Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number:	**2023/4708**
Re:	**Agyapal Singh**
	APPLICANT
And	**Minister for Immigration, Citizenship and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Member R. Maguire**
Date:	**14 May 2024**
Place:	**Brisbane**

Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal **affirms** the decision made by a delegate of the Respondent on 27 June 2023 to not revoke the mandatory cancellation of the Applicant's Class WC Subclass 030 Bridging C visa.

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

Member R. Maguire

Catchwords

MIGRATION – non revocation of a mandatory cancellation of visa- remittal- where Applicant does not pass the character test – whether there is another reason to revoke the mandatory cancellation decision – consideration of Ministerial Direction No. 99 – where the Applicant's criminal history is lengthy for associated time in the community- where Tribunal finding the Applicant's evidence to be untrustworthy- Tribunal not satisfied Applicant's recidivist risk is acceptable- where Tribunal finding that factors in favour of revocation outweighed by factors against revocation- Tribunal finding there is no another reason to revoke the mandatory cancellation decision- decision under review affirmed

Legislation

Administrative Appeals Tribunal Act 1975 (Cth)
Criminal Code Act 1899 (Qld)
Migration Act 1958 (Cth)
Migration Regulations 1994 (Cth)

Cases

Afu v Minister for Home Affairs [2018] FCA 1311
BSJ16 v Minister for Immigration and Border Protection [2016] FCA 1181
FYBR v Minister for Home Affairs [2019] FCA 500
FYBR v Minister for Home Affairs [2019] FCAFC 185
HZCP v Minister for Immigration and Border Protection [2019] FCAFC 202
Ismail v Minister for Immigration, Citizenship and Multicultural Affairs [2024] HCA 2
Minister for Home Affairs v Stowers [2020] FCA 407
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane [2021] HCA 41
Plaintiff M1-2021 v Minister for Home Affairs [2022] HCA 17
Suleiman v Minister for Immigration and Border Protection [2018] FCA 594
Uelese v Minister for Immigration and Border Protection [2016] FCA 348
YNQY v Minister for Immigration and Border Protection [2017] FCA 1466

Secondary Materials

Ministerial Direction No. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA (3 March 2023)

REASONS FOR DECISION

Member R Maguire

14 May 2024

1. The Applicant seeks the review of a decision made by a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs ("**the Respondent**") on 27 June 2023 pursuant to s 501CA(4) of the *Migration Act 1958* (Cth) ("**the Act**"), not to revoke a decision under s 501(3A) of the Act to cancel the Applicant's Class WC Subclass 030 Bridging C visa ("**the Visa**").

2. Section 501CA(4) of the Act provides that the decision-maker may revoke the mandatory cancellation of a visa if the person made representations within the relevant time period provided for in the *Migration Regulations 1994* (Cth) ("**the Regulation**") (28 days in accordance with reg 2.52), and the decision-maker determines that the Applicant passes the "*character test*", or, as provided under s 501CA(4)(b), there is another reason why the mandatory cancellation should be revoked. The Respondent Minister accepted that the Applicant had made the necessary representations within the prescribed period.

3. Section 501(3A) of the Act is a mandatory cancellation power. It relevantly provides that the Respondent Minister (or his delegate) must cancel a visa that has been granted to a person if, under s 501(6)(a) of the Act the person does not pass the character test because they have a substantial criminal record as defined by s 501(7) of the Act. Relevantly, s 501(7) states:

> *7 For the purposes of the character test, a person has a substantial criminal record if:*
>
> *...*
>
> *(c) the person has been sentenced to a term of imprisonment of 12 months or more;...*

4. The term "*imprisonment*" is defined to include any form of punitive detention in a facility or institution: s 501(12) of the Act.

5. The Applicant is a 29 year old citizen of India, who first arrived in Australia on a subclass 500 student visa on 29 June 2018. He departed Australia on 2 January 2020, and returned on 11 February 2020, and has remained here since.

6. Prior to the issue of the visa, the Applicant was granted an initial Class WC Subclass 030 visa on 11 December 2020 while his Partner (subclass 820 visa was being processed. The visa was issued on 18 November 2022. Both the initial visa and the visa were issued subject to Bridging visa condition 8101 – No Work. The holder must not engage in work in Australia[1]

7. Regulation 1.03 of the Regulations relevantly defines "work" as '*an activity that, in Australia, normally attracts remuneration*.'

8. On 17 November 2022, the applicant was sentenced 12 months' imprisonment[2].

9. This sentencing led to the mandatory cancellation of the Applicant's visa on 14 December 2023 pursuant to s 501(3A) of the Act. Notice of this decision was given to the Applicant by hand on that date.[3]

10. In accordance with reg 2.52(2)(b) of the Regulation the Applicant was invited in accordance with s 501CA(3)(b) of the Act to make representations to the Respondent Minister about revoking the cancellation decision within 28 days after he had received the notice, and he did so within the period and in the manner specified.[4]

11. On 27 June 2023, a delegate of the Respondent, acting pursuant to s 501CA(4) of the Act, decided not to revoke the visa cancellation decision made under s 501(3A) of the Act.[5] The Applicant was notified of this decision by email on that date, and the Applicant made the present application to this Tribunal for a review of that decision.[6] The Tribunal has jurisdiction to review this decision pursuant to s 500(1)(ba) of the Act.

12. On 19 September 2023, the Tribunal (differently constituted) affirmed the decision under review and published its reasons for doing so on 19 October 2023.[7]

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[1] Ex R1 p 727.
[2] Ex R1 p 368.
[3] Exhibit R1 p 576.
[4] Exhibit R1 p 528.
[5] Exhibit R1, pp 480-503.
[6] Exhibit R1, pp 4-13.
[7] Ex R1 p 986.

13. On 18 December 2023, that decision was set aside by the Federal Court of Australia, and the matter was remitted to be reconsidered and re-determined according to law back to this Tribunal[8].

14. The remittal hearing for this matter was held by video link in Brisbane on 15 and 16 April 2024 with the assistance of an interpreter. Dr Donnelly of counsel appeared for the Applicant, instructed by Zarifi Lawyers. Ms Ho of Clayton Utz represented the Respondent.

ISSUES

15. Revocation of the mandatory cancellation of visas is governed by s 501CA(4) of the Act. Relevantly, this provides that:

> *4 The Minister may revoke the original decision if:*
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> *(a) the person makes representations in accordance with the invitation; and*
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> *(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.*

16. The Applicant has made the representations required by s 501CA(4)(a) of the Act. Section 501CA(4)(b)(ii) requires the Tribunal to examine the factors for and against revoking a mandatory cancellation decision to assess if there is another reason why the cancellation decision should be revoked. This assessment is made by reference to the representations made by the applicant which the Tribunal is required to read, identify, understand and evaluate.[9]

17. If the Tribunal exercises the power conferred by s 501CA(4) and in giving reasons makes a finding of fact, the Tribunal must do so based on some evidence or other supporting material, rather than no evidence or no material, unless the finding is made in accordance with the Tribunal's personal or specialised knowledge or by reference to that which is

[8] Ex R1 p 901.

[9] *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17 at [22] and [36].

commonly known. It is open to the Tribunal to adopt the accumulated knowledge of the Department.[10]

18. As provided in s 501CA(4)(b) of the Act, there are therefore two issues presently before the Tribunal:

- whether the Applicant passes the character test; and, if not,
- whether there is another reason why the decision to cancel the Applicant's Visa should be revoked.

19. If the Applicant succeeds on either ground, the weight of authority indicates that the Tribunal must find that the cancellation of the Applicant's visa must be revoked.

DOES THE APPLICANT PASS THE CHARACTER TEST?

20. The character test is defined in s 501(6) of the Act. Under s 501(6)(a), a person will not pass the character test if they have "*a substantial criminal record*". This phrase, in turn, is relevantly defined in s 501(7)(c), which provides that a person will have a substantial criminal record if they have "*been sentenced to a term of imprisonment of 12 months or more*". In addition, and as an alternative, s 501(7)(d) provides that a person will have a substantial criminal record if the person "*has been sentenced to two or more terms of imprisonment, where the total of those terms is 12 months or more*." Section 501(7A) provides that for the purposes of the character test, if a person has been sentenced to two or more terms of imprisonment to be served concurrently (whether in whole or in part) the whole of each term is to be counted in working out the total terms.

21. It was conceded on behalf of the Applicant that the information contained in his Australian Criminal Intelligence Commission Check Results Report[11] (ACICCRR) dated 21 December 2022 was not disputed. Neither was it disputed that he did not pass the character test.[12]

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[10] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* [2021] HCA 41 at [17]-[20].

[11] Ex R1 p 504-507.

[12] Ex A2 pars 3-5.

22. The remaining question therefore is found in s 501CA(4)(b)(ii) of the Act, namely whether there is another reason why the original decision should be revoked.

IS THERE ANOTHER REASON FOR REVOCATION OF THE CANCELLATION OF THE APPLICANT'S VISA?

Ministerial Direction No. 99

23. In considering whether to exercise the discretion in s 501CA(4) of the Act, the Tribunal is bound by s 499(2A) to comply with any directions made under the Act. In this case, *Direction No 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ("**the Direction**" or "**Direction 99**") has application.[13] The Direction provides guidance for decision-makers on how to exercise the discretion in s 501CA(4) of the Act.

