Decision and Reasons for Decision

Administrative Review Tribunal

Applicant/s:	**Joshua Adam Koudelka**
Respondent:	**Minister for Immigration and Citizenship**
Tribunal Number:	**2026/3102**
Tribunal:	**Senior Member K Raif**
Place:	**Sydney**
Date:	**15 September 2026**
Decision:	**The Tribunal sets aside the decision under review and in substitution decides that discretion should not be exercised to refuse to grant the visa to the Applicant**

Senior Member K. Raif

Statement made on 15 September 2026 at 3:11pm

Catchwords

Refusal to grant a Class UF Partner (Provisional) visa – character test – substantial criminal record - Ministerial Direction No. 110 applied – whether Tribunal should exercise discretion to refuse to grant the visa – decision under review set aside

Legislation

Migration Act 1958 (Cth)

Migration Regulations 1994 (Cth)

Cases

Abraham v Minister for Immigration and Citizenship [2026] FCAFC 115
FYBR v Minister for Home Affairs [2019] FCAFC 185
Ismail v Minister for Immigration, Citizenship and Multicultural Affairs [2024] HCA 2
Tu'uta Katoa v Minister for Immigration and Multicultural Affairs [2021] FCA 1000
Uelese v Minister for Immigration and Border Protection [2016] FCA 348

Secondary Materials

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

Statement of Reasons

Introduction

1. This is an application for review of a decision of the delegate of the Minister for Immigration and Citizenship (the Respondent) made on 31 March 2026 to refuse to grant a Class UF Partner visa to the Applicant.

2. The Applicant was born in December 1978 and is a national of the USA. In June 2024 the Applicant made an application for the Partner visa on the basis of his relationship with Ms Kassell, who is an Australian citizen. As the Applicant had been convicted of an offence, in February 2026 he was issued with the Notice of Intention to Consider Refusal under s.501 (Notice) on the basis that he did not pass the character test. The Applicant replied to the Notice in March 2026 and on 31 March 2026, the delegate made the decision to refuse to grant the visa to the Applicant. The Applicant seeks review of that decision.

3. The issues before the Tribunal are:

   (a) whether the visa Applicant passes the character test as required by section 501 of the Act and, if not

   (b) whether the Tribunal should exercise its discretion to refuse to grant the visa to the Applicant.

4. The Applicant appeared before the Tribunal on 14 September 2026. For the reasons that follow, the Tribunal has decided that the decision under review should be set aside.

Legislative framework

5. The 'character test' is defined in subsection 501(6) of the *Migration Act 1958* (Cth) (the Act). Relevantly, paragraph 501(6)(e) provides in part:

> *For the purposes of this section, a person does not pass the character test if:*
> …
> (e) a court in Australia or a foreign country has
> (i) convicted the person of one or more sexually based offences involving a child; or

(ii) found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction

6. Should the Applicant not satisfy the character test, the discretion to refuse the visa under subsection 501(1) of the Act is enlivened.

7. Direction No. 110 *Visa refusal and Cancellation under s. 501 and revocation of a mandatory cancellation of a visa under s. 501CA* ('Direction 110') sets out the principles that provide a framework within which decision-makers should approach their task. The principles set out at paragraph 5.2 of Direction 110 state 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.

8. At Paragraph 5.2(2), the Direction provides that the safety of the Australian community is the highest priority of the Australian government. Further, at Paragraph 5.3(3) the Direction provides that:

> *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.*

9. The primary considerations which are set out in clause 8 of Direction 110 are:

> *(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.*

10. The other considerations, which are not exhaustive, are set out in clause 9 of Direction 110:

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

11. Paragraph 7(2) of Direction 110 states that the primary consideration of the 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.

Does the Applicant pass the character test?

12. The Tribunal has been provided with copies of the US court records and other law-enforcement records. Information in these records, the primary decision record and various submissions before the Tribunal indicates that in August 2004 the Applicant was convicted of

    - Sexual assault of a child under 17
    - Indecency with a child by contact

13. The Applicant was sentenced to two years imprisonment. On appeal, the court determined in August 2005 that there was no error in the judgment or trial and the orders were confirmed.

14. The Tribunal finds that the Applicant had been convicted of sexually based offences involving a child. The Tribunal finds that such offending was of the type referred to in subsection 501(6)(e). The Tribunal finds that the Applicant does not pass the character test. The Applicant concedes that this is so.

Consideration of discretion

15. The Applicant concedes that he does not pass the character test but submits that discretion should not be exercised to refuse the visa grant. The Applicant submits that the risk of reoffending is remote and he refers to his rehabilitation, contrition and compliance with the law. The Applicant submits that the refusal of the visa would have an adverse impact on his wife's family in Australia and be contrary to the best interests of his children. The Applicant submits that those considerations that weigh against the exercise of discretion outweigh other considerations.

