Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

X and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2020] AATA 4860 (3 December 2020)

Division:	GENERAL DIVISION
File Number:	**2020/5701**
Re:	**X**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Dr L Bygrave, Member**
Date:	**3 December 2020**
Place:	**Sydney**

The Administrative Appeals Tribunal affirms the decision under review.

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

Dr L Bygrave, Member

CATCHWORDS

MIGRATION – visa cancellation – Class BB (subclass) 155 Resident Return visa – substantial criminal record – where applicant has been imprisoned on multiple occasions – previous administrative warning – drug offences – violent offending – drug misuse – Direction No. 79 – primary considerations – medium risk of reoffending – rehabilitative course completed – expectations of the Australian community – other considerations – ties to Australia – limited impediments if returned – decision under review affirmed

LEGISLATION

Drug Misuse and Trafficking Act 1985 (NSW)

Migration Act 1958 (Cth)

CASES

FYBR and Minister for Home Affairs [2019] FCA 500

FYBR and Minister for Home Affairs [2019] FCAFC 185

SECONDARY MATERIALS

Australian Crime Commission report: *The Australian Methylamphetamine Market: The national picture* (25 March 2015)

Australian Government, Department of Foreign Affairs and Trade: *(DFAT) Country Information Report Thailand* (10 July 2020)

Australia Government, Department of Health report: *National Drug Strategy 2017-2026* (18 September 2017)

Australian Government, Department of Prime Minister and Cabinet report: *Final Report of the National Ice Taskforce* (6 October 2015)

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

Dr L Bygrave, Member

3 December 2020

1. The applicant, Mr X, is a 44-year-old citizen of Thailand who first arrived in Australia on 15 March 1992.

2. On 24 June 2016, X was convicted of '[s]upply prohibited drugs on an ongoing basis' in the District Court of New South Wales (NSW), and sentenced to six years and nine months imprisonment with a non-parole period of five years.[1]

3. On 24 January 2019, the Department of Home Affairs (the Department) notified X that his Class BB (subclass 155) Five Year Resident Return visa (visa), granted on 1 February 2006, was cancelled under subsection 501(3A) of the *Migration Act 1958* (Cth) (the Act) because he did not pass the character test on the following ground: he had a 'substantial criminal record' as defined in subsection 501(7) of the Act because he had been sentenced to a term of imprisonment of 12 months or more.

4. X submitted a request for revocation of the mandatory visa cancellation decision pursuant to section 501CA of the Act on 6 February 2019.

5. On 11 September 2020, a delegate of the Minister[2] decided not to revoke the mandatory visa cancellation decision.

6. X subsequently applied to the General Division of the Administrative Appeals Tribunal (the Tribunal) for review of this decision on 18 September 2020.

7. The matter was heard in Sydney on 19 and 20 November 2020. Mr X attended the hearing by videoconference from Christmas Island. He had legal representation and gave oral evidence with the assistance of an interpreter of the Thai language.

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[1] Exhibit G-G5, page 33.

[2] Referred to in the decision as 'Delegate of a Minister administering the *Migration Act 1958'*.

RELEVANT LEGISLATION AND POLICY

The power to revoke a visa cancellation

8. Subsection 501(3A) of the Act provides that the Minister *must* cancel a visa that has been granted to a person if the Minister is satisfied the person does not pass the character test because of the operation of subsections 501(6) and 501(7).

9. Subsection 501(6) of the Act defines the character test. Relevantly, a person does not pass the character test if the person has a 'substantial criminal record' as defined by subsection 501(7). Subsection 501(7) 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.

10. In accordance with subsection 501CA(4) of the Act, the Minister *may* revoke the original cancellation decision if the Minister is satisfied that the person passes the character test; or there is another reason why the original decision should be revoked. This is a discretionary power.

11. Mr X does not pass the character test in subsection 501(6) of the Act because his criminal record, which comprises a sentence of six years and nine months imprisonment (with a non-parole period of five years), meets the statutory definition of a 'substantial criminal record' in subsection 501(7) of the Act. I must therefore consider whether there is another reason to revoke the original cancellation decision.

12. The power of the Tribunal to review the decision to cancel Mr X visa is provided by section 500 of the Act.

13. Under subsection 499(1) of the Act, the Minister has given written directions as to the exercise of the power to review the decision. Subsection 499(2A) of the Act provides that these directions must be complied with. The relevant direction is *Direction No. 79 – Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA* (Direction No. 79) issued by the Minister on 20 December 2018.

