaica)* [2018] EWCA Civ 85 that the above provision meant that the UK Spent Conviction Act had no direct application to immigration and nationality decisions made by

³⁰ As to which see *The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975* (UK).

the Secretary of State, and related appeal decisions made by the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal ([87]-[90]).

44. The UK Ministry of Justice Guideline dated 28 October 2023,³¹ similarly advises that 'immigration and nationality decisions are exempt from the [UK Spent Conviction Act].'
45. Sections 85ZR and 85ZS of the Crimes Act were considered by the High Court of Australia in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17; (2023) 276 CLR 136 (**Thornton**) and *Lesianawai v Minister for Immigration, Citizenship, and Multicultural Affairs* [2024] HCA 6; (2024) 281 CLR 1 (**Lesianawai**). These decisions were summarised by Banks-Smith J in *Jattan v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 866 (**Jattan**) as follows:

[108] The outcome in *Thornton*, as summarised by Beech-Jones J in *Lesianawai* was:

[22] In *Thornton*, Gageler and Jagot JJ held that the effect of the *Youth Justice Act* was that a finding of guilt for which no conviction was recorded was not, and was 'not taken to be', a conviction for any purpose. It followed that s 85ZR(2)(b) was engaged and the 'corresponding purpose' was 'any purpose', including the purpose of considering whether to revoke the cancellation of a visa. Their Honours concluded that '[t]he Minister's consideration of Mr Thornton's *youth offending* in deciding not to revoke the cancellation of the visa was contrary to the direction in s 85ZR(2)(b) of the *Crimes Act*' (emphasis added).

[23] Gordon and Edelman JJ reached the same conclusion by in part relying on s 85ZS. Their Honours construed s 85ZR(2) so that, if a State law provides that in 'particular circumstances' a person is deemed never to have been convicted of an offence for any purpose, then a Commonwealth authority in that State in those circumstances is to take that person as never having been convicted for any purpose. Their Honours construed ss 183 and 184 of the *Youth Justice Act* as specifying particular circumstances in which a person was taken never to have been convicted, namely, where a finding of guilt had been made and a court had decided or been mandated not to record a conviction. Thus, their Honours found that s 85ZR(2) was engaged for all purposes in those particular circumstances. Their Honours concluded that ss 85ZS(1)(d)(ii) and 85ZM of the *Crimes Act* precluded the Minister from taking into account any of the 'findings of guilt' made against the respondent or the fact that he had been charged with the offences he committed when he was a child.

(footnotes omitted)

[109] In *Lesianawai*, Beech-Jones J considered similar provisions of the *Children (Criminal Proceedings) Act* (referred to in the reasons as the *Children Proceeding Act*) which had the effect that a person under the age of 16 years could not be convicted of particular offences, despite being found guilty or pleading guilty. His Honour observed that:

³¹ See Ministry of Justice (UK), 'Guidance on the rehabilitation of Offenders Act 1974 and the Exceptions Order 1975' dated 28 October 2023, p 26, accessible online: https://assets.publishing.service.gov.uk/media/653f7e52d10f3500139a6b20/30102023___Guidance_on_the_Rehabilitation_of_Offenders_Act_1974_and_The_Exceptions_Order_1975.pdf.

[32] ... like the provisions of the *Youth Justice Act* considered in *Thornton*, the above provisions of the *Children Proceedings Act* reflect a clear distinction between a finding of guilt and a conviction. Under the *Children Proceedings Act*, a finding of guilt is not a conviction and, subject to any statutory provisions that provide to the contrary, is not treated as a conviction for any purpose. An example of a statutory provision that provides to the contrary is s 33(6) of the *Children Proceedings Act*, which was introduced with effect from 3 November 2008. Section 33(6) deems a finding of guilt by the Children's Court to be a conviction '[f]or the purposes of any provision of the road transport legislation that confers power on a court with respect to a person who has been convicted of an offence' and enables the Court to exercise power under that legislation as if the person had been convicted of the offence.

(footnotes omitted)

[110] In conclusion his Honour accepted the plaintiff's contention that:

[35] ... once it is concluded that [the plaintiff] is taken never to have been convicted of the offences for which he was sentenced by the Children's Court when he was under the age of 16 years for any purpose, then s 85ZR(2) is engaged, and it follows from *Thornton* that s 85ZR(2) and, to the extent necessary, s 85ZS(1)(d)(ii) precluded the delegate from relying on those convictions (or the findings of guilt they embody).

