Decision and Reasons for Decision

Administrative Review Tribunal

Applicant:	**Hoang Phuong Do**
Respondent:	**Minister for Immigration and Citizenship**
Tribunal Number:	**2025/6638**
Tribunal:	**Senior Member A. Nikolic**
Place:	**Melbourne**
Date:	**19 February 2026**
Decision:	The Tribunal sets aside the reviewable decision and substitutes a decision that there is another reason to revoke the mandatory cancellation of the Applicant's visa.

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

Senior Member A. Nikolic

Catchwords

MIGRATION *– mandatory visa cancellation – citizen of Vietnam – Class BC (Subclass 801) Partner Visa – substantial criminal record – does not pass character test – non-revocation decision – whether another reason to revoke visa cancellation – Ministerial Direction No. 110 applied – reviewable decision set aside*

Legislation

Administrative Review Tribunal Act 2024 (Cth)

Migration Act 1958 (Cth)

Migration Regulations 1994 (Cth)

Cases

Ali v Minister for Immigration and Border Protection [2018] FCA 650

Assistant Minister for Immigration and Border Protection v Splendido (2019) 271 FCR 595

Ayoub v Minister for Immigration and Border Protection (2015) 231 FCR 513

BNY23 v Minister for Immigration, Citizenship and Multicultural Affairs [2025] FCAFC 14

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

CZA19 v Commonwealth of Australia; DBD24 v Minister for Immigration and Multicultural Affairs (2025) 422 ALR 133

DOB18 v Minister for Home Affairs [2018] FCA 1523

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

FYBR v Minister for Home Affairs and Anor [2020] HCATrans 056

Hughes v The Queen (2017) 263 CLR 338

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

Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2025] HCA 33

Matthews v Minister for Home Affairs [2020] FCAFC 146

Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559

Nguyen v Minister for Immigration, Citizenship and Multicultural Affairs [2024] FCAFC 160

Plaintiff M1/2021 v Minister for Home Affairs (2022) 275 CLR 582

RGCZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (2022) 295 FCR 365

Singh v Minister for Immigration, Citizenship and Multicultural Affairs (2023) 296 FCR 582

Singh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2024] FCA 1273

Stonely v Minister for Immigration and Multicultural Affairs [2025] FCA 143

Taulahi v Minister for Immigration and Border Protection (2016) 246 FCR 146

Uelese v Minister for Immigration and Border Protection (2015) 256 CLR 203

YKSB v Minister for Home Affairs [2020] FCAFC 224

Secondary Materials

Australian Institute of Health and Welfare, '*Alcohol, tobacco & other drugs in Australia, Cannabis*', (25 February 2025), <https://www.aihw.gov.au/reports/alcohol/alcohol-tobacco-other-drugs-australia/drug-types/ cannabis> (AIHW Report)

Direction No. 110 – Migration Act 1958 – Direction under section 499: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA

Sentencing Advisory Council (Vic), *'Imprisonment'* (Web Page, updated 7 May 2024) https://sentencingcouncil.vic.gov.au/about-sentencing/imprisonment

Statement of Reasons

INTRODUCTION

1. Mr Hoang Phuong Do ('**the Applicant'**) is a 42-year-old citizen of the Socialist Republic of Vietnam ('**Vietnam**').[1] He has asked the Tribunal to review a decision by the Minister not to revoke the mandatory cancellation of his Class BC (Subclass 801) Partner Visa ('**visa**').

2. The application was heard was by video on 12 and 13 February 2026. The Applicant was represented by Dr Jason Donnelly of counsel, acting on a direct access basis. Ms Emma Carnell, Special Counsel with HWL Ebsworth Lawyers, represented the Respondent.

3. For the following reasons the Tribunal sets aside the reviewable decision and substitutes a decision that there is another reason to revoke the cancellation of the Applicant's visa.

BACKGROUND AND PROCEDURAL HISTORY

4. The Applicant was born in Vietnam and lived there until his mid-30s. He was educated to postgraduate level[2] and worked for an international company.[3] He married in 2011 and his two daughters were born in 2011 and 2015.[4] This marriage ended in divorce in 2016.[5] The Tribunal will refer to the Applicant's ex-wife as '**Ms AA'**.

5. The Applicant first arrived in Australia in June 2017.[6] He began living here more permanently from August 2019 after marrying an Australian citizen who sponsored his partner visa. This was granted on 22 January 2022.[7]

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[1] Exhibit R1, 62.
[2] Ibid 72.
[3] Ibid 44 [7];81 [15].
[4] Ibid 66.
[5] Ibid 79 [2], 122.
[6] Ibid 120-121.
[7] Ibid 79 [24.

6. In or about June 2022, Ms AA arrived in Australia on a Student Visa.[8] About three months later, in September 2022, the Applicant's two daughters arrived in Australia.[9]

7. Between 9 January and 29 July 2023, the Applicant aided the large-scale production of cannabis at a farm in regional Queensland.[10] He was employed at the time as a salesperson for a garden supply company in Sydney but travelled to Queensland on multiple occasions. Police arrested him in Queensland on 29 July 2023.[11] The Applicant was charged and remanded in custody. Search warrants were executed.[12]

8. In September 2023, the Applicant was released on bail. He worked for about 17 months in several casual roles prior to sentencing.[13]

9. In May 2024, the Applicant's short-lived second marriage ended in divorce.[14] There were no children from this union.

10. In December 2024, Ms AA married an Australian citizen and is currently on a temporary visa awaiting the outcome of a Partner Visa application.[15] She currently cares for her two children with the Applicant, who are 10 and 14 years of age.

11. On 19 February 2025, the Applicant was convicted in the District Court of Queensland of '*Producing dangerous drugs schedule 2 drug quantity or exceeding schedule 3*'.[16] He was sentenced to three years' imprisonment. The Court ordered that the sentence be suspended after the Applicant had served five months.[17]

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[8] Ibid 80 [6].
[9] Ibid 79 [5].
[10] Ibid 42-43.
[11] Ibid 42 [25[.
[12] Ibid 53.
[13] Ibid 81 [18]-[23].
[14] Ibid 79 [3-4].
[15] Ibid 97 [2], 98 [8].
[16] Ibid 39-40.
[17] Ibid 46 [20].

12. On 1 April 2025, a delegate of the Minister cancelled the Applicant's visa under s 501(3A) of the *Migration Act 1958* (Cth) ('**the Act**').[18] On 7 April 2025, the Applicant requested that the cancellation decision be revoked.[19]

13. In about mid-2025, after serving five months of his sentence, the Applicant was released from prison and taken into immigration detention where he has since remained.

14. On 27 November 2025, a delegate of the Minister refused to revoke the cancellation of the Applicant's visa.[20]

15. On 3 December 2025, the Applicant lodged a review application with the Tribunal.[21]

16. Section 500(6L) of the Act provides that if the Tribunal has not made a decision on this application within 84 days of the Applicant being properly notified of non-revocation, the Tribunal is taken, at the end of that period, to have made a decision by operation of law to affirm the reviewable decision under s 105 of the *Administrative Review Tribunal Act 2024* (Cth) ('**ART Act**'). The 84th day in this matter falls on 20 February 2026, which is five working days after the listed hearing dates.

LEGISLATIVE FRAMEWORK

17. Section 500(1)(ba) of the Act, read in conjunction with s 13 of the ART Act, are the sources of the Tribunal's jurisdiction to hear this review application.

18. Sections 49–50 of the ART Act provide that the Tribunal has a broad discretion regarding procedure and must act with as little formality and technicality as a proper consideration of the matters before it permits. Section 52 of the ART Act provides that '*the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it considers appropriate*'.

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[18] Ibid 122.
[19] Ibid 58-119.
[20] Ibid 15, 18.
[21] Ibid 1-14.

19. Section 501(3A) of the Act, read in conjunction with ss 501(6) and 501(7), requires the Minister to cancel a person's visa if satisfied the person does not pass the character test and is serving a full-time sentence of imprisonment.

20. The '*character test*' is defined in s 501(6) of the Act and a person does not pass it if they have a '*substantial criminal record*' as defined by s 501(7). This includes if they have been sentenced to a term of imprisonment of 12 months or more.

