Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

MKNT and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2020] AATA 4089 (14 October 2020)

Division: GENERAL DIVISION

File Number(s): **2018/3623**

Re: **MKNT**

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Emeritus Professor P A Fairall, Senior Member**

Date: **14 October 2020**

Place: **Sydney**

The Tribunal sets aside the decision under review, being the decision of a delegate of the respondent dated 19 June 2018, and in substitution, decides to revoke the mandatory cancellation of the applicant's Class BF transitional (permanent) visa.

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

Emeritus Professor P A Fairall, Senior Member

CATCHWORDS

MIGRATION – mandatory cancellation of visa – child arrival – long-stay non-citizen – failure to pass the character test – protection of the Australian community – best interests of minor children in Australia – expectations of the Australian community – strength, nature and duration of ties to Australia – extent of impediments if removed – decision set aside and substituted

LEGISLATION

Migration Act 1958 (Cth) ss 499, 501, 501CA

CASES

Bugmy v The Queen (2013) 249 CLR 571

FCFY and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] AATA 3092

FYBR v Minister for Home Affairs & Anor [2020] HCATrans 56

FYBR v Minister for Home Affairs [2019] FCAFC 185

Marzano v Minister for Immigration and Border Protection (2017) 250 FCR 548

Minister for Immigration and Border Protection v Stretton [2016] FCAFC 11

YKZZ and Minister for Home Affairs [2019] AATA 3248

SECONDARY MATERIALS

Direction No 79 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA

REASONS FOR DECISION

Emeritus Professor P A Fairall, Senior Member

14 October 2020

INTRODUCTION

1. On 10 November 2016, Mr MKNT (the applicant), pleaded guilty to '*accessory after the fact serious indictable offence*' (the accessory offence) committed on 4 November 2014.[1] He was sentenced to 18 months imprisonment, commencing on 11 November 2015 and expiring on 10 May 2017, with a 12 month non-parole period.[2]

2. By notice dated 25 May 2017, the applicant's Class BF transitional (permanent) visa (visa) was mandatorily cancelled under subsection 501(3A) of the *Migration Act 1958* (Cth) (the Act) (the original decision).[3] The notice referred to his conviction for the accessory offence.

3. The applicant made representations as to why the original decision should be revoked under subsection 501CA(4) of the Act.[4] On 19 June 2018, a delegate of the Minister (respondent) decided not to revoke the original decision (reviewable decision).[5]

4. On 28 June 2018, the applicant applied to the Administrative Appeals Tribunal (the Tribunal) for review of the reviewable decision.[6] On 10 September 2018, the Tribunal affirmed the reviewable decision.[7]

5. The applicant sought judicial review of the Tribunal's decision dated 10 September 2018 in the Federal Court of Australia. On 14 October 2019, the Federal Court of Australia made orders, by consent, quashing the Tribunal's decision and remitting the matter for reconsideration according to law.[8] The orders noted that the Tribunal's decision was affected by jurisdictional error, having failed to have regard to representations made by the applicant that he had undertaken rehabilitation by completing behavioural

---

[1] Section 93G(1)(c) of the *Crimes Act 1900* (NSW) provides, *inter alia,* that any person who fires a firearm in a manner likely to injure, or endanger the safety of, any other person or any property, or with disregard for the safety of himself or herself or any other person, is liable to imprisonment for ten years. An accessory after the fact to this offence is liable to imprisonment for five years: s 350 *Crimes Act 1900* (NSW).

[2] Application Book (AB) 1, G2, 43, 137.

[3] Ibid 48.

[4] Ibid 194.

[5] Ibid 10.

[6] Ibid G1, 3-8.

[7] AB9, 459-472.

[8] AB12, 525-27.

management courses and attendance at counselling sessions with a psychologist on a weekly basis.[9]

6. On 30 and 31 July 2020, the matter was reheard by the Tribunal. For the reasons given below, I have decided that the correct and preferable decision is to set aside the decision under review, and in substitution, revoke the mandatory cancellation of the applicant's visa.

LEGISLATIVE PROVISIONS

7. Subsection 501(3A) of the Act provides for circumstances in which the Minister must cancel a non-citizen's visa:

> *(3A) The Minister must cancel a visa that has been granted to a person if:*
>
> *(a) the Minister is satisfied that the person does not pass the character test because of the operation of:*
>
> *(i) paragraph (6)(a) (substantial criminal record), on the basis of paragraph (7)(a), (b) or (c); or*
>
> *(ii) …; and*
>
> *(b) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.*

8. Under paragraph 501(6)(a) of the Act, a person does not pass the '*character test*' if the person has a '*substantial criminal record*'. Paragraph 501(7)(c) of the Act provides that for the purposes of the '*character test*', a person has a substantial criminal record if '*the person has been sentenced to a term of imprisonment of 12 months or more*'.

9. Under subsection 501CA(4) of the Act, the Minister may revoke the original decision if: (a) the person makes representations in accordance with the invitation; and (b) the Minister is satisfied: (i) that the person passes the character test (as defined by section 501); or (ii) that there is another reason why the original decision should be revoked.

10. Pursuant to paragraph 500(1)(ba) of the Act, if the delegate of the Minister decides under subsection 501CA(4) not to the revoke the original decision, an application may be made to the Tribunal for review of the decision.

---

[9] Ibid.

11. The decision *must* be revoked if the Tribunal, standing in the Minister's shoes, is satisfied either that the person passes the character test (as defined by section 501); or that there is another reason why the original decision should be revoked. In subsection 501CA(4), '*may*' is to be interpreted as '*must*'.[10]

FINDING ON CHARACTER TEST

12. The applicant concedes that he was convicted of the accessory offence on 10 November 2016 and sentenced to a term of imprisonment of 12 months or more, and that he has a '*substantial criminal record*', as defined in paragraph 501(7)(c) of the Act.[11]

13. The applicant rightly concedes that he does not pass the character test contained in paragraph 501(6)(a) of the Act, and I so find.[12]

14. In exercising the discretion under subparagraph 501CA(4)(b)(ii), the sole question for the Tribunal to consider is whether there is '*another reason*' why the original decision should be revoked.

BACKGROUND AND CHRONOLOGY

15. The applicant is a 39 year old Turkish national. He was born in Kayseri, a large industrial city in Turkey. His parents separated when he was a baby. He is the younger of two brothers. He has no memory of his mother and has no relationship with her.[13] There is some evidence that his older brother had some contact with her after they left Turkey.[14]

16. The applicant and his brother spent their early years in the care of their grandmother in Turkey.[15] On 4 November 1988, they were brought by their uncle to be with their father in Australia, who was living with his partner and daughter in Mt Druitt, NSW. The applicant

---

[10] If the conditions of s 501CA(4)(b) are satisfied then the mandatory cancellation decision *must* be revoked: see *YKZZ and Minister for Home Affairs* [2019] AATA 3248, per Deputy President Constance, [32], citing *Marzano v Minister for Immigration and Border Protection* (2017) 250 FCR 548, per Collier J, [31].

[11] The accessory offence is one amongst many listed in his National Police Certificate (NPC) dated 1 March 2018: AB1, G2, 43.

[12] Applicant's Statement of Facts, Issues and Contentions dated 21 March 2020 (Applicant's SFIC) [10].

[13] Summonsed Material, Vol 1, SM2, 262; Applicant's Supplementary Statement dated 21 March 2020 (Applicant's supplementary statement) [7].

[14] Transcript, 30 July 2020, 71.

[15] Applicant's supplementary statement [7].

had just turned seven.[16] He has not left Australia since he arrived as a boy.[17] He does not speak Turkish and has no family in Turkey.[18] He regards himself as Australian.[19]

17. The entry of the young boys into an unhappy home did not go well. According to the applicant, he was terrified of his father. He is said to have inflicted violence on his children and partner, sometimes to the point of them requiring medical treatment.[20]

18. Mr JA, a friend to both the applicant and his father, described the situation as follows:

> *Do you know if* [the applicant] *has a relationship with his father at present?*
>
> *No. Not for a long time now. He's never had a good relationship…*
>
> *… He had a problem marriage and two kids that he had come from overseas. It's a fact that his relationship with his wife as well….- ex-wife, I should say, didn't really allow him to take care of his other kids. And there was a lot of fighting in the house, him and the ex-wife… well, they weren't really in a good situation.* [21]
>
> (emphasis added)

19. The applicant says that his father was a violent alcoholic and threw him out when he was about 12 or 13 years old.[22] He did not list his father in his Personal Statement.[23]

20. The applicant started drinking and using drugs when he was around 14 years old.[24] During his younger years he was either on the streets or in juvenile detention.[25] He says that he was homeless between the ages of 13 to 19, although he did try to return home on a few occasions.[26] He says that he tried to complete his high school education, but none of the local schools would take him because of his criminal record.[27]

---

[16] Transcript, 30 July 2020, 4. By operation of the *Migration Reform (Transitional Provisions) Regulations*, the applicant held a Class BF transitional (permanent) visa from 1 September 1994: AB1, G2, 48.

[17] There is only one entry in the applicant's Movement History: AB1, G2, 47.

[18] See para [197] below.

[19] Transcript, 30 July 2020, 25.

[20] Ibid 15; Applicant's supplementary statement [12], [16].

[21] Transcript, 30 July 2020, 79.

[22] Applicant's supplementary statement [12].

[23] AB1, G2, 205.

[24] Summonsed Material, Vol 1, SM2, 417.

[25] Applicant's supplementary statement [19].

[26] Transcript, 30 July 2020, 16.

[27] Ibid.