24. Relevantly, the Direction states that:[14]

> *"Informed by the principles in paragraph 5.2, a decision maker must take into account the considerations identified in sections 8 and 9, where relevant to the decision."*

25. The principles that are found in paragraph 5.2 of the Direction are as follows:

> *1 Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*
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> *2 Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*
>
> *3 The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether*

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[13] On 3 March 2023, the former applicable direction, *Direction No. 90 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*, was revoked and was replaced by Direction 99.

[14] *Direction No 99 – Migration Act 1958 – Direction under section 499: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ("**the Direction/ Direction 99"),** page 5, Part 2, 6 – *Making a decision*.

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the non-citizen poses a measurable risk of causing physical harm to the Australian community.

4 Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, or by other non- citizens who have been participating in, and contributing to, the Australian community only for a short period of time.

5 With respect to decisions to refuse, cancel and revoke cancellation of a visa, Australia will generally afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age. The level of tolerance will rise with the length of time a non-citizen has spent in the Australian community, particularly in their formative years.

6 Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation. In particular, the inherent nature of certain conduct such as family violence and the other types of conduct or suspected conduct mentioned in paragraph 8.55(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.

26. Paragraph 7(1) of the Direction provides that in applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight. Paragraph 7(2) provides that primary considerations should generally be given greater weight than the other considerations. Paragraph 7(3) provides that one or more primary considerations may outweigh other primary considerations.

27. Paragraph 8 of the Direction sets out five Primary Considerations that the Tribunal must take into account and they are:

(1) protection of the Australian community from criminal or other serious conduct;

(2) whether the conduct engaged in constituted family violence;

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

(4) the best interests of minor children in Australia; and

(5) expectations of the Australian community.

28. Paragraph 9(1) of the Direction sets out four Other Considerations which must be taken into account. These considerations are:

(a) legal consequences of the decision;

(b) extent of impediments if removed;

(c) impact on victims; and

(d) impact on Australian business interests.

29. The Tribunal notes that whilst the Direction provides "Primary" and "Other" considerations, "Other" considerations are not secondary considerations, as noted by Colvin J in *Suleiman v Minister for Immigration and Border Protection*.[15]

30. In considering issues of family violence, regard must be had for para. 4(1) of the Direction which defines ***"member of the person's family"*** to include present and former intimate partners:

> *'member of the person's family, for the purposes of the definition of the definition of family violence, includes a person who has, or has had, an intimate personal relationship with the relevant person.'*

31. The Tribunal now turns to addressing the relevant considerations.

32. Unless the context indicates otherwise, passages quoted in bold have been emphasised by the Tribunal.

Documentary evidence before the Tribunal

33. In reaching its decision the Tribunal has taken into account the evidence and submissions at hearing and all of the documents listed in the Exhibit Register which is annexed to these reasons.

[15] [2018] FCA 594 at [23].

34. The ACICCRR, together with the Verdict and Judgment Record[16], together with the Queensland Police Service Traffic Record[17] show that the Applicant has been convicted or found guilty of multiple criminal offences, bearing in mind that s. 5(1) of the Act defines "crime" to include "any offence", (which includes traffic offences) some of which are very serious. His offending occurred between April 2020, and April 2022. On 17 November 2022, the Applicant was convicted of a number of crimes including one which the Tribunal shall discuss in greater detail later in these reasons, *Stealing by Clerks or Servants* found in s. 398.6 of the *Criminal Code (Qld):*

> *'398.6 Stealing By Clerks and Servants*
>
> *If the offender is a clerk or servant, and the thing stolen is the property of the offender's employer, or came into the possession of the offender on account of the offender's employer, the offender is liable to imprisonment for 10 years.'*

35. On 17 November 2022, the Applicant was sentenced to 12 months' imprisonment for *fraud – dishonestly obtains property from another.*[18] In addition, he was also found to have been convicted of an offence punishable by imprisonment during the operational period of a suspended sentence and ordered to serve the whole of the suspended sentence of 16 months' imprisonment.[19]

36. The Applicant's history of offending includes various offences which can be categorised as follows:

- Stealing;
- Fraud;
- Unauthorised dealing with shop goods;
- Possessing dangerous drugs;
- Contravening domestic violence orders;
- Unlawful use of motor vehicles
- Traffic offences.; and

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[16] Ex R1 p 805-814.
[17] Ex R1 p 801-802.
[18] Ex R1 p 505.
[19] Ex R1 pp 522-526.

Personal Circumstances Form (PCF)

37. In his revocation request and PCF dated 7 February 2023, the Applicant identified himself as an Indian citizen born in 1994. He arrived in Australia on 30 June 2018, and returned to India for about a month from 2 January 2020.[20]

38. He had married an Australian citizen Ms Manpreet Kaur on 26 October 2021. At the time he completed his PCF, they had been together almost two years and had a six month old baby and had recently bought a new house. He expressed concern that his wife would suffer financial hardship if he were deported, as well as the responsibility of raising their child alone. He would live with them if returned to the community. The Applicant said he spent only two months with his daughter (who shall be referred to as "Child A") before he was imprisoned, but there had been weekly visits. His only relatives in Australia were his wife and Child A.

39. The Applicant identified his mother, mother and father in law, and brother and sister in law as living in India.

40. The Applicant said he was remorseful and ashamed of his past. He had a business plan and pledged not to repeat his past.

41. By way of ties to Australia, he pointed to his wife, Child A, and their home. He listed no impediments to his return to India, but said his ex-wife was now married to his cousin who had blackmailed his mother, and he feared being harmed by him and said he faced "lots of issues" because of him. He would be unable to face relatives because of his ex-wife's new marriage.

42. The Applicant said that he lost his mind because of his cousin and ex-wife and her father.

43. The Applicant also provided various letters of support from his sister-in-law Harpreet Singh[21], a former co-worker Narinder Singh[22], and his wife Manpreet Kaur[23].

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[20] Ex R1 p 438.
[21] Ex R1 p 425.
[22] Ex R1 p 426.
[23] Ex R1 p 427.

44. Ms Kaur said she was an Australian citizen, as was Child A. She recorded her personal and financial struggles since the Applicant's imprisonment. She had been hospitalised several times with migraines. She was depressed, and sometimes felt suicidal. She had been unable to care for Child A properly because of her mental health and financial pressures. She had been able to do two jobs as her parents had been visiting from India, but they were returning at the end of April 2024. She worried if she would be able to continue her job and to support herself. She blamed his ex-wife for the Applicant's mistakes.

45. The Applicant also produced various medical records pertaining to his wife and her diagnoses of anxiety, depression insomnia and migraine, and her plan and medications.[24] She had reported to her psychologist that her husband's visa had been cancelled due to his "repeated traffic offences and his poor decisions." She met the DSM criteria for Adjustment Disorder (mixed with anxiety and depression). She had a severe level of anxiety and depression and a moderate level of stress and would benefit from 5-8 therapy sessions. [25]

46. It was submitted that the Applicant had had only spent *"very limited time"* with Child A, and *"the relationship was developing and stilted"*[26]

47. The Applicant's wife, Manpreet Kaur provided a statutory declaration[27] dated 9 January 2023, in which she described the Applicant as a *"loving and caring husband and responsible dad….I can feel how much he loves the baby.. [he] is developing great [sic] relationship with the child."* She said he had changed himself, and expressed concerns that Child A would be deprived of her father, and the prospect of the difficulties of single parenthood, and there was no one else who could fill a parental role for the child. He had never caused or exposed the child to harm.

Statement of the Applicant[28]

48. In a statement to the Tribunal dated 7 August 2023, the Applicant said that he had strong ongoing relationships with his wife and Child A. He described the financial burdens he and

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[24] Ex R1 p 428-434, 437, 476-478.
[25] Ibid at 477-478.
[26] Ex R1 p 531.
[27] Ex R1 p 533-534.
[28] Ex R1 p 26.

his wife had undertaken and recounted his wife's mental health struggles caused by his imprisonment and detention, and inability to contribute financially or practically. He also said he kept in contact with his sister in law and had a good friendship with Mr Narinder Singh.

49. He said that he had only worked from 2018 to 2020, firstly as a full-time cleaner, and then as a full time truck driver. He paid taxes during this period. Given the opportunity and work rights he would do so again.

50. He said he had done voluntary work between 2018 to 2020 for a local Sikh Temple providing free cleaning services, meal assistance and waiter like duties.

51. The Applicant asserted that he was not a risk of reoffending. Prison and detention had been a shock to his system, and the prospect of a future visa cancellation was a very significant deterrent to further offending. He said he had undertaken a number of rehabilitation courses he believed to have been of assistance to him and listed eleven[29]. He provided certificates of completion regarding these courses as well as evidence of participation in Smart Recovery Program.[30]

52. The Applicant said he had suffered great trauma through the death of his brother and his wife's infidelity in early 2020 which caused his life to spin out of control. He expressed remorse for his past conduct and pointed to his pleas of guilty in support of this.