21. Under s 501CA(3) of the Act, the Minister is obliged to give notice of a cancellation decision as soon as practicable after it is made and invite the affected person to make representations about revocation. Provisions relating to the form and process of those representations are found in reg 2.52 of the *Migration Regulations 1994* (Cth).

22. Section 501CA(4) of the Act confers a discretionary power on the Minister to revoke the original decision if the person whose visa has been cancelled makes representations in accordance with the invitation, and the Minister is satisfied the person either passes the character test, or there is another reason why the original decision should be revoked.

ISSUE

23. Because of the Applicant's convictions and sentence on 19 February 2025 he has a substantial criminal record and does not pass the character test. It follows there is no discretion under s 501CA(4)(b)(i) of the Act to revoke the cancellation of his visa. Accordingly, the only issue to be decided is whether there is '*another reason*' for revocation.[22] The Tribunal must read, identify, understand and evaluate the Applicant's representations or those obviously arising from the evidence.[23]

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[22] Ibid s 501CA(4)(b)(ii).

[23] *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582 ('*Plaintiff M1/2021*'), [22]; [25]; [27]; [36] (Kiefel CJ, Keane, Gordon, and Steward JJ).

DIRECTION 110

24. In making its decision, the Tribunal must comply with a ministerial direction under s 499(1) of the Act, known as 'Ministerial Direction 110' ('**the Direction**').[24] This contains *'mandatory and aspirational considerations'* that guide the exercise of statutory power.[25]

25. Clause 5.1(1) of the Direction sets out several objectives, the first of which is to '… *regulate, in the national interest, the coming into, and presence in, Australia of non-citizens*'.

26. Clause 5.2 of the Direction sets out principles that guide decision-makers as follows:

> *(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*
>
> *(2) The safety of the Australian Community is the highest priority of the Australian Government.*
>
> *(3) 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.*
>
> *(4) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measureable risk of causing physical harm to the Australian community.*
>
> *(5) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, or by other non-citizens who have been participating in, and contributing to, the Australian community only for a short period of time.*
>
> *(6) With respect to decisions to refuse, cancel, and revoke cancellation of a visa, Australia may afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age.*
>
> *(7) Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation.*

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[24] The Act, s 499(2A; *Khalil v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2025] HCA 33, [1]; *Direction No. 110: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (commenced 21 June 2024) (**the Direction**).

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

(8) The inherent nature of certain conduct such as family violence is so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation, even if the information available at the time of consideration suggests that the non-citizen does not pose a measureable risk of causing physical harm to the Australian community.

27. Clause 6 of the Direction provides that, informed by the principles in cl 5.2, a decision-maker must have regard to primary and other considerations where relevant to the decision.

28. Clause 7 of the Direction provides as follows:

> *7. Taking the relevant considerations into account*
>
> *(1) In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight.*
>
> *(2) The primary consideration at 8.1 below (protection of the Australian community) is generally to be given greater weight than other primary considerations. Otherwise, primary considerations should generally be given greater weight than the other considerations.*
>
> *(3) One or more primary considerations may outweigh other primary considerations.*

29. Clause 8 of the Direction sets out the following primary considerations:

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

30. Clause 9(1) of the Direction sets out a non-exhaustive list of other considerations:

> *(a) legal consequences of the decision;*
>
> *(b) extent of impediments if removed; and*
>
> *(c) impact on Australian business interests.*

31. The weight given to an Applicant's claims and the individual and cumulative weighing process is a matter for individual decision-makers.[26]

[26] *Nguyen v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCAFC 160, [23] (Perram, Colvin and Abraham JJ); *Singh v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 296 FCR 582, [23] (Mortimer J, as Her Honour then was).

EVIDENCE

Statement of Facts, Issues, and Contentions

32. The Tribunal has considered the Applicant's Statement of Facts, Issues, and Contentions ('**SFIC**')[27] dated 28 December 2025, the Respondent's SFIC dated 27 January 2026, and the Applicant's reply dated 9 February 2026. Previous statements / affidavits / submissions advanced on the Applicant's behalf have also been considered.[28]

Documentary evidence

33. The following was tendered into evidence:

(a) G-documents filed by the Respondent numbering 166 pages;[29]

(b) 52 pages of documents obtained under summons;[30]

(c) Applicant's 12-page statement dated 27 December 2025;[31]

(d) Report of consultant psychologist Mr Tim Watson-Munro dated 5 February 2026;[32]

(e) Letters dated 9 and 12 January 2026 from counsellor Ms Kirston Butcher,[33] covering records dated between June and October 2025 and information about the Power in Change Program;

(f) Attendance forms dated between 14 November 2025 and 6 February 2026 for online sessions of the SMART Recovery Program;[34]

(g) Certificate dated 20 November 2025 for the Positive Lifestyle Program;[35]

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[27] A SFIC is routinely lodged by parties during the pre-hearing phase and is comparable to a pleadings document in a court proceeding. It serves to identify / narrow the issues in dispute and helps ensure both sides are aware of and have an opportunity to answer each other's case.

[28] Exhibit R1, 75-86.

[29] Exhibit R1.

[30] Exhibit R2.

[31] Exhibit A1.

[32] Exhibit A2.

[33] Exhibit A3.

[34] Exhibit A4.

[35] Exhibit A5.

(h) Detainee Case Plan dated 30 January 2026;[36]

(i) Certificates from an online organisation called Universal Class dated 18 and 23 November 2025 regarding completion of '*Conflict Resolution and Negotiation Tactics*', and '*Stress Management*';[37]

(j) Undated Christmas card to the Applicant from Anglicare;[38]

(k) Certificate from an unknown source acknowledging the Applicant's '*business principles*';[39]

(l) Australian Tax Office notice of assessment for year ended 30 June 2025;[40]

(m) Country Information Report – Vietnam dated 19 February 2025, from the Department of Foreign Affairs and Trade ('**DFAT**');[41]

(n) '*Law of Employment*' dated 16 November 2013, Socialist Republic of Vietnam;[42]

(o) Three online articles relating to unemployment benefits in Vietnam;[43]

(p) Statement dated 30 October 2025 from Thi My Truong;[44]

(q) Undated statement from Lan Anh Phan;[45]

(r) Undated statement from Ngoc Y Pham;[46]

(s) Statement dated 14 November 2024 from Thich Duc Tanh;[47]

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[36] Exhibit A6.
[37] Exhibit A7. Universal Class is an online provider of both free and fee-based self-paced courses.
[38] Exhibit A8.
[39] Exhibit A9.
[40] Exhibit A10.
[41] Exhibit A11.
[42] Exhibit A12.
[43] Exhibit A13.
[44] Exhibit A14.
[45] Exhibit A15.
[46] Exhibit A16.
[47] Exhibit A17.

(t) High School Certificate dated 2025 for the Applicant's eldest daughter for upholding the school's core values;[48] and

(u) Undated and unsigned handwritten letter from one of the Applicant's daughters.[49]

Oral evidence

34. The Applicant's oral evidence occupied most of the first hearing day. Other witnesses called were consultant psychologist Mr Tim Watson-Munro and Ms AA.

Applicant's evidence

35. The Applicant gave evidence in English and Vietnamese, assisted at times by an interpreter in the Vietnamese language. He adopted Exhibit A1 as true and correct.

36. The Applicant agreed his convictions amount to very serious offending. He described his crimes as bringing shame on his family and found imprisonment to be a '*horrible experience*' that left him '*quite panicked*'. The Applicant recalled financial pressures at the time of his involvement in the cannabis enterprise. He was only earning $700-$800 per fortnight as an employee at a garden centre and needed more, including because his two daughters had recently arrived from Vietnam. He also felt stressed after the breakdown of his second marriage. The Applicant's employer at the garden centre recruited him into the cannabis enterprise and, once he was involved, he feared stopping because of how co-offenders might perceive this. In addition to the wages he received from the garden centre, the Applicant made commissions from selling horticultural equipment to the cannabis farm. He recalled receiving a commission on one occasion of $1000. Co-offenders at the farm also gave him amounts up to $250. The Applicant now realises deciding to become involved was '*very bad judgement*' and a '*stupid mistake*':

> *The bad experiences I had in prison and the immigration detention centre have opened my eyes and changed my attitude. I understand if given a second chance it will be the last chance…if I ever do anything wrong in future.*

37. During a 17-month period on bail the Applicant recalled twice-weekly reporting to police and said he complied with all conditions. He worked several jobs, including as a disability

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[48] Exhibit A18.