Direction No. 79

14. Paragraph 7 of Direction No. 79 sets out how the discretion is to be exercised. It states:

> *Informed by the principles in paragraph 6.3…, a decision-maker:*
>
> *…must take into account the considerations in Part C, in order to determine whether the mandatory cancellation of a non-citizen's visa will be revoked.*

15. Under the heading of 'General Guidance' at paragraph 6.2, Direction No. 79 states in part:

> *The Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. The principles …[in paragraph 6.3] are of critical importance in furthering that objective, and reflect community values and standards with respect to determining whether the risk of future harm from a non-citizen is unacceptable.*

16. In paragraph 6.3, the Minister sets out the principles that provide a framework to approach the task of deciding whether to revoke the decision to cancel a visa. These principles are:

> *(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*
>
> *(2) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia or elsewhere.*
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> *(3) A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against women or children or vulnerable members of the community such as the elderly or disabled, should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*
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> *(4) In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be 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 or refusing the visa.*
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> *(5) Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.*
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> *(6) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be*

no expectation that such people should be allowed to come to, or remain permanently in, Australia.

(7) The length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen's visa should be cancelled, or their visa application refused.

17. Paragraph 8 of Direction No. 79 requires the decision-maker to take into account the primary and other considerations relevant to the individual case. It states that '[o]ne or more primary considerations may outweigh other primary considerations', and 'information and evidence from independent and authoritative sources should be given appropriate weight'. Subparagraph 8(4) provides that '[p]rimary considerations should generally be given greater weight than the other considerations'.

18. The primary considerations the Tribunal must take into account in deciding whether to revoke the cancellation of the applicant's visa are set out in Part C of Direction No. 79 as follows:

(a) protection of the Australian community;

(b) the best interests of minor children in Australia affected by the decision; and

(c) expectations of the Australian community.

19. Direction No. 79 also sets out, at Part C, other considerations that must be taken into account, which include (but are not limited to):

(a) international non-refoulement obligations;

(b) strength, nature and duration of ties to Australia;

(c) impact on Australian business interests;

(d) impact on victims; and

(e) extent of impediments to the applicant if removed from Australia.

PRIMARY CONSIDERATION 1 – PROTECTION OF THE AUSTRALIAN COMMUNITY FROM CRIMINAL AND OTHER SERIOUS CONDUCT

20. Paragraph 13.1 of Direction No. 79 outlines the Government's commitment to protecting the Australian community from harm by non-citizens and requires that I consider:

(a) the nature and seriousness of the applicant's conduct to date; and

(b) the risk to the Australian community should the applicant commit further offences or engage in other serious conduct.

The nature and seriousness of Mr X conduct to date

21. Mr X criminal record is set out in an Australian Criminal Intelligence Commission (ACIC) report dated 11 February 2019. This report shows that since 30 May 1996, Mr X has been charged with and found guilty in the Courts of 21 offences that include possession and supply of prohibited drugs, assault, theft and driving unlawfully.

22. The ACIC report shows Mr X has been convicted of the following offences that have resulted in the Courts imposing sentences of imprisonment:

- NSW (Sydney) District Court: 12 June 2007.

  Offence: *specially aggravated take & detain for advantage*. Sentence: imprisonment for four years with a non-parole period of two years and eight months.

- Queensland (Southport) Magistrates Court: 14 February 2014.

  Offences: *possess thing with intent to forge documents*, *obtaining or dealing with identification information*. Sentence: conviction recorded on all charges and imprisonment for three months concurrent.

  Offences: *unlawful possession of suspected stolen property*, *fraud – dishonest application of property of another*. Sentence: conviction recorded on all charges and imprisonment for 12 months suspended for two years after serving four months concurrent.

  Offences: *possess property suspected of having been used in connection with the commission of a drug offence*, *assault or obstruct police officer*. Sentence: conviction recorded on all charges and not further punished.

- NSW (Waverley) Local Court: 29 January 2015.

  Offence: *deal with property suspected proceeds of crime*. Sentence: imprisonment for three months.

  Offence: *possess prohibited drug*. Sentence: imprisonment for one month.

- NSW (Waverley) Local Court: 3 February 2015.

  Offence: *drive conveyance taken w/o consent of owner.* Sentence: imprisonment for three months.

- NSW (Downing Centre) District Court: 24 June 2016.