53. The Applicant said he came from a good family. His parents had been Police officers. His father had died in a car accident when he was six in similar circumstances to his brother. His mother continued to serve as a Police officer.

54. In 2020 he rented rooms in his house to drug users, but has since severed his contact with them, and other antisocial individuals. His current wife was a hard worker, a good mother to Child A, and not a drug user.

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[29] Ibid at para 20.
[30] Ex R1 p 57-83.

55. His plans if released into the community are to live with his wife and Child A, and work as a volunteer in her business, seek work rights, continue his rehabilitation, and liaise with good members of the community.

56. The Applicant expressed concerns about returning to India. Owing to his criminal record and deportation he would find it difficult to gain employment. He feared relapse into drug use and deterioration in his mental health from permanent separation from his wife and Child A.

57. He expressed extreme distress and concern about the inadequacies and availability of health care and unemployment benefits in India, stigma and discrimination arising from his mental health issues.

58. The Applicant expressed concern for his safety, as he had been threatened by his cousin who had an affair with his ex-wife. He did not detail the precise nature of the threat, but said that his cousin had criminal links and could easily find him and harm him.

59. He would also suffer hardship as a member of the Sikh community.

Statement of Ms Manpreet Kaur[31]

60. The Applicant's wife provided a statement dated 7 August 2023, in which she detailed the closeness of her and Child A's bonds to the Applicant.

61. She said she was fully aware of his criminal and drug related past, and substantially echoed what he had stated.

62. He had kept his drug use secret from her, and she had only discovered it shortly before the birth of Child A in 2022 when she discovered two plastic bags of heroin when washing his clothes. She took him to a doctor who referred him to a psychiatrist, Dr Alam but no appointment eventuated before he was arrested in October of that year.

[31] Ex R1 p 33.

63. In the meantime, Child A had been born, and she described his role as a happy hands-on father.

64. Due to his language difficulties, he needed a psychologist who spoke Punjabi. She engaged Dr Tina Chatterjee to consult with the Applicant.

65. Ms Kaur said that she worked from 5:30 am to 8 pm six or seven days a week. She had been involved in a car accident on 23rd August 2023, and was not sure if she would be able to continue to work. She was forced to take Child A to work with her when work permitted, but this was not always possible or practical. Her parents were presently in Australia helping her. She detailed her financial liabilities including her husband's legal costs relating to his visa cancellation, and said if she could not continue her workload, she would potentially lose everything. She had no choice but to work even if she was sick.

66. Her physical and mental health were '*not the best*'. She was in pain following her car accident, and had been diagnosed with depression anxiety and stress, and had poor sleep, and suffered migraines for which she had been hospitalised many times.

67. She feared her current hardships would become permanent if the Applicant were to be deported. If she became ill and required hospitalisation after her parents returned to India, there would be no one to care for Child A. She would have to close her business and terminate three permanent and many casual employees.

68. She currently had cleaning contracts for 29 Chemist Warehouse stores in Brisbane, Logan Village Woolworths, and BCIC Service Partners.

69. She had come to Australia as a student but was now an Australian citizen. She gave reasons why she would not return to India if the Applicant were to be deported.

Statement of Mr Jitendra Singh[32]

70. In a statement dated 13 July 2023, Mr Singh said he was a permanent resident of Australia and friend of the Applicant since 2018. He vouched for the Applicant's remorse and

[32] Ex R1 p 42.

commitment to rehabilitation and respecting the law. He repeated what the Applicant had told him. He committed to supporting the Applicant spiritually and financially if he is permitted to stay. He made no claim that the Applicant's deportation would have any particular impact on him.

Statement of Mr Narinder Singh[33]

71. In a statement dated 26 July 2023, Mr Singh said he had known the Applicant since 2019, and expressed shock at his criminal history, which he said was out of character. He expressed a positive opinion of the Applicant's character, and role as a partner and father, who had a good work ethic. The Applicant had learnt from his past mistakes and made a commitment to rehabilitation and could be a productive member of the community. He made no claim that the Applicant's deportation would have any particular impact on him.

Statement of Mr Surinder Singh (from India)[34]

72. In a statement dated 12 July 2023, Mr Singh said he was a serving member of the Punjab Police in India. He vouched for the Applicant's conduct and character as a child and blamed the trauma of his brother's death and wife's infidelity for his choice of the wrong path. He made no claim that the Applicant's deportation would have any particular impact on him.

First statement of Mr Surinder Singh (General Secretary, Brisbane Sikh Temple)[35]

73. In a statement dated 25 July 2023, Mr Singh said that he was the General Secretary of the Brisbane Sikh Temple. He said that the Applicant used to frequently attend the Temple prior to his detention and did volunteer work. He expressed the belief that the Applicant was a valuable member of the Sikh community, who had embraced his religion and was of good character. He made no claim that the Applicant's deportation would have any particular impact on him, or anyone else in the Sikh community.

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[33] Ex R1 p 43.
[34] Ex R1 p 44.
[35] Ex R1 p 45.

Second statement of Mr Surinder Singh (General Secretary, Brisbane Sikh Temple)[36]

74. Mr Singh recorded that he was still in contact with the Applicant a couple of times a month, and he had informed him of his wife's medical condition and became quite emotional explaining his current family situation. Mr Singh also said that he had seen the Applicant's wife occasionally in the Temple, and she seemed quite depressed due to his current situation.

75. The Applicant produced a Police Clearance Certificate dated 14 March 2022 from the Punjab,[37] as well as a Death Certificate for his late brother, who died on 3 February 2020.[38]

First report of Dr Tina Chatterjee[39] Psychologist

76. In a report dated 26 August 2023, Dr Chatterjee said that the Applicant had attended seven one hour sessions in the period up to that date for depression, stress and drug counselling, and concerns about deportation. She found that his levels of depression, anxiety and stress were all normal. He was extremely responsive to therapy and compliant with strategies, maintaining contact with his wife and Child A and a healthy lifestyle.

Second report of Dr Tina Chatterjee[40]

77. In her report dated 20 March 2024, Dr Chatterjee said that the Applicant had attended 12 sessions, most recently on 9 March 2024. His wife had also attended some of those sessions. The Applicant expressed concern that they might need to send Child A to live with his wife's parents in India if there was no one to look after her.

78. Dr Chatterjee again found that the Applicant's assessments for depression, anxiety, and stress were all normal. He has low mood and stress because he was away from his family, but did not experience Depression or Anxiety. He continued to be responsive to therapy

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[36] Ex A4.
[37] Ex R2 p 55.
[38] Ex R2 p 56.
[39] Ex R2 p 89-91.
[40] Ex A2 pp 1-2.

and compliant with suggested strategies. He was committed to ongoing treatment every four weeks.

Third Report of Dr Chatterjee pertaining to Ms Kaur[41]

79. In her report dated 20 March 2024, Dr Chatterjee said that Ms Kaur had attended seven sessions with her, most recently on 10 March 2024. Mr Kaur had attended with symptoms of anxiety and depression, which developed in January 2023. Ms Kaur had demonstrated a long list of symptoms consistent with depression and anxiety. Ms Kaur worried about her husband and her financial situation and was struggling to come to terms with the fact that Child A may have to live with her parents who had been caring for her but were returning to live in India on 3 May 2024. Child A's behaviour owing to her father's absence was overwhelming and difficult to witness.

80. Dr Chatterjee initially assessed Ms Kaur as having extremely severe depression, anxiety, and stress. Her most recent assessment was that she had severe levels of depression, and extremely severe levels of anxiety and stress.

81. Ms Kaur had been treated with psychological strategies to which she was responsive and compliant.

Fourth report of Dr Tina Chatterjee[42]

82. Dr Chatterjee provided a fourth report dated 2 April 2024 which was identical to her third report save for the fact that it recorded the fact that Ms Kaur had become extremely worried about her health, and the result of her recent test which showed that she had the Heliobacter pylori virus and a Human Papilloma virus.

Report of Dr Emily Kwok Clinical and Forensic Psychologist.[43]

83. In her report dated 30 August 2023, Dr Kwok noted that during interview, the Applicant gave long answers, even for simple questions, and often gave too much and irrelevant

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[41] Ex A2 p 63.
[42] Ex A3.
[43] Ex R4 p 316-327.

information. She also acknowledged that there might consequentially be information missing from his background. He told her that he ceased using illicit drugs in July 2022. Dr Kwok noted that the Applicant had been married at the time of his recent problematic offending. He told her that he had been unaware of the DVO at the time of his offending, and only found out when he was at the police station for breaching the order. He did not mention to Dr Kwok about the phone call he made to his ex-wife. If allowed to stay in Australia, he would seek employment, and continue to engage in volunteer work.

84. Dr Kwok reviewed the reports of the Applicant and concluded that he was not suffering from any mental illness and did not report any current psychological symptoms. After 12 months abstinence from drugs, he was in the early stages of sustained remission for Substance Abuse Disorder. He was a low risk of committing criminal offences in future, and was a low risk in terms of his general behaviour. The target of his past domestic violence allegations had relocated to India. He was now in a harmonious supportive and caring relationship and it was very unlikely that he would commit domestic violence in this relationship.

85. Dr Kwok did not assess his partner, but thought that she currently had severe anxiety, and was at a higher risk of developing a mental, mood, or adjustment disorder.