[49] Exhibit A19.

support worker, and intends returning to this role if he can satisfy NDIS Worker Check requirements. In the alternative he referred to other work options, including with a business operated by his former sister-in-law's husband.[50]

38. In terms of rehabilitation, the Applicant said he has attended 18 sessions of the SMART Recovery Program, fortnightly counselling in immigration detention, and interacted with Ms Butcher from Straight and Narrow Counselling Service. He also completed online programs for personal change. The Applicant said these efforts have adjusted his attitude and will help him better cope with future life stressors.

39. Much of the Applicant's evidence centred on the interests of his two daughters, whose migration he sponsored in September 2022. His unchallenged evidence is that they now hold permanent resident visas. When asked about current care arrangements for the children, the Applicant said they live rent free under an arrangement he has with the homeowner, who is a friend living nearby. Ms AA cares for the children and is assisted by her sister and friends. If allowed to remain in Australia, the Applicant said the children will live with him. If returned to Vietnam, the children will stay in Australia with Ms AA. The Applicant claimed his 10-year-old daughter has '*almost forgotten*' to speak Vietnamese and is no longer able to write in Vietnamese after three years of Australian education. His 14-year-old daughter is now in high school. The Applicant said both children would find it disruptive to return to the Vietnamese education system and this would also separate them from Ms AA who has made a new life for herself in Australia.

40. The Applicant's concerns about returning to Vietnam include being unable to find a job and provide for himself because of his age (42), criminal history in Australia, gaps in his employment history, and a neck problem he claims will limit the work he can do. The Applicant said he would find it hard to get a job in Vietnam, including because would feel obliged to divulge his Australian criminal history in the interests of candour.

41. The Applicant said his neck condition is '*manageable*' through exercise, physiotherapy, and without medication. Although he was referred to a rheumatologist for review, this is yet to occur. He said the condition will not impede him working in the disability support sector or

[50] Exhibit A16.

in the flooring business operated by his former sister-in-law's husband. When asked about references in evidence to gout, the Applicant said he only experienced one episode of gout in 2022, which he managed through diet, activity, and without medication.

42. The Applicant said his parents in Vietnam are elderly and live with his sister. He has not told them about his crimes because of shame. Although he stayed with them during past visits to Vietnam, he claims this is not a long-term option.

43. The Applicant referred to possible harm from his Australian co-offenders. He has not been in contact with them since arrest, has not received any threats, and cannot predict what they might do. The claimed fear to his safety was expressed at a high level of generality.

44. In terms of current assets, the Applicant said he has limited savings. He has not checked his superannuation balance for a long time, but when he last did, it was around $7000.

Evidence of Ms AA

45. Ms AA gave evidence with the assistance of an interpreter in the Vietnamese language, which is summarised as follows:

(a) Ms AA adopted her statement as true and correct.[51] She is currently on a temporary Bridging Visa awaiting the outcome of a Partner Visa.

(b) Ms AA said that after her divorce from the Applicant in 2016 they remained in close and friendly contact.

(c) Ms AA cared for her children in Vietnam after the Applicant moved to Australia in 2019. When both she and the Applicant were living in Australia from June 2022, Ms AA said the Applicant's sister and parents cared for the children until their arrival in Australia in September 2022. Ms AA has lived in the Applicant's home so the children can continue attending the same school. This includes when the Applicant was travelling to and from Queensland, while he worked during a 17-month period on bail, and since his imprisonment. Ms AA finds this arrangement difficult because

[51] Exhibit R1, 97-101.

she has a new husband and works fulltime – often seven days a week. Her sister, a neighbour and friends assist her with the children's care.

(d) Ms AA said the children love the Applicant, miss him, visit him regularly in detention, and speak with him daily by telephone. They are unwilling to accept her new husband who they perceive as a stranger. If the Applicant is removed Ms AA said the children will remain here. She is concerned about how much longer she can handle competing priorities in her life and became emotional when asked to consider arrangements if the Applicant is repatriated. She said this would be an '*extremely difficult and miserable situation*'.

Expert evidence

46. The Tribunal has considered a report dated 6 February 2026 from consultant psychologist Mr Tim Watson-Munro. Mr Watson-Munro gave oral evidence by video and adopted his report as true and correct. He said the Applicant constitutes a low recidivism risk and this rating would be '*amplified and reinforced*' through adherence to his recommendations. He said the salutary experiences of imprisonment and visa cancellation have profoundly affected the Applicant who has '*learned his lesson*'. Mr Watson-Munro said the Court's decision not to impose conditions on the Applicant after he had served five months of his prison sentence is '*significant*' and reflects '*good prospects for rehabilitation*'.

PRIMARY CONSIDERATIONS

Protection of the Australian community from criminal or other serious conduct

47. Clause 8.1 of the Direction states:

> *(1) When considering protection of the Australian community, decision-makers should keep in mind that safety of the Australian community is the highest priority of the Australian Government. 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. In this respect, decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.*
>
> *(2) Decision-makers should also give consideration to:*
>
> *a) the nature and seriousness of the non-citizen's conduct to date; and*
>
> *b) the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.*

48. Under cl 8.1.1(1) of the Direction, the following factors are to be considered in determining the nature and seriousness of the non-citizen's criminal and other conduct to date:

(a) without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:

i. violent and/or sexual crimes;

ii. crimes of a violent and/or sexual nature against women or children, regardless of the sentence imposed;

iii. acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed;

(b) without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:

i. causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;

ii. crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties;

iii. any conduct that forms the basis for a finding that a non-citizen does not pass an aspect of the character test that is dependent upon the decision-maker's opinion (for example, section 501(6)(c));

iv. where the non-citizen is in Australia, a crime committed while the non-citizen was in immigration detention, during an escape from immigration detention, or after the non-citizen escaped from immigration detention, but before the non-citizen was taken into immigration detention again, or an offence against section 197A of the Act, which prohibits escape from immigration detention;

(c) with the exception of the crimes or conduct mentioned in subparagraph (a)(ii), (a)(iii) or (b)(i) above, the sentence imposed by the courts for a crime or crimes;

(d) the impact of the offending on any victims of offending or other conduct and their family, where information in this regard is available and the non-citizen whose visa is being considered for refusal or cancellation, or who has sought revocation of the mandatory cancellation of their visa, has been afforded procedural fairness;

(e) the frequency of the non-citizen's offending and/or whether there is any trend of increasing seriousness;

(f) the cumulative effect of repeated offending;

(g) whether the non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending;

(h) whether the non-citizen has reoffended since being formally warned, or since otherwise being made aware, in writing, about the consequences of further offending in terms of the non-citizen's migration status (noting that the absence of a warning should not be considered to be in the non-citizen's favour).

(i) where the conduct or offence was committed in another country, whether that offence or conduct is classified as an offence in Australia.

Nature and seriousness of conduct

49. Use of the term '*without limiting the range of conduct'* in cls 8.1.1(1)(a) and (b) of the Direction highlights the non-exhaustive nature of the examples given. The Tribunal is not bound by the views of the Australian Government or community.[52] Judgements about the seriousness of drug-related offending turn on the specific circumstances of each case.[53]

50. Key aspects of the sentencing remarks from McDonnell DCJ are summarised as follows:[54]

    (a) The Applicant pleaded guilty at an early stage to an agreed schedule of facts.

    (b) During an approximately seven-month period between January and July 2023, the Applicant knowingly participated in a '*large scale*' cannabis enterprise '*with the potential for substantial commercial exploitation*'. He provided horticultural supplies and undertook other tasks.