  Offence: *supply prohibited drugs on an ongoing basis-SI*. Sentence: imprisonment for six years and nine months with a non-parole period with conditions of five years.[3]

23. The Courts have described the nature of Mr X convictions on 12 June 2007, 14 February 2014 and 24 June 2016.

24. Sentencing remarks by Judge Sweeney on 12 June 2007 stated that Mr X was found guilty of detaining a person without consent 'with intent to obtain an advantage, namely money' and occasioning actual bodily harm to the person.[4] Judge Sweeny summarised the facts of the offending as follows:

> *[The victim] and Mr X and his co-offenders…were known to each other, having a few months earlier facilitated the supply of approximately half a kilo of methylamphetamine, commonly known as "Ice" to some persons described as bikies. Some of the drugs were considered by the bikies to be of poor quality and they demanded a refund of $18,500, being part of the purchase price… [The victim] had given [a co-offender] $7,000 to partially defray the debt because he knew [he] was under pressure from the bikies.*
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> *Between the morning of 11 August and the morning of 13 August 2005, [the victim] was detained in his home…The purpose of the detaining was to obtain money which the offenders believed [the victim] had…*
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> *The evidence showed that [the co-offenders] were jointly directing the enterprise, but Mr X followed their directions and played his part, specifically hitting and punching [the victim]…ransacking the house to find money or financial documents;*

[3] Exhibit G-G5, pages 33-35.

[4] Exhibit G-G19, page 220.

monitoring some of [the victim's] phone calls so he did not alert anyone about his detention; guarding [the victim]…[5]

25. The Judge noted in her sentencing remarks that Mr X 'behaved less violently overall' than his co-offenders, but his account given in his interview to the police was 'largely self-serving and exculpatory'.[6] Also notable in the sentencing remarks, apart from the violent behaviour perpetrated towards the victim that resulted in him being hospitalised, was the presence of the victim's partner and 15-month-old child in the house during the offending.

26. In the Magistrates Court in Southport (Queensland) on 14 February 2014, Magistrate Kehoe described Mr X offences as 'a group of six charges' that included 'dishonest activity' relating to the use of credit cards, a drug charge, obstructing a police officer, possessing things with an intent to forge documents, and fraud.[7] Noting the submissions and that a 'sentence of imprisonment should only be imposed as a last resort', Magistrate Kehoe was satisfied that no sentence other than imprisonment was appropriate for Mr X.[8]

27. On 24 June 2016, Judge Traill in the NSW District Court stated that Mr X had pleaded guilty to one count of supply prohibited drug on an ongoing basis under section 25A of the *Drug Misuse and Trafficking Act 1985* (NSW). Judge Traill set out the agreed facts including that NSW police commenced an investigation into the supply of methylamphetamine and, on three separate occasions between 13 November 2014 and 28 November 2014, Mr X 'supplied a total of 203.66 grams of the prohibited drug methylamphetamine which is almost 41 times the applicable indictable amount'.[9] In imposing the sentence of a term of imprisonment of six years and nine months with a non-parole period of five years, Judge Traill considered the pre-sentence report that assessed Mr X as 'a medium risk of re-offending' and her judgement that Mr X 'was not a low level person in the organisation [supplying methylamphetamine] but…a middle man'.[10]

28. Both in a written statement dated 4 March 2019 and in his oral evidence to the Tribunal, Mr X did not dispute these facts of his criminal record and acknowledged the serious

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[5] Exhibit G-G19, pages 223-227.
[6] Exhibit G-G19, pages 222 and 227.
[7] Exhibit G-G7, page 49.
[8] Exhibit G-G7, page 49.
[9] Exhibit G-G6, page 41.
[10] Exhibit G-G6, page 47.

nature of his offending behaviour. He expressed remorse and stated that he is rehabilitated.

29. During his oral evidence, Mr X was asked about 'Incoming passenger cards' completed on his arrival into Australia (dated 2 February 1997, 21 October 1998, 14 January 1999 and 14 November 1999) in which he did not declare his criminal history.[11] Mr X accepted he had been convicted in the Courts of offences in 1996 and 1998, but said he believed when he completed the documents that the questions related to whether he had spent time in prison (which he had not at that time) and he did not intentionally provide false or misleading information to the Australian government.