86. The Tribunal has had regard for the various records, and substantial number of certificates[44] of the Applicant's participation in rehabilitation programs. These include:

- *Healthy Relationships* (7 hours) 28 November 2023;
- *Listening Skills* (5 hours) 29 November 2023;
- *Anxiety Therapy* (5 hours) 3 December 2023;
- *Personality Development* (7 hours) 9 December 2023;
- *Home Safety* (5 hours) 12 December 2023;
- *Problem Solving Strategies* (3 hours) 16 December 2023;
- *Social Anxiety* (6 hours) 20 December 2023;
- *Understanding Learning Styles* (7 hours) 23 December 2023;

[44] Ex A2 pp 5 – 63.

- *The Art of Setting Goals* (5 hours) 25 December 2023;
- *Community Development 101* (8 hours) 27 December 2023;
- *English Grammar Level 1* (11 hours) 1 January 2024;
- *Basic English Speaking Skills* (7 hours) 9 January 2024;
- *Lifetime Wellness* (7 hours) 19 January 2024;
- *Creative Thinking* (5 hours) 26 January 2024;
- *Emotional Healing 101* (6 hours) 8 February 2024;
- *Building Self Esteem* (3 hours) 28 February 2024;
- *Confidence Building* (6 hours) 3 March 2024.

87. The Tribunal has also had regard to a pathology report[45] which recorded that Ms Kaur suffered an unspecified HPV, but not HPV 16 or HPV 18 as well as *Heliobacter pylori Serology*. However, there was no expert evidence to elaborate the ramifications of such findings.

88. The Tribunal has also had regard for a report[46] dated 18 March 2024 from Queensland Children's Clinic regarding the Applicant's Child A. The report noted that Ms Kaur worked from 2:30 am to 7:30 pm, and that the Applicant was currently detained "waiting for visa approval". The report questioned the adequacy of her nutrition and sleep, recommended treatment for eczema, and more social interaction with children her age.

EVIDENCE AT HEARING

Examination-in-chief

89. The evidence of the Applicant and Ms Kaur was received via an interpreter.

[45] Ex A2 p 66 - 67.
[46] Ex A2 p 68 – 69.

90. In evidence in chief, the Applicant said that he was born in India in 1994. He arrived in Australia in June 2018 on a subclass 500 visa, as the dependent visa of his now ex-wife. On 11 December 2020 he was granted a Bridging visa class WC.

91. The Applicant accepted that he had a very serious criminal history in Australia, and he felt sad and bad about what he had done. He was not like that, but blamed his personal circumstances of his brother having passed away and his mental health deteriorated when he discovered that his wife had been cheating on him with his cousin who was living in India at that time. He and his wife separated on their return from India. He took in boarders to have some cash flow, and they introduced him to drugs. He has since deleted their numbers and severed all contact with them.

92. The Applicant described having a drug addiction problem, and had used heroin and methylamphetamine initially daily, and then every three or four days from 2020 to 2022. He said he gave up when his daughter was born in July 2022. He had kept his drug use from his wife, and she found plastic bags containing heroin in his clothes while doing his laundry.

93. He was taken through his traffic history which included offences of speeding, unlicenced driving, driving at high speed with methylamphetamine in his system whilst his licence was suspended, and unlawful use of a motor vehicle. He acknowledged that driving under the influence of drugs can lead to very serious accidents, and said he felt bad about this[47]:

> *'When I think about those things, I feel like I was lucky that nothing happened in terms of any accidents or anything, like, the way I was using drugs and still driving, it, you know, as we hear the news now, that can lead to very serious accidents. And, you know, when I think about it now, about the crimes that I did, I was using drugs and then driving, that could have led back to something very serious in terms of someone else being injured, and something could have happened to someone else as well. So I feel really bad about that, that these were the wrong things, and I shouldn't have done that. It was a very serious thing.'*

94. He had attended sessions with a psychologist who helped him with his mental health and drug use and he had learned coping strategies to manage his mental health and drug use.

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[47] Transcript Day 1 p 8 lines 6-14.

95. He gave evidence of drug counselling and rehabilitative courses he had undertaken in immigration detention, and what he had learned, and felt this had had a positive impact on him.

96. It was put to him that the Respondent Minister contended that the Tribunal should have limited confidence that he would not return to drugs. He said that he had not used drugs in the last two years and had become stronger physically and mentally. He wanted to support his wife and daughter and would not re-offend because of this. It was put to him that his wife and child were in his life previously when he offended, and he replied that at that time he did not understand how to stop, or what to do. He now had the confidence and understanding to do it.

97. The Applicant said that his mother is in Punjab in India, his father died in an accident when he was young, and his brother also died in an accident in India. His parents were both police officers, and his mother still was. He said he had not used drugs before 2020, and no one in his family had. His conduct was an insult for his family, and he expressed remorse.

98. His ex-wife is living in Brisbane.

99. He and his current wife, have a really close relationship. She visits him every week with his daughter. She is his best friend and helps him be positive and manage. She had a range of mental and physical health issues, including cancer.

100. The Applicant gave long winded evidence of his concerns and fears of returning to India. His concerns included shame and embarrassment arising from his divorce, his cousin's gangster links and general lack of safety for him if he were to be removed to India.

101. He was also concerned as to how his wife could continue to work without him, as she starts work at 3 am and there would be no one to care for his daughter. His wife had health issues which could develop into cancer, and his daughter had behavioural issues, including biting and crying. They would not be safe, and he would be unable to support them in India. He had been absent for too long to get a job, and wages were lower in India than in Australia.

102. If returned to the community he said he would want to care for his daughter and enrol her in a good school, and have her learn to swim. He also wanted care for his wife and take her to medical appointments.

103. His wife's cleaning business has two contracts with Woolworths and more than 40 contracts with others, including Chemist Warehouse. She starts work at 3 am.

Cross-Examination

104. In cross examination, the Applicant said that he can read English well, but has difficulty speaking, but had had done all his rehabilitative courses in English.

105. He said that on 11 December 2020 he got his Bridging visa, and did not have any work rights, and had not worked since that date[48].

106. Ms Ho took the Applicant to Ex R8 p 805-814 of the Remittal bundle (Ex R1), the Verdict and Judgment Record which listed 180 offences by him. It was put to him that this was a significant pattern of fraudulent conduct of frequent offending, obtaining refunds for items which he had not purchased. He accepted this. He was then referred to p 815, which was a police record which alleged he was involved in a syndicate of fraudsters. He said this was not correct, as he did not act as part of a group[49]. He nevertheless agreed that he had committed those crimes, and this was serious and had caused a lot of businesses financial harm, and had diverted resources required to respond to his offending.

107. In relation to a conviction for stealing involving unauthorised withdrawal of funds on a bank card,[50] he claimed he had been given permission to use the code.[51]

108. He acknowledged that he was convicted on 13 April 2021, and received a 16 month suspended sentence, which he agreed was a quite significant sentence despite it being suspended. He also agreed that he continued to offend after that date, and acknowledged offences recorded at Ex R1, G2 p 522-524 offences committed after that sentence.

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[48] Transcript Day 1 p 16 lines 10-15.
[49] Ibid p 17 lines 19-30.
[50] Ex R1 p 738.
[51] Transcript Day 1 p 19 lines 19-21.

109. The Applicant said that he lived with and cared for Child A during the two month period from her birth until his arrest. He had not had permission to work since 2020. He was in good physical health and mentally stronger than before.

110. The Applicant was questioned about the Protection Orders for his former wife. He was convicted 17 November 2022 for a breach and sentenced to one month's imprisonment. He agreed that his conduct would negatively impact the aggrieved. The Applicant denied his alleged conduct using weedkiller and said he did not know about the domestic violence order at the time of his offending conduct.

111. He denied messaging his ex-wife and said she started calling him when she found out he was getting married. His current wife had responded to his ex-wife using his phone, but not at his request. He agreed that contacting in the face of an order was threatening behaviour. He also agreed that kind of behaviour was harassment, and that it was wrong, but denied doing it.[52]

112. The Applicant said that he speaks to his mother in India about three or four times a week. She lives in her own house which had three bedrooms and which he described as "*okay*". His mother and his eight year old son from his ex-wife live in the house. He also speaks to son when he speaks to his mother. The Applicant said he is closer to his mother than he is to his son because he has not lived with him. If he were returned to India, he would be able to live with his mother and son.

113. The Applicant said that he owned property in India, and his cousin and ex-wife had been blackmailing him to transfer the property into his son's name. He was scared of this, as they had filed a court case seeking custody of the child to get hold of the property. If the court case is resolved in favour of his mother having custody of his son he would not mind transferring it to his child.

114. The Applicant said that his ex-wife and cousin live in Australia now. His cousin has two brothers in India who live 15 or 20 kilometres away from his mother's house, in the same town, which had a population which he estimated could be a million. Asked to explain why

[52] Transcript Day 1 p 21 line 35 – p 22 line 15.

he thought his cousins would know if he returned to the town, he said they are his mother's sisters' sons.

115. The Applicant said that with Tina Chatterjee, he had learnt how to redirect himself to go to the gym or study and he is now able to manage himself.