    (c) The offending warranted the Court signing a '*serious drug offence certificate*'. Almost 5000 cannabis plants were discovered with an estimated total weight of 2000 kilograms and potential value between $10.6 million and $19.7 million. The Court concluded, however, that the Applicant did not profit from the sale of cannabis.

    (d) The Applicant was sentenced to a three-year term of imprisonment, suspended after he served five months.

51. The Applicant's participation in the cannabis enterprise is not attributable to impulsiveness or immaturity. He was almost 40 at the time, knew his conduct was illegal, but continued participating for about seven months. He played a critical role despite not profiting from the sale of drugs. His offending is very serious irrespective of the head sentence being well below the maximum penalty for these crimes or the suspended nature of his sentence.

Risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct

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[52] *BNY23 v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCAFC 14 (*BNY23*), [107] (Rangiah, Derrington and Rofe JJ).

[53] *McKay v R* [2000] FCA 155 [14]-[15] (Spender J).

[54] Ibid 41-47.

52. Clause 8.1.2(1) of the Direction provides:

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

53. Clause 8.1.2(2) of the Direction states that in assessing the risk the non-citizen poses to the Australian community, decision-makers must take into account, cumulatively:

> *(a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and*
>
> *(b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:*
>
> *i. information and evidence on the risk of the non-citizen re-offending; and*
>
> *ii. evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).*
>
> *(c) where consideration is being given to whether to refuse to grant a visa to the non-citizen – whether the risk of harm may be affected by the duration and purpose of the non-citizen's intended stay, the type of visa being applied for, and whether there are strong or compassionate reasons for granting a short stay visa.*

54. The nature and seriousness of past offending is probative to assessing the harm that could result from further crimes.[55] This aspect of the Direction, however, requires a '*future-focused* assessment' of risk,[56] taking into consideration the nature of harm and its probability. In *Guo*,[57] the High Court held that past actions are an uncertain guide and, depending on circumstances, the probability of an event occurring could be so low as to be '*safely disregarded*' or so high as to '*border on certainty*'.[58] Maxwell P and Weinberg J have observed that such assessments are best founded on expert input:[59]

> *Predicting whether a particular person will commit a criminal offence in the future is notoriously difficult…the prediction of future dangerousness, if it is to be attempted at all, is a matter for expert opinion … The necessary expertise combines the ability to make a qualitative assessment of an individual and the ability to utilise the available quantitative risk assessment instruments.*

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[55] *BNY23 v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCAFC 14 [97].

[56] *CTK17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1211 [90] (Kerr J). See also *Murphy v Minister for Home Affairs* [2018] FCA 1924, [37] (Mortimer J).

[57] *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559, 574 ('***Guo'***).

[58] Ibid 574-5. See also, *Hughes v The Queen* (2017) 263 CLR 338, 392 [154] (Nettle J, albeit in dissent); *Assistant Minister for Immigration and Border Protection v Splendido* (2019) 271 FCR 595 [78] (Mortimer J, as her Honour then was).

[59] *RJE v Secretary to Department of Justice* (2008) 21 VR 526 [16]-[17] (Maxwell P and Weinberg J]).

> *One thing is clear. Judges, including experienced criminal judges, have no such expertise. Neither the conduct of criminal trials nor the sentencing of offenders requires judges to have, or equips them with, the ability to assess the likelihood that an offender will re-offend…*
>
> (Footnotes removed).

55. The Applicant has no prior criminal history. Witness statements from those who know him well invoke financial and emotional stress as contextually relevant to his crimes.[60]

56. The Applicant complied with bail conditions for about 17 months and undertook casual work during this time. In terms of rehabilitation, the Tribunal has considered:

    (a) Mr Watson-Munro's evidence, which was earlier summarised.

    (b) Letters dated 9 and 12 January 2026 from a counsellor at Straight and Narrow Counselling Service.

    (c) An attendance form regarding participation in online sessions of the SMART Recovery Program between 14 November 2025 and 6 February 2026.

    (d) Certificate relating to the Applicant's completion of the Positive Lifestyle Program on 20 November 2025.

    (e) Certificates from an online organisation called Universal Class dated 18 and 23 November 2025 for the Applicant's completion of '*Conflict Resolution and Negotiation Tactics*', and '*Stress Management*'.[61]

    (f) Reference to the Applicant's involvement in a program based on a book titled: '*Unshackled: A Daily Diary for Inner Freedom*'. This is based on an unsigned and undated letter without contact details from the author, Mr Stephen Keating.[62]

57. In terms of recidivism risk:

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[60] Exhibit R1, 99 [16], 105 [13]-[14].

[61] Universal Class is an online provider of both free and fee-based self-paced courses.

[62] Ibid 112-113.

(a) The Applicant claims he constitutes a '*very low likelihood of engaging in further criminal or other serious conduct'* and is not an unacceptable risk of harm to the Australian community.[63] The following was advanced in revocation submissions:

> *The applicant has an extremely limited history of criminal offending. He has expressed deep and genuine remorse for his conduct in Australia. The sentence imposed by the court serves as a strong personal deterrent against any future offending. In addition, the cancellation of his visa has had a profound and adverse effect on his mental health. The ongoing risk of visa cancellation in the future remains a significant deterrent. Importantly, the applicant has actively taken steps towards rehabilitation, including severing all ties with anti-social associates. The applicant has behaved in prison.*

(b) A custodial record states the Applicant falls '*into a category of prisoners who pose a low risk of further general offending*'.[64] This was based on the Risk of Reoffending Prison Version (RoR-PV) methodology undertaken on 23 February 2025.[65] The Applicant subsequently served his sentence under a low custodial security classification and there is no evidence he was other than compliant.

(c) Mr Watson-Munro assesses the Applicant's recidivism risk as '*low*', which will be reinforced if he continues with psychological support and maintains employment.

58. In terms of protective factors, the Applicant invokes stable accommodation, prospects of work, and the interests of his two children who are now permanent residents.

59. The Tribunal makes the following findings regarding this aspect of the Direction:

(a) As the sentencing remarks point out, illicit drug production '*compromises the health and lives of its users, impacts families and places a burden on our emergency and healthcare services*'.[66] Physical and / or psychological harm can result to cannabis users, including as a pathway to harder drugs.[67] Harm can also result from the nexus between addiction and other crimes or when a drug-affected person operates a vehicle or machinery. These costs are borne by families and the broader community.

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[63] Applicant's SFIC, 9-10 [49].

[64] Exhibit R1, 56.

[65] Ibid 57.

[66] Exhibit R1, 43 [40].

[67] Australian Institute of Health and Welfare, '*Alcohol, tobacco & other drugs in Australia, Cannabis*', (25 February 2025), <https://www.aihw.gov.au/reports/alcohol/alcohol-tobacco-other-drugs-australia/drug-types/cannabis> (AIHW Report).

(b) Aiding the production of a significant quantity of illicit drugs falls into a category of conduct where even a low risk of repeat elicits significant concerns. This is so regardless of whether someone aids drug production or profits from sale.

(c) The Applicant's claim about fearing co-offenders was unpersuasive. There is no evidence he was other than a knowing and willing participant.[68]

(d) The Applicant entered a guilty plea at the earliest opportunity, was law-abiding during a 17-month period of parole and has been compliant in custodial settings.[69]

(e) Some aspects of the Applicant's rehabilitative claims are unpersuasive as follows:

(i) The letter from the author of '*Unshackled: A Daily Diary for Inner Freedom*' makes no reference to the Applicant's crimes and contains no contact details or other information about the author's qualifications. It is unclear when the Applicant participated in this program. The letter contains general claims, aspects of which border on advocacy. An example is that the Applicant has been '*instrumental*' in assisting Mr Keating with the program. Little weight is placed on the Applicant's participation in '*Unshackled*' as meaningfully advancing his rehabilitation.