16. The Respondent submits that there remains a risk of reoffending and such a risk, although a low risk, is nevertheless real, particularly given the Applicant's 'conditional' remorse. The Respondent submits that given the nature of the offending, such a risk is unacceptable. The Respondent submits that the protection of the Australian community outweighs the countervailing considerations.

Protection of the Australian Community

17. Paragraph 8.1 of Direction 110 provides in part as follows:

8.1 Protection of the Australian community

(1) When considering protection of the Australian community, decision-makers should keep in mind that the safety of the Australian community is the highest priority of the Australian government… 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.

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

18. Sub-paragraph (c) of paragraph 8.1.1(1) of the Direction requires a decision-maker (with the exception of certain crimes or conduct) to have regard to the sentence(s) imposed by the Courts for a crime or crimes of a non-citizen. Subparagraph (e) requires the decision maker to have regard to the frequency of the non-citizen's offending and/or whether there is any trend of increasing seriousness.

19. In considering the nature and seriousness of the Applicant's conduct to date, the Tribunal has had regard to the circumstances of the 2003 offending.

20. The delegate was provided with the transcript of the criminal proceedings and other materials relating to the conviction and the appeal. The delegate in the primary decision record refers to the court records which set out the circumstances of the offending as follows. The Applicant and the victim (Miss W) first met in the class where the Applicant was teaching, in April 2023. The Applicant gave the victim his email address to contact him. Miss W told the court that she initiated email contact and the two began to email daily and that she had romantic feelings for the Applicant. Miss W told the court that she informed the Applicant she was 14 years of age. In June 2023, Miss W invited the Applicant to her home as her parents were out of the house. She told the court she did not intend to have sex with the Applicant. The two had lunch together and began to engage in intimacy before the Applicant had sexual intercourse with Miss W. Miss W states that they stayed at the house for several hours watching TV. In the following days, Miss W realised that the Applicant's conduct was predatory and confronted him by email. The Applicant convinced her not to tell anyone of the relationship and the two remained in contact. Miss W subsequently told her parents about what had occurred and the incident was

reported to the police. In September 2023, the Applicant handed himself to the authorities. The delegate refers to several emails written by the Applicant to Miss W in which he urged her not to tell others about their friendship and acknowledging that the friendship was inappropriate.

21. In his submission to the delegate dated 30 April 2024, the Applicant describes the incidents as follows. The Applicant states that he was aged 24 at the time of the offending and was working as a substitute teacher at a local school where he met a 14 year old student. He had communications with the student resulting in a sexual encounter in June 2003. He was arrested and prosecuted and in 2004, he was sentenced to a term of 2 years imprisonment. The conviction was confirmed on appeal in 2005.

22. In his September 2025 statement, the Applicant refers to having multiple jobs at the time, stating that he had only 6 days as a substitute teacher in the semester. At that time, he met the victim who started to 'show up' at his other jobs and he states they continued to talk on the phone and email. The Applicant states that the victim invited him to her house and although he had some hesitation, he went anyway. The Applicant states that after a while, the talk became flirtatious and they had physical contact which 'elevated' to the offence. The Applicant states that he had plenty of chances to stop but did not. The Applicant submits that he was not sure of the victim's exact age. The Applicant states that they never met again and he was contacted by the police some weeks later.

23. In his submission of 10 March 2026, the Applicant states that all the charges relate to a single incident in June 2003. The Applicant cites various articles concerning the legal marriage of minors. (The relevance of these observations is unclear, the fact that a minor may be permitted to marry in some jurisdictions does not, in the Tribunal's view, diminish the nature of the Applicant's offending).

24. The delegate refers to the reports that the Applicant initially denied having any contact with the school students but ultimately admitted to having sex with Miss W and had cooperated with the police.

25. The delegate states that the court heard the Applicant had inappropriate contact with another student, Miss DC, who was 16 at the time. It is recorded that Miss DC obtained the Applicant's phone number and when she had temporarily ran away from home, she called the Applicant to ask for help and the Applicant offered his parents' home, where Miss DC stayed for two nights. It is recorded that on the second night, the Applicant kissed her on the lips. There was no information to

indicate the contact progressed further than a kiss and a hug. (In oral evidence the Applicant stated that the girl spent two nights at his home, one night in his bed and another night on the couch. The Applicant denied kissing or having any sexual contact in relation to DC and claimed that some of these allegations have been denied during cross-examination.)

26. The delegate refers to the third inappropriate relationship with another student Miss MS, who was 15 at the time. Miss MS claimed that on one occasion, the Applicant picked her up and gave her a hug which was inappropriate and was accompanied by the Applicant thrusting the lower half of his body into her, during which she felt his penis. On another occasion, it is stated that the Applicant kissed Miss MS on the forehead while at school and told her he wanted to 'hang out' with her. The court was told that the Applicant engaged in inappropriate behaviour, asking Miss MS about her sex life.