116. The Applicant gave evidence regarding his participation in various rehabilitative courses. It was put to him that he was jailed in 2020, and again in 2022, and his efforts to rehabilitate were made at the last minute. He said that he had not been educated about these things previously. He has been attending every week for the last one and a half years and had not missed a session.

117. At this point, the Applicant's internet connection failed. An early luncheon break was taken, and on resumption the evidence of Dr Kwok was interposed to accommodate her availability.

Evidence of Dr Kwok

118. Dr Kwok said that if permitted to return to the community, the Applicant would need treatment for six months for psychosocial stressors that could contribute to emotional distress, such as returning without employment, and normal readjustment to community living. He had an adjustment disorder, and the substance use disorder followed at the time of his offending. Having gone 12 months without drugs he was in sustained remission. He was a low risk of reoffending if he maintained support by a psychologist, and drug and alcohol support in the community for six months.

119. On resumption of his evidence, the Applicant said he cared for Child A as a newborn, but denied he was using drugs at the time. He had been able to contribute financially for her as his mother had helped him.

120. The Applicant was cautioned by the Tribunal.

121. The Applicant initially confirmed to the Tribunal that there had been a formal diagnosis of his wife having cancer and said that she was in the early stages of cancer, and if it was not looked after, it could develop into a cancer very rapidly. He then said she did not actually

have cancer at the moment.[53] The Tribunal invited Dr Donnelly to call further evidence on the point and offered time for him to do so.

122. The Applicant was asked if he had lied to the Tribunal about having stolen as a clerk or servant, and he denied having lied.[54]

123. The Applicant was referred to Ex R1 p 512, a statement made by the prosecutor to the court regarding his various charges. The relevant extract taken from lines 15 to 20 is as follows:

> *'Next one in time is a stealing by a clerk or a servant. The defendant is employed as a cleaner for the victim business, that being Opal Fibre Packaging. Whilst cleaning one night or attending the address he went into the petty cash money tin. His fingerprints were located on that tin and also on the cupboard door. Six hundred and fifty-nine dollars was stolen at that time. Restitution for that amount is requested as well – is sought.'*

124. The Tribunal raised with Dr Donnelly the prospect that his client had perjured himself before the current Tribunal and the previous one.[55] Dr Donnelly said he would respond in closing.

125. The Applicant denied working at the victim business, and said he had only been there to pick up his wife[56]:

> *'INTERPRETER: I wasn't working there. I went there to pick my wife. She was pregnant at that time, so I helped my wife, and I went there to pick her up. So I wasn't working there, it was my wife, and I just went there to pick her up.*
>
> *MEMBER: Well, why did you plead guilty to the offence then?*
>
> *INTERPRETER: I pleaded guilty because of my fingerprints. So my wife was working there and I went there to pick her up. I was just helping her, but I pleaded guilty. I told about that, that it was – in 2020 I wanted to start a new life. I had a daughter so I wanted to start my life again, and I just wanted to have all the matters resolved, and I pleaded guilty so it would be an opportunity for me to start again.'*

126. In re-examination by Dr Donnelly, the Applicant said he had stolen from the victim business, but not worked for it.

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[53] Transcript Day 1 p 41 lines 31-40.

[54] Transcript Day 1 p 42 lines 37- p 43 line 3.

[55] Ibid lines 9-11.

[56] Transcript Day 1 p 44 lines 40 – p 45 line 6.

127. On conclusion of the Applicant's evidence, the Tribunal was informed that the interpreter would not be required further for the day and was excused.

128. An attempt to take evidence from Dr Chatterjee was postponed until the next day owing to unsatisfactory audio.

129. An attempt to take evidence from Ms Manpreet Kaur failed after she announced that she required an interpreter, notwithstanding that her solicitor had informed Dr Donnelly that she spoke English fluently. Her evidence was postponed until the following day.

130. On the second day of the hearing, the Tribunal received evidence from Dr Chatterjee by telephone from Japan.

Evidence of Dr Chatterjee

131. Dr Chatterjee confirmed her report[57] dated 26 August 2023, and her statement[58] dated 20 March 2024. Dr Chatterjee explained the treatment that the Applicant had received, and his responses and compliance. From a depression, anxiety and stress perspective he was normal when she first saw him, and normal when she last saw him. Planned treatment every one to two months for his mental health would be needs based.

132. Dr Chatterjee told Ms Ho her qualifications would not allow her to treat the Applicant if he is outside Australia. She said the Applicant was highly motivated to be with his family and had a strong motivation not to do drugs anymore. He wanted to start a new life with his wife and daughter, get a job, and live a normal life.

133. Dr Chatterjee said she had eight sessions with the Applicant's wife, and that her main stressor was about her husband, daughter, and financial situation. She was also concerned about how her daughter was coping not seeing her father. She was worried how she would cope after her parents returned to India, and she was worried about her health. She was suffering severe levels of depression, and extremely severe levels of anxiety and stress.

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[57] Ex R1 p 89.
[58] Ex A2 p1-2.

134. Ms Ho suggested to Dr Chatterjee that a lot of Ms Kaur's stressors were caused by the Applicant's conduct and the situation he had placed her in. Dr Chatterjee said Ms Kaur was a very devoted wife.

135. Dr Chatterjee told Dr Donnelly that Ms Kaur's worries had not stopped her from working. After Ms Kaur's parents leave Australia, they will have to consider sending Child A away as Ms Kaur has to work to pay his legal fees and everything else.

Evidence of Manpreet Kaur

136. Ms Manpreet Kaur gave evidence via an interpreter, and confirmed her statement of 7 August 2023, her statutory declaration of 9 January 2023, and her undated "Spouse statement."[59]

137. Ms Kaur emphasised her long working hours, lack of sleep, her financial struggles, large range of health issues including panic attacks and extremely serious anxiety which were not impacting her capacity to work. She said she needed to reduce stress and rest and monitor her cancer risk.

138. She emphasised her very good relationship with the Applicant, and the strong relationship between the Applicant and Child A, even though Child A was only a couple of months old when the Applicant was taken into custody[60]. She had suffered a lot since that time.

139. She had built a new house in November 2023[61]. It costed her about $630,000 and that was why she had financial pressure. She was working from 2:30 am to 7 pm at night, seven days a week. She recounted her various monthly financial outgoings.

140. Ms Kaur said that she and Child A would not accompany the Applicant if he returned to India.

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[59] Ex R1 p 564.

[60] 24 September 2022: Ex R1 p 520.

[61] Transcript Day 2 p 66 line 47 – p 67 line 1; p 67 line 47.

141. When questioned regarding the Applicant's conviction for stealing by a clerk or servant, she said that she had worked for Menzies Group, which had a contract to clean for the victim business, Opal Fibre Packaging ("Opal").

142. When questioned if her husband had worked for Opal, she replied[62]:

> *'No, he did not work there. He couldn't work, but I was pregnant at the time, and there were some heavy bins that I asked him – used to ask him to help with. So if there was anything heavy that needed lifting, because I was about eight or nine months pregnant at that time, so I used to leave the heavy things aside and I asked him for help, I think, once or twice.'*

143. She was present in court when he pled guilty and was convicted. The particular crime and place or any details were not mentioned. There was no mention of "*company names or anything*".

144. Doctors felt her daughter was mentally disturbed because she wanted to be with her father.

145. Her parents were returning to India in May. She had paid all their travel and living expenses while they are in Australia and did not currently have the financial capacity for immigration purposes for a further visa for them. Her parents had no plans to return to Australia for ten years.

146. She was paying all of Child A's daily expenses. The Applicant was not paying these.[63] Childcare was not an option for her daughter because her working hours were not compatible with childcare availability.

147. Ms Kaur said that she had messaged the Applicant's ex-wife from his phone pretending to be him, but he did not know about this, and she did not tell him. It was her messages that were the basis of a domestic violence complaint against him.[64]

148. Ms Kaur expressed fears as to how she would cope as a single parent in his absence, particularly if she was ill.

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[62] Transcript Day 2 p 71 lines 14-19.
[63] Ibid p 76 lines 8-12.
[64] Ibid p 78 lines 31 – p 79 line 3.