[111] Therefore, as explained by the High Court, the effect of s 85ZR is that full force and effect is to be given by a commonwealth authority to a law of a State under which a person is 'for any purposes' to be taken never to have been convicted of an offence. The 'corresponding purpose' as referred to in s 85ZR is therefore 'any purpose', and this includes the purpose of a commonwealth authority making a decision under s 501CA(4) of the Migration Act: *Thornton* at [13], [36] (Gageler and Jagot JJ).

46. In *Jattan*, Banks-Smith J considered whether s 35(4) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) (dealing with taking further offences into account for sentencing) has the same effect as the state legislation the subject of *Thornton* and *Lesianawai* (dealing with juvenile offending). Her Honour held that:

[117] [...an] important common element remains – that is, the state legislation concerns circumstances where a person is never convicted or is taken never to have been convicted of an offence. Although there are differences in the language across the provisions of the various state acts, those differences do not direct a different result in this case. I agree that the Tribunal is precluded from treating further offences taken into account under the Form 1 scheme as offences of which the applicant has been convicted.

47. The Applicant in this matter argued that the statutory effect of s 4 of the UK Spent Convictions Act is 'indistinguishable in substance from [domestic] legislation that provides that a person is taken "never to have been convicted" [of an offence]' and that therefore it satisfies the criterion in s 85ZR(2) of the Crimes Act.³²

48. The Minister argued that the Applicant:

³² Applicant's submissions dated 1 December 2025, [12], [14].

- (a) is for ‘all purposes’ under UK law, to be treated as a person who has not committed, been charged with, prosecuted for, convicted of, or sentenced for, the offence of rape; but
- (b) is not to be treated as such as person in any proceedings connected with immigration decisions or otherwise for the purposes of, or in connection with, such decisions.³³
49. It was put by the Minister that the circumstances and purpose of the present proceeding are analogous to those contemplated by s 56A of the UK Border Act and that they ‘do not correspond with the circumstances and purposes that fall within the ambit of s 4(1) of the [UK Spent Convictions Act]’ (i.e. everything except those matters specifically excluded from its operation, including proceedings in respect of a ‘relevant immigration decision’ defined to mean a decision in relation to the entitlement of a person to enter or remain in the UK).³⁴
50. The Tribunal agrees with the Minister’s characterisation, and that therefore s 85ZR(2)(b) of the Crimes Act is not engaged in this review (to the extent it would require the Tribunal to disregard the fact of commission, prosecution, conviction and imprisonment).
51. The Tribunal notes that Judge Gerrard accepted the joint position put in *Moore v Minister for Immigration and Citizenship* [2025] FedCFamC25 723 that the UK Spent Convictions Act (read with the Crimes Act) did not mean that a British visa applicant was not required to disclose his spent convictions in an underlying visa application, the refusal of which had been reviewed by the Tribunal (differently constituted) under Pt 5 of the Migration Act ([71]).
52. The Applicant separately raised the proposition that the Minister’s position in this review was not consistent with the position that had been taken by the Minister in *Re Baldwin and Minister for Immigration and Citizenship* (Administrative Review Tribunal, 2025/3865, commenced 3 June 2025) (**Baldwin**).
53. In *Baldwin*, the Tribunal (differently constituted) was seized with an application for review of a decision of a delegate of the Minister under s 501(1) of the Migration Act to refuse to grant

³³ Respondent’s submissions dated 1 December 2025, [11].

³⁴ Respondent’s submissions dated 1 December 2025, [12].

the applicant a Class EN Subclass 186 Employer Nomination Scheme (permanent) visa. The delegate had relied upon the applicant's sentencing on 13 December 2006 by the Inferior Number of the Royal Court (Samedi Division) of Jersey to 15 months' imprisonment³⁵ to find that he did not pass the character test. It was subsequently identified that the conviction had become 'spent' under the *Rehabilitation of Offenders (Jersey) Law 2001*. Following that submission, the presiding member invited the parties to address him on the issue and the fact that the conviction would separately appear to be 'spent' under Div 3 of Pt VIIC of the Crimes Act.³⁶ Thereafter the parties tendered terms of agreement under s 103(1) of the ART Act, to the effect that the reviewable decision should be set aside because the applicant did not fail the character test. The Tribunal acted in accordance with those terms of agreement under s 103(2) of the ART Act on 5 August 2025.