21. He was before the Cobham Children's Court on seven occasions between the ages of 15 and 18: for unlawful entry, various forms of stealing and robbery, sometimes with a dangerous weapon, common assault and assault occasioning actual bodily harm.[28] He was sentenced to modest fines and various control orders for these juvenile offences.[29]

22. On 12 October 2000, the applicant was arrested for supplying cannabis.[30] On 17 October 2000, he was convicted of possession of cannabis and received a 12 month bond.[31] On 7 August 2001, he was convicted of the supply offence and sentenced to three months' imprisonment, which was suspended upon him entering into a 3 month supervised bond.[32] These appear to be the only offences related to drugs in his criminal record.

23. Notes made by the police during this period record that he was living at home with his mother and father, and receiving money from his mother because he could not get benefits at that time.[33] His mother was very supportive during her interview with the Probation and Parole Service, and described him as '*perfect*'.[34] His antipathy to his father does not extend to his step-mother, who clearly tried to help him on various occasions.

24. At some point in his late teens, he formed a relationship with W1, which ultimately led to the birth of five children, now all teenagers from the ages of 14 to 19.[35] His first child, (Child No.1), a daughter, was born in 2001, when he was 19 years old. Another daughter (Child No. 2) was born in 2003; his twin boys (Child No. 3 & Child No. 4) in 2005; and another daughter (Child No. 5) in 2006.

25. In 2012, the applicant partnered with W2 and they had a son in 2013 (Child No. 6).

26. He also had a relationship with W3 in 2014, to which no children were born.

---

[28] AB1, G2, 45.
[29] Ibid.
[30] Summonsed Material, Vol 1, SM2, 454.
[31] AB1, G2, 44.
[32] Ibid.
[33] Summonsed Material, Vol 1, SM2, 454.
[34] Ibid 416-417.
[35] AB1, G2, 66-71.

CRIMINAL OFFENDING

27. In terms of sentences of imprisonment imposed by the courts, four offences committed by the applicant over the past 20 years stand out. Three of those offences involved sentences to a term of imprisonment greater than 12 months. Some minor offences are interspersed between these offences, as detailed below.

Offence	**Date Committed**	**Offending age**	**Plea**	**Sentence**	**Non-parole period**
Maliciously inflict Grievous Bodily Harm in company	1 January 2002	20	Guilty	28 months and 15 days	14 months and 6 days
Assault with intent to take/drive motor vehicle	5 November 2006	25	Not guilty	2 years and 11 months	1 year and 11 months
Accessory after fact serious indictable offence	4 November 2014	33	Guilty	18 months	12 months
Stalk/intimidate intend fear physical etc harm (domestic)	27 March 2017	35	Not guilty	8 months	6 months

Maliciously inflict grievous bodily harm in company

28. On 1 January 2002, the applicant and his co-offender were involved in a melee on a public street at around dusk on New Year's Day. The applicant had celebrated the end of 2001 with a bout of heavy drinking, which continued on the day in question. He was heavily intoxicated and arguing with his partner, W1. Three adults walked by,

accompanied by four children. One of the adults, V, was holding a bottle of scotch in a brown paper bag. The applicant exchanged words with someone in the group. This rapidly escalated to a general fracas - on one side, the applicant, his co-offender, and a third unidentified person; and on the other, V and his male friend. V was forced to the ground and an unidentified person jumped on the back of his head – it was accepted that it was not the applicant. V's face came into contact with the broken bottle of scotch. His face was badly lacerated and he lost his right eye. During the melee, a child was injured.

29. The applicant was arrested and charged with maliciously inflict grievous bodily harm in company. He was released on bail.[36]

30. Some 19 months after the offence was committed, on 31 July 2003, the applicant was sentenced, a few days after the birth of Child No. 2.

31. The applicant asked that an additional offence of affray be taken into account on the Form 1.[37] He was sentenced to 28 months and 15 days imprisonment, with a non-parole period of 14 months and 6 days. The sentence commenced on 31 July 2003 and concluded on 14 December 2005.

32. The sentencing judge accepted the events spiralled out of control, fuelled by alcohol but without any premeditation by the participants. Neither the applicant, nor his co-offender, *intended* to cause the specific injury suffered by the victim, but nevertheless the '*lack of intention to cause the injury which resulted does not in any sense operate as an excuse in the circumstances, nor does it go to the relevant elements of the offence*'.[38]

33. The sentencing judge took into account his age, his difficult upbringing and family background and his commitment to rehabilitation. On 6 October 2004, he was released to parole.[39]

34. In a statement dated 13 October 2017, the applicant wrote:

---

[36] Summonsed Material, Vol 2, SM3, 841.
[37] AB1, G2, 159, 163-164.
[38] Ibid 177.
[39] Summonsed Material, Vol 2, SM3, 840.

> *In 2001 (I was then 20 y/o) I was arrested and charged with 'grievous bodily harm'. The facts were, that in self-defence, I used excessive force. It wasn't a situation where I attacked somebody – I was in-fact attacked and defended myself. I was imprisoned for about 18 months. Things like this are not like on television – sometimes you have to fight for your life. This is what happened to me.*[40]

35. Although his 2017 statement appears somewhat justificatory and focused on self, the sentencing judge recognised that he was exceedingly remorseful. The applicant went to some length to apologise to the victim's wife.[41]

36. In 2005, his twin boys were born (Child No. 3 and Child No. 4), and a few weeks later he was convicted on two counts: '*unlicensed driver/rider (not licensed for 5 years) – 1st offence*' and '*never licensed person drive vehicle on road – 1st offence'*.[42] In 2006, he was convicted of '*never licensed person drive vehicle on road – 2nd offence'* and '*proceed through red/yellow traffic light (not toll booth)*'. He received fines for these offences.

37. In 2006 his third, and youngest, daughter (Child No. 5) was born.

Assault with intent to take/drive motor vehicle

38. In the early hours of 5 November 2006, a few months after the birth of Child No. 5, he committed another serious offence.[43] He participated in a taxi hijacking in the early hours of the morning in order to get home from St Marys to Parramatta. He was heavily intoxicated. The taxi was intercepted by police. He was arrested after a brief foot chase. He was charged on two counts: assault with intent to take a motor vehicle and robbery.[44] He was granted Supreme Court bail on 5 December 2006.[45]

39. On 7 March 2008, he was convicted on the first count, but acquitted on the count of robbery.[46] On 11 June 2008, he was sentenced to two years and 11 months

---

[40] AB5, 385.
[41] AB1, G2, 167.
[42] Ibid 44.
[43] Ibid 146.
[44] Ibid.
[45] Ibid 157.
[46] Ibid 146.

imprisonment, and a non-parole period of one year and 11 months, adjusted for time served.[47] He was released on 6 February 2010, at the age of 28.

40. The applicant was convicted as a member of a joint criminal enterprise, although he was not the prime mover.[48] He spontaneously decided to join a group of men who had secured the car keys from the taxi driver. There was no premeditation and his intention was formed on the spur of the moment.[49]

41. The sentencing judge noted that the applicant had some earlier drug offences but did not appear to have a significant problem with drugs. The real problem was with alcohol and persistent weekend binge-drinking.

42. On 16 December 2008, the applicant was notified by the Department of Immigration and Citizenship (as it then was) that his visa may be liable for cancellation under section 501 of the Act. On 31 July 2009, the applicant was informed by letter that a delegate of the Minister had decided not to cancel his visa on character grounds. The fact that he had been acquitted of the robbery and that he was not seen as a prime mover of the offence were no doubt significant factors in the decision not to proceed with deportation at this stage. He was warned that the case could be reconsidered in the event of further criminal offending. The fact that the applicant received such warning is a significant factor in this case.

43. At some point over the next two years he broke up with W1. He had care of the children and went with them to Queensland for a period but returned when he could not find work.[50]

44. In 2012, the applicant developed a new relationship with W2 and Child No. 6 was born in mid-2013. The relationship between the applicant and W2 was far from stable. On the evening of 8 November 2013, there was a row between the applicant and W2. According to the NSW Police Facts Sheet, an anonymous caller said a woman was standing on her front veranda calling for help. When police attended the residence, W2 attempted to invite

---

[47] Ibid156-157.
[48] Ibid 153, 155-156.
[49] Ibid 153.
[50] Summonsed Material, Vol 2, SM3, 770.

them in, but the applicant refused them entry. He confronted one of the constables, which gave rise to a charge of '*intimidate police officer in execution of duty without actual bodily harm*'. When he refused to offer his hands for handcuffing, he was charged with '*resist officer in execution of duty*'. He was continually thrashing his body around.[51] He was highly emotional and attempted self-harm by putting his head through a glass window. He was restrained and taken into custody. Police bail was refused.[52]

45. On 9 November 2013, he was charged before the Local Court with intimidation and resisting officer in execution of duty.[53] He was released on bail. Measures for the protection of W2 were inserted in the bail conditions.[54]

46. The offences were set down for 28 November 2013, but the applicant failed to appear and a warrant was issued. He attended the police station the next day and said that he was mistaken about the court date.[55] On 29 November 2013, he was charged with breaching bail.[56] On 12 December 2013, the court sentenced him to a fine of $500 and a 12 month good behaviour bond for the intimidation offence; and 80 hours of community service for resisting police.[57]

47. In January 2014, he was residing in Mount Druitt with W2 and her two children (one of them being Child No. 6).[58] He indicated his willingness to participate in group counselling relating to his childhood, and for anger management.[59] He also indicated that he was having access to his children on alternate weekends.[60]

48. On 26 February 2014, the applicant was re-arrested and charged with various offences, which were eventually withdrawn. He was remanded in custody until 11 April 2014. It

---

[51] Ibid SM2, 544.
[52] Ibid 745.
[53] AB2, G2, 43-44.
[54] Summonsed Material, Vol 2, SM2, 745.
[55] Ibid 546.
[56] Ibid 746.
[57] AB1, G10, 374; AB1, G2, 43; Summonsed material, Vol 2, SM3, 750.
[58] Summonsed Material, Vol 2, SM3, 751.
[59] Ibid.
[60] Ibid 753.

appears that when he was released W2's address was empty, and he was essentially homeless.[61]

49. In May 2014, it was noted that he had only completed 18.5 hours of the 80 hours of community service imposed on 12 December 2013 for the resist officer offence.[62]

50. By mid-June 2014, he had a new partner, W3.[63] They were apparently living together in Whalan, NSW. He was working as a scaffolder and his work was satisfactory, according to his supervisor.[64]

51. On 23 June 2014, he agreed to undertake a five week anger management course commencing on 14 July 2014. On the same day, he attended a medical centre for a blood test, apparently to determine his blood-type because one of his children had been diagnosed with leukaemia.[65] By the end of the month he was not so sure about the anger management course.[66] He said he had attended such a program whilst in jail and it "*did nothing*" for him.[67] He was however happy to attend Adventist Development and Relief Agency (ADRA) in Blacktown.[68]

52. On 24 June 2014, he was supposed to appear in the Local Court in relation to breaching the community service order imposed for the resist officer offence, but he did not appear.[69] He went to see his community service officer, accompanied by W3,[70] and said that he had arrived fifteen minutes late for court and the matter was adjourned.[71]

---

[61] Ibid 757.