(ii) The letters from Ms Butcher of Straight and Narrow Counselling Service contain disclaimers that the Power in Change Program '*does not constitute standalone therapeutic treatment or diagnosis*' and is not designed to '*replace appropriate medical or psychiatric care where indicated*.' Accompanying notes do not state how long sessions went for, what was covered, how the Applicant participated, or what was achieved. Much of the information rests on the Applicant's self-reported claims. Recommendations in the notes are unremarkable and include comments such as '*continue with current activities*' in immigration detention, '*encouraged gym, self-cares* (sic)', or '*refer to counsellor/psychologist for psychological support*'. Ms Butcher was not called as a witness and could not be cross-examined. Little

[68] Ibid 44 [28].
[69] Ibid 57.

weight is placed on the Applicant's engagement with Straight and Narrow Counselling Service as meaningfully advancing his rehabilitation.

(iii) The Tribunal is aware from the online presence for Universal Class that the company offers courses that are informative rather than therapeutic. There is scant evidence about what was covered during these courses and little weight is placed on them as meaningfully advancing the Applicant's rehabilitation.

(f) The Tribunal is unpersuaded the Applicant can return to disability support work but accepts he has other employment options. His circumstances if released would differ to those in 2022. This includes because his children are more settled in Australia and the salutary criminal and visa consequences since his arrest.

60. The Tribunal accepts the Applicant is remorseful, has learned from his crimes, and constitutes a low recidivism risk. In terms of the treatment recommended by Mr Watson-Munro, decisions should not be delayed for this to be undertaken.[70]

61. On balance, this primary consideration weighs no more than moderately against revocation.

Family violence committed by the non-citizen

62. There is no evidence the Applicant engaged in family violence. It follows that this primary consideration weighs neutrally.

Strength, nature, and duration of ties to Australia

63. Clause 8.3 of the Direction provides:

> *(1) Decision-makers must consider any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.*
>
> *(2) Where consideration is being given to whether to cancel a non-citizen's visa or whether to revoke the mandatory cancellation of their visa, the decision-maker must*

[70] The Direction, cl 8.1.2(2)(b)(ii).

also consider the strength, nature and duration of any other ties that the non-citizen has to the Australian community. In doing so, decision-makers must have regard to:

a) *how long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that:*

   i. *less weight should be given where the non-citizen began offending soon after arriving in Australia; and*

   ii. *more weight should be given to time the non-citizen has spent contributing positively to the Australian community*

b) *the strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia.*

64. The Applicant has lived in Australia for about six-and-a-half years. His only immediate family in Australia are his two daughters.

65. The Tribunal has considered a statement dated 7 April 2025 from Ms AA[71] and her oral evidence. She and the Applicant have an amicable relationship focussed on their children's interests. Ms AA has remarried, is currently on a temporary visa, and does not fall within the meaning of cl 8.3 of the Direction. Her interests are not considered further.

66. The Tribunal has considered a statement from the Applicant's former sister-in-law who claims to be an Australian citizen.[72] This is generally to the effect that the Applicant is a '*loving and active presence*' in the lives of her two children, who know him as a '*kind and dependable uncle*' and with whom they share a '*close emotional bond*'. She states the Applicant has a close relationship with her husband[73] although there is no independent evidence from him in this proceeding.

67. The Tribunal has considered statements from the Applicant's other supporters in Australia.[74]

68. The Applicant refers to positive contributions that include employment in the disability sector, looking after his children, and helping maintain a library in immigration detention. There is a supportive letter from a Buddhist Temple, which states that his attendance only

[71] Ibid 97-101.
[72] Ibid 103-106.
[73] Ibid 104 [11].
[74] Ibid 107-111; Exhibits A14-A17.

commenced after release on bail in September 2023.[75] In addition to Exhibit A8, the Tribunal has considered an undated message from Anglicare regarding unspecified '*donations*'.[76]

69. Given the Applicant's offending did not occur until approximately three-and-a-half years after he started living in Australia, it cannot be said less weight is given to this primary consideration under cl 8.3(2)(a)(i) of the Direction. His six-and-a-half-year residence in Australia has not resulted in particularly broad ties but those he has appear quite strong. He has made some contributions through work and other activities.

70. This primary consideration carries moderate weight in favour of revocation.

Best interests of minor children in Australia affected by the decision

71. Clause 8.4 of the Direction requires decision-makers to determine whether the best interests of minor children in Australia are served by grant or refusal of the visa.[77] It is generally for an Applicant to '*identify the personal facts and circumstances relevant to the decision*'.[78] This primary consideration applies only if the child is, or would be, under 18 years old at the time the application is decided. If there are two or more relevant children, the best interests of each affected by the decision should be given individual consideration, to the extent their interests differ. In considering the best interests of the child, the following factors must be considered where relevant:[79]

> a. *the nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);*
>
> b. *the extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;*
>
> c. *the impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;*

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[75] Exhibit A17.

[76] Ibid 116.

[77] *RGCZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 295 FCR 365, [44].

[78] *Ismail v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 2, [23]; *Uelese v Minister for Immigration and Border Protection* (2015) 256 CLR 203, 221 [61].

[79] The Direction, cl 8.4(4).

d. *the likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;*

e. *whether there are other persons who already fulfil a parental role in relation to the child;*

f. *any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);*

g. *evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the non-citizen, or has otherwise been abused or neglected by the non-citizen in any way, whether physically, sexually or mentally;*

h. *evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.*

72. The Applicant's documentary claims about his children have been considered.[80] They were born in Vietnam and lived there until September 2022. The Applicant's involvement with them is contextualised by long periods of absence. The claim that he was a '*devoted father prior to incarceration*' sits uncomfortably with his decision to become involved in crime soon after the children arrived in Australia. He was their primary carer for less than a year before being arrested on 29 July 2023. Ms AA looked after them after he moved to Australia in 2019, while he was offending in Queensland, working long hours on bail,[81] and since his imprisonment about a year ago.

73. In revocation submissions the Applicant referred to the children's likely return to Vietnam if he is removed.[82] His current evidence, however, is that the children will remain in Australia with Ms AA as '*best for their future*'.[83] In the event of non-revocation the Applicant and Ms AA will be confronted by a difficult but ultimately personal choice about where the children live. They could return to Vietnam, although this would separate them from Ms AA, their current education / friendship groups, and curtail opportunities in Australia. This would also be disruptive for their education. If the children remain in Australia they would be separated from the Applicant, who could not provide direct emotional or practical support.

74. The Applicant refers to the two children of his former sister-in-law as his niece and nephew. They are currently three and eight years' old. He claims to be '*a dependable uncle figure*'

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[80] Exhibit R1, 75-78, 80 [9]-[10], 82 [25]-[28], 84-85 [11]; Applicant's SFIC, 14-16.

[81] Ibid 81 [18]-[21].

[82] Ibid 74.

[83] Ibid 82 [26]; Exhibit A1, 10 [41].

who has provided '*educational support and emotional guidance*'.[84] The Applicant's role with these children is non-parental. There has also been a long period of absence and limited meaningful contact since his imprisonment / detention. He has been physically absent for most of the youngest child's life. That said, the Tribunal accepts the Applicant has formed some bond with the children and aspires to play a positive avuncular role in future.

75. The Tribunal accepts the Applicant has a close, loving, and parental relationship with his two daughters. He also has a developing relationship with his niece and nephew. There is a considerable time before the children become adults during which the Applicant could play a positive role. Revocation is in the children's collective best interests, although more weight is placed on his biological children. On balance, this primary consideration weighs no more than moderately in favour of revocation.

Expectations of the Australian community

76. Clause 8.5(1) of the Direction identifies the expectations of the Australian community:

> *(1) The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia.*

77. Clause 8.5(2) of the Direction states:

> *In addition, visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:*
>
> *a) acts of family violence; or*
>
> *b) causing a person to enter into, or being party to (other than being a victim of), a forced marriage;*
>
> *c) commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual nature, as well as other serious crimes against the elderly or other vulnerable persons in the form of fraud, extortion, financial abuse/material exploitation or neglect;*
>
> *d) commission of crimes against government representatives or officials due to the position they hold, or in the performance of their duties; or*

[84] Applicant's SFIC, 14 [69].

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

f) worker exploitation.

78. Clause 8.5(3) of the Direction provides that the above expectations apply regardless of whether the non-citizen poses a measurable risk of causing physical harm.