30. The evidence shows Mr X received formal warnings that criminal convictions could result in the cancellation of his visa under section 501 of the Act. Prior to the letter sent by the Department on 24 January 2019 notifying Mr X that his visa was cancelled, he received the following written warnings:

- On 20 December 2007, the (then-named) Department of Immigration and Citizenship wrote a 'FORMAL COUNSELLING LETTER' [emphasis in original] to Mr X advising that he has a criminal history in Australia and explaining the provisions of section 501 of the Act. It stated:

  > ***The purpose of this letter is to warn you that any further criminal convictions, or any other conduct on your behalf that comes within the scope of subsection 501(6)*** *[of the Act],* ***could result in the consideration of the cancellation of your visa or refusal of your application under section 501 of the Act.***
  >
  > ***I note that the consequences of visa cancellation under section 501 of the Act include removal of the former visa holder from Australia and, in certain cases, bars on re-entering Australia.***[12] [emphasis in original]

- On 27 February 2014, the (then-named) Department of Immigration and Border Protection wrote to Mr X stating he had been convicted of a criminal offence and:

  > *…it may be necessary to consider cancellation of your visa under section 501 of the Migration Act 1958. However, please note the question of whether or not to cancel your visa is not under formal consideration at this time.*[13]

[11] Exhibit G-G21, pages 235-238.

[12] Exhibit G-G21, page 239.

[13] Exhibit TBR-TB11, page 275.

31. Mr X acknowledged to the Tribunal that he had received and read these letters. However, he said that on both occasions he subsequently relapsed into using drugs, and it was not until his visa was actually cancelled on 24 January 2019 that he finally realised and understood the consequences of his offending.

32. Having regard to the factors set out in paragraph 13.1.1 of Direction No. 79, I find the evidences shows:

- Mr X has committed serious and violent offences. The seriousness of his crimes is shown by the lengths of sentences of imprisonment imposed by the Courts on 12 June 2007 and 24 June 2016.
- Mr X has been convicted of 21 offences since 30 May 1996. There is evidence of repeated offending, particularly in relation to the possession of prohibited drugs. There is also a trend of increasing seriousness as shown by his conviction of 'supply prohibited drugs on an ongoing basis' in 2016.
- Mr X did not declare his criminal offending on four 'Incoming passenger cards' to Australia from 1997 to 1999; however, he provided the Tribunal with an adequate explanation for this non-disclosure.
- Prior to the cancellation of his visa by the Department on 29 January 2019, Mr X was warned in writing on 20 December 2007 and 27 February 2014 that the consequences of further offending could result in the cancellation of his visa under section 501 of the Act.

33. I am satisfied the frequency and cumulative effect of Mr X criminal behaviour is a matter of significant concern, particularly as he continued to offend after receiving formal warnings from the Department. I find that the nature and seriousness of Mr X offending weighs very heavily against revoking the cancellation of his visa.

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

34. In a written statement dated 4 March 2019, Mr X stated that he accepted his offence in relation to 'supply prohibited drug on an ongoing basis' is 'plainly serious' and, as 'a former drug user', he is 'cognisant of the devastating impact drugs can have on victims

and their family and friends'.[14] Mr X wrote that his time in prison has allowed him to reflect on his criminal conduct and he believes he is 'rehabilitated in relation to [his] offending and will not engage in further offences in the future'.[15] He expressed sincere remorse and stated he takes 'full responsibility for engaging in the criminal conduct'.[16]

35. Mr X accepted in his oral evidence that he had been involved in a fight with a fellow inmate while in prison on 18 October 2015 and had a positive drug test result on 20 October 2015. However, he said he made a decision to change his behaviour after he returned a positive result to methylamphetamine in a target urinalysis conducted in prison on 4 February 2017.[17] Mr X described this incident as a turning point and said he has not used drugs since this time. This is confirmed in his urinalysis testing history reports.[18]

36. Mr X, both in his written statement dated 4 March 2019 and his oral evidence to the Tribunal, described his education and the rehabilitation courses he has undertaken between 2015 and 2019. He spoke positively about his self-referral to and completion of the Intensive Drug and Alcohol Treatment Program (IDATP) in 2018. He said that although he completed the Get Smart Drug and Alcohol Program during his time in prison from 2006 to 2009, he did not find this program effective. Mr X said the IDATP program had taught him about himself, how to socialise and how to be involved in the community. He also spoke about his opportunity to mentor young-adult offenders while in prison and his positive participation in this program is set out in case note reports by the NSW Department of Corrective Services during 2019.[19]

37. I have also had regard to reports before the Tribunal about the likelihood of Mr X reoffending.

38. Dr Richard Furst (consultant forensic psychiatrist) provided a written report on 27 April 2016 that set out his assessment of Mr X background and any relevant psychiatric/ psychological mitigating factors at the time of his offence of supply prohibited drug on an