149. The Tribunal put a number of questions to Ms Kaur.[65]

> *'MEMBER: Why didn't you say to the court what you've just said to me that you made those texts? Why did you stand by and allow him to plead guilty to that charge?*
>
> *INTERPRETER: Because the lawyer – the criminal lawyer, Bruce was his name, he explained that as Agyapal has a lot of cases against him, it doesn't make sense to bring that up now and it would be better for him to plead guilty to everything. So on lawyer's advice, we proceeded because he said one case is not going to make any difference because he's got so many against him. So we followed the advice and Agyapal pleaded guilty to all those cases.*
>
> *MEMBER: Now did anyone at Opal know your husband's name?*
>
> *INTERPRETER: No, sir. I don't think so.*
>
> *MEMBER: Okay. Are you able to explain why he might have a key to some of those premises?*
>
> *INTERPRETER: So as I explained previously, all the doors have locks on them, so when we're going to take the bins out and going inside the building, you need the keys, so I gave the keys to Agyapal because he was helping me with the bins.*
>
> *MEMBER: Right. So he was doing work there with you?*
>
> *INTERPRETER: Yes. As I said, because I was pregnant, so I asked him to pick up the bins for me, that's it.*
>
> *MEMBER: Now police records say that your husband effectively admitted that he was working for Opal, so how do you account for that? Was he lying to the police or are you saying the police falsified the record?*
>
> *INTERPRETER: I think there may have been a misunderstanding because of his understanding of English, I don't know what he said there, but I know that he's not able to explain things on his own.*
>
> *MEMBER: Okay. Now you were in court when he was sentenced for that charge of stealing as a servant, weren't you?*
>
> *INTERPRETER: Yes.*
>
> *MEMBER: Do you have a clear recollection of the magistrate?*
>
> *INTERPRETER: I can't remember the name, but I think the magistrate was a lady, maybe South Indian or Indian. I can't remember the name, but I think it was a female.'*

150. Following discussions with both counsels, it was agreed that each party would provide written closing submissions.

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[65] Ibid p 81 lines 1-46.

CONSIDERATION

151. The Tribunal now turns to the specific considerations of Direction 99. In doing so, the Tribunal is mindful that it is not open to it to entertain evidence which seeks to impugn a court imposed conviction, or the facts underlying the sentence imposed.[66]

152. Moreover, in applying the considerations (both primary and other) information and evidence from independent and authoritative sources should be given appropriate weight.

153. The Tribunal considers that the Queensland Police Service (QPS) to be an independent and authoritative source. The Tribunal considers that the appropriate weight to be given to information and evidence from the QPS is heavy.

Credibility of the Applicant

154. The Applicant's record of over 200 offences, the great majority of which pertain to dishonesty, necessitates careful scrutiny of his evidence and credibility.

155. The Applicant told the Tribunal that he ceased using drugs when his daughter was born, which was early July 2021.[67] He also told the same thing to Dr Kwok[68], however the ACICCRR shows that shows that he committed a string of offences regarding dishonesty in the months after he claimed to have ceased using drugs. Included among these was the offence from 1 August 2022, where he used a stolen bankcard to withdraw thousands of dollars. He explained this conduct saying that he was a drug addict at the time and could not tell right from wrong.[69] Moreover, he was charged with *Possessing Dangerous Drugs* on 23 September 2022, and being in possession of a hypodermic needle and a syringe the same day. These episodes are very inconsistent with his claimed cessation of drug use, and the Applicant's evidence that he ceased using drugs when his daughter was born is rejected. Further, the Tribunal finds that the Applicant was not truthful to Dr Kwok when he told her that he had ceased drugs at that time.

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[66] *HZCP v Minister for Immigration and Border Protection* [2019] FCAFC 202 at [78-]-[79].
[67] Transcript Day 1 p 6 lines 19-22.
[68] Ex R4 par 25.
[69] Transcript Day 1 p 18 lines 22-38.

156. The Applicant claimed to have been unaware of the DVO issued to protect his ex-wife at the time that he breached it.[70] However, there is credible evidence[71] that it was served on him at 3:55 pm on 28 September 2021. Moreover, three days later, his ex-wife immediately terminated a call from an unknown number when she recognised the Applicant's voice when she asked: *"Have you filed a complaint against me?".* [72] This communication formed part of the basis for the charge of breaching the DVO to which he pleaded guilty. On the occasion of his guilty plea, he did not contest the relevant facts which were read to the court at the time[73]:

> *'With respect to the first contravene domestic violence order in time. There was a domestic violence order in place that the defendant was not – was prohibited from contacting or attempting to contact or asking someone else to contact the aggrieved. The aggrieved received a phone call on one date from the defendant stating, "Have you filed a complaint against me?" The victim recognised the voice and immediately terminated the call. She further received a text message on another date asking her to call regarding their son; however, the victim was aware that the son is currently in India and not with the respondent. She received another five text messages in both Punjabi and in English. She stated that she's aware that the English messages – that the defendant doesn't necessarily have good English skills and that he may have asked a friend to text on his behalf. The defendant was then intercepted by police and questioned regarding that. He did not make admissions regarding those messages.'*

157. The Applicant's evidence that he was unaware of the DVO at the time of his offending on 1 October 2021 is therefore rejected.

158. Of particular concern to the Tribunal is the Applicant's evidence pertaining to his conviction under s. 398.6 of the *Criminal Code (Queensland).* QPS records of the circumstances of his offending were tendered as evidence before the Court and admitted by consent.[74]

159. The records of this particular offence are found at Ex R1 pp 733-734, and show as follows:

> *'The victim business is Opal Fibre Packaging, 103 Ashover Road, Rocklea. The defendant is employed by Menzies Group, a cleaning company used by the victim business as their cleaners to perform cleaning duties within the business after officer hours.*

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[70] Ibid p 21 lines 35-40.

[71] Ex R1 p 732.

[72] Ex R1 p 882.

[73] Ex R1 p 511 lines 35-47.

[74] Ex R1 p 510 lines 20-38.

On the 14 April 2022 at 5:13pm the defendant, using a key has entered an office room, where the offence occurred. The defendant was in the room for approximately one minute before leaving with a black rubbish bag in their hand. At 5:20pm the defendant has hastily returned to the offence location wearing bright blue gloves, the defendant has unlocked the door and entered the room. At approximately 5:21pm the defendant has left the room. At 5:23pm the defendant has again returned to the same office room and remained in the room for approximately one minute.

On Tuesday the 19th April 2022 at approximately 9:00am the informant has entered the room and observed a cupboard door open in the office. The informant has checked the petty cash money tins that were in the cupboard and observed that $657 was missing. The informant has reported the matter to Police. On the 20th April 2022 Police conducted a forensic examination of the office and located a fingerprint on the petty cash tin and cupboard door where the cash tin was stored.

The defendant was subsequently named by the victim business and flagged wanted to be questioning in relation to this matter.

Police have reviewed CCTV footage from a camera outside the offence location. Police have observed the defendant enter several offices and leave. Police observed the defendant enter the offence location then leave after approximately one minute. The defendant has returned to the offence location, walking at a quick pace and wearing bright blue gloves. The defendant has walked straight to the door of the offence location and using a key entered the room. Police observed the high visibility jacket and white shoes worn by the defendant walk directly to the cupboard where the petty cash tin was kept. The defendant can be seen crouching down in front of the cabinet for approximately two minutes.

The defendant is then seen to stand up and exit the offence location. As the defendant exits the offence location the defendant checks the building before proceeding down the hallway.

The defendant returns to the offence location again and can be seen walking immediately to the cupboard where the money tin was kept, the defendant is observed crouching down in front of the cabinet before standing up and leaving the offence location.

Police reviewed photographs taken by Scenes of Crime of the offence location and note that the petty cash tin was kept on the bottom shelf of the cupboard by the window that the defendant was crouching in front of.

Police reviewed further CCTV footage from the victim business that shows the defendant opening and searching through desk drawers in the office. The defendant has then turned off the lights on the floor and using the light from the mobile device proceeded to search through desk drawers. The defendant was not observed to be cleaning, per employment duties.

On 6 June 2022 at approximately 4:10 pm, Police attended the defendant's home address, Police have taken up with the defendant. Police have notified the defendant that they wish to speak to the defendant in relation to this matter. The defendant agreed to accompany Police to Crestmead Police Station to participate in an electronic record of interview.

*During the interview, Police put accusations to the defendant, the defendant made nil admissions to stealing the $657 that was stored in the money tines and stated that if fingerprints were on the tin**, it was likely due to his cleaning duties.***

Based on the CCTV footage and forensic evidence available to Police, Police have charged the defendant for stealing as a clerk.'

(Emphasis added)

160. The offence with which the Applicant was charged arises under s. 389.6 of the *Criminal Code (Qld)*:

> *'398.6 STEALING BY CLERKS AND SERVANTS*
>
> *If the offender is a clerk or servant, and the thing stolen is the property of the offender's employer, or came into the possession of the offender on account of the offender's employer, the offender is liable to imprisonment for 10 years.'*

161. The Tribunal notes that the maximum penalty for *stealing by a clerk or servant* is 10 years imprisonment, as opposed to the five years imprisonment for mere *stealing*.[75] Clearly, stealing by a clerk or servant is regarded as a significantly more serious offence by the Queensland Parliament than mere stealing. The significantly heavier sentence for the latter offence makes it hard to believe that had the Applicant's legal representative considered there was scope for a successful challenge to this charge, and a conviction only on the charge which carried a lesser penalty, that course would have been taken, and the charge contested.

162. When this matter came before the Court on 17 November 2022, the Magistrate read a list of the charges the Applicant was facing including stealing by a clerk or servant[76], and asked the Applicant how he pleaded, to which he replied, guilty,[77] and he then told the court that he entered that plea on the basis of his own free will[78].

163. The prosecutor then read over the following facts[79]:

> *'Next one in time is a stealing by a clerk or a servant. The defendant is employed as a cleaner for the victim business, that being Opal Fibre Packaging. Whilst cleaning one night or attending the address he went into the petty cash money tin. His fingerprints were located on that tin and also on the cupboard door. Six hundred and fifty-nine dollars was stolen at that time. Restitution for that amount is requested as well – is sought.'*

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[75] *Criminal Code (Qld) s*.398.1.