79. Clause 8.5(4) of the Direction provides that this consideration is '*about the expectations of the Australian community as a whole*', and decision-makers are to proceed based on the Government's views as articulated in the Direction, without independently assessing the community's expectations in a particular case. This correlates with the reasoning in *FYBR*[85] where the plurality held that this primary consideration is a deeming provision with normative principles, ascribing to the community an expectation aligning with that of the executive government. The reasoning in *FYBR* establishes that the '*deemed community expectation*' will in most cases call for cancellation, but '*the question of whether it is appropriate to act in accordance with the deemed community expectation is in all cases left for the decision-maker to determine*'.[86] The High Court refused an application for special leave to appeal from the orders in *FYBR*.[87]

80. Pursuant to cl 5.2(1)–(3) and (5) of the Direction, the nature of the Applicant's crimes is such that there would be a low tolerance for his conduct and he should expect to forfeit the privilege of holding a visa or staying in Australia. This primary consideration weighs substantially against revocation.

OTHER CONSIDERATIONS

Legal consequences of the decision

81. Clause 9.1 of the Direction states:

> *9.1 Legal consequences of decision under section 501 or 501CA*
>
> *(1) Decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable in the circumstances specified in that section, and in the meantime, detention under section 189,*

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[85] *FYBR v Minister for Home Affairs* (2019) 272 FCR 454, 471–2 [66] (Charlesworth J), 476 [91] (Stewart J).

[86] Ibid 473 [75]–[76] (Charlesworth J).

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

noting also that section 197C(1) of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful noncitizen.

(2) A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act, particularly the concept of 'protection obligations', reflects Australia's interpretation of non-refoulement obligations and the scope of the obligations that Australia is committed to implementing.

(3) International non-refoulement obligations will generally not be relevant where the person concerned does not raise such obligations for consideration and the circumstances do not suggest a non-refoulement claim.

9.1.1 Non-citizens covered by a protection finding

(1) Where a protection finding (as defined in section 197C of the Act) has been made for a non-citizen in the course of considering a protection visa application made by the non-citizen, this indicates that non-refoulement obligations are engaged in relation to the non-citizen.

(2) Section 197C(3) ensures that, except in the limited circumstances specified in section 197C(3)(c), section 198 does not require or authorise the removal of an unlawful non-citizen to a country in respect of which a protection finding has been made for the non-citizen in the course of considering their application for a protection visa. This means the non-citizen cannot be removed to that country in breach of non-refoulement obligations, even if an adverse visa decision under section 501 or 501CA is made for the non-citizen and they become, or remain, an unlawful non-citizen as a result. Instead, the non-citizen must remain in immigration detention as required by section 189 unless and until they are granted another visa or they can be removed to a country other than the country by reference to which the protection finding was made.

(3) Decision-makers should also be mindful that where the refusal, cancellation or non-revocation decision concerns a protection visa, the person will be prevented by section 48A of the Act from making a further application for a protection visa while they are in the migration zone (unless the Minister determines that section 48A does not apply to them – see sections 48A and 48B of the Act). Further, as a result of a refusal or cancellation decision under section 501 or a non-revocation decision under section 501CA, the person will be prevented from applying for any other class of visa except a Bridging R (Class WR) visa (see section 501E of the Act and regulation 2.12AA of the Regulations.

9.1.2 Non-citizens not covered by a protection finding

(1) Claims which may give rise to international non-refoulement obligations can also be raised by a non-citizen who is not the subject of a protection finding, in responding to a notice of intention to consider cancellation or refusal of a visa under section 501 of the Act, or in seeking revocation of the mandatory cancellation of their visa under section 501CA. Where such claims are raised, they must be considered.

(2) However, where it is open to the non-citizen to apply for a protection visa, it is not necessary at the section 501/section 501CA stage to consider non-refoulement issues in the same level of detail as those types of issues are considered in a protection visa application. The process for determining protection visa applications is specifically designed for consideration of non-refoulement obligations as given effect by the Act and where it is open to the person to make such an application a decision-maker, in making a decision under section 501/section 501CA, is not required to determine whether non-refoulement obligations are engaged in respect of the person. Having considered the person's representations, the decision-maker may choose to proceed on the basis that if and when the person applies for a protection visa, any protection claims they have will be assessed, as required by section

> *36A of the Act, before consideration is given to any character or security concerns associated with them.*
>
> *(3) Non-refoulement obligations that have been identified for a non-citizen with respect to a country, via an International Treaties Obligations Assessment or some other process outside the protection visa process, would not engage section 197C(3) to preclude removal of the non-citizen to that country. In these circumstances, in making a decision under section 501 or 501CA, decision-makers should carefully weigh any non-refoulement obligation against the seriousness of the non-citizen's criminal offending or other serious conduct. However, that does not mean an adverse decision under section 501 or 501CA cannot be made for the non-citizen. A refusal, cancellation or non-revocation decision will not necessarily result in removal of the non-citizen to the country in respect of which the non-refoulement obligation exists. For example, consideration may be given to removal to another country, or the Minister may consider exercising his/her personal discretion under section 195A to grant another visa to the non-citizen, or alternatively, consider exercising his/her personal discretion under section 197AB to make a residence determination to enable the non-citizen to reside at a specified place in the community, subject to appropriate conditions. Further, following the visa refusal or cancellation decision or non-revocation decision, if the noncitizen makes a valid application for a protection visa, the non-citizen would not be liable to be removed while their application is being determined.*

82. An Applicant's claims in the context of whether there is '*another reason*' for revocation can be less categorical than the more comprehensive process under s 36A of the Act.[88] It is permissible for the Tribunal to defer assessment of non-refoulement obligations if an Applicant is entitled to lodge a Protection Visa.[89] The Tribunal must nevertheless read, identify, understand and evaluate representations made.[90] In terms of consequences, this relates to the '*direct and immediate statutorily prescribed consequences of the decision in contemplation*' (emphasis added),[91] rather than future outcomes resulting from the irresoluble branches and sequels of future events. The Tribunal respectfully adopts Federal Court authority in not speculating about the course of future decision making.[92]

83. The following submissions were advanced in April 2025 regarding legal consequences:[93]

> *… the legal and practical consequences of non-revocation are severe. Mr Do would face prolonged immigration detention and likely removal to Vietnam, a country to which he has limited recent ties and where his chronic health conditions would be difficult to manage.*

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[88] *The Direction* cl 9.1.2(2); *Ayoub v Minister for Immigration and Border Protection* (2015) 231 FCR 513, 521 [27]–[28].

[89] *Plaintiff M1/*2021, [9], [20], [29]–[30].

[90] *Plaintiff M1/2021,* [24]; *YKSB v Minister for Home Affairs* [2020] FCAFC 224, [5].

[91] *Taulahi v Minister for Immigration and Border Protection* (2016) 246 FCR 146, [84] (Kenny, Flick, Griffiths JJ).

[92] See, for example, *Ali v Minister for Immigration and Border Protection* [2018] FCA 650, at [28], [31]-[33]; *DOB18 v Minister for Home Affairs* [2018] FCA 1523, [35] (Griffiths J); *MNLR v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs* [2021] FCAFC 35, [150]; *RRFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 27, [37] (Nicholas, Yates and Burley JJ).

[93] Exhibit R1, 85 [13].