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[14] Exhibit G-G13, page 85.
[15] Exhibit G-G13, page 85.
[16] Exhibit G-G13, page 86.
[17] Exhibit TBR-TB10, page 234.
[18] Exhibit G-G13, page 141-143.
[19] Exhibit TBA1.

ongoing basis. Dr Furst diagnosed Mr X with 'substance use disorder (methyl-amphetamine addiction)'[20] and provided the following prognosis:

> *Mr X offence is clearly serious and he has a previous history of drug-related and other offences. However, he has accepted his guilt, regrets his actions, has insight into substance abuse issues and emotional problems, has a supportive family and good record of employment and does not want to use drugs again. He does not have a major mental illness and was reasonably engaging at the time of assessment.*
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> *Those factors mean that* ***his risk of re-offending is probably moderate and he has reasonable prospects of being successfully rehabilitated****, especially if he is able to remain abstinent from drugs of abuse and returns to a stable work routine.*[21] [emphasis added]

39. Dr Furst stated Mr X denied 'any temptation to use "ice" again' but recommended he would 'benefit from further structured counselling/rehabilitation and a return to the workforce to maintain abstinence from drugs of abuse'.[22]

40. I note that, despite stating to Dr Furst in April 2016 that he was not tempted to use ice again, Mr X tested positive to methylamphetamine ten months later in February 2017.

41. A pre-release report for Mr X dated 20 December 2019 described his post-prison release plans, which include living with his mother and aunt and engaging in full-time employment. This report set out the reasons for Mr X release to parole as including his satisfactory conduct in prison, completion of offence specific programs, return to a supportive familial environment, regular access to identified interventions in the community, access to full-time employment and assistance with transitioning into the community. This report noted a 'pivotal time for Mr X was his participation in IDATP', which helped him to develop 'insight into his offending behaviour' and 'identify risk factors associated with that behaviour'.[23] Mr X was 'assessed at a **Medium** risk of reoffending'.[24] [emphasis in original]

42. Mr X provided a supplementary written statement to the Tribunal dated 20 October 2020. He wrote that during his time in immigration detention, he has 'kept out of trouble' and

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[20] Exhibit TBA2, page 5.
[21] Exhibit TBA2, page 6.
[22] Exhibit TBA2, pages 5-6.
[23] Exhibit TBA1, page 39.
[24] Exhibit TBA1, page 37.

'avoided drugs [and]…spending time with troublemakers'.[25] He also set out his future plans if released into the Australian community, including working part-time as a chef in a café owned by his half-brother and living with his mother, aunt, uncle and cousin.

43. In relation to Mr X likelihood of recidivism, I have had regard to the assessment by Dr Furst in April 2016 that his risk of re-offending was 'probably moderate' and the pre-release report in December 2019 that assessed he had a 'medium risk' of reoffending. I note that Mr X continues to receive support from his family and has employment prospects.

44. I accept that Mr X evidence to the Tribunal shows he is genuine in his attempt to change his life. At his hearing, he said he has evaluated himself during his most recent period in prison and immigration detention, and now recognises his past behaviour using drugs and criminal offending was 'bad' and 'wrong'.

45. However, Mr X current intentions remain untested in the Australian community. His past criminal offending has involved the use and supply of prohibited drugs. I have regard to the following reports and evidence regarding drugs in Australia:

- The 2015 report by the Australian Crime Commission on *The Australian Methylamphetamine Market: The national picture* outlined that methylamphetamine is 'highly addictive and is used more often and for longer periods than other drugs.'[26]
- The *Final Report of the National Ice Taskforce* in 2015 described the 'distinct problem' that ice has caused for individual, families, communities and frontline workers, and the increasing supply of ice from 2010 to 2014.[27]
- The *National Drug Strategy 2017-2026* report identified health, social and economic harms caused by drugs on the Australian community.[28]

[25] Exhibit A1.
[26] Exhibit TBR-TB13.
[27] Exhibit TBR-TB17.
[28] Exhibit TBR-TB18.

46. In considering the harm and potential risk to the Australian community if Mr X were to reoffend in the future, I am extremely mindful of the nature and seriousness of his past criminal behaviour that included the use and supply of prohibited drugs. I view the nature of the harm that would be caused if Mr X engaged in further criminal conduct to be a very significant risk to individuals and the Australian community.

47. On balance, I am satisfied the protection of the Australian community weighs very heavily against revoking the decision to cancel Mr X visa.