54. The Tribunal notes that

- (a) the *Rehabilitation of Offenders (Jersey) Law 2001* is in similar terms to the UK Spent Convictions Act but it cannot be assumed that UK and Jersey law are necessarily the same;³⁷
- (b) the conviction that is the genesis of this review is not 'spent' under Div 3 of Pt VIIC of the Crimes Act because the Applicant was sentenced to more than 30 months' imprisonment for the foreign offence (see s 85ZM(2)); and
- (c) Div 3 of Pt VIIC of the Crimes Act had no application to either review (see ss 85ZV(2) 'subject to Division 6' and 85ZZH(c)-(d)).

55. The Minister submitted in those circumstances that it should not be inferred that he had advanced a 'notably different' position in the two reviews and that this Tribunal must proceed on the basis of a correct understanding of the law and not on the basis of consent orders in some other proceeding. The Tribunal agrees.

³⁵ *The Attorney General v Adam Duncan Baldwin* [2006] JRC 188.

³⁶ See Crimes Act, ss 85ZL, 85ZM(2)(b) and 85ZV(2).

³⁷ See *Attorney General for Jersey v Holley* [2005] UKPC 23; (2005) 2 AC 580, [1]; The Bailiwick of Jersey having its own legal system, embracing several Norman legal concepts and processes not seen in the UK: see <https://www.courts.je/courts-of-jersey/>.

56. For the avoidance of doubt, the Tribunal finds that the UK Conviction has not been 'otherwise nullified' for the purposes of s 501(10) of the Migration Act by the UK Spent Convictions Act.³⁸
57. For the above reasons, the Tribunal finds that the Applicant does not pass the character test because he has a 'substantial criminal record' as defined in s 501(6)(a), read with s 501(7)(c), of the Migration Act.
58. The Tribunal is satisfied that the discretion to refuse to grant the Applicant a visitor visa under s 501(1) of the Migration Act is enlivened.

Whether to exercise the discretion

Protection of the Australian community

59. The Tribunal is required to consider whether the Australian community requires protection from harm said to have arisen from the criminal activity or other serious conduct engaged in by the Applicant to date, and from any risk of such harm arising in the future.³⁹ This is a two-stage process, requiring consideration of both the nature and seriousness of conduct to date, and the risk to the community if further offences are committed or the Applicant engages in other serious conduct.⁴⁰
60. It should be noted at this juncture that the Tribunal is not sentencing the Applicant for his past deeds. That has already happened. Rather, the Tribunal must assess whether his 'presence here would be opposed to the safety and welfare of the nation'.⁴¹
61. The concept of 'risk', and whether it is 'unacceptable', under cl 8.1 of the Direction is not the same thing as the 'likelihood of the non-citizen engaging in further criminal or other serious conduct'.⁴² For this purpose, an 'unacceptable risk' is a risk which the Tribunal considers to be 'unacceptable' having regard to a variety of considerations, including:

³⁸ See, by analogy, *Cunningham v Khan* [2006] WASC 28, [28]-[29].

³⁹ See Direction, cls 8(1) and 8.1.

⁴⁰ Direction, cl 8.1(2).

⁴¹ See *Falzon v Minister for Immigration and Border Protection* [2018] HCA 2; (2018) 262 CLR 333, [94].

⁴² See *Re RRRB and Minister for Immigration and Multicultural Affairs* [2025] ARTA 471, [74].

- (a) the nature and seriousness of the Applicant's criminal offending and other conduct to date (including the sentences imposed by the courts for a crime or crimes);
 - (b) the likelihood of the Applicant engaging in further criminal or other serious conduct; and
 - (c) the nature of the harm that could be caused by further offending.
62. The Direction informs the Tribunal's risk assessment, at cls 5.2, 8.1(1), 8.1.1(1) and 8.1.2(1), by reiterating, amongst other things, that the Executive Government:
- (a) is committed to 'protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens';
 - (b) considers identified types of conduct to be 'very serious' or 'serious'; and
 - (c) considers that 'the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases.'
63. It follows that the 'risk' referred to in the balancing exercise contemplated by those clauses of the Direction is not *any risk* that an applicant may commit further criminal or other serious conduct but is calibrated towards the Tribunal's assessment of the nature and degree of the harm said to be in prospect in the case at hand.
- Nature and seriousness of the conduct to date*
64. The Tribunal is required to assess for itself the nature and seriousness of an applicant's conduct to date, and the weight which should be attributed to this factor.⁴³
65. Subject to the submissions made regarding s 85ZR of the Crimes Act (dealt with above), it was accepted by Applicant that there was no doubt that the rape conviction is inherently serious and that the offending was made more serious because the victim was 17 years of