84. Current submissions advanced by the Applicant are:[94]

> *89. Legal Consequences of the Decision. Section 501E bars a non-citizen who is in Australia from lodging any new visa application while a s 501, 501A, 501B or 501BA refusal or cancellation remains on foot and has not been set aside or revoked.*
>
> *90. The prohibition applies even if the earlier visa application was made on the person's behalf or without their knowledge (for example, due to mental impairment or minority) and covers refusals or cancellations deemed to arise automatically under the Act or regulations.*
>
> *91. Limited exceptions permit applications for protection visas or any visa class prescribed by regulation, and the bar is lifted if the Minister personally grants the person a permanent visa; it also does not block further applications for a visa already obtained under those specific exceptions.*
>
> *92. Section 501F automatically extends the effect of a character-based refusal or cancellation under ss 501, 501A, 501B or 501BA. When the Minister makes such a decision, any other pending visa application by the person (except a protection visa or a class prescribed by regulation) is deemed refused, and any other visa the person already holds (again excluding a protection visa or prescribed class) is deemed cancelled.*
>
> *93. If the original character decision is later set aside or revoked, these deemed refusals or cancellations are also undone. The deemed decisions are not reviewable under Part 5, and notification requirements are dealt with in s 501G.*
>
> *94. Schedule 5, criterion 5001 bars a non-citizen from meeting the "special return" requirements if they: (a) left Australia under any deportation order issued under the Act's current s 200 or its earlier equivalents; (b) had a visa cancelled under former s 501 before 1 June 1999 on character grounds; (c) had a visa cancelled under ss 501, 501A or 501B and that cancellation has not been revoked under s 501C(4) or 501CA(4) and the Minister has not since personally granted them a permanent visa; or (d) had a visa cancelled under s 501BA and have not subsequently received a permanent visa personally granted by the Minister.*
>
> *95. The general effect of a non-revocation decision is permanent exclusion from Australia. The applicant will remain in immigration detention until removed as per s 189 of the Migration Act. These are serious adverse legal consequences.*
>
> *96. This other consideration weighs in the applicant's favour. See further, Singh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2024] FCA 1273.*

85. During oral evidence, the Applicant said he has not had contact with four co-offenders since his arrest. When asked by Dr Donnelly about claims at paragraphs 32-34 of his recent statement, the Applicant said that while living in Vietnam he witnessed co-offenders '*retaliate*' and take '*revenge*' against others. He cannot predict what his co-offenders may do and has not received any threats. His fears were expressed at a high level of generality, based on '*how things operate in Vietnam*'. The Tribunal inferred that the Applicant has residual anxiety about being targeted by co-offenders, but without any persuasive basis for why. During closing submissions Dr Donnelly conceded the Applicant's claims were '*nowhere close*' to constituting non-refoulement claims.

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[94] Applicant's SFIC, 17-18 [89]-[96].

86. In terms of the Applicant's claims about duration of detention, limitations on future applications, and possible exclusion from Australia, these are possible but intended consequences of the statutory scheme.[95] They are not a direct or immediate consequence of the Tribunal's decision but turn on future events as the following possibilities show:[96]

(a) Cancellation of the Applicant's visa meant he became an unlawful non-citizen within the meaning of s 14 of the Act. Under ss 189, 196 and 198, this status renders him liable for detention, removal from Australia as soon as reasonably practicable, impacts his ability to make other applications, and has the potential to lead to permanent exclusion from Australia.[97] There is no evidence his removal to Vietnam is not reasonably practicable.

(b) A revocation decision by the Tribunal restores the Applicant's visa. The Minister may challenge this in the Federal Court or exercise a personal power to set it aside under s 501BA of the Act. These possibilities turn on future Departmental / Ministerial decision-making, about which there is no evidence. They are not direct or immediate consequences of the Tribunal's decision.

(c) In the event of a non-revocation decision, the Applicant can appeal this to the Federal Court under Part 7 of the ART Act. He would remain in immigration detention under s 189 of the Act and be liable for removal as soon as reasonably practicable pursuant to s 198. Section 197C(1) of the Act provides: '*For the purposes of s 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen*'. Duration of detention is unpredictable and turns on factors such as how long it might take for a judicial review application to be decided or whether a protection visa application is lodged. Detention is permissible while a judicial appeal or other valid applications are considered.[98]

(d) The Applicant is not the subject of a protection finding and has not lodged a protection visa application despite being eligible to do so. His circumstances fall

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[95] *Stonely v Minister for Immigration and Multicultural Affairs* [2025] FCA 143, [35]-[37].

[96] *BWS22 v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] FCA 387, [88]-[90] (Button J); *Stoneley v Minister for Immigration and Multicultural Affairs* [2025] FCA 143, [35]-[36] (Charlesworth J).

[97] *Stoneley v Minister for Immigration and Multicultural Affairs* [2025] FCA 143, [35] (Charlesworth J).

[98] *CZA19 v Commonwealth of Australia; DBD24 v Minister for Immigration and Multicultural Affairs* (2025) 422 ALR 133, [38], [59], [78], [84] [111], [113].

within cl 9.1.2 of the Direction.[99] If he were to lodge an application, legal consequences vary depending on the outcome. His claims would be considered by the Respondent and, in the event of refusal, by the Migration Jurisdictional Area of this Tribunal if merits review was sought. This specialises in considering whether protection obligations are owed under section 36 of the Act[100] and assessments are not subject to the 84 Day Rule. The Tribunal is not required to decide the prospects of such an application,[101] but possible courses include:

(i) If the protection visa application is granted, the Applicant may be in a cohort of persons affected by the High Court's decision in *NZYQ*[102] and perhaps released on a BVR with certain conditions pursuant to the *Migration Regulations 1994* (Cth).[103] This is a fast-moving area of the law and it remains uncertain what conditions might be applied. These can be restrictive, have a compliance burden, and possible prosecution if breached. BVR holders currently become a '*removal pathway citizen*' within the meaning of s 5(1) of the Act.[104] Under s 199E of the Act, compliance with a removal direction is required if a third country approves the Australian Government's request for the non-citizen to enter and remain. The Applicant could be removed irrespective of a protection finding if one of the circumstances in s 197C(3)(c) of the Act applied, such as the Minister deciding under 197D(2) of the Act that a protection finding can no longer be made, or the Applicant requests voluntary removal. It is not known how long the possibilities above could take, or whether the Australian Government would apply for a third country visa, or how that country would respond. Any decision to grant the Applicant a BVR, seek his removal to a third country, or remove a protection

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[99] The Act, s 36(1C)(b); *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582, [18].

[100] *DXJL and Minister for Immigration and Multicultural Affairs (Migration)* [2024] ARTA 18 [186] (Nikolic SM); *BYMD and Minister for Immigration and Multicultural Affairs (Migration)* [2024] ARTA 16 [186] (Nikolic SM).

[101] *BFMV v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 199, [13]-[15] (Thawley, Stewart and Cheeseman JJ).

[102] *NZYQ v Minister for Immigration and Citizenship and Multicultural Affairs* (2023) 280 CLR 137 ('*NZYQ*'). The High Court held that constitutional limits apply on the executive detention of unlawful non-citizens under ss 189(1) and 196(1) of the Act. Continuing detention under those provisions is now unlawful if there is no real prospect of a non-citizen's removal becoming practicable in the reasonably foreseeable future.

[103] *Migration Regulations 1994* (Cth) sub-reg 2.20(12)(b).

[104] The legislative architecture includes ss 76AAA(1), 198, 198AHB, 199B, 199C of the Act.

finding is an exercise of non-statutory executive power rather than a direct or immediate consequence of the Tribunal's decision.

(ii) If the protection visa application is refused the Applicant would remain in immigration detention pending removal as soon as reasonably practicable. There is no evidence removal to Vietnam is not reasonably practicable. The disentitling effect of s 501E of the Act would continue to be enlivened and he could not satisfy special return criteria in cl 5001(c) of Schedule 5 to the Migration Regulations. In this event, other possibilities include him asking the Minister for an exercise of non-compellable discretion under ss 195 or 195A.[105] The Minister could also make a residence determination under s 197AB or the Applicant could elect voluntary removal. There is no evidence about these speculative possibilities.

87. Irrespective of how future events unfold the Tribunal accepts that a non-revocation decision would be a distressing outcome for the Applicant, his children and supporters. Non-revocation may also carry the consequence of permanent future exclusion from Australia unless the Minister exercised a non-compellable personal power.

88. Pursuant to the so-called *'84 Day Rule*' at s 500(6L) of the Act the Tribunal must decide this application within five working days. To the extent the Applicant's claims are intended to invoke non-refoulement obligations the Tribunal defers assessment of these. That said, his current evidence about fearing co-offenders and the prospect of prolonged detention came across as overly speculative.