PRIMARY CONSIDERATION 2 – THE BEST INTERESTS OF MINOR CHILDREN IN AUSTRALIA AFFECTED BY THE DECISION

48. Paragraph 13.2(4) of Direction No. 79 sets out the factors I *must* consider in relation to whether revoking the cancellation decision is in the best interests of a minor child affected by the decision. Relevant to this factor are the nature and duration of the relationship, the extent to which the applicant is likely to play a positive parental role, the likely effect any separation would have on the child, and whether there are other persons who already fulfil a parental role for the child.

49. Mr X has a son living in Thailand from a relationship that ended in 2002. In his statement dated 4 March 2019, Mr X wrote:

> *[M]y former de facto partner in Australia disappeared back to Thailand before the birth of my child… I have never had the opportunity to meet my child. I also have not had any contact with my de facto partner since the cessation of our relationship many years ago.*[29]

50. Mr X has no biological children living in Australia. He has a two-year-old niece, the daughter of his younger brother, who he has never met in person. In submissions to the Department on 6 March 2019, Mr X legal representative accepted that he 'does not have any existing relationship with [this] child'.[30]

51. I find this primary consideration neither weighs for nor against revoking the decision to cancel Mr X visa.

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[29] Exhibit G-G13, page 84.

[30] Exhibit G-G13, page 114.

PRIMARY CONSIDERATION 3 – EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

52. Paragraph 13.3(1) of Direction No. 79 provides:

> *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.*

53. I also have regard to the decision of Perry J in *FYBR v Minister for Home Affairs* in which he observed:

> *…it is not for the Tribunal to determine for itself the expectations of the Australian community by reference to the applicant's circumstances or evidence about those expectations. Rather, the Tribunal must give effect to the "*norm*" stipulated in cl 11(3) which will of its nature weigh in favour of refusal, at least in most cases.*[31]

54. I note a majority of the Full Federal Court (Charlesworth and Stewart JJ) upheld this approach in *FYBR v Minister for Home Affairs*.[32]

55. Considering the requirement of paragraph 13.3(1) and the principles set out in paragraph 6.3 of Direction No. 79, I am satisfied the Australian community expects a non-citizen will obey Australian laws, not cause harm to individuals or the Australian community and the Australian government should cancel the visa of a non-citizen if they commit serious crimes. I further note that paragraph 6.3 of Direction No. 79 describes circumstances where the Australian community *may* afford a higher level of tolerance of criminal conduct to a non-citizen who has lived in Australia for most of their life and/or has made a positive contribution to the Australian community. The consequences of a visa cancellation for 'immediate family members' in Australia should also be considered.

56. Mr X was born in Thailand in 1976 and is the eldest son of his biological parents. Mr X parents divorced when he was 14 years old. His father, a truckdriver, remained in

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[31] [2019] FCA 500, [42].

[32] [2019] FCAFC 185, [61]-[84], [104].

Thailand and later established a second family. Mr X told the Tribunal he has not seen or spoken with his biological father for about 25 years.

57. Mr X mother married an Australian and, together with his mother and younger brother (born in 1981), he came to Australia in 1992. Mr X did not get on with his Australian stepfather and later moved to live with his aunt (his mother's sister). His mother and stepfather had a son (Mr X half-brother) who was born in 1997.

58. Mr X mother and stepfather are now divorced. Family members of Mr X who are Australian citizens residing in Australia are his mother, his younger brother and half-brother, and two aunts.

59. Mr X attended English classes and completed high school to year 10. He then trained as a chef working mostly in Thai restaurants. He provided the following employment history: 1996–1998 kitchen hand; 1998–2000 apprentice chef; 2000–2004 self-employed chef; 2009–2012 manager/chef; and 2012–2014 chef.

60. Mr X immigration records show that he travelled between Australia and Thailand on seven occasions from 1995 to 2001. This travel included an extended period in Thailand from May 1998 to November 1999, with only two short return trips to Australia in October 1998 (seven days) and January 1999 (four days). Mr X explained to the Tribunal that he lived with his then-girlfriend in Bangkok and did not work in Thailand during this period. Mr X last arrived in Australia in January 2001 and has undertaken no further travel to Thailand or overseas.

61. Based on this evidence, I am satisfied that Mr X arrived in Australia as a child in what would have been difficult personal circumstances for a 15-year-old; he was required to adjust to a new family, school, language and country. I also note he has participated in employment in Australia when not incarcerated, although his periods of stated employment do not reconcile with his travel records that show he primarily resided in Thailand from May 1998 to November 1999. I further accept that he has immediate adult family members in Australia (his mother, brother and half-brother) who would be affected if his visa cancellation is not revoked and he is removed to Thailand.