⁴³ See *BNY23 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2025] FCAFC 14; (2025) 307 FCR 150, [107].

age.⁴⁴ It was appropriately conceded that rape or sexual penetration without consent is classified as an offence in Australia.⁴⁵

66. The Minister highlighted the facts reported within the two Welsh newspaper articles, including that the use of violence. It was put that cls 8.1.1(1)(a)(i)-(ii) of the Direction provide that violent and/or sexual crimes against women are viewed very seriously by the Australian Government and the Australian community regardless of the sentence imposed by the courts.
67. The Tribunal finds that the Applicant committed a very serious offence in January 1988. It was reported that the trial judge had remarked, in sentencing, that the victim 'was considerably affected by having to relieve the ordeal' during the trial and that she had been very distressed on the day of the rape.⁴⁶ It was also reported that the victim's father had 'said she had a complete personality change as a result of what happened.'⁴⁷
68. However, it must be said, as his counsel eloquently put, that the Applicant has tried to put the offence he committed behind him, travelled to different jurisdictions without issue and is thought to be a good father and grandfather.⁴⁸
69. The Applicant has been employed for over a decade at the same company in Wales and is highly regarded by that employer.⁴⁹ The Tribunal was provided with references from the Applicant's relatives and friends,⁵⁰ and evidence of community and charitable activities.⁵¹ It was also clear to the Tribunal that the Applicant is an active and loving grandfather, including to his Australian grandchildren.⁵²

⁴⁴ Closing submissions.

⁴⁵ As to which, see, e.g., *Criminal Code (WA)* s 325.

⁴⁶ See Exhibit 1, p 288.

⁴⁷ Ibid.

⁴⁸ Closing submissions.

⁴⁹ See Exhibit 1, pp 117-121, 237-241, 246

⁵⁰ See e.g. Exhibit 1, pp 106-116, 122-133.

⁵¹ See Exhibit 1, pp 145-161.

⁵² See Exhibit 1, pp 162-190.

Risk to the Australian community should the Applicant engage in further conduct

70. The Tribunal is required to have regard to the future risk that may be posed by the Applicant to the Australian community by considering, cumulatively, the nature of the harm to individuals or to the community should the Applicant engage in further criminal or other serious conduct, and the likelihood of the Applicant engaging in such conduct.⁵³
71. There is no statutory constraint on the way that risk is assessed by the Tribunal other than that there must be a rational and probative basis for the assessment.⁵⁴
72. In the context of the discretionary refusal of a visa, the Tribunal must consider whether the risk of harm may be affected by the duration and purpose of the visa and the conditions that may apply to it.⁵⁵ The visitor visa is a temporary visa.⁵⁶ It would generally be in effect for three months from entry,⁵⁷ and will have conditions 8101 (no work), 8201 (limited study or training), 8503 (not entitled to a substantive visa while holder remains in Australia) and 8531 (not remain in Australia after period of stay permitted by the visa) imposed.⁵⁸

Nature of harm to individuals or the community should the Applicant engage in further criminal or other serious conduct

73. The Minister contended that the nature of harm if the Applicant were to re-offend is serious and likely to result in significant psychological and physical harm to members of the Australian community.⁵⁹ This was accepted by the Applicant.⁶⁰

⁵³ Direction, cls 8.1.2(2)(a)-(b).

⁵⁴ See *BSJ16 v Minister for Immigration and Border Protection* [2016] FCA 1181, [68]; *Hambledon v Minister for Immigration and Border Protection* [2018] FCA 7, [41].

⁵⁵ Direction, cl 8.1.2(c)

⁵⁶ See Migration Act, s 30(2).

⁵⁷ See Migration Regulations, Sch 2, cl 600.512

⁵⁸ See Migration Regulations, Sch 2, cl 600.611(2).

⁵⁹ See RSFIC, [30].

⁶⁰ See ASFIC, [18].