[62] Ibid 756.

[63] Ibid 758.

[64] Ibid.

[65] Ibid 758, 759.

[66] Ibid 758.

[67] Ibid 752.

[68] Ibid 758; the Adventist Development and Relief Agency (ADRA) is the official humanitarian agency of the Seventh-day Adventist Church.

[69] Summonsed Material, Vol 2, SM3, 759.

[70] Ibid.

[71] Ibid.

53. On 24 July 2014, he reported that his new relationship with W3 was '*strong and stable*'.[72] He reported attending anger management courses at Caroline Chisholm and participating in all tasks.[73] Later in the month, things were less smooth in the new relationship. He asked about relationship counselling because he had noticed things beginning to happen in his new relationship that happened in his last relationship. He was advised to see a GP and obtain a Mental Health Plan.[74] His mental health appears to have deteriorated over July and August. He was non-compliant with his community service obligations.[75] He missed a class at Caroline Chisholm.[76]

54. On 12 August 2014, he was fined $700 for the resist officer offence committed on 8 November 2013.[77] No action was taken on the breach.[78] The same day he had an interview with his case worker and commented on the difficulties he was having with his anger management course. There were aspects he related to, but some did *'his head in*'.[79] He recognised that his frustrations often grew into anger over trivial matters. His case-worker made various suggestions including 1:1 counselling with a psychologist, and he appeared highly engaged with the discussion.[80]

55. On 10 October 2014, he attended his community service interview with W3. He stated that he had missed the last two anger management sessions at Caroline Chisholm due to court commitments. He requested a referral to a relationship counsellor, stating that he and his partner were having some communication difficulties, causing what he thought was needless and avoidable conflict. W3 agreed. She denied any violence or harm occurred but said that they each '*struggled to explain and be understood'* by each other. Both stated that they were committed to a long term relationship and wished to ensure their relationship stayed healthy. He attended alone a few days later and said that his ex-partner (it is not clear whether he was referring to W1 or W2) was in a mental institution; but he wished to attend relationship counselling with W3 due to their communication

---

[72] Ibid 760.
[73] Ibid.
[74] Ibid 761.
[75] Ibid.
[76] Ibid.
[77] AB1, G2, 43; G10, 375.
[78] Summonsed Material, Vol 2, SM3, 762.
[79] Ibid 763.
[80] Ibid.

problems. While at the service, he contacted Relationships Australia, and was told that the waiting time was 5 weeks.[81]

56. On 28 October 2014, he was approved for early termination of parole supervision.[82] But then, just as things were improving, things went backwards.

57. On 30 October 2014, he was arrested for assault said to have occurred on 27 October 2014.[83] He was released on bail, the hearing being set down for 24 November 2014. On 27 January 2015, no evidence was offered and the charge was withdrawn.[84]

58. On 4 November 2014, his parole officer made the following file note:

> *I didn't tell him about termination at this point!! Stated that he was at hospital at Campbelltown as his 8 year old daughter had cut her foot on some glass and will be off her feet for two weeks… said he had spent a couple of nights with her and with his current partner. Then the interview got really confusing, given his mode of reporting.* [I]t *is understood his ex-partner the mother of the child in hospital was charged with assault on the daughter and subsequently 4 or 5 children were removed from her and placed into FACS care. Somehow he is not to see the children (because of the associated AVO) despite the fact he had spent the time in the hospital. To compound matters his current mother-in-law (who likes to control everyone) orchestrated her daughter* [W2] *taking out an assault charge on his current partner who reportedly didn't know understand and felt a little lost at the police station and did not know what she was really signing when she signed a statement… hence there is an AVO against him with her as the victim. Hence he is unable to be with her. As a result his head is spinning and he has spoken to his boss who gave him time off work based on safety reasons (*[the applicant] *is a scaffolder). he has to go to FACS to sort the children issues out and then is confident that the new assault charges against him by his current partner will be dropped as his wife does not want to proceed.* [85]

Accessory after fact serious indictable offence

59. On the afternoon of 4 November 2014, the applicant was with W3 and Phillip, her brother.

---

[81] Ibid 765.

[82] Ibid.

[83] Ibid 766.

[84] AB1, G10, 376.

[85] Summonsed Material, Vol 2, SM3, 766.

60. W3 and Phillip's parents were separated. Phillip had recently discovered that his father had assaulted his mother, causing actual bodily harm. He was outraged. The applicant agreed to drive Phillip to confront his father. They were both in a highly emotional state.

61. When they arrived at the father's residence, Phillip got out of the car and started yelling for his father. When his father came out, Phillip withdrew a pistol from a pocket and discharged it, hitting two vehicles and the carport.[86] Phillip returned to the car, and the applicant drove away from the scene.[87] No-one was injured.

62. On 7 November 2014, the applicant surrendered to police.[88] He was arrested the following day and detained in the Surry Hills cells, and then transferred to the Metro Remand Centre.[89]

63. During the period of remand, which ran for the next two years, there is a substantial record as to his behaviour and mental health,[90] including the Programs/Services Status Report.[91]

64. The applicant was admitted to Long Bay Correctional Centre on 5 May 2015, and there was '*Nil evidence of thought disorder or psychosis'*.[92] He was seen again on 20 May 2015 and he seemed to be making progress in controlling his anger and depression.[93] In June 2015, he was transferred to Parklea Correctional Centre and was worried about seeing his children, who were under the care of the NSW Department of Community Services (DOCS) (as it was formerly known).[94]

65. In July 2015, he participated in a consultation with a psychologist for his anger management issues.[95] He was polite and showed no signs of medical or mental illness. [96]

---

[86] AB1, G2, 129.
[87] Ibid 130.
[88] Ibid 128.
[89] Summonsed Material, Vol 2, SM3, 767.
[90] Ibid 768-802.
[91] Ibid 847-849.
[92] Ibid 770.
[93] Ibid 771.
[94] Ibid 772.
[95] Ibid 773.

66. Over the following months, the applicant was approved visits with his children.[97] However, in October 2015, his cell was searched and some goods were found: '*an iPod Mini*' and a '*gaol made shiv'*.[98] At the end of October, he participated in a Work Safety course and records indicate he was assessed as not suitable for '*sweeper work*'.[99]

67. In November 2015, he participated in another anger management session with a psychologist. His attitude towards moderating his behaviour was discussed.[100] He participated in a '*Seasons for Growth*' program and was described as having '*untapped potential*'.[101] In December 2015, he was receiving visits from his family.[102]

68. In January 2016, his transfer to Cessnock Correctional Centre elicited bad behaviour and the file note records '*this inmate poses a real physical danger to staff when treated as an inmate or when things don't go his way*'.[103] Two weeks later, another staff member recorded: '*I believe that inmate poses a real physical danger to staff'*.[104] In late January 2016, he returned to Long Bay Correctional Centre. In February 2016, his attitude was negative. He was indifferent about seeing a doctor. In March 2016, he was referred for assessment for anger management issues. The psychologist reported the session with the applicant as follows:

> [The applicant] *advised of a long history of impulse control and anger management issues. He reported deriving pleasure from hurting others and was unaware of cues and triggers. Inmate still believed that he had no control over his impulsivity. Inconsistencies around this belief were explored with the inmate, providing examples as to when he has been able to resist invitations to violence.*[105]

69. He had further sessions with a psychologist in April and May 2016.[106] Of the session in May, his assessor noted:

---

[96] Ibid.
[97] Ibid 774-775.
[98] Ibid 775.
[99] Ibid 776.
[100] Ibid 777.
[101] Ibid 779.
[102] Ibid.
[103] Ibid 780.
[104] Ibid.
[105] Ibid 782.
[106] Ibid 784, 786.

> *Inmate relayed some sleep disturbances. identified possible anxiety issues related to his legal matters. provide psychoeducation on anxiety and discussed simple relaxation methods. attempted to discuss behavioural cycle (CBT). Inmate relayed that he is not good at identifying and holding on to a thought. he stated he had a car accident when he was approx. 8 and suffered injury to the back of his head. provided brief psychoeducation on identifying thoughts. Inmate then became concerned and disclosed possible prodromal symptoms of mental illness. Inmate was asked to be mindful about symptoms and to further discuss such at the next session. Discussed sleep hygiene and behavioural activations.*[107]
>
> (emphasis added)

70. Later in May 2016, his situation seemed stable. He obtained work as a sweeper which was a source of pride. He was given advice about behavioural controls. But he continued to display symptoms of anxiety. He was on the waitlist for mental health treatment but had not been assessed.[108] In July 2016, his condition deteriorated and he was depressed.[109] Two weeks later he had lost weight. He tried to get in touch with DOCS in relation to Child No. 6, who had been taken into care.[110]

71. In August 2016, he indicated that he had broken up with '*his partner*' (presumably W3) and had gained some closure.[111] He was showing symptoms consistent with depression and anxiety. In September 2016, he asked for counselling, but could not be seen due to workload priorities.[112] He was concerned that he might be held responsible for certain substances (suboxone and what appeared to be ICE) found in his shared cell.[113] In October 2016, there were further notes relating to his mood, which appeared to be more settled.[114]

72. The trial for the accessory offence was set down for 7 November 2016. After negotiations with the prosecution, the applicant pleaded guilty.