[76] Ex R1 p 373, lines 8-9.

[77] Ibid line 19.

[78] Ibid line 24.

[79] Ibid p 375 lines 15-20.

164. The Applicant's legal representative[80], acknowledged that the Applicant came before the Court "*certainly with an appalling criminal record"* and submitted that "*his history doesn't speak well for a chance of rehabilitation*"[81] but made no submission contesting the facts as outlined pertaining to this or other charges.

165. The Applicant provided no explanation to the Tribunal for how the representative of the victim business was able to provide his name to Police had he not been an employee, and indeed sought to explain the presence of his fingerprint to Police as being from his duties. Neither did the Applicant explain why, if indeed he was only there to pick up his wife as he claimed, he came into possession of a key to enter the room or knew the where to look for the cash tins. The Applicant made no mention of any request from his wife to assist with heavy bins.

166. From the evidence provided by Police, it is unclear if the Applicant's wife, (who would have been about a little over six months' pregnant at the time), was even on the premises when the offence was committed.

167. In the initial hearing before the Tribunal, the Applicant denied that he had worked at the cleaning company where he was charged with stealing as a clerk or servant.[82] Specifically, he said[83]:

> *'I did not work there. My wife, she worked there, and I went there to pick her up. That time I had no work rights, so I didn't work for that company.'*

168. The Applicant gave similar evidence before the present Tribunal, and that has been referred to above.

169. In pleading guilty on his own voice[84] in circumstances where he had legal representation, and the background facts had been admitted by consent before the Court, the Applicant acknowledged that he had stolen as a clerk or servant.

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[80] Ibid p 380 line 9.
[81] Ibid p 381 lines 5-6.
[82] Ex R1 p 929 lines 28-37.
[83] Ibid lines 35-37.
[84] Ex R1 p 510 lines 5-19.

170. As can be seen from the comparison of sentences for mere stealing as opposed to stealing as a clerk or servant above, the admission that he stole as a clerk or servant exposed him to twice the maximum sentence, he would have faced had he been charged with mere stealing. The Applicant's employment was an element of the offence to which he pled guilty and of which he was convicted, and therefore a necessary finding made by the court on the basis of the unchallenged facts tendered without objection put by the prosecutor, as matter to be taken into account in determining both guilt and the appropriate sentence.

171. The Applicant's evidence that he was not so employed cannot be accepted, as to do so would be to impugn judicial findings as to both guilt and sentence, a course which is not open to a mere administrative tribunal. As was stated by the Full Court of the Federal Court of Australia in *HZCP v Minister for Immigration and Border Protection* [2019] FCAFC 20 at 77:

> *'77. As a matter of policy, it would be highly undesirable if Minister or the Tribunal exercising a decision-making power that is founded on an earlier decision of a criminal court could, in effect, challenge the propriety or correctness of that decision, or reopen findings on which the decision was necessarily based. To make a finding of "another reason" on facts necessarily inconsistent with the conviction and sentence would be an incongruous outcome. It has long been recognised that the adjudgment and punishment of criminal guilt is an exclusively judicial function: Waterside Workers' Federation of Australia v J W Alexander Ltd [1918] HCA 56; (1918) 25 CLR 434 per Griffiths CJ (at 444); Federal Commissioner of Taxation v Munro [1926] HCA 58; (1926) 38 CLR 153 per Isaacs J (at 175); Brandy v Human Rights and Equal Opportunity Commission [1995] HCA 10; (1995) 183 CLR 245 per Mason CJ (at 258); Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1 per Brennan, Deane and Dawson JJ (at 27) and Re Woolley; Ex parte Applicants M276/2003 (by their next friend GS) (2004) 225 CLR 1 per McHugh J (at [53]).The adjudgment of guilt, and the determination of the punishment to be imposed as a consequence (including a sentence of imprisonment), fall within the central conception of judicial power. It is inconsistent with this principle at the heart of the separation of powers to suggest that an administrative decision-maker could come to a factual conclusion contrary to that of a court when making an adjudgment and punishment of criminal guilt which is, in turn, the precondition to that administrative decision-maker's power.'*

172. Even without the Applicant's admission of guilt, there was more than sufficient evidence of his guilt on the basis of employment recorded in the facts recorded by Police, however closer analysis of that evidence is unnecessary for present purposes, as the Applicant effectively admitted employment when he explained the presence of his fingerprints as arising from the performance of his duties.

173. Since that plea of guilt, the Applicant's employment by the victim company was quite properly acknowledged (and must be taken to have been acknowledged on instructions) in writing on two occasions on his behalf[85]. Moreover, it was submitted[86]:

> ***'His offending shows a lack of consideration even for those closest to him or who have placed trust in him (such as employers).'***
> (Emphasis added)

174. The Tribunal therefore finds that the Applicant is not a credible witness, and his evidence, unless implicitly or expressly accepted in these reasons, is rejected.

PRIMARY CONSIDERATION 1 – PROTECTION OF THE AUSTRALIAN COMMUNITY

175. In considering this Primary Consideration 1, paragraph 8.1 of the Direction compels decision-makers to keep in mind that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. Decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that this country confers on non-citizens in the expectation that they are, and have been, law abiding, that they will respect important institutions and that they will not cause or threaten harm to individuals or the Australian community.

176. In determining the weight applicable to this Primary Consideration 1, paragraph 8.1(2) of the Direction requires decision-makers to give consideration to:

- The nature and seriousness of the non-citizen's conduct to date; and
- The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

Application of Factors in Paragraph 8.1.1(1) of the Direction

177. When assessing the nature and seriousness of a non-citizen's criminal offending or other conduct to date, paragraph 8.1.1(1) of the Direction specifies that decision-makers must have regard to the following:

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[85] Ex A1 par 21; Ex R1 p 18 par 19.
[86] Ex R1 p5 par 33; Ex A1 p7 par 35.

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

(i) violent and/or sexual crimes;

(ii) crimes of a violent nature against women or children, regardless of the sentence imposed;

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

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

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

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

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

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

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

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

(e) the cumulative effect of repeated offending;

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

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

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

178. **Sub-paragraph (a)** of paragraph 8.1.1(1) of the Direction provides that without limiting the range of crimes or conduct that may be considered very serious, violent and/or sexual crimes; crimes of a violent nature against women or children (regardless of the sentence imposed); or acts of family violence (regardless of whether there is a conviction for an offence or a sentence imposed) are viewed very seriously by the Australian Government and the Australian community.

179. Before turning to the specifics of sub-subparagraphs (i), (ii) and (iii) of subparagraph (a) of para 8.1.1(1) of the Direction, the Tribunal considers a general overview of the Applicant's offending.

180. The Applicant's criminal record includes hundreds of offences of dishonesty, many of which might be viewed in isolation as relatively petty but lose that character when considered collectively.

181. This is particularly so having regard to what Police alleged involved discarded receipts for items purchased by others, and entering the relevant store, taking and producing an article corresponding to the receipt, and returning the article to obtain a refund of cash or credit to a card. The Applicant did this in relation to two bank accounts one of which was his[87]. The other card belonged to one Sunil Bains.[88] Moreover, he did it on over 180 occasions between 17 April 2020 and 6 September 2020, at various stores, sometimes committing multiple offences and up to eight offences at different locations in a day.[89] Although the individual amounts obtained might appear relatively meagre, it is clear that this was a continuing enterprise, carried out with a level of professionalism. The Applicant pled guilty to these offence on 13 April 2021, and was given a sentence of 16 months' imprisonment, suspended for 18 months. The Applicant continued fraudulent and other offending during the operational period of his suspended sentence, including multiple offences of dishonesty against his wife. The fact that this second tranche of offences was committed whilst the Applicant was on a suspended sentence, adds to their inherent seriousness.

182. The Applicant has also committed a range of drug related offences.

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[87] Ex R1 p 815.
[88] Ex R1 p 747.
[89] Ex R 1 p 805.

183. The Applicant has received tainted property, including keys and contents of a car which was stolen and never recovered.[90] He unlawfully used motor vehicles on two occasions.

184. His traffic history[91], over a short period of years, is poor. He has regularly committed multiple offences in the same calendar month and committed as many as five offences in one calendar month. The Applicant's driving offences are crimes for the purposes of the Act. His offending includes disobeying the speed limit, unlicenced driving due to accumulation of demerit points and driving at high speed whilst his licence was suspended, with methylamphetamine in his system, and unlawful use of a motor vehicles. The Applicant has shown disrespect for the law by driving when he was not entitled to do so. Speeding and driving with drugs in one's system are inherently dangerous to other road users, and these offences are viewed as very serious.

185. The Applicant has also been convicted of breach of a Domestic Violence Order (DVO).

186. Regarding paragraph 8.1.1(1)(a)(i) of the Direction, there is no evidence of violent and or sexual crimes by this Applicant, and it is therefore given neutral weight.

187. Regarding paragraph 8.1.1(1)(a)(ii) of the Direction, no submission was made that this consideration arose. Accordingly, this consideration is given neutral weight.