27. In his submissions to the delegate and the Tribunal, the Applicant states that other than the offending for which he was convicted, he denies having any inappropriate conduct towards any child. The Applicant denied having contact with the other alleged victims stating that one of them conceded under cross examination that nothing happened and, in relation to the second incident, the Applicant states that he allowed the girl to sleep at his parents' home but nothing sexual or inappropriate occurred between them. In oral evidence the applicant also denied all of these allegations.

28. The Respondent submits, by reference to *Katoa*[1] that s. 501 "is not limited to prohibiting the entry or presence in Australia of persons who have been convicted of criminal conduct" and the Tribunal is able to have regard to evidence that may indicate the incidents occurred, where no conviction is recorded. It is for the Tribunal to determine what weight, if any, to give to such evidence. The Respondent submits that the Tribunal should give weight to the two incidents because of the contemporaneous evidence and the similar nature of the circumstances described to by the alleged victims. In his submission of 7 September 2026, the Applicant acknowledges that the Tribunal is able to consider these allegations despite the absence of convictions but claims that in the absence of convictions and when the evidence has not been tested, it should not be given any weight. The Applicant denies the events but claims that even if the allegations were accepted, the allegations concern the same historical period and, while increasing the seriousness

[1] *Tu'uta Katoa v MIMA* [2021] FCA 1000 at [30]

of the conduct then, these allegations do not establish a pattern continuing over the subsequent period.

29. The Tribunal acknowledges that it is possible to have regard to the information about these incidents despite the absence of prosecution or convictions. However, the Tribunal is not convinced that the evidence relating to these incidents is cogent and probative. The Applicant denies any misconduct, the offending has not been proven in relation to these two incidents and the alleged conduct has not resulted in any conviction. The Tribunal cannot be satisfied as to the accuracy of these allegations. In the circumstances, the Tribunal has decided to place no weight on these alleged incidents.

30. Further, the Tribunal accepts the Applicant's claim that even if these allegations were accepted, these relate to the isolated period and do not establish a pattern of offending, nor offending of increasing seriousness. It is necessary to consider the Applicant's circumstances since these events and, importantly, to assess the risk of reoffending in the future, not merely by reference to past offending.

31. The Respondent submits that the offending – involving sexual contact with a 14 year old child – was very serious and was calculated, involving a pursuit of a relationship which was known to be inappropriate. In his submission of 7 September 2026, the Applicant concedes the very serious nature of offending. The Applicant also refers to one charge for violation in 2018 when he failed to register a social media account but states that the charge was withdrawn. The Tribunal places no weight on that incident.

32. The Tribunal considers sexual offending against minors to be very serious offending. This is particularly so in circumstances where the Applicant was a teacher and in the position of authority in relation to the victim. In oral evidence, the Applicant suggested that he did not receive adequate (or any) training and was not expected to do much as a substitute teacher and he was not fully aware of the victim's age as the drama class he was teaching had students of different ages. However, in the Tribunal's view, the Applicant would have been fully cognisant that the victim was a minor. He would have been aware of his position and the power imbalance and he would have been fully aware of the inappropriate nature of any sexual relation between himself and a student. The Applicant breached that trust by engaging in a sexual offence in relation to a person who was, as his student, under his care and protection. The Tribunal considers the offending to be extremely serious.

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

33. The Tribunal has considered the risk to the community, should the Applicant reoffend. Paragraph 8.1.2(1) provides that 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 of the 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.

34. Paragraph 8.1.2(2) provides that in assessing the risk that may be posed by the non-citizen to the Australian community, decision-makers must have regard to, 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;*
    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*

35. Assessing the nature of the harm to individuals or the Australian community that may occur if the Applicant were to engage in further criminal or other serious conduct, is informed by the nature of his offending to date, including any escalation in the offending. This assessment also notes that the Direction provides that the Australian community's tolerance for harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, is so serious that any risk that it may be repeated may be unacceptable.

The nature of harm, should the Applicant reoffend

36. The Applicant had engaged in sexual offending in relation to a minor. Such offending has the potential of causing extreme and potentially life-long psychological harm to the victim. The Tribunal finds that the harm that may be caused to others, should the Applicant commit similar offences, would be significant.

The likelihood of the non-citizen engaging in further criminal or other serious conduct

37. The Tribunal has considered information and evidence on the risk of re-offending and evidence of rehabilitation achieved by the Applicant.

38. When making the application for review, the Applicant stated that the offending occurred in 2003, more than twenty years earlier and arose from a single historical incident with no subsequent offending. The Applicant refers to the evidence that he was compliant, had accepted responsibility and completed treatment, has not breached supervision and has been regarded as a 'model probationer'.

39. In his statement date 12 August 2026, the Applicant expressed remorse for his offending, stating that he has had time to reflect on what has happened and claiming that imprisonment has acted as a strong deterrent. The Applicant refers to the rehabilitation he has achieved, including programs he has engaged in, conditions of probations and engagement with other professionals. In oral evidence, the applicant outlined the nature of the rehabilitative programs he had engaged in.