---

[107] Ibid.
[108] Ibid 788.
[109] Ibid 790.
[110] Ibid 792.
[111] Ibid 793.
[112] Ibid 797.
[113] Ibid 797, 799.
[114] Ibid 800-801.

73. The applicant was sentenced for the accessory offence on 10 November 2016. The learned sentencing judge accepted that there was no evidence of planning. His Honour stated:

> *In assessing the factors that are relevant in relation to this offender's offence I do take into account the fact that he was aware that a serious offence of firing a firearm had taken place in circumstances where the possibility someone could have been seriously injured was clear to him. In those circumstances however it occurred over a very short period of time in a highly emotive situation and one where I except he felt obliged to assist the principal offender as he was his brother-in-law. He had little time to assess the situation and the extent of his involvement was driving the shooter away from the scene. There is no evidence he provided any other assistance other than taking him from the property. Taking all those factors into account I am satisfied that whilst it is a serious offence when assessing his role the objective seriousness of his offending lies towards the lower end of objective seriousness in relation to an offence that carries a maximum penalty of five years imprisonment.*[115]
>
> (emphasis added)

74. In terms of mitigating factors, the judge noted:

> *He has a criminal record. The most serious offences seem to be primarily when he was a juvenile… in that he was thrown out of the home when he was aged 13 and lived on the streets and unfortunately in Correction organisations.*
>
> *The offender tells me that since in custody he has been seeing a psychologist which has been helpful in relation to dealing with those underlying problems from his childhood and he will be making it a priority to get the assistance of a GP once he is released on parole. He confirms his aspirations are to look after his children, re-establish his relationship with them and to obtain gainful employment. He understands that this is his last chance to prove himself which is probably a comprehension of what is expressed by his brother in his reference. He says he is prepared to be a hard worker and is now a sweeper in the MRRC which in my experience is considered a position of trust.* [116]

75. The judge also took into account his plea of guilty:

> *…particularly in circumstances where this involved the emotional issues surrounding a number of participants who are in the same family, has resulted in them not being required to give evidence as a result. This factor I will take into account as indicating a degree of remorse on his behalf as referred to by him in his letter to me. I am satisfied that he is remorseful.*[117]

---

[115] AB1, G2, 131.

[116] Ibid 133.

[117] Ibid 135.

76. He was sentenced to a term of 18 months imprisonment, with a non-parole period of 12 months. He was released the same day. He had been in custody on remand since his arrest by police on 8 November 2014, that is, for approximately 24 months.[118]

77. In assessing the applicant's conduct for present purposes, I note that the offence was committed when the applicant drove Phillip away from the scene. Both parties were highly emotional and Phillip was armed. Moreover, Phillip had just discharged the firearm towards his father.

78. The applicant could have avoided committing the accessory offence by refusing to drive, or by removing himself from the car and walking away. But the shooting had created a highly volatile environment, and the applicant's 'heat of the moment' reaction to drive away from the scene must be judged in that context. Incidentally, by driving Phillip *away* from the scene, he ensured that no further immediate harm came to Phillip's father. This is all predicated on the assumption that until Phillip took out the gun after he alighted from the car, the applicant was *unaware* that he was armed. The trial judge proceeded on that basis.

79. The applicant gave the following evidence before the Tribunal:

> *It was more of a case of… wrong place, wrong time where it was – at the time my brother in law, like my partner's brother, his father had beaten the crap out of his mother and growing up, my father beating up my stepmother and myself and that, I drove him to confront his father and I didn't know he had a pistol on him at the time until he pulled it out and started shooting at his father. I thought he was just going to go confront his father, like, you know, man to man and next thing he started shooting and I was like what… the fuck are you doing? I said get the hell in the car, you know what I mean, like what the fuck you doing, you're stupid shooting at your father….*
>
> *…I got him in the car and drove him away from there. At the time I didn't see it as, like, I did something wrong, you know what I mean?* [119]
>
> (emphasis added)

80. In my respectful view, it is not surprising that the learned sentencing judge rated the objective seriousness '*towards the lower end*'.[120]

---

[118] Ibid 185.

[119] Transcript, 30 July 2020, 31.

[120] Application Book, AB1, G2, 131.

81. When he was released on 10 November 2016, he moved into the loft space above a wrecking yard provided by JA.[121] He was hopeful of working with his brother as a scaffolder.[122] His relationship with W3 did not survive the incarceration.[123]

82. When he was released in November 2016, he found it very difficult to obtain housing. He attended Community Corrections with W1, with whom he had '*re-engaged*'.[124] By December 2016, he was sleeping in his car.[125] He was in a state of heightened anxiety and frustration and talking of going back to gaol.[126] He was still sleeping in his car in the week up to Christmas.[127]

83. By 30 December 2016, the applicant was seeing W2 and was still sleeping in his truck. His attitude towards finding accommodation at the time was '*defeatist*'.[128] He reported nil drug use. In January 2017, the applicant was given temporary accommodation for two nights.

84. By mid-January 2017, he was arrested for possession of a knife. He was reported as saying the police had overreacted and it was only a '*small knife*'.[129]

85. On the last day of January 2017, his parole officer raised concerns about his behaviour. W2 said that it was important that he attend further counselling to assist her efforts in getting their child back from NSW Department of Family and Community Services (FACS).[130] He was staying with W2's family.

86. In February 2017, he started working for a trucking company.[131] At the end of February, he was still looking for accommodation.

---

[121] Summonsed Material, Vol 2, SM3, 802.
[122] Ibid.
[123] Transcript, 30 July 2020, 32.
[124] Summonsed Material, Vol 2, SM3, 804.
[125] Ibid 805.
[126] Ibid.
[127] Ibid 806.
[128] Ibid.
[129] Ibid 809.
[130] Ibid 810.
[131] Ibid 811.

87. In March 2017, he was provided with accommodation at Providential Homes, but for some reason did not follow up. He was informed that he was in breach of his parole.[132]

88. On 31 March 2017, W2 contacted his parole supervisor on his behalf and said that he had been working. She was told that the State Parole Authority had issued a warning and that he needed to be more compliant.[133]

89. On 12 April 2017, he reported for parole with W2 and said that he believed that he was getting his life in order with his new job.[134] He didn't want to lose the job by reporting all the time for parole. He was reminded of his reporting obligations, which expired on 10 May 2017. The next day, a file note by the parole officer records:

> *Little has been able to be accomplished with this person due to his entrenched resistance. Would not give information about himself, his whereabouts and sublimated his obligations under the Parole order to his desire to work, yet has not provided any evidence as to his work or how the shifts interfered with his obligations…*[135]

90. On 17 April 2017,[136] the applicant was arrested and charged with an offence of '*stalk/intimidate intend fear physical etc harm (domestic)*' (stalk/intimidate offence) said to have occurred on 27 March 2017.[137] On 10 May 2017, on the day his parole was to end, he was re-admitted to prison for breach of parole.[138]

Stalk/intimidate intend fear physical etc harm (domestic)

91. On 9 June 2017, after a contested hearing, the applicant was sentenced to a term of 8 months imprisonment, with a non-parole period of 6 months, for the stalk/intimidate offence.[139] The complainant was W2's mother, MD.

92. At the hearing, the applicant represented himself. W2's mother, MD, gave evidence for the prosecution. W2 gave evidence for the applicant.

---

[132] Ibid 812.
[133] Ibid 814.
[134] Ibid 815.
[135] Ibid 816.
[136] Ibid.
[137] AB1, G22, 122.
[138] Summonsed Material, Vol 2, SM3, 817, 839.
[139] AB1, G2, 78-127.

93. MD gave evidence to the following effect.[140] The applicant pulled into the driveway of her residence and started beeping the car horn. W2 asked MD to lock the screen door. Eventually, W2 unlocked the screen door and went out and the applicant screamed at W2 through the open window to get in the car. W2 refused and ran back into the house. The applicant followed. MD stood between them and asked the applicant to '*please leave*'. He returned to the car but then came back into the house and followed W2 to the bathroom. They continued arguing in the bathroom. He was screaming at her, using foul language, and bailing W2 up against the wall in the bathroom. MD screamed at him to get out of the house and her husband also told him to leave. She then called the police. She said:

> *After a few minutes, after about five minutes,* [the applicant] *came out and he just said anybody who gets in the way of their relationship is going to regret it and he walked past me, going to his car. He knew I was on the phone to the police, to ringing the cops, and he goes "Yeah, fucking ring them. Send the boys around to shoot your house up with her in it".*[141]

94. MD said that this made her feel frightened. She was frightened because he had behaved in this way before. He then returned to collect his washing and then left before the police arrived. W2 also left and did not come back to be interviewed by the police.

95. MD acknowledged that she previously had a good relationship with the applicant. She had known him since primary school. She '*loved him*' but had reconsidered her feelings after he refused to allow her access to her grandson. She acknowledged that he had been considerate, and helped her and her husband with transport, including that very week.[142]

96. W2 gave evidence to the effect that '*she did not hear the words, the threats made by* [the applicant] *to* [MD]'.[143] The magistrate observed that the '*evidence of* [W2] *substantially contradicts that of her mother* [MD]' and that MD's evidence was preferred because of '*her clear recollection of all the precise details*'.[144]

97. W2's evidence was that when he drove up and hooted she went out to meet him. She didn't want to go with him and returned to the house. He followed about a metre behind.