62. I have set out Mr X criminal conduct, including the nature and seriousness of his offending, in paragraphs 21 to 47 above. It is indisputable that the Australian community would experience significant harm if Mr X repeated his past offences, which included serious and violent behaviour, and the use and supply of prohibited drugs.

63. I am satisfied this primary consideration weighs heavily against revoking the mandatory cancellation of Mr X visa.

OTHER CONSIDERATIONS IN DIRECTION NO. 79

64. Paragraph 14 of Direction No. 79 sets out other considerations that must be taken into account in deciding whether to revoke the mandatory cancellation of a visa.

65. Relevant other considerations to Mr X application are the strength, nature and duration of his ties to Australia; and the extent of impediments if he is removed from Australia. For completeness, there is no evidence before the Tribunal that the other considerations of international non-refoulement obligations, impact on Australian business interests or the impact on victims is relevant to these proceedings.

Strength, nature and duration of ties to Australia

66. In considering the strength, nature and duration of Mr X ties to Australia, paragraph 14.2(1) of Direction No. 79 provides that:

> *…Reflecting the principles at 6.3, decision-makers must have regard to:*
>
> *(a) How long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that:*
>
> *(i) less weight should be given where the non-citizen began offending soon after arriving in Australia; and*
>
> *(ii) more weight should be given to time the non-citizen has spent contributing positively to the Australian community.*
>
> *(b) The strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia, including the effect of non-revocation on the non-citizen's immediate family in Australia (where those family members are Australian citizens, permanent residents, or people who have a right to remain in Australia indefinitely).*

67. Mr X arrived in Australia in 1992 when he was 15 years old. He is currently single and his mother, younger brother and half-brother, and two aunts (all Australian citizens) reside in Australia. Mr X does not own any business or property in Australia.

68. In his Personal Circumstances Form completed on 6 February 2019, Mr X stated:

> *All of my family in Australia will suffer significant emotional distress if I am removed to Thailand.*[33]

69. Mr X told the Tribunal that he needs to remain in Australia to care for his mother because she has 'significant ongoing health issues'.[34] He also stated that his immediate and extended family members in Australia will be adversely affected if he is removed from Australia.

70. Mr X mother, brother and half-brother, and two family friends provided written statements in support of Mr X and gave oral evidence at his Tribunal hearing. His two aunts in Australia also provided supporting written statements. This evidence outlined Mr X close relationship to his mother, brother and half-brother, and aunts. Both Mr X brothers particularly conveyed significant concern for their mother (his half-brother said it would be a 'massive shock') if Mr X visa cancellation is not revoked and he is removed to Thailand.

71. Mr X mother expressed her love and support for her son, and outlined plans to open a café with money from her divorce settlement. In her written statement on 19 March 2019, Mr X mother said:

> *…[G]iven my ongoing financial and health issues, I will not be in a position to visit my son at all in Thailand…*
>
> *My son is an important part of my life and I do not know how I will be able to live long-term in Australia without him. Given the deterioration of my health, I do not wish to return to Thailand at all (as the health system is much better in Australia).*[35]

72. I accept Mr X mother is close to her son and would be extremely distressed if he is removed from Australia. However, the oral evidence of Mr X mother was that she has recently returned to Australia after she travelled to Thailand in February 2020 and was unable to fly back to Australia due to the COVID-19 pandemic. She also told the Tribunal

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[33] Exhibit G-G10, page 66.

[34] Exhibit G-G13, page 91.

[35] Exhibit G-G13, pages 97-98.

that she has returned to Thailand regularly to visit her siblings (in particular to see her sister who died of cancer in 2018) and holiday. Last year, she travelled to Thailand for an eye operation because she had access to free medical care as a citizen of Thailand. In view of this evidence, I place less weight on the statement by Mr X mother that she is not able to visit her son in Thailand due to her health and financial concerns.

73. I am satisfied Mr X has strong family and social ties to Australia. Mr X has lived in Australia for 28 years and made some positive contributions through employment. However, I place less weight on this consideration because Mr X criminal record shows his first conviction occurred only four years after his arrival in Australia.

74. I find consideration of the strength, nature and duration of Mr X ties to Australia weigh in favour of revoking the decision to cancel his visa.

Extent of impediments if Mr X is removed from Australia

75. The extent of impediments if Mr X is removed from Australia relies on his capacity to establish himself and maintain basic living standards in Thailand. Pursuant to paragraph 14.5 of Direction No. 79, I must consider Mr X age and health, whether there are any substantial language or cultural barriers, and any available social, medical and/or economic support available to him in Thailand.