188. Regarding paragraph 8.1.1(1)(a)(iii) of the Direction, there is evidence before the Tribunal in the form of an application for a Protection Order[92] verified by statutory declaration made by the Applicant's ex-wife who is obviously a member of the Applicant's family for the purposes of the definition of family violence provided by the Direction.[93]

189. Allegations of conduct which fits within the definition of *family violence* in the Direction contained in the verified application include:

- threats to kill his ex-wife which the Tribunal accepts would cause her to be fearful;
- slaps and hitting her with his legs during aggressive attempts at intimacy;

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[90] Ex R1 p 741 item 21.
[91] Ex R1 p 801-802.
[92] Ex R1 p 822- 829.
[93] Paragraph 4 of the Direction.

- forceful attempts at intimacy;
- stalking;
- controlling behaviour; and
- mental, physical and financial harassment.

190. The Tribunal notes that the alleged acts have not resulted in a conviction or sentence against the Applicant. The application was nevertheless accepted by the Court, and clearly formed the basis for its order made on 12 November 2020.[94]

191. Moreover, the Applicant accepted before the present Tribunal that the conduct for which he was convicted of breaching the DVO was threatening and harassment, even though he denied having done it.[95] He did of course plead guilty to that conduct and the Tribunal cannot go behind the conviction[96].

192. The Tribunal is therefore satisfied that the Applicant has committed acts of family violence and views such acts very seriously.

193. A consideration of sub-paragraph (a) of paragraph 8.1.1(1) of the Direction weighs very heavily against revocation.

194. **Sub-paragraph (b)** of paragraph 8.1.1(1) of the Direction provides that without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:

> *(i) causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;*
>
> *(ii) crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the possession they hold, or in the performance of their duties;*

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[94] Ex R1 p 830.

[95] Transcript Day 1 p 22 lines 10-23.

[96] *HZCP v Minister for Immigration and Border Protection* [2019] FCAFC 202 at [68] and [191].

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

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

195. No submission was made towards either of the abovementioned sub-paragraphs as being relevant.

196. Sub-paragraph (b) of paragraph 8.1.1(1) of the Direction is given neutral weight.

197. **Sub-paragraph (c)** of paragraph 8.1.1(1) of the Direction directs a decision-maker (subject to subparagraphs (a)(ii), (a)(iii) or (b)(i) of paragraph 8.1.1(1) of the Direction) to the sentence(s) imposed by the Courts for a crime or crimes of a non-citizen/applicant. The imposition of a custodial term is regarded as the last resort in any reasonably and correctly applied sentencing process. Custodial terms are viewed as a reflection of the objective seriousness of an Applicant's offending.

198. The Applicant has a concerning custodial history. At his very first sentencing appearance, and after spending 119 days in pre-sentence custody, the Applicant was sentenced to 16 months imprisonment wholly suspended in April 2021, with an operational period of 18 months. The way the sentence was structured allowed the Applicant to avoid mandatory cancellation of his Visa at that point. Had his 119 days in custody been served after sentence, instead of before, he would have no doubt been subject to mandatory cancellation at that point. However, the Applicant was given an opportunity by the Court and proceeded undeterred to commit significant further offences at a time when he knew of his obligations during the operational period, and which resulted in a further term of imprisonment, and an order that he serve his original sentence in full.

199. **Sub-paragraph (c)** of paragraph 8.1.1(1) of the Direction weighs very heavily against revocation.

200. **Sub-paragraph (d)** of paragraph 8.1.1(1) of the Direction points a decision-maker to the frequency of a non-citizen's offending and whether there is any trend of increasing seriousness.

201. For the Applicant, it was submitted that the Applicant's offending was "somewhat frequent"[97] and was increasing in seriousness. The Tribunal finds itself more inclined to agree with the frequency of the Applicant's offending as described on behalf of the Respondent: "alarming …repetitive and deceptive."[98]

202. The Applicant's offending has plainly been very frequent, and that can also be said of his traffic offending.

203. The Tribunal considers that the offending by the Applicant during the operational period – a period during which he must be taken to have been cognisant of the potential consequences – shows an increase in the seriousness of his offending.

204. A consideration of sub-paragraph (d) of paragraph 8.1.1(1) of the Direction therefore weighs very heavily against revocation.

205. **Sub-paragraph (e)** of paragraph 8.1.1(1) of the Direction concerns itself with an examination of the cumulative effect of an Applicant's repeated offending.

206. The Applicant has accumulated a very substantial criminal history in a very short period of time, which his own lawyer aptly described as "*an appalling criminal record*"[99] and a "*petty and long, annoying criminal history.*[100]

207. The Applicant has shown a great disrespect for the property of others, including his employers.[101] He has caused financial harm to many. He has regularly exposed road users to unnecessary danger. He has committed acts of family violence and breached a DVO and

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[97] Ex A1 p 7, par 35.
[98] Ex R2 p 11 par 39.
[99] Ex R1 p 517 line 9.
[100] Ibid p 518 lines 16-17.
[101] Ex R1 p 7 par 33.

offended whilst at conditional liberty. He has received two quite substantial sentences of imprisonment.

208. The Applicant has occupied substantial police resources.

209. A great deal of the Applicant's offending has occurred at a time when he was on a Bridging visa, awaiting approval of a substantive visa, which would have entitled him to live in Australia as a permanent resident, and offered him a potential path to citizenship. One would have thought that he had powerful incentives to be on his very best behaviour at such a time.

210. The totality of this is viewed very seriously.

211. A consideration of sub-paragraph (e) of paragraph 8.1.1(1) of the Direction weighs very heavily against revocation.

212. **Sub-paragraph (f)** of paragraph 8.1.1(1) of the Direction points to an inquiry as to whether a non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending.

213. It was not submitted that this consideration arises in this case.

214. A consideration of sub-paragraph (f) of paragraph 8.1.1(1) of the Direction is given neutral weight.

215. **Sub-paragraph (g)** of paragraph 8.1.1(1) of the Direction looks for evidence about whether the non-citizen has re-offended since being formally warned or otherwise informed about the consequences of further offending in terms of the non-citizen's migration status.

216. It was not submitted that this consideration arises in this case.

217. A consideration of sub-paragraph (g) of paragraph 8.1.1(1) of the Direction weighs neutrally.

218. **Sub-paragraph (h)** of paragraph 8.1.1(1) of the Direction concerns offending and conduct in another country where such offence or conduct is classified as an offence in Australia.

219. There is no evidence before the Tribunal so as to enliven this consideration.

220. A consideration of sub-paragraph (h) of paragraph 8.1.1(1) of the Direction weighs neutrally.

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

221. Paragraph 8.1.2(1) provides that in considering the risk to the Australian community, a decision-maker should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.

222. Paragraph 8.1.2(2) provides that in considering the risk to the Australian community, a decision-maker must have regard to the three following factors on a cumulative basis:

(a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct;

(b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account available information and evidence on the risk of the non- citizen re-offending; and evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since the most recent offence; and

(c) where consideration is being given to whether to refuse to grant a visa to the non-citizen - whether the risk of harm may be affected by the duration and purpose of the non-citizen's intended stay, the type of visa being applied for, and whether there are strong or compassionate reasons for granting a short stay visa.

223. The assessment of the risk to the Australian community were the Applicant to engage in further offending or other serious conduct, is properly informed by the nature of his offending and other serious conduct to date. This assessment is also informed by the provision in paragraph 8.1.2(1) of the Direction which stipulates that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases, and that some conduct and the harm that would be caused if it were to be repeated, is so serious that any risk that it may be repeated is unacceptable.

8.1.2(1) – Community tolerance of risk

224. Having regard for the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. The Tribunal finds that the nature of the harm should the Applicant reoffend or engage in further criminal or other serious conduct includes that innocent persons might be subjected to suffer physical or psychological harm, and that community tolerance for such risk would be low to the point that any risk of such occurrence is unacceptable.

8.1.2(2)(a) – The nature of the harm

225. For the Applicant, it was submitted that future offending of similar nature would have the potential to cause physical and or psychological injury and financial harm to members of the Australian community.[102]

226. For the Respondent, it was submitted[103] that there was nothing in the Direction or in any authority that suggested that the Tribunal is limited, in its assessment of the potential magnitude of future harm, to assessing the harm that has been caused previously.[104] It was also submitted that any risk that the Applicant might reoffend in a comparable manner should be considered unacceptable.

227. Repetition of the Applicant's offending and other serious conduct might have very serious consequences for the Australian community. Significant number of offences of dishonesty might be committed, resulting in financial loss and psychological harm to individuals and financial and material harm to businesses. Substantial police resources might be required to investigate and prosecute the Applicant. The Applicant might undertake work again, even without work rights, and might steal as a servant again. Road users might be exposed to potentially life threatening danger if the Applicant drives a vehicle with at high speed with methylamphetamine in his system or fails to observe speed limits and traffic lights. The Tribunal considers that any risk of such a circumstance arising is unacceptable.

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[102] Ex A1 par 40.

[103] Ex R2 par 43.

[104] *Minister for Home Affairs v Stowers* [2020] FCA 407, [58]; *BSJ16 v Minister for Immigration and Border Protection* [2016] FCA 1