---

[140] Ibid 122.
[141] Ibid 90.
[142] Ibid 123.
[143] Ibid.
[144] Ibid 123-124.

He stayed outside at first but then went into the house. She went towards the bathroom and they continued arguing in loud voices. Her parents were home. Her father came to the bathroom and asked him to leave. He did so and she followed him out. She was not far behind him, about two or three steps. She did not hear him say anything to her parents.

98. In passing judgment and sentence, the magistrate said:

> *The Court has heard that you maintain your denials, that is of course your right, but the Court is satisfied beyond reasonable doubt of your guilt. The maximum sentence for this offence is two years. The court should take into account that it was in the context of a domestic violence or domestic incident between yourself and* [W2] *whereby when her mother sought to order you out of the house you threatened her on the way out the second time. Given your criminal record and your serious violent history…the Court is satisfied - is of the view that there is no other alternative than a sentence or full time imprisonment. <u>The Court should take into account though that nothing did occur out of it in a sense that you did not perpetrate violence on your partner, your girlfriend's mother.</u>*[145]
>
> (emphasis added)

99. During the Tribunal hearing, the applicant was cross-examined about the offence:

> *MS MAK: Now, Mr* [Applicant]*…You gave evidence before that you engaged in psychology sessions while you were in custody between 2015 to 2017. Was that before or after the stalk/intimidate offence involving your mother-in-law?---That was before.*
>
> *Okay, so it's fair to say then, isn't it, that even after that extended period of engagement with your anger management issues, you still then went on to commit an offence that involved a threat against a woman in a domestic setting. Would you agree?---No, I would not agree because, like I said, my mother-in-law at the time she had a vendetta against me ever since she found out that I was in for the shooting. She actually believed that I was the one that done the shooting. She had it in her head that I was the one that done the shooting, and she no longer wanted me with her daughter, and* [W2] *even testified to that, and* [W2] *even said, no,* [the applicant] *did not say those words. Her husband in his statement says that, no, he did not hear me say those words, and yet I was found guilty because - I don't know why, even though in court there was - I represented myself, I didn't have a lawyer.*
>
> *So, Mr* [Applicant]*, are you saying that you didn't commit that offence?---Yes, I am saying that. I'm not - I'll take responsibility for everything else, but on that one that was a situation where the mother-in-law did not want me with her daughter no more because she thought I was the actual shooter to my last offence, and she was - - -*

---

[145] Ibid 125.

> *Well, Mr* [Applicant]*, when you say you take responsibility for everything else (indistinct), earlier today, you were a follower, you weren't the instigator?---Yes.*
>
> *Is it your evidence that you essentially don't take full responsibility for any of your offences?---No, that's not what I said, I said I take responsibility for all my offences. Yes, I was a follower, I follow stupid people, I've done stupid things following stupid people.* [146]

100. Although this conviction did not trigger the mandatory cancellation of the applicant's visa, it is very important to understanding the nature and quality of the applicant's offending. The conviction was based on a finding of fact made by the magistrate to the criminal standard. It was open for the magistrate to be satisfied beyond reasonable doubt despite the conflicting testimony, and it is not for the Tribunal to question the veracity of the conviction or the sentence imposed.

101. For completeness, I note that on 14 June 2017, the applicant was sentenced to one month imprisonment for having custody of a knife in a public place.[147] The sentence was served concurrently with the conviction for the stalk/intimidate offence imposed on 9 June 2017.

102. I also note that from June 2017, he was seen by various psychologists during his time in prison and before his transfer to Villawood. In July 2017, he told a psychologist that he had still not been seen by the mental health clinic despite two referrals.[148] In August 2017, he was employed as a sweeper.[149] In September 2017, he indicated that he hoped to get accommodation again in the loft above the wrecking yard.[150]

103. On 23 November 2017, the applicant was referred by the visiting psychiatrist for adjustment disorder with depressive symptoms and for anger management treatment. He had seen the psychiatrist twice and had been prescribed medication by the mental health nurse. He had had a recent visit from his eldest daughter which had gone well.[151]

---

[146] Transcript, 30 July 2020, 44.
[147] AB1, G2, 43.
[148] Summonsed Material, Vol 2, SM3, 824.
[149] Ibid 826.
[150] Ibid 827.
[151] Ibid 833.

104. On 8 December 2017, he was transferred from prison to immigration detention.[152]

DIRECTION NO. 79

105. A determination made under subsection 501CA(4) must be carried out in accordance with any written directions given under subsection 499(1) of the Act.[153] The Minister has given such written directions in the form of '*Direction No 79 – Migration Act 1958 – Direction under section 499 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA*'. Part C of Direction No. 79 identifies the considerations relevant to determining whether to exercise the discretion to revoke the mandatory cancellation of a non-citizen's visa. Paragraph 13(2) provides:

> *In deciding whether to revoke the mandatory cancellation of a non-citizen's visa, the following are primary considerations:*
>
> *a) Protection of the Australian community from criminal or other serious conduct;*
>
> *b) The best interests of minor children in Australia;*
>
> *c) Expectations of the Australian community.*

106. Paragraph 14(1) sets out the other considerations to be taken into account where relevant, and states:

> *In deciding whether to revoke the mandatory cancellation of a visa, other considerations must be taken into account where relevant. These considerations include (but are not limited to):*
>
> *a) International non-refoulement obligations;*
>
> *b) Strength, nature and duration of ties;*
>
> *c) Impact on Australian business interests;*
>
> *d) Impact on victims;*
>
> *e) Extent of impediments if removed.*

PRIMARY CONSIDERATION (PC1) – PROTECTION OF THE AUSTRALIAN COMMUNITY

107. Paragraph 13.1(1) provides that:

> …[w]*hen considering the protection of the Australian community, decision-makers should have regard to the principle that the Government is committed to protecting*

---

[152] Ibid 835.

[153] See *Migration Act 1958* (Cth) s 499(2A).

the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens 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…

108. Under Paragraph 13.1(2) I 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 non-citizen's conduct to date

109. I am required to consider a range of factors in determining the nature and seriousness of the applicant's conduct. These are set out in paragraph 13.1.1(1)(a)-(i).

110. The applicant's criminal record has been described in the chronology above. He has been convicted of a number of violent offences, including assault occasioning actual bodily harm; common assault; affray; maliciously inflict grievous bodily harm in company; and assault with intent to take/drive motor vehicle. I note the principle that violent crimes are viewed very seriously: paragraph 13.1.1(1)(a).

111. He has also committed various dishonesty offences, including robbery; robbery while armed with a dangerous weapon; robbery in company; aggravated robbery and larceny. Some of these offences also engage the principle contained in paragraph 13.1.1(1)(a).

112. He has also committed various drug offences (including supply); offences against law enforcement officers; offences involving a weapon; a stalking offence; and various traffic offences (including unlicensed driver).

113. In terms of the sentences imposed by the courts, I note that the applicant has been sentenced to a range of sanctions including imprisonment as detailed in the chronology above: paragraph 13.1.1(1)(d).

114. There are also various incidents in immigration detention. I note that the applicant denies these incidents, that he was not charged with any offences in relation to the incidents and that no oral evidence was called by the respondent. I acknowledge the incident reports but decline to make any adverse finding in respect thereof.

115. Paragraph 13.1.1(1)(e) also requires consideration of the frequency of the applicant's offending and whether there is any trend of increasing seriousness. Neither the accessory offence nor the stalk/intimidate offence are, in my view, as serious as the earlier offences involving the malicious infliction of grievous bodily harm and assault with intent to take motor vehicle, and this is reflected in the sentences imposed. I also note that the later offences were committed during periods of high drama involving personal relationships. The most recent offending is undoubtedly serious, but it cannot be said that there is a trend of *increasing* seriousness.

116. The fact that the applicant received an administrative warning is a relevant factor under paragraph 13.1.1(1)(h). As previously noted, on 16 December 2008 the applicant received a warning from the Department that if he re-offended his visa could be cancelled.[154]

117. I note that the applicant has been in contact with the criminal justice system since he was 15 years old, with a few islands of relative tranquillity. There comes an inflection point where the community's tolerance of misbehaviour is outweighed by a legitimate concern for public safety and a fear of ongoing delinquency and possible violence. This is especially so where, as in this case, the applicant received a previous administrative warning.

118. I do however take into account that his offending appears to be reactive and situational and, on occasion, a response to stress. I note for example, the coincidence of his offending with the birth of his children, which inverts expectations of '*normal*' responsible behaviour, but is not entirely inexplicable given his childhood experience. The fact that the subsequent offending had a non-premeditated and emotional quality tends to ameliorate the significance of his offending in the period after receiving an administrative warning.

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

119. Paragraph 13.1.2(1)(a) requires the Tribunal to consider the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct.

---

[154] AB1, G2,188. By letter dated 31 July 2009, a delegate of the Respondent informed the applicant that it had been decided not to cancel the applicant's visa at that time.

120. The nature of the harm ranges from psychological to physical. One cannot ignore the risk of physical injury, especially in light of the maliciously inflict grievous bodily harm in company offence that occurred in 2002. The victim of the offence lost his right eye in a fracas in which the applicant was involved. The assault with intent to take/drive motor vehicle offence committed in 2006, colloquially referred to as '*taxi-jacking*', exposed the taxi driver to significant risk of psychological harm. The accessory offence is serious, but he was sentenced on the basis that he did not know that the principal offender had a pistol or that he intended to discharge it. I have noted that the applicant had placed himself in a somewhat impossible position. As to the stalk/intimidate offence, this occurred in the highly volatile context of domestic conflict, and the magistrate noted to the applicant's credit that he had withdrawn without inflicting violence on anyone. Other offences involving assault or resist officer appear to occur within the domestic context.

121. Paragraph 13.1.2(1)(b) requires the Tribunal to consider the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account available information and evidence on the risk of the non-citizen re-offending.