40. In his SFIC, the Applicant refers to his childhood with minimal supervision and lack of boundaries, his employment history and economic instability at the time of offending. The Applicant refers to the programs he has completed while in prison and subsequent to his release, noting that there had been no disciplinary issues in custody and no other offending since his release from prison in 2006. The Applicant refers to his role in the sex offender program and good conduct since the offending.

41. There is before the Tribunal an Order for Discharge after complying with community supervision, issued in September 2014, evidence that the Applicant had completed 240 hours of court-ordered community service restitution requirements. There is evidence that the Applicant had engaged in the sex offender treatment program. The Applicant provided to the delegate a number of character references and support letters, including statements from his partner and her family members. The Applicant provided a letter from the probation officer Mr Sager, who refers to the Applicant being a 'model probationer'. The Tribunal has had regard to a report by Ms Wiant, a sex offender treatment provider, dated 31 July 2014 who states that the Applicant accepts responsibility for the offence and trauma caused to the victim and others. It states that the Applicant has made significant changes in his life and has actively participated in rehabilitation.

42. In his statement to the delegate dated 29 September 2025, the Applicant states that at the time of the offending, he was going through turmoil, having limited employment opportunities and with his parents recently separating, leading to him being in a 'deflated uncaring headspace'. The Applicant also refers to a lack of boundaries, having limited adult supervision while growing up and witnessing older men dating younger women. The Applicant states that he has no excuse or defence for what happened in 2003 and once he was sentenced, it was a relief that the waiting was over. The Tribunal is mindful that despite the Applicant's claim that he had no excuse or defence, he did appeal the sentence and although in oral evidence the Applicant claims that he simply followed the advice of his lawyer or the normal processes of the US criminal system, the Tribunal does not accept the Applicant's claim that he was "relieved" by the charges and immediately recognised his wrong-doing.

43. The Applicant states that while in prison, he engaged with counsellors and helped other inmates. The Applicant states that he had completed eight years of probation upon release from prison which included regular visits from a probation officer, community service and therapy and he never had probate violations. The Applicant refers to his achievements since the convictions, including employment and family and states that he has been a law abiding citizen.

44. In his submission to the delegate date 30 April 2024, the Applicant also acknowledged the offending and outlined his rehabilitation, including requirements under the Sex Offender Registration program. The Applicant stated that he completed the community supervision program in 2014 and a four year course of sex offender counselling and treatment. The Applicant noted that he had undergone formal psycho-social evaluations in 2015, 2017 and 2020 which determined that there was low risk of reoffending.

45. The Applicant submits that there was a single incident occurring 23 years ago, there is no pattern of similar criminal conduct and no pattern of disregard for the law. The Applicant submits that he has been in a stable relationship, has two children, runs a successful business and has otherwise contributed to the community.

46. The Respondent claims, in the SFIC dated 28 August 2026, that the Applicant's 'convenient misremembering of key events' calls into question his insight and remorse. The Respondent notes that the version of events put forward by the Applicant is inconsistent with what was recorded at trial. The Respondent submits that contrary to the Applicant's recollection, he was aware of the victim's age and inappropriateness of their relations prior to the offending but despite that, he

continued to communicate with the victim, ultimately sexually assaulting her. The Respondent notes that after the offence, the Applicant blamed the victim and asked her not to talk about it. The Respondent submits that the Applicant's unwillingness to confront the truth of his offending diminishes any remorse and insight and provides a basis for a finding that there exists some risk of reoffending. The Respondent submits that the risk of reoffending may be low but it is a real and an unacceptable risk.

47. The Tribunal accepts the Respondent's argument that the circumstances surrounding the offending and the subsequent criminal proceedings do not support the Applicant's claim that he recognised his wrongdoing. The evidence indicates that the Applicant did ask the victim not to disclose the sexual contact in the subsequent messages, he pleaded not guilty to the offence and appealed the sentence. In the Tribunal's view, the Applicant took whatever actions were available to him at the time to avoid responsibility for his conduct.

48. The Tribunal has had regard to the report by Shelley Graham, dated 1 March 2021. Relevantly, it indicates that the Applicant was administered a personal assessment inventory and all clinical scales were within normal limits. It is reported that the Applicant does not endorse cognitive distortions that could justify sexual offending behaviours and does not endorse thought patterns that would justify acting out behaviours for violent or criminal behaviour. The report indicates that the Applicant has been assessed as a low risk for acting out while in the community, indicating a recidivism rate for general criminality at approximately 1.5%. The report sets out protective factors. Ms Graham concludes that there is a low risk for acting out in violence and a low risk for recidivism with any sexual offending behaviour.

49. Ms Graham provided an updated risk assessment, which the Applicant presented in his March 2026 submission to the delegate. Ms Graham confirms that the current risk level remains low.

50. In considering the likelihood of reoffending, the Tribunal notes the following. The offending occurred in 2003 and stems from a single incident. (For the reasons set out above, the Tribunal has decided to disregard other allegations.) There is no evidence of repeated offending. The Tribunal is satisfied that there is no trend of increasing seriousness and no frequency to the offending.