89. This consideration is not enlivened and carries neutral weight.

Extent of impediments if removed

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

> *(1) Decision-makers must consider the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and*

[105] *Plaintiff S4/2014 v Minister for Immigration and Border Protection* (2014) 253 CLR 219; *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 at 191 [16].

maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:

a) The non-citizen's age and health;

b) Whether there are substantial language or cultural barriers; and

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

91. The Applicant has advanced the following concerns about removal to Vietnam:[106]

(a) He claims to have '*only minimal funds available…to stabilise himself while seeking work and treatment*', no housing, or established employment in Vietnam. During oral evidence the Applicant said he has not checked his Australian superannuation balance for a long time, but the last time he did it was around $7000.

(b) The Applicant's parents and sister live in Vietnam. He stayed with them during past visits, most recently in 2022. The Applicant claims, however, that this would not be a viable long-term option if he is repatriated.

(c) The Applicant claims that '*significant social and labour-market disadvantage*' await him in Vietnam, with '*barriers to employment and community reintegration*', because of his status '*as a person removed from Australia with a serious drug-related conviction*'. He intends being candid with possible employers by divulging his Australian criminal history. The Applicant said he could not immediately qualify for unemployment benefits in Vietnam, which is only available to workers who have paid unemployment insurance premiums for at least 12 months and whose Vietnamese labour/working contract has terminated.[107]

(d) The Applicant claims to have '*chronic*' health conditions, namely '*ankylosing spondylitis*' and gout, which will '*directly affect his capacity to work consistently and…re-establish himself promptly upon return*'. He contends it will be difficult to access treatment of an appropriate standard compared to Australia and '*his condition may worsen…if medical records are not readily available*'. The only expert evidence about ankylosing spondylitis and gout is a medical letter dated 10 February

[106] Ibid 74; Applicant's SFIC, 18-21 [97]-108].

[107] Citing Exhibits A12 and A13.

2025.[108] The Applicant received advice to '*take analgesia, physiotherapy…exercise and reguarly* [sic] *check up with GP*'. An imaging report dated January 2025 refers to a CT scan of the Applicant's chest, abdomen, and pelvis that states: '*Features of ankylosing spondylitis. Otherwise, normal CT chest, abdomen and pelvis*'.[109] The Applicant has been referred to a rheumatologist, but this is yet to occur. The medical letter refers to gout in the past tense. The Applicant's evidence is he experienced one instance of gout in 2022 that was treated through lifestyle change and without medication. He said there is no impediment to him returning to disability support work or in a business operated by his former sister-in-law's husband.

92. No substantial language or cultural barriers are disclosed by the evidence. Most of the Applicant's life has been spent in Vietnam and he has returned multiple times since 2017. He is 42 years' old, educated to post-graduate level, and has an extensive work history in Vietnam and Australia.[110] He speaks quite good English. The Tribunal is unpersuaded he could not competitively apply for work if returned.

93. The Tribunal notes from open-source information that ankylosing spondylitis is an inflammatory condition that causes pain and stiffness, especially in the lower back, buttocks, and neck, which improves with activity. The Applicant agreed with this description. The Tribunal does not accept that ankylosing spondylitis or gout prevent the Applicant re-establishing himself in Vietnam. The recommended treatment centres on regular exercise, a healthy lifestyle, and analgesia / physiotherapy if required. There is no evidence treatment for gout or ankylosing spondylitis is unavailable in Vietnam.

94. The Applicant's claims about differences in income and health services between Australia and Vietnam is likely correct. But this is not the basis of cl 9.2 of the Direction. Impediments are considered in the context of what is generally available to other Vietnamese citizens rather than by comparison with income or services in Australia. The Applicant is not impecunious and there is no evidence he would be treated differently to other Vietnamese citizens. This includes if he needed to access income support.

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[108] Exhibit R1, 117.
[109] Ibid 119.
[110] Ibid 80-81 [13]-[15].

95. Given the Applicant previously stayed with his sister and parents during return visits, he could draw a measure of practical and emotional support from them if returned. The Tribunal accepts Mr Watson-Munro's evidence that repatriation has the potential to exacerbate the Applicant's depressive symptoms. There is no evidence he could not obtain treatment for deteriorating mental health in Vietnam if returned.[111]

96. On balance, this consideration weighs somewhat in favour of revocation but not heavily so.

Impact on business interests

97. In terms of cl 9.3 of the Direction, it was advanced prior to the hearing that '*the premature loss of a skilled disability support worker would negatively affect an already strained industry*'.[112] The Applicant has submitted one fortnightly invoice during January-February 2025.[113] This shows he undertook two days of work while on bail and prior to sentencing, listed as '*Social and Community Participation*', for which he was paid $377. There is no evidence regarding qualifications the Applicant has for disability support work. His oral evidence is that a friend, Ms Thuy Linh Phung, gave him instructions about interacting with clients, observed him providing services, and then allocated him work with other clients. Ms Phung was not called as a witness and could not be questioned about her claims that the Applicant has worked under her '*supervision*' since January 2014 and that:[114]

> *Australia has a growing need for compassionate disability support workers like Hoang, especially as the population continues to age and the demand for skilled care increases. Losing a dedicated worker like Hoang would be a loss not only to the disability sector but also to the community.*

98. These are general claims and aspects of Ms Phung's letter are unpersuasive given the Applicant's limited involvement in disability work. An example is the claim that he '*has been an integral part of the disability support sector*'. Ms Phung's willingness to offer the Applicant '*as many shifts as possible*' is also conditional on her taking on more clients.

99. The Applicant's intention to be a disability support worker is aspirational and turns on whether he can obtain necessary clearances such as a police check. He hopes to convince

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[111] Exhibit A11, 2.55-2.59.
[112] Exhibit R1, 85 [14].
[113] Ibid 93-94.
[114] Ibid 114.

regulatory authorities to give him a chance. It remains unclear to the Tribunal how he previously worked with NDIS clients without mandatory requirements.

100. The Tribunal does not accept there is any impact on Australian business interests from a non-revocation decision. There is also no evidence an adverse decision significantly compromises the delivery of a major project or an important service in Australia.

101. This consideration is not enlivened and carries neutral weight.

Additional considerations

102. There is no basis to conclude that other considerations outside of those expressly referred to in the Direction need to be addressed.

CONCLUSION

103. The Applicant has engaged in very serious offending despite not profiting from the sale of drugs. There would be a very low tolerance for such conduct, and he should expect to forfeit the privilege of staying in Australia.

104. The Applicant has no prior criminal history. He was law-abiding on bail, entered an early guilty plea, and has been compliant in custodial settings. The Court did not impose supervisory or rehabilitation conditions. The five months he spent imprisoned and since then in immigration detention has been salutary. The Applicant is remorseful, shows insight, and constitutes a low recidivism risk.

105. The Applicant has made some positive contributions while living in Australia and enjoys close relationships. His ties are closest with his children.

106. The Applicant would be confronted by impediments if returned to Vietnam, albeit that are not insurmountable. There are no language or cultural barriers. He is not impecunious and can rely on his parents, a sister, and perhaps other relatives and friends for a measure of practical and emotional support. The Applicant has been educated to post-graduate level in Vietnam and has an extensive work history there. There is no evidence he would be treated differently to other Vietnamese citizens.

107. This is a finely balanced matter. Based on the individual and cumulative weighing process required by the Direction, the Tribunal finds there is another reason for revocation. That is because the primary considerations *Strength, nature and duration of ties to Australia*, *Best interests of minor children in Australia*, and the other consideration '*Extent of impediments if removed*, outweigh the two primary considerations favouring non-revocation.

DECISION

108. It follows that the Tribunal sets aside the reviewable decision and substitutes a decision that there is another reason to revoke the mandatory cancellation of the Applicant's visa.

I certify that the preceding one hundred and eight (108) paragraphs are a true copy of the written reasons for the decision herein of Senior Member A. Nikolic AM CSC

.....[sgd].....

Associate

Dated: 19 February 2026

Dates of hearing:	**12-14 February 2026**
Advocates for the Applicant:	**Dr Jason Donnelly on a direct access basis**
Advocate for the Respondent:	**Ms Emma Carnell**
Solicitor for the Respondent:	**HWL Ebsworth Lawyers**