122. There is no doubt that the impulsive, unpremeditated behaviour that characterised some of the applicant's offending constitutes a serious risk to the Australian community.

123. The applicant's counsel cautioned against relying simply on past behaviour as a reliable predictor of future behaviour. The offending was diverse and had different antecedents. In written and oral submissions he took me through the offence categories, identifying the likelihood that each type of offending might be repeated given the circumstances of the offending.[155] Some of the offences were committed earlier in his '*criminal career*', and had not been repeated; some were situational, and were therefore unlikely to recur; some occurred when the applicant was grossly intoxicated. He said there was no evidence of ongoing problems with alcohol. He conceded that the applicant had problems with anger management, which heightened the risk to the Australian community should the applicant commit further intimidation type offences.

[155] Applicant's SFIC [48]-[50].

124. The applicant's counsel conceded that the criminal record was against the applicant but argued that it was not decisive. He suggested that it weighed '*moderately*' in favour of non-revocation.[156]

125. He also contended that childhood deprivation was a relevant factor in determining the level of criminality involved in particular offending. He referred to *Bugmy v The Queen* (2013) 249 CLR 571(*Bugmy*) where the plurality stated:

> *The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.*[157]

126. In essence, counsel for the applicant argued that, if a background of alcohol abuse and violence should be taken into account in determining the appropriate minimum sentence, and therefore eligibility to parole, it was also relevant in exercising the administrative discretion under subsection 501CA(4). Evidence that his father was an alcoholic and violent towards him has been accepted in numerous reports and sentencing decisions.[158]

127. The extent to which the rule in *Bugmy* is applicable in exercising the administrative discretion within subsection 501CA(4) is unclear. If it is relevant at all, it would seem to be most relevant to expectations of the Australian community (PC3) contained in paragraph 13.3; rather than PC1 (which deals with the protection of the Australian community). It may be that, within the context of PC3, what might otherwise be regarded as a most serious case of offending requiring removal may be mitigated somewhat by the natural sympathy engendered by a deprived and dysfunctional childhood.

128. PC1 is concerned with public safety, and the risk of reoffending. As noted by the plurality in the passage above, early deprivation causing serious damage to the individual may '*compromise the person's capacity to… learn from experience*'. In such a compromised state, a person may be *more* likely to reoffend.

---

[156] Ibid [54].

[157] *Bugmy v The Queen* (2013) 249 CLR 571, 594-595 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[158] AB1, G2, 132; See also Applicant's SFIC [53].

129. I also note that the common denominator of the first serious 'headland' offences was his state of inebriation at the time of offending.

130. The respondent's solicitor commented on the frequency and remarkable duration of the applicant's offending, particularly in circumstances where the nature and seriousness of the applicant's criminal offending escalated after being formally warned by the respondent about the effect of further criminal offending on his visa status.

131. The respondent notes that the applicant has been convicted of multiple assaults. However, as an adult, his record does not contain any conviction where he has personally inflicted physical harm. Only in the first headland offence some 20 years ago was the applicant's conduct associated with actual physical injury, and there it was accepted by the sentencing judge that someone else inflicted the actual injury.

132. W1's mother, CB, gave evidence on behalf of the applicant, and stated that her daughter hit the applicant '*but that he did not hit back'*. She was cross-examined before the Tribunal:

> [Ms CB] *are you aware that* [the applicant] *has been convicted of over ten offences involving violence over the last 22, 23 years?---Yes… my daughter was the violent one in the relationship, not* [the applicant]*. That's why for me – this is hard for me to sort of understand the extent and what's actually happened. Because I've never seen that side of him.*
>
> *…But you're aware now, aren't you, that he's been convicted of multiple offences of assaults?---Violence and assault, yes.*[159]

133. I do not overlook the real psychological harm arising from high level arguments, yelling, screaming and so on.

134. Moreover, and importantly, there is no evidence that he has harmed any of the children.

135. The applicant himself admits that his tendency from a young age was to meet any challenge with threats of violence. He has a great capacity to scare people. The police were intimidated by his conduct on 8 November 2013. Clearly, W2's mother was very frightened by his conduct on 27 March 2017.

---

[159] Transcript, 30 July 2020, 93.

136. While I do not entirely accept the Respondent's characterisation of the applicant's conduct as escalating, I am not inclined to accept the benevolent view put forward by the applicant's counsel either.

137. Although there is no evidence that he has hit any of his children or the women with whom he has shared his life; the uncontrolled rage and shouting has its own destructive power and moves people to very great fear. He is too quick to anger.

138. He has chronic problems of living associated with poverty and a large family that he lacks the means to support. The use of alcohol and drugs as an escape has contributed enormously to the calamitous nature of his personal life. His attempts to moderate his behaviour have not been conspicuously successful, despite his engagement in custody with psychological services.

139. I therefore find that his conduct over almost two decades of offending weighs against revocation of the mandatory cancellation of the applicant's visa. It is not however of the heaviest weight and is significantly mitigated by the chronic challenges of his personal life.

PRIMARY CONSIDERATION (PC2) – BEST INTERESTS OF MINOR CHILDREN IN AUSTRALIA AFFECTED BY THE DECISION

140. Under paragraph 13.2, decision-makers must make a determination about whether revocation is in the best interests of a minor child.

141. The applicant is the father of three boys and three girls, ranging from seven years old to 19 years old. There are five minor children, born 2003, twins in 2005, 2006 and 2013. He also has a grandchild born in 2020 to Child No. 1.[160] His children, other than Child No. 1, are under the responsibility of FACS.

142. Children Nos. 2 and 5 are placed with W1's mother.[161] The twin boys (Children Nos. 3 and 4) are currently with relatives.[162] Child No. 6 is in a foster home.[163] As noted by the applicant's counsel, the arrangements for the children are in a state of flux, and there is no

[160] Transcript, 30 July 2020, 99.
[161] Ibid 20-21.
[162] Ibid 21.
[163] Ibid 22.

certainty as to how long they will remain with their present care-givers.[164] Nor, for that matter, is it certain that they will be returned to the applicant if he were to be released from immigration detention and back into the community.

143. There is some evidence that the applicant has a strong parental bond with each of his children. All five minor children have supervised contact with the applicant once a month, until the advent of the pandemic.[165] I have before me written statements in support of the applicant by case workers for three of the children (Children Nos. 2, 4 and 6).

144. Although his parenting has been interrupted by long periods of imprisonment and detention, there have been solid periods when he has looked after the children as a single parent. I note for example, that the children lived with the Applicant for a substantial period between 2011 and 2014, and that he took the children to the Gold Coast for several months but was forced to return to New South Wales when he could not get work.[166]

145. Child No. 2 provided a letter in support of the applicant, in which she wrote '*as an adolescent I would need that father figure in my life*' and his deportation would result in *'my siblings and I without parents in Australia as my mum is currently in New Zealand…'*[167]

146. CB, W1's mother, is the grandmother of five of the applicant's children, four of them minor children relevant to PC2. At the time of hearing, two of the children - Child No. 2 and Child No. 5 - were in her care.

147. At the hearing, CB gave evidence that the children had daily contact with the applicant by phone or social media, and that there had been personal visits pre-COVID.[168]

148. She was asked about her daughter, W1, and said that she was in New Zealand:

---

[164] Applicant's SFIC [65].
[165] AB11, 516.
[166] Transcript, 30 July 2020, 23, 54.
[167] AB11, 510.
[168] Transcript, 30 July 2020, 88.

> [W1] *is currently not working, she's just – just doing what she was doing in Australia, just taking drugs and going from place to place and not being a very good adult at the moment.*
>
> *Had* [W1] *expressed any view to you about coming back to Australia to take care of her children or put in place attempts - - -?---Not at all. No. Not at all.* [169]

149. When asked whether, if the applicant were permitted to remain in Australia, she would support him being granted primary care of the children, she said she would '*absolutely support it*'.[170] When asked why, she said:

> *I've always supported* [the applicant] *as he's been a great father throughout the whole time through his ordeals with the children. His relationship with his children are much closer. He has a much closer relationship with his children than my daughter does with her own children. And he's always been there for them regardless…*[T]*he communication that he has with them and with myself, always letting me know where they are, what they're up to, where my daughter hasn't done that.* [171]

150. She said that the applicant would be better placed to provide care for his children with her daughter out of the country:

> *I believe that he is in the… process now where he's able to change, like he's wanting to change for everything that he's done. He now has – well, he has a bigger support network now than he did before. And he's always (indistinct) for him regardless what happens. To either have him and the children with me or to support him wherever he decides to be. So there's going to always be a family member around for him. Where at first it was very difficult for him because my daughter wasn't a very good influence in regards to the choices that he was making. And I believe now that she's not here in the country, that he will be more focused on what is best for him and his children.* [172]

151. She was asked about the period in which the children were moved from the applicant's care to W1:

> *Why did your daughter, if you know, move – remove the children from [the applicant]? From his care? Because she needed the money.*
>
> *When you say she needed the money, for what? --- Centrelink. She needed the money for her – for her habits. For her drugs and not so much have any kids in her care but because she was getting paid from Centrelink.*
>
> *And just for the benefit of the tribunal and my learned friend and myself, what's your perspective on that? I'm sorry to ask you these questions, but it's important.*

---

[169] Ibid 89.

[170] Ibid.

[171] Ibid 89-90

[172] Ibid 90.

What's your perspective on that? --- Well that sucks. You need to be there for your children not because they provide you money. The money is there to look after your children and to raise them and to be there. She wasn't emotionally attached to the children so she never showed them any, like, emotional support, it was just all about the money and what her needs were, not my grandchildren.