Likelihood of engaging in further criminal or other serious conduct

74. The Applicant was assessed by a forensic psychologist, Ms Delphine Bostock, in February 2024.⁶¹ As part of that assessment, Ms Bostock used the Level of Service/Case Management Inventory (LS/CMI; Andrews, Bonta and Wormith, 2004) and the Static-99R (Helmus, Babchishin, Hanson and Thornton, 2009) actuarial assessment tools.⁶² The Applicant's score on the LS/CMI placed him in the very low risk of re-offending range.⁶³ If the Applicant had been scored on the Static-99R in 1988, he would have scored in a category of risk which would be moderate-low, however this tool was not recommended for use for historical offending.⁶⁴ Ms Bostock indicated that:

...the Static-99R manual stipulates that the longer an offender has been free of detected sexual offending since their time in the community from their index sex offence, the lower their risk of recidivism. Research indicates that, in general, for every five years the offender is in the community without a new sex offence, their risk of recidivism roughly halves. For [30+] years that Mr O'Donnell has been in the community without reoffending, his score would therefore be equivalent to a person who had never committed a sexual offence. Some of the factors believed to contribute to this include ageing, the effect of treatment, and learning how to make a prosocial life rewarding.⁶⁵ (footnotes omitted).

75. Ms Bostock testified that she spoke with the Applicant prior to the Tribunal hearing and was informed that there had been no changes which would impact upon her risk assessment (from February 2024). She told the Tribunal that she had identified no areas of treatment need for the Applicant.

76. Ms Bostock was asked whether the Applicant's denial of the rape impacted her opinion and said that she did not think the Applicant maintains his innocence, in the sense that he admits that they had sexual intercourse; rather there was disagreement about how this occurred. 'Even if he did deny it, we know that the research indicates that denial has very little correlation to risk of recidivism. Things that would worry use would be antisocial attitude and things around the offence.' Those things were described to be 'attitudes towards women, feeling socially rejected and lonely; not being able to solve problems; lack of empathy; high sex-drive; cooperation with supervision and things like that'.

⁶¹ See Exhibit 1, p 135 [1].

⁶² Exhibit 1, pp 140 [30] and 141 [33].

⁶³ See Exhibit 1, p 141 [31].

⁶⁴ See Exhibit 1, p 142 [34].

⁶⁵ Exhibit 1, p 142 [34].

77. The Minister accepted that the Applicant presents with a risk profile that is 'at the lower end of the spectrum' but submitted that this was nevertheless a 'real risk'.⁶⁶

78. For the above reasons, the Tribunal finds the Applicant is at a very low likelihood of recidivism.

Conclusion on protection of the Australian community

79. The Tribunal finds the Applicant to pose a risk to the Australian community. It has found that:

- (a) he engaged in criminal conduct which should be viewed as being very serious in nature;
- (b) the nature of harm associated with further conduct of that kind includes serious physical and psychological harm; and
- (c) he poses a very low likelihood of recidivism.

80. The question that arises then is whether that risk is 'unacceptable'?

81. The Direction contains policy guidance, at cls 5.2, 8.1(1), 8.1.2(1), to the effect that:

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 (cls 5.2(1), 8.1(1));

The safety of the Australian community is the highest priority of the Australian Government' (cls 5.2(2), 8.1(1)). To that end, the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens (cl 8.1(1));

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 (cl 5.2(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 [measurable] risk of causing physical harm to the Australian community (cl 5.2(4));

⁶⁶ Closing submissions.

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 ... refusing the visa (cl 5.2(7));

The inherent nature of certain conduct ... is so serious that even strong countervailing considerations may be insufficient to justify not ...refusing the visa... even if the information available at the time of consideration suggests that the non-citizen does not pose a [measurable] risk of causing physical harm to the Australian community (cl 5.2(8)); and

In considering the need to protect the Australian community ...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 (cl 8.1.2(1));

82. The Tribunal is authorised, but not bound, to give weight to the above policy guidance.⁶⁷ The Tribunal respectfully considers the policy considerations identified above to be appropriate, and to conform with the terms of the Migration Act and the nature of the power found in s 501 and its analogous provisions.
83. The Applicant engaged in criminal conduct which would ordinarily come with an expectation that he be denied the privilege of coming to Australia. However, that conduct was committed over 35 years ago and has not been repeated. The Tribunal considers the Applicant to pose a very low likelihood of recidivism, and he has previously travelled to places like NZ on multiple occasions without incident. The Tribunal accepts that any risk of repetition of sexual violence would, generally speaking, be unacceptable. However, the risk in this case is properly classified as being trivial or transient. For those reasons, the Tribunal finds that this primary consideration weighs in favour of refusal but not determinatively so.