51. The Tribunal accepts the Respondent's argument that the Applicant's conduct immediately after the offending (i.e. victim blaming and asking her not to disclose the incident) shows lack of remorse or insight. However, the Applicant's conduct at

the time is reflective of his state of mind at the time of offending it cannot be said to be indicative of the Applicant's lack of remorse or insight at present. Neither does the Tribunal consider the Applicant's claims made in the September 2025 statement necessarily inconsistent with the facts surrounding the offending. The Applicant stated that he accepted the victim's invitation to attend her house and after the incident, did not give it much thought until the police contacted him. The Respondent submits that the Applicant was aware of the victim's age and inappropriateness of their relationship. In the Tribunal's view, that is likely to be the case, but it is not necessarily inconsistent with the Applicant's evidence that after the incident he gave it little thought.

52. The Tribunal finds that the offending occurred within a confined period and stemmed from a single incident. There has been no repeat offending. There has been no other known offending of any kind. There is no suggestion that the Applicant had otherwise engaged in any anti-social behaviour, nor that he has any tendency to do so. Evidence indicates that the Applicant engaged in various rehabilitative programs over a number of years. More than twenty years passed since the offences took place. The Tribunal has had regard to the professional views expressed in various risk assessments reports which identify the risk of reoffending as being low. Given the circumstances of the offending (i.e. single offence occurring more than 20 years ago with no repeat offending), the Tribunal agrees with that assessment. In the Tribunal's view, there is little probative basis for the Respondent's submission that there exists a real risk of reoffending. Having regard to the Applicant's circumstances since the offending, the time that has passed and the rehabilitation achieved, as well as the professional views set out in various reports, the Tribunal has formed the view that the risk of reoffending is low.

53. Noting the nature and the seriousness of the offending, the Tribunal is of the view that this consideration weighs against the visa grant. However, as the Tribunal has determined that there is a low risk of reoffending, the Tribunal gives this consideration limited weight against the visa grant.

Whether the conduct engaged in constituted family violence

54. Paragraph 8.2(3) of the Direction provides:

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

55. There is no evidence to indicate that the Applicant had engaged in family violence. This consideration is neutral.

The strength, nature, and duration of ties to Australia

56. Paragraph 8.3.1 of the Direction provides:

> *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.*

57. Subparagraph (2) directs the decision-maker to consider the strength, nature and duration of any ties that the non-citizen has to the Australian community and to have regard to the length of the person's residence in Australia and the strength, duration and nature of any family or social links with Australian citizens or permanent residents.

58. The delegate found that the Applicant has no immediate family in Australia. The Applicant refers to the presence of his wife's family who reside in Australia and the Applicant notes that his wife and their two children are Australian citizens (although they do not reside in Australia). The Applicant provided in his submission to the delegate medical reports relating to the Australian relatives.

59. The Respondent submits that none of the Applicant's immediate family reside in Australia and this consideration does not arise and should be given neutral weight. The Respondent submits that the interests of the wife's family should be considered as another consideration and not a primary one.

60. The Applicant's submission is that the term 'immediate family' is not defined in Direction 110 but has been defined in r. 1.12AA of the *Migration Regulations* 1994 (Cth) (Regulations) and the meaning in the Direction should be consistent with the meaning assigned in the Act and the Regulations. Both parties agree that the immediate family of the Applicant's spouse should not be considered as being the applicant's immediate family.

61. The Tribunal finds that the Applicant has no immediate family in Australia. He has never resided in Australia.

62. Paragraph 8.3(2)(b) requires the Tribunal to have regard to any other ties to the Australian community, including strength, duration and nature of any family or social

links with Australian citizens, permanent residents or people who have an indefinite right to remain in Australia.

63. As noted above, the immediate family of the Applicant's partner reside in Australia. They can be considered as family or social links. The Applicant's spouse and her various family members provided statements in support of the present application and the Tribunal acknowledges the various health reports in relation to these family members. The Tribunal has also had regard to the views expressed by Ms Odelia Carmon in her March 2026 report concerning the impact on the family members of the decision not to grant the visa. The Tribunal generally accepts the evidence in these documents.

64. However, while the Tribunal is satisfied a decision to refuse the visa to the Applicant may have some impact on the family in Australia, the Tribunal is not satisfied the decision would have *significant* adverse impact on the Australian family members. The Applicant's evidence is that he has been able to establish and maintain a relationship with these family members despite having never lived in, or travelled to, Australia. If the Applicant's visa is refused, the future circumstances would be no different as the Applicant would be able to maintain the same family and social relationships, although he will not have the opportunity to provide practical support to these family members.

65. The Applicant also claims that a refusal of his visa will have an effect on his partner and children. As none of them are in Australia, these claims have been addressed below.