Has [the applicant] *ever spoken to you about his feelings about that topic? The fact that your daughter was, as I understand the evidence, getting Centrelink for her own drug addiction and not to take care of the children? Did* [the applicant] *ever speak to you about that? Yes.*

What was his perspective? --- Absolutely. He was the same because the whole reason of how I got to connect with the children again was that [the applicant] *reached out to me and said that they needed help, they needed family. But he's always expressed that she was always in it for the money and not there for her children when they needed her.*

So just to clarify for my benefit. When you said [the applicant] was the same, do you mean the same perspective as you or as [W1]*? --- He had the same perspective as me when it came to the children needed emotional, physical, wellbeing support and financial support, but she never provided any of that for her children where* [the applicant] *did. Regardless whether they were together or not, he was always there for the children.*[173]

152. She was asked what she knew about his criminal record:

When did you first hear about [the applicant's] *criminal history?---Just last year actually. But I knew from the beginning he was a – I knew from his previous – well, when he had a record before. This was maybe about 18 years ago. I heard about the first one, but to this extent, it was only just last year. Because I've never known* [the applicant] *as that type of person.*

Well, Ms CB, [the applicant] *has spent a few periods of multiple years - - -?---In gaol.*

- - - in prison. In gaol, over the last 20 or so years that you've known him. Did you know that he was in gaol those times?---I knew he was in gaol at that time but I did not know – I haven't personally seen him that type of person to his extent of his criminal record.

Okay. So what do you know about his criminal record now?---I understand that it was physical, a gun was involved, from my understanding, and the person that I know is not the person that he supposed had committed this crime. Not the [applicant] *I know.*

So when you say 'this crime', are you indicating that you're talking about one particular offence?---This particular one to the extent is, like, him and I have spoken about it, but I've – I don't know him as that type of person to become violent or lose his temper or anything like that. Or to become dangerous.

Ms CB, are you aware that [the applicant] *has been convicted of over ten offences involving violence over the last 22, 23 years?---Yes. And my – my daughter and*

[173] Ibid 91.

> [the applicant]– *my daughter was the violent one in the relationship, not* [the applicant]. *That's why for me – this is hard for me to sort of understand the extent and what's actually happened. Because I've never seen that side of him. Okay. But you're aware now, aren't you, that he's been convicted of multiple offences of assaults?---Violence and assault, yes.*[174]
>
> (emphasis added)

153. It is not easy to discount CB's evidence, which was frank and forthright, especially in relation to the failings of her daughter, W1. It is hard to see any motive for her to distort the picture in favour of the applicant.

154. The fact that the children were removed from W1 and that she is no longer in Australia and is not able, even if she returned to Australia, to provide a stable home for any of the children, is a significant factor in this case.

155. As to W2, I note that at the time of the hearing, Child No. 6 is also in state care. There was some suggestion that W2 was not in a position to look after him.

156. I find that PC2 weighs in favour of revocation of the mandatory cancellation decision.

PRIMARY CONSIDERATION (PC3) – EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

157. Paragraph 13.3(1) provides as follows:

> *The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to not revoke the mandatory visa cancellation of such a person. Non-revocation may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not hold a visa. Decision makers should have due regard to the Government's views in this respect.*

158. The leading decision on expectations of the Australian community is *FYBR v Minister for Home Affairs* [2019] FCAFC 185 (*FYBR*), a case concerned with the interpretation of clause 11.3 of Direction No. 65, which is in all respects equivalent to paragraph 13.3(1) of

[174] Ibid 93.

Direction No. 79. A majority held that identifying the expectations of the Australian community was not an empirical matter subject to proof. Charlesworth J stated at [67]:

> *To the extent that cl 11.3 contains a statement of the expectations of the Australian community, the clause is "deeming"... It is not for the decision-maker to make his or her own assessment of the community expectations and to give that assessment weight as a "primary consideration"…. For my part, I prefer to describe the clause as imputing or ascribing to the whole of the Australian community an expectation that wholly aligns with the expectation of the executive government of the day in respect of its subject matter.*

159. Her Honour added at [73]:

> *The clause implicitly recognises that the decision-maker's assessment as to whether or not a visa should be granted may differ from the expectations of the Australian community, as the government has deemed those expectations to be.*

160. The High Court declined to grant special leave to appeal from the majority decision.[175]

161. The majority decision in *FYBR* supports the proposition that it is for the Tribunal as decision-maker, to determine, in light of the particular circumstances of the case, how decisively PC3 operates in favour of revocation of the mandatory cancellation decision. In general, the more serious the breach of the Australian community's trust that the applicant will '*obey Australian laws while in Australia*', the more it weighs against revocation, and it may even be decisive. It is hard to imagine a case where PC3 would not weigh, at least to some degree, against revocation.

162. In assessing the weight to be assigned to PC3, I have due regard to the views of the executive government relating to the removal of non-citizen offenders from this country. The views of the government are encapsulated within Direction No. 79.

163. In assessing the weight to be assigned to this factor, the individual circumstances of the applicant are '*necessarily front and centre'* in this decision-making process. However, this process must be conducted within the context of the principles contained within paragraph 6.3 which are stated to be of '*critical importance'* in furthering the government's objective of protecting the Australian community from harm as a result of criminal activity: paragraph 6.2(1). These principles '*reflect community values and standards with respect*

---

[175] *FYBR v Minister for Home Affairs & Anor* [2020] HCATrans 56 (24 April 2020).

to determining whether the risk of future harm from a non-citizen is unacceptable': paragraph 6.2(1).

164. One of the principles is that a non-citizen who has committed a serious crime, including of a violent nature, and particularly against women or children, should '*generally*' expect to be denied the privilege of staying in Australia: paragraph 6.3(3). This principle has relevance in this case. However, counsel for the applicant drew my attention to the comments made by Griffiths J in *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 at [70]:

> *…In particular, without doubting the relevance to the exercise of that power of protecting the Australian community, it is important that the value of the statement of reasons is not diminished by resort to superficial aphorisms or empty rhetoric, which is illustrated by phrases such as "expectations of the Australian community" and the "privilege" of being a visa-holder. The former concept has the potential to mask a subjective value judgment and to distort the objectivity of the decision-making process. The latter expression is simply misleading as a legal concept. Under Australian law, having the status of a visa-holder is not a privilege. Visa-holders hold statutory and non-statutory rights which are inconsistent with the notion of their status being described simply as a "privilege". For example, many visa-holders have statutory rights of review and all visa-holders have rights relating to judicial review of adverse migration decisions. The statutory rights of a visa-holder are, of course, subject to the lawful exercise of executive powers such as those under s 501. But that fact does not justify the position of a visa-holder under Australian law being described as merely one of "privilege" in a legal sense.*

165. Although these remarks were not directed specifically to this aspect of Direction No. 79, they do not in my view detract from the importance of treating crimes of violence, and especially towards women or children, as very serious.

166. Another principle is that in some circumstances the criminal offending and the harm that would be caused if it were repeated may be so serious that any risk of similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing considerations may be insufficient to justify not cancelling the visa: paragraph 6.3(4).

167. Another principle of particular relevance to this case is that contained within paragraph 6.3(7), which recognises as a consideration the consequences of a visa cancellation for minor children and other immediate family members.

168. There is no doubt in my mind that in this case the consequences for the applicant's five minor children and his recently born grandchild are profound. I was very moved by his

oldest daughter's testimony and the account she gave of his fathering, and the support the applicant received as a father from his former mother-in-law, who was by comparison most critical of her daughter's behaviour.

169. I conclude that PC3 weighs against the applicant, but it cannot be said to weigh so heavily against the applicant as to be decisive. I have taken into account the importance of the protection of women from violence, and I do not think that the evidence supports a finding that he presents a risk of harm to any specific woman or to women generally. I have also considered the consequences for family members flowing from visa cancellation. These consequences are profound, as outlined in relation to PC2.

OTHER CONSIDERATION (OC1) – INTERNATIONAL NON-REFOULEMENT OBLIGATIONS (TURKEY)

170. In deciding whether to revoke the mandatory cancellation of a visa, international non-refoulement obligations must be taken into account where relevant. Direction No. 79 requires decision-makers to consider, where appropriate, the issue of non-refoulement, that is, an obligation not to return, deport or expel a person to a place where they will be at risk of a specific type of harm.

171. Paragraph 14.1 refers to international non-refoulement obligations, specifically those arising under the various Conventions referred to in paragraph 14.1(1), such as the 1951 Convention relating to the Status of Refugees.

172. The applicant has made non-refoulement claims based on his unwillingness to serve in the Turkish military, and his Christian affiliation.

173. For completeness, I consider the Applicant's claim that he is liable to experience persecution if returned to Turkey.

174. The Applicant says that there is a significant risk that he may be conscripted into the Turkish military. He says that if conscripted he would refuse to serve. His refusal to serve may result in some kind of punishment, possibly imprisonment.

175. A realistic assessment of the likelihood of such eventualities should take into account his lack of fluency in Turkish, and his age. There is only a narrow opening before he reaches

the age of 41, at which age, according to evidence before the Tribunal, individuals are no longer liable to conscription.

176. Around the time of the Christchurch massacre, there was some tension between Turkey and Australia following comments made by the President of Turkey about Australians. However, there is no evidence before the Tribunal of any ongoing hostility in Turkey to persons identifying as Australians.

177. There is in my view a very small risk that he will face some persecution by reason of his Australian status, or for that matter, his religion. I note that he claims to be a non-practising Christian. Faith is not central to his beliefs.

178. I consider overall this consideration to be of neutral significance.

OTHER CONSIDERATION (OC2) – STRENGTH, NATURE AND DURATION OF TIES

179. Under Paragraph 14.2, decision-makers are required to have regard to the strength, nature and duration of ties to Australia, including the length of time a person has resided in Australia; and the strength, duration and nature of any family or social links with Australian citizens.