Strength, nature and duration of ties to Australia

84. The Tribunal is required to consider any impact of the decision on the Applicant's immediate family members in Australia.⁶⁸

⁶⁷ See *Lasalo v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCFAC 82, [22]-[23], [27]-[28]; *Price v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 301 FCR 484, [71]-[72].

⁶⁸ Direction, cl 8.3(1). The 'strength, nature and duration of other ties' question does not arise: see cl 8.3(2).

85. The Applicant's 'immediate family members'⁶⁹ in Australia comprise:
- (a) the Review Applicant;
 - (b) Ms BH; and
 - (c) their three daughters (E, 9 years old; V, 5 years old; and P, 10 months old) (the Applicant's grandchildren).
86. The Review Applicant holds a permanent visa and Ms BH and their children are Australian citizens. The Review Applicant testified that his father (the Applicant) has 'been the biggest supporter and greatest teacher.' He described how his father taught him the value of hard work and attention to detail and how those lessons were why he was able to become an engineer today.
87. The Tribunal was told by both the Review Applicant and Ms BH about how the family regularly communicate by remote means and how the children miss their grandparents, particularly the oldest child who regularly asks when 'grampy' (the Applicant) is coming to visit their home in Australia.⁷⁰
88. The Review Applicant testified that he had relatively recently been made redundant and then suffered a knee injury one week into his new job and how the Applicant being allowed to visit would have made a real difference to their lives, including the ability for him to drive the kids to/from school and appointments or even to take the Review Applicant to work.
89. The Minister properly accepted that the impact of an adverse decision on Applicant's immediate family in Australia weighed in favour of not refusing to grant the visitor visa but submitted that this was not outweighed by the adverse relevant factors.⁷¹
90. This primary consideration weighs in favour of not refusing to grant the visa.

⁶⁹ As to which see *Re Anane and Minister for Immigration and Multicultural Affairs* [2025] ARTA 822, [82]-[85].

⁷⁰ See Exhibit 1, pp 129-130.

⁷¹ See RSFIC, [41].

Best interests of minor children in Australia

91. The Tribunal is required to consider the best interests of minor children in Australia that are affected by the decision.⁷² As there are three relevant minor children in this application, the Tribunal is required to give their interests separate consideration to the extent that their interests may differ.⁷³ Clause 8.4(4) of the Direction outlines the factors that the Tribunal must consider when determining the best interests of a child affected by the decision.
92. The Tribunal has already summarised some of the evidence before it concerning the children in the context of the strength, nature and duration of ties primary consideration. It was accepted by the Minister that the best interests of each child weighed in favour of revocation.⁷⁴

Child E born in 2016

93. In considering the best interests of this child the Tribunal has had regard to:
- (a) the nature and duration of the grandparental relationship, including that it there were periods where the child lived with her grandparents between 2017 and 2020;
 - (b) the Applicant is likely to play a positive grandparental role in the future;
 - (c) there is no evidence that the child has been adversely affected by the Applicant's conduct or is otherwise at risk of being exposed to family violence, abuse or neglect;
 - (d) the child misses her paternal grandparents, particularly the Applicant and has written him cards to that effect; and
 - (e) the child is being cared for by her parents and there are some maternal extended relatives in Australia.

⁷² Direction, cls 8.4(1), 8.4(2).

⁷³ Direction, cl 8.4(3).

⁷⁴ See RSFIC, [46]-[47].

Child V born in 2020

94. In considering the best interests of this child the Tribunal has had regard to:
- (a) the nature and duration of the grandparental relationship, including that it there were periods where the child lived with her grandparents in 2020;
 - (b) the Applicant is likely to play a positive grandparental role in the future;
 - (c) there is no evidence that the child has been adversely affected by the Applicant's conduct or is otherwise at risk of being exposed to family violence, abuse or neglect;
 - (d) the child misses her paternal grandparents, particularly the Applicant; and
 - (e) the child is being cared for by her parents and there are some maternal extended relatives in Australia.