66. The Tribunal is of the view that this consideration weighs very slightly in favour of visa grant.

The best interests of minor children in Australia

67. Paragraph 8.4(1) of the Direction requires a decision-maker to make a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA is in the best interests of a child affected by the decision.

68. Paragraphs 8.4(2) and 8.4(3) respectively contain further considerations. The former provides that for their interests to be considered, the relevant child (or children) must be under 18 years of age at the time when a decision about whether or not to refuse or cancel the visa or not to revoke the mandatory cancellation decision is being made. The latter provides that if there are two or more relevant

children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

69. Paragraph 8.5(4) sets out the factors that must be considered when considering the best interests of the child. These include:

> *(a) The nature and duration of the relationship between the child and the non-citizen*
> *(b) The extent to which the non-citizen is likely to play a positive parental role in the future*
> *(c) The impact of the non-citizen's prior conduct, and likely to future conduct*
> *(d) The likely effect that any separation from the non-citizen would have on the child*
> *(e) Whether any other person already fulfils a parental role*
> *(f) Any known views of the child*
> *(g) Evidence that the child has been, or is at risk of being subject to or exposed to family violence*
> *(h) Evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct*

70. The Applicant has two minor children, SJK born in July 2018 and SRK born in May 2021. These children are not presently in Australia and are not Australian residents. The Tribunal has considered their interests below.

71. The Applicant also refers to his wife's extended family in Australia and four minor children. The Applicant submits that his niece and nephews would benefit from closer contact with his own children and the extended family and, the Applicant submits that his children would not establish residence in Australia if he cannot be granted the visa, as they would not split up the family.

72. The Applicant provided evidence concerning health issues for one of the children and the Tribunal accepts that evidence.

73. The Tribunal generally accepts that it may be in the best interests of each of the four minor children in Australia to have a closer connection with the Applicant's children and the Applicant and his partner. That relationship was maintained to date through electronic means but the Tribunal generally accepts that the relationship may be of a different and a closer nature if the Applicant's family was to live in Australia. The Tribunal is prepared to accept that it may be in the best interests of each of these four children if the Applicant's family relocates to Australia and therefore if the Applicant's visa is granted.

74. There is no suggestion that the Applicant has ever played a parental or otherwise a close role in relation to these children. The evidence indicates that despite the absence of the Applicant's family in Australia they have been able to establish and maintain a meaningful relationship. The Tribunal is not satisfied that the best interests of the children in Australia would be significantly adversely affected by the decision on the Applicant's visa. The Tribunal thus gives this consideration some, but limited weight in favour of the visa grant.

Expectations of the Australian community

75. Sub-clause 8.5 of Direction 110 provides that the Australian community expects non-citizens to obey Australian laws while in Australia. Paragraph 8.5(1) of the Direction sets out the government's view in relation to community expectations:

> *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.*

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

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

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

78. Paragraph 8.5(4) is consistent with the decision of the Full Court of the Federal Court in *FYBR v Minister for Home Affairs*,[2] which affirmed the approach established in previous authorities that it is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an Applicant's circumstances or evidence about those expectations. Instead, the Tribunal is to be

[2] [2019] FCAFC 185 ('*FYBR*').

guided by the Government's views as to the expectations of the Australian community, which are to be found in the Direction.[3]

79. Paragraph 8.5(2) contains a statement of the Government's views as to the expectations of the Australian community, which operates to ascribe to the whole of the Australian community an expectation aligning with that of the executive government, which the decision maker must have regard to.

80. In *Ismail*,[4] the High Court said (regarding the same primary consideration as it appeared at paragraph 8.4 in the former Direction 90):

> *Further, para 8.4 does not stipulate that, in assessing what weight is to be given to the expectations of the Australian community, the decision maker must attribute to that hypothesised community knowledge of the personal circumstances of the Applicant for the visa as known to the delegate. To the contrary, para 8.4(4) stipulates that the decision maker is to proceed on the basis of the Australian Government's views as set out in para 8.4 "without independently assessing the community's expectations in the particular case.*
>
> *Paragraph 8.4(4) is to be understood as directing the decision maker not to attempt to infer what the expectations of the Australian community would be "in the particular case" (that is, with the knowledge of the delegate about the Applicant's personal circumstances), but to proceed on the basis that the views of the Australian Government set out in para 8.4(1)- (3) are the relevant norm described as the expectations of the Australian community...*

81. The Full Court more recently considered the manner in which the expectations of the Australian community are to be considered in *Abraham*.[5]

82. For the purpose of consideration required by para 8.5(1), the Applicant has never travelled to Australia. For the purpose of para 8.5(2), the Applicant committed an offence of a sexual nature (and thus a 'serious crime') against a child. It is an offence of the type set out in subparagraph (c) of paragraph 8.5(2). That paragraph

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

[4] *Ismail v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 2 at [51]-[52].

[5] Abraham v *Minister for Immigration and Citizenship [2026] FCAFC 115*

relevantly provides that a visa refusal may be appropriate simply because of the nature of the character concern of offence being such that he Australian community would expect that a person should not be granted a visa.