76. Mr X is 44 years old. He speaks the Thai language fluently (he was assisted by an interpreter of the Thai language at the Tribunal hearing) and has spent time in Thailand both as a child to the age of 15 years and as a young adult. I accept Mr X has not seen or spoken with his biological father for 25 years. However, he has extended family members in Thailand and his mother has travelled regularly to Thailand in the past. There is no evidence there are any language or cultural barriers to Mr X living in Thailand.

77. In his Personal Circumstances Form on 6 February 2019, Mr X reported he has hepatitis B and 'must go to hospital every 3 month[s] to check blood' and 'T.B'.[36] Mr X confirmed to the Tribunal at his hearing that he has hepatitis B, but not TB. There is no medical evidence before the Tribunal that Mr X has any other physical or mental health problems.

[36] Exhibit G-G10, page 69.

78. In his written statement dated 4 March 2019, Mr X observed that Thailand does not have 'social services or welfare services comparable to Australia'.[37] He further submitted his 'prospects of life in Thailand are very limited' and he will become 'homeless, unemployed and destitute'.[38] He told the Tribunal he is concerned that he will not have the financial means for medical support in Thailand and believes he will not be able to find employment because he has been in prison in Australia.

79. I have also had regard to an Australian Government, Department of Foreign Affairs and Trade *(DFAT) Country Information Report Thailand* (10 July 2020) that outlined 'Thailand's official unemployment rate of 0.7 per cent in January 2020 is among the lowest in the world' and '[m]ore than half of the active labour force is estimated to work in the services sector'.[39] This Report further stated that citizens of Thailand have access to 'public health services provided by the State'.[40]

80. Mr X has qualifications and employment experience as a chef in Australia, and he has owned a food business. While I accept Mr X would not have access to the Australian welfare system and social security payments if he is removed to Thailand, there is *no* objective evidence before the Tribunal to suggest that he would be unable to obtain employment, find suitable accommodation and resume a life in Thailand. I accept this view assumes that Mr X will not use prohibited drugs in the future.

81. Although Mr X history of substance abuse was not explicitly raised at the hearing as an impediment if he is removed from Australia, I nonetheless believe it is an issue that should be addressed. The evidence of Mr X, which is supported by Dr Furst's report and his December 2019 pre-release report, is that he has shown insight into his substance abuse issues, and has identified the support of his family and access to employment in Australia as factors that will assist him to abstain from drug abuse in the future. It is clear that the support of his family and access to employment will not be as readily available to Mr X in Thailand.

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[37] Exhibit G-G13, page 91.
[38] Exhibit G-G13, page 91.
[39] Exhibit TBR-TB14, page 357.
[40] Exhibit TBR-TB14, page 360.

82. I am satisfied that there are some impediments, including being removed from the emotional and financial support of his family in Australia, that would affect Mr X living in Thailand. However, I am also satisfied that there are no cultural, language, employment or health reasons that would adversely affect Mr X capacity to establish himself and maintain basic living standards in Thailand.

83. I find that this consideration weighs neither for nor against revoking the decision to cancel Mr X visa.

CONCLUSION

84. I am satisfied that the first and third primary considerations weigh heavily against the revocation of the mandatory visa cancellation, and the second primary consideration weighs neither for nor against revocation.

85. In relation to the other considerations, I find Mr X substantial ties to Australia weigh for revoking the cancellation of his visa, while the impediments to his removal from Australia weigh neither for nor against revoking the decision to cancel his visa.

86. I note the requirement in Direction No. 79 that primary considerations should *generally* be given greater weight than the other considerations. There is no evidence before the Tribunal that suggests this should not apply to the circumstances of Mr X.

87. Weighing the primary considerations and other considerations, I am not satisfied there is another reason why the mandatory cancellation of Mr X visa should be revoked. I therefore find the correct and preferable decision is not to revoke the mandatory cancellation of Mr X visa.

DECISION

88. The Tribunal affirms the decision made by a delegate of the Minister on 11 September 2020 to not revoke the mandatory cancellation of Mr X visa.

I certify that the preceding 88 (eighty-eight) paragraphs are a true copy of the reasons for the decision herein of Dr L Bygrave, Member

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

Associate

Dated: 3 December 2020

Dates of hearing:	**19 and 20 November 2020**
Counsel for the Applicant:	**Dr J Donnelly**
Solicitors for the Respondent:	**Mr M Hawker, Sparke Helmore Lawyers**