Child P born in 2025

95. In considering the best interests of this child the Tribunal has had regard to:
- (a) the nature and duration of the grandparental relationship, including that this child has yet to meet her paternal grandparents in-person;
 - (b) the Applicant is likely to play a positive grandparental role in the future;
 - (c) there is no evidence that the child has been adversely affected by the Applicant's conduct or is otherwise at risk of being exposed to family violence, abuse or neglect; and
 - (d) the child is being cared for by her parents and there are some maternal extended relatives in Australia.
96. The Tribunal accepts that children should be entitled to have a relationship with their grandparents provided it is in the child's best interests, and that this should be informed by

the family dynamics between the children's parents and grandparents.⁷⁵ The children's parents have a good relationship with the Applicant and his second wife. The parents are supportive of the Applicant being allowed to travel to Australia.

97. The Tribunal finds that the best interests of each child weigh in favour of permitting the Applicant to come to Australia. Cumulatively, their interests weigh heavily in favour of not exercising the discretion to refuse to grant the visa.

Expectations of the Australian Community

98. This primary consideration is a 'kind of deeming provision',⁷⁶ which requires the Tribunal to consider the Minister's articulation of community expectations.⁷⁷ Clause 8.5(1) of the Direction provides that 'the Australian community expects non-citizens to obey Australian laws while in Australia'. The Direction goes on to state that:⁷⁸

[w]here 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 would not allow such a non-citizen to enter or remain in Australia.

99. Clause 8.5(2) then adds to that first 'norm' and indicates that visa refusal may be appropriate in a particular case 'simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa'. It specifies identified kinds of conduct, committed in Australia or elsewhere, as attracting that further expectation,⁷⁹ including 'commission of serious crimes against women', where "serious crimes" 'include crimes of a violent or sexual nature'.⁸⁰
100. The Applicant falls foul of both stated expectations. These norms 'apply regardless of whether the [Applicant] poses a [measurable] risk of causing physical harm to the Australian community'.⁸¹ The Tribunal is also commanded to 'proceed on the basis of the

⁷⁵ See *Church v Overton* [2008] FamCA 952, [43].

⁷⁶ *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466, [76].

⁷⁷ Direction, cl 8.5(4).

⁷⁸ Direction, cl 8.5(1).

⁷⁹ Direction, cls 8.5(2)(a)-(f).

⁸⁰ Direction, cl 8.5(2)(c).

⁸¹ Direction, cl 8.5(3).

Government's views as articulated' in the Direction, 'without independently assessing the community's expectations in the particular case'.⁸²

101. The Tribunal adopts the approach to this primary consideration identified by Justice Horan in *RCLN v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 876 at [50]-[59].
102. The Tribunal finds that this primary consideration weighs heavily in favour of visa refusal and will weigh this against the other relevant considerations.

Legal consequences of the decision

103. The Tribunal is required to consider the legal consequences of its decision.⁸³ That is, the Tribunal must have regard to the statutory framework in which the power to refuse to grant the visa exists, including the direct and immediate consequences of an exercise of the power (including any decision under s 105 of the ART Act).
104. There are three major consequences of visa refusal or cancellation under s 501 and related provisions:
 - (a) a prohibition, within the migration zone, on applying for other types of visas under s 501E of the Migration Act (other than a protection visa or a bridging (removal pending) visa);⁸⁴
 - (b) refusal/cancellation of other visa applications/visas under s 501F of the Migration Act; and
 - (c) the possible application of periods of exclusion and special return criteria under s 503 of the Migration Act and SRC 5001 and 5002 in Sch 5 to the Migration Regulations. This includes permanent exclusion where SRC 5001 applies unless the Minister acts personally to grant a permanent visa to the person under s 195A.

⁸² Direction, cl 8.5(4).

⁸³ Direction, cl 9.1(1). See also *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38; (2014) 220 FCR 1, [3], [9]-[10]; *Taulahi v Minister for Immigration and Border Protection* [2016] FCAFC 177; (2016) 246 FCR 146, [84], [88].

⁸⁴ See also Migration Act s 46(1)(d).