83. In his submission to the delegate, the Applicant submits that the offending occurred some 20 years ago, he has rehabilitated and has not reoffended. The Applicant states that there is no risk of reoffending. The Applicant submits that this consideration should not be given significant weight in favour of refusal. The Respondent submits that the considerations should be given significant weight.

84. The Tribunal finds that the Applicant had engaged in sexual offending against a minor and such offending is extremely serious, particularly in circumstances where the Applicant held a position of trust in relation to the minor, being her school teacher. The Direction provides that such type of offending constitutes a serious crime giving rise to an expectation that a visa refusal may be appropriate.

85. Given the nature of the offending, the Tribunal is of the view that the community expectations weigh very strongly in favour of exercising the discretion to refuse the grant of the visa.

Other Considerations

86. It is necessary to look at the other considerations listed in section 9 of the Direction.

Legal consequence of the decision

87. The Applicant resides in the US and has never lived in, or travelled to, Australia. There is no suggestion that Australia's non-refoulement obligations are engaged.

88. If the Applicant's visa is refused, the Applicant will effectively be precluded from obtaining other visas in Australia in the future.

89. The Tribunal is of the view that this consideration should be given neutral weight.

Extent of impediments if removed

90. Paragraph 9.2 of the Direction directs a decision-maker to take into account the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards.

91. As the Applicant is not in Australia, this consideration is irrelevant.

Impact on Australian business interests

92. Paragraph 9.3.1 of Direction 110 directs a decision-maker to take into account the following:

> *Decision-makers must consider any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia, noting that an employment link would generally only be given weight where the decision under section 501 or 501CA would significantly compromise the delivery of a major project, or delivery of an important service in Australia.*'

93. The Applicant and his partner run a leather business and claim that they work with Australian designers, stylists, photographers and models to promote the business. The Applicant refers to the possibility of expanding the business in Australia and working with the Australian companies. In oral evidence, the Applicant spoke about engaging with an Australian PR company with the aim of promoting the business in Australia. A number of documents had been provided to the delegate concerning the company's operations. In the March 2026 submission, the Applicant's partner Ms Kassell refers to the plans for business expansion in Australia, engagement of Australian staff and business interests and the company's profitability. The Applicant submits that basing the company in Australia would strengthen the country's position in leather goods. The Applicant stated in oral evidence that if the family cannot relocate to Australia, they are unlikely to develop their business interests in Australia while if they do relocate to Australia, the majority of their business interactions would also relocate to Australia while maintaining some part in the US.

94. The Tribunal accepts that the business has some links with Australia and that there is an intention and potential for the business to expand and form stronger links with the Australian businesses. As the Applicant and his partner have been able to establish and maintain the business connections with the Australian businesses while living and working in the US, the Tribunal is of the view that it is possible that they will be able to continue to do so. The Tribunal is not satisfied that the existing business operations will be adversely affected if the Applicant's visa is not granted. As for the couple's plans to expand the business in Australia and thus improve Australia's business interests, the Tribunal considers these, at present, to be merely aspirational. The couple may be able to fulfil these plans or they may not and their future business activities may or may not be of benefit to Australia. The Tribunal is

not convinced that the impact of visa refusal on the Australian business interests would be significant.

95. The Direction provides that an employment link would generally only be given weight where the decision under section 501 or 501CA would significantly compromise the delivery of a major project, or delivery of an important service in Australia. In the Tribunal's view, the Applicant's evidence suggests nothing more than the mere possibility of a future project. The Tribunal is not satisfied that a decision to refuse to grant the visa to the Applicant would adversely impact Australian business interests or significantly compromise the delivery of a major project or of an important service. This consideration is neutral.

Other claims

96. The Applicant submits that his inability to travel to Australia with his wife and children and visit his wife's family would have an adverse impact on his wife and children. The Applicant presented statements from Dr Michaelson who outlines the effect of separation on Ms Kassell and the children. Ms Kassell also provided a statement to the delegate outlining the hardship she had experienced when travelling to Australia to support her sister and nephew and was unable to do so with the Applicant. Dr Michaelson has expressed the view that allowing the Applicant to travel with his wife and children would serve as a protective mental health function and reduce psychological harm for Ms Kassell. The Tribunal accepts the professional views expressed in these reports. The Tribunal accepts that Ms Kassell may wish to undertake trips to Australia in the future and if the present visa is not granted, the Applicant would not be able to accompany her. The Tribunal accepts that this may cause a degree of hardship to Ms Kassell. This weighs somewhat in favour of the visa grant.