180. The applicant has a large family in Australia, including two grandparents, 12 uncles and aunts, seven nieces, and 20 cousins.[176]

181. He has six children, all born in Australia.

182. He recently became a grandfather, when his oldest daughter had a child.[177]

183. He also has a 22 year old step-son, W2's previous child.[178]

---

[176] AB1, G2, 205.
[177] Transcript, 30 July 2020, 99.
[178] Ibid 53.

184. It is clear to the Tribunal that the applicant has extensive ties to this country. This is borne out by the sheer scale of his family network, including his large number of children and the birth of his grandchild.

185. I have explained above how the applicant arrived in Australia in 1988 as a seven year old and that his first offence was committed in 1997.

186. The respondent contends that the weight to be given to the time the applicant has resided in Australia should be '*appropriately balanced in circumstances where the applicant began criminally offending in Australia as a child approximately eight years after his arrival and has been offending since then, having been convicted of over 25 criminal offences over a 20 year period*".[179]

187. Child No. 1 gave evidence to the Tribunal. She said that her father was a very good father, indeed, '*a great father*':

> *How was your father when you lived with him? How would you describe - - -?*
> *He was very good. He was a great father.*
> *Can you give some examples of why you say he is a great father?*
> *Because he just did everything for us…*[180]

188. Despite this glowing report from his daughter, and indeed the positive affirmation from CB, his ex-mother-in-law, he can hardly be described as a model parent. An important aspect of parenting is to set an example, and to be a role model. In this aspect the applicant has not performed well, and all one can say is that by reason of the vicissitudes of his own sad upbringing, he was unable to transcend that suffering and ensure that his children were given a better chance in life. They have suffered periods where he was absent, in prison or in immigration detention, and they were taken into care. Since his incarceration which led to the mandatory cancellation of his visa, the applicant has been in custody for almost four years (3 years and 300 days). He has been in immigration detention since 8 December 2017, more than 1,000 days.[181]

---

[179] Respondent's Statement of Facts, Issues and Contentions (Respondent's SFIC) [71].
[180] Transcript, 30 July 2020, 101.
[181] AB1, G2, 220.

189. I am also mindful of the evidence given by the applicant that he is essentially Australian. It is obvious that this is not a correct description of the legal relationship of the applicant to this country, but in assessing the strength of his ties, his self-perception is not to be discounted.

190. I find that OC2 weighs strongly in favour of revocation.

OTHER CONSIDERATION (OC3) – BUSINESS INTERESTS

191. There is no evidence of any business interests in the relevant sense and this consideration is neutral.

OTHER CONSIDERATION (OC4) – IMPACT ON VICTIMS

192. There is no evidence of any impact on victims. This consideration is neutral.

OTHER CONSIDERATION (OC5) – EXTENT OF IMPEDIMENTS IF REMOVED

193. The applicant has just turned 39 years old. He has spent 32 years in this Anglophone country, to which he was brought as a young boy without any choice. It is important to emphasise that he did not choose to come to Australia, or to lose the customs and language associated with his home country. That was taken from him by decisions made by adults.

194. The deportation of a person who came here as a child and has lived here since is not beyond the reach of subsection 501(3A) of the Act, especially in a case where the offending is sustained and serious.[182]

195. The applicant stated categorically that he does not speak Turkish.[183] The respondent's solicitor conceded that he was not, by any means, fluent in Turkish.[184] It is not improbable that he could regain some proficiency in his birth language, although I would be reluctant

---

[182] *FCFY and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 3092, per Deputy President Constance and Member Evans.

[183] Transcript, 30 July 2020, 14.

[184] Ibid 4.

to base any finding on such speculation. The evidence is that the applicant has difficulty concentrating and would struggle to acquire such language proficiency.

196. It would be a daunting prospect for a person of the strongest mental fortitude to be deported with such a linguistic handicap. The evidence is that the applicant is not such a person. He has behavioural issues associated with his upbringing. He also suffers from depression and anxiety, according to numerous reports made during his time in prison. It is reasonable to conclude that his life problem solving skills are poorly developed and he has spent sufficient time in institutions to the extent that to some degree he has become institutionalised. During his later periods of detention, it appears that his mental state was deteriorating, and he required treatment for adjustment disorder, depressive symptoms and anger management.[185]

197. In terms of support systems in Turkey, he said that there was no family that would be willing to support him. As to his birth mother, the situation is as follows:

> *Did you ever ask anybody - any adult, "What happened to Mum"?---When I was younger once and my dad gave me a hiding for that.*
>
> *And have you ever spoken to your brother about what he discovered when he visited her?---No, no.*
>
> *Why not?---It's something that, to me, like even if so, like she's just a stranger, like I have no means to even - if she walked into my life now, like after 39 years I don't want anything to do - like she - she'll be - like I don't need to put myself into a heartache where she's almost on her death bed. No thank you.*
>
> *But did you not ever think that maybe - maybe you were taken away from your mother and that she didn't want to give you up?---No.*
>
> *You never asked? That question never actually occurred to you?---No, because if so she would've had somehow contacted my old man to get in some - at least try to get in contact with me to at least talk over the phone - not anything.*
>
> *But now that you're facing the possibility of deportation has it ever occurred to you that perhaps you should consider ways in which you might try to answer the question that I put to you - to find out whether, you know, there is something there?---No.*
>
> *So you would rather be begging on the streets of Istanbul than seeing whether, in fact, you've still got a mother?---Basically, yes. Because - - -*
>
> *Are you sure - - -?---Don't get me wrong - don't get me wrong on this, because like - like I said, after 39 years like to me she's a stranger. Don't misunderstand what I*

[185] Summonsed material, Vol 2, SM3, 833.

> *am saying but I have - like I don't even know if she is in Turkey. I don't even know if s he's in - like what country, you know what I mean, like.*
>
> *Okay. I understand your attitude. I am just asking you whether you've thought about these things?---No, no. Like - I did once upon a time. Don't get me wrong, I did and like I said, I asked my father what happens when I found out that my mum at the time was my step-mum and when I asked him about it he gave me a hiding and said "Never bring it up" and from there on I just never thought about it ever again.*[186]

198. His employment record in Australia is somewhat uneven and interrupted by his periods of time in detention and prison. It is inevitable that as a deportee with a criminal record he is likely to struggle to find employment. Moreover, on the basis of the evidence before the Tribunal I am not satisfied that the applicant is entitled to social security, having not contributed to the various employment-based schemes in any way. He would in all likelihood face extreme financial hardship and impoverishment. The harsh circumstances of economic deprivation may lead to further offending in Turkey.

199. There is no evidence to suggest that his children in Australia or his siblings will be able to support him in the future. His oldest daughter is barely 19 and has just had a child. His other children are still teenagers. There is nothing to suggest that any of them would be able to assist him.

200. I find that this consideration weighs heavily in favour of revocation.

WEIGHING THE FACTORS

201. It is a truism that juvenile delinquency is often rooted in the early family experience. Not all who come from broken families are doomed to such a life, but the path from survivor to perpetrator is a path well-travelled. Dysfunctional families provide the most fertile growing conditions, each in their uniquely unhappy way, to invoke Tolstoy. The family is a crucible of possibilities, but strife and terror tend to narrow the window of opportunity.

202. In this particular case, I have tried to understand the applicant's life story and history of offending. I have gone into his offending in some detail. I have also looked closely at the notes made by various professionals while he was in custody. I have done so in order to form a credible judgment as to the real risks associated with the reinstatement of his visa.

---

[186] Transcript, 30 July 2020, 72-73.

It cannot be said that his return to the community will be risk free. The question is whether the risk is of an acceptable magnitude.

203. I have made the following findings with respect to the considerations identified in Direction No. 79:

(a) PC1 and PC3 weigh against revocation of the mandatory cancellation of the applicant's visa;

(b) PC2, OC2 and OC5 weigh in favour of revocation;

(c) OC1, OC3 and OC4 are neutral.

204. The process of synthesising these various factors is complex. It is neither arithmetical nor formulaic. The decision that emerges must also consider the real impact of the revocation decision, whilst balancing the relevant considerations. However, it is inevitable that in a particular case certain factors may stand out as key elements. For example, in the present case, the following seem to me to be especially important.

205. As with many cases involving settled non-citizens who have developed and matured in this country, the applicant has put down deep roots. He has six children and a grandchild. He has a strong capacity to love and care for his children and grandchild, as testified to by CB, his ex-mother-in-law, and by his two oldest daughters. This is a very powerful consideration.

206. Moreover, despite three relationships that can only be described as dysfunctional, he has not been convicted of inflicting physical violence on women or children. This is highly relevant to the assessment of the risk of harm. He has made genuine efforts at rehabilitation by attending courses on anger management and psychological awareness.

207. In terms of the likelihood of recidivism, the applicant has an appreciation of the precariousness of his present life in Australia. He has looked deep into the abyss. He knows it would be a terrible mistake to assume that because of his circumstances as a father and a long established Australian resident, that further offending will be greeted with complacency by the authorities or by the respondent.

208. The applicant will confront serious challenges if returned to the Australian community. His previous challenges will be amplified by the present pandemic. CB, his ex-mother-in-law, says that he has a solid group of support persons, and counts herself amongst them. JA, his father's friend, has offered support and accommodation, at least in the short term. The applicant will certainly need to find credible and responsible support systems, and very soon after his release from immigration detention.

209. Although he fails the character test, I find that there is another reason why the original decision should be revoked.

210. I therefore decide that the decision of a delegate of the respondent dated 19 June 2018 is set aside and, in substitution, the mandatory cancellation of the applicant's Class BF transitional (permanent) visa is revoked.

I certify that the preceding 210 (two hundred and ten) paragraphs are a true copy of the reasons for the decision herein of Emeritus Professor P A Fairall, Senior Member

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

Associate

Dated: 14 October 2020

Date(s) of hearing:	**30 & 31 July 2020**
Counsel for the Applicant:	**Dr J Donnelly**
Solicitors for the Respondent:	**Clayton Utz**