105. None of the above consequences apply to a person in the Applicant's position because he is offshore and has no pending visa applications. However, there is the potential application of 'public interest criterion' 4013 in respect of any further visitor visa application that are made within three years of the Tribunal's decision. That criterion would require satisfaction of compassionate and compelling circumstances affecting the interests of an Australian citizen or permanent resident to justify the grant of the visa within the three-year timeframe.
106. This adverse legal consequence can be avoided by a positive decision not to exercise the discretion to refuse to grant the visa, and it should not be assumed that Parliament has evinced any preference as to the outcome of the review.⁸⁵
107. The Applicant otherwise did not advance any claim to engage Australia's international obligations as a party to the Refugees Convention, International Covenant on Civil and Political Rights or the Convention Against Torture.⁸⁶
108. For the above reasons, the Tribunal finds that the legal and other consequences of its decision weigh slightly in favour of not refusing to grant the visa.
109. The parties agreed that the considerations identified in cls 8(2) (family violence), 9(b) (extent of impediments if removed) and 9(c) (impact on Australian business interests) of the Direction were not relevant to this matter.

CONCLUSION

110. The Tribunal has a discretion to refuse to grant the Applicant the visitor visa. In deciding whether to exercise the discretion, the Tribunal is required to consider the Applicant's circumstances and each of the relevant considerations identified in the Direction, as part of a single evaluation.⁸⁷
111. Clause 7(2) of the Direction states that the primary consideration in cl 8.1 (protection of the Australian community) is 'generally to be given greater weight than other primary considerations', and that, otherwise, the relevant 'primary considerations should generally

⁸⁵ See *Stoneley and Minister for Immigration and Multicultural Affairs* [2025] FCA 143, [36].

⁸⁶ See ASFIC, [41].

⁸⁷ See *CRNL v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 138, [28].

be given greater weight than the [relevant] other considerations.’ This guidance is consistent with the principle articulated at cl 5.2(2), that ‘the safety of the Australian community is the highest priority of the Australian government.’

112. The above policy guidance does not mean that the other considerations are secondary to the primary considerations, or that the other relevant considerations should always be given less weight.⁸⁸

113. The Tribunal considers there to be good reason to depart from the above policy in this case.⁸⁹ The Tribunal has found that the Applicant poses an acceptable risk to the Australian community on a visitor visa. He has a son resident in Australia and Australian-citizen grandchildren, who would each like to see him for Christmas. The Applicant’s previous criminal conduct was very serious. However, he is now considered, as a matter of UK law, to be a ‘rehabilitated person’ in respect of that offence.

114. In this country, we hold to the:

fundamental proposition that criminal offenders must be appropriately punished. However, it is also believed that people should have the opportunity to be relieved of the social stigma and other consequences of a criminal record where that is justified by blameless conduct for a lengthy period. That is in the interests of not only of the offenders but also of the general community as well.⁹⁰

115. The Migration Act (and Direction 110) allows the Tribunal to give favourable regard to a person who, despite their initial conviction, has that conviction spent.⁹¹ The Applicant was required to disclose his spent conviction in his visa application, and he did so. The Tribunal has now considered the Applicant’s circumstances and each of the relevant considerations identified within Direction 110 and determined that he should not be refused a visitor visa. Accordingly, the Tribunal set aside the reviewable decision and substituted it for a decision not to refuse to grant the visa.

⁸⁸ See *Suleiman v Minister for Immigration and Border Protection* [2018] FCA 594; (2018) 74 AAR 545.

⁸⁹ See *Clive Elliot Jennings & Co Pty Ltd v Western Australian Planning Commission* [2002] WASCA 276, [25]-[26].

⁹⁰ Western Australia, Parliamentary Debates, Legislative Council, 22 September 1988, p 3285 (Hon J M Berinson MLC, Attorney-General), cited with approval by the Court of Appeal in *WHW v Commissioner of Police* [2014] WASCA 153, [66]-[67].

⁹¹ See, by analogy, *WHW v Commissioner of Police* [2014] WASCA 153, [74]; see also *Crimes Act 1914*, ss 85ZR and 85ZS.

DECISION

116. The Tribunal sets aside the decision under review and, in substitution, decides that the visitor visa should not be refused under s 501(1) of the Migration Act.

*I certify that the preceding 116
(one hundred and sixteen)
paragraphs are a true copy of
the reasons for the decision
herein of General Member J
Papalia*

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

Associate

Dated: 8 December 2025

Date of hearing:	7 October 2025
Counsel for the Applicant	Associate Professor Dr J Donnelly
Solicitor for the Applicant:	Ms A Wan, Wan & Co Lawyers
Counsel for the Respondent	Mr K M Sypott
Solicitor for the Respondent:	Ms A Rezae, Sparke Helmore Lawyers