97. The Tribunal has considered the best interests of the Applicant's children.

98. The Applicant and his partner claim in their submission to the delegate that they fear for the children's safety, given the rising gun violence and general violence in the US and that they want to bring up their children in a safer environment in Australia. The Applicant refers to general statistics about violent crime in the US. The Tribunal acknowledges that evidence but notes that there is no suggestion that the children have been specifically targeted, nor that they are facing a higher risk of harm compared to the general population due to any of their personal characteristics. Neither does the Tribunal necessarily accept that there is no risk of similar harm in Australia. In the Tribunal's view, the differential for the possibility of facing violence

in the US and in Australia has not been sufficiently established to satisfy the Tribunal that it is in the best interests of the children to travel to Australia because of the risk of violence in the US.

99. The Tribunal has had regard to an assessment prepared by Dr Michaelson dated 20 February 2026 who identifies the risks to the children due to the separation with their father. However, there is no suggestion that the Applicant's partner and children will relocate to Australia and that the Applicant will remain in the US if his visa is not granted. That is, it is not claimed that a refusal to grant the visa to the Applicant will result in his separation from the children on a permanent or even long term basis. The Applicant can continue to live with the children and perform the parental role in the same way that he has done to date. However, the Tribunal accepts that if Ms Kassell decides to travel to Australia with the children and the Applicant is unable to do so, the children may be (likely for a relatively short period) separated from their father. The Tribunal is prepared to accept, having regard to the evidence of Dr Michaelson, that this is not in the best interests of the children.

100. The Applicant claims that the children have a close relationship with their mother's family in Australia. In oral evidence, the Applicant spoke about the close family bond and the time the children have spent with the family members in Australia and the relationships they have formed. The Tribunal is prepared to accept that this is so. The Tribunal accepts the Applicant's evidence that if the visa is not granted, the family will not relocate to Australia and the children will have limited opportunity to form a close relationship with their extended family in Australia. The Tribunal finds that it is in the best interests of each of the Applicant's two children that the Applicant's visa is granted. This weighs strongly in favour of the visa grant.

101. In his August 2026 statement, the Applicant refers to the community and charitable contribution that he and his wife had made, volunteering and other activities. The Tribunal accepts that the family has engaged in these activities, including supporting causes in Australia. The Tribunal is not convinced that engagement in voluntary activities or other supports in Australia weighs strongly in favour of visa grant.

CONCLUSION

102. The Tribunal has had regard to the factors set out in the Direction and the Applicant's circumstances. The Tribunal has found that the Applicant had engaged in serious offending, as his offending involved sexual conduct in relation to a minor. The

seriousness of the offending was compounded by the fact that the Applicant was a teacher and held a position of trust in relation to the victim.

103. However, the Tribunal has formed the view that the risk of reoffending is very low. The Tribunal places weight on the fact that the offending involved a confined series of events which occurred within a fairly short period of time, there has been no repeat offending during the lengthy period that has passed since the offending conduct took place and the Applicant had engaged in rehabilitation. The professional views expressed in the various reports refer to the low risk of reoffending. Having regard to these factors, the Tribunal has formed the view that, given the serious nature of offending and the serious harm that could be caused by reoffending, this consideration weighs against the visa grant. However, given the low risk of reoffending and the degree of rehabilitation achieved, the Tribunal has decided to give the protection of the community limited weight against the visa grant.

104. The Tribunal finds that the expectations of the community weigh against the visa grant and the Tribunal gives these significant weight against the visa grant.

105. The Applicant had not engaged in family violence and the impediment of removal is irrelevant. These considerations are neutral.

106. The Tribunal acknowledges that there may be some impact on the (wife's) family members in Australia by the visa refusal as that would mean that the Applicant's spouse and children are unlikely to relocate to Australia (as the Applicant told the Tribunal they would split the family). The Tribunal is not convinced that the impact would be significant. This consideration weighs somewhat in favour of the visa grant.

107. The best interests of the children in Australia are in favour of the visa grant but the Tribunal gives these limited weight given the applicant's distant role in relation to these children. The Tribunal has also formed the view that it is in the best interest of the Applicant's own children that the visa be granted, enabling the family to relocate to Australia. These considerations weigh in favour of the visa grant.

108. The Tribunal accepts that the refusal of the visa may cause a degree of hardship to the Applicant's partner. The Tribunal also accepts that there is a possibility of a business benefit to Australia if the Applicant and his family relocate to Australia. These considerations weigh somewhat in favour of the visa grant, although in the Tribunal's view, they ought to be given very limited weight.

109. In the particular circumstances of this case, the Tribunal has decided to give greater weight to the considerations that weigh in favour of the visa grant, such as the best interests of the Applicant's children and other minor children in Australia and the impact of the visa refusal on the Applicant's spouse and children and the family in Australia.

110. Having regard to all the circumstances, the Tribunal has decided that the discretion to refuse to grant the visa should not be exercised.

DECISION

111. The Tribunal sets aside the decision under review and in substitution decides that discretion should not be exercised to refuse to grant the visa to the Applicant.

Date(s) of hearing:	**14 September 2026**
Counsel for the Applicant:	**Dr J. Donnelly, Latham Chambers**
Solicitors for the Respondent:	**S. Valliappan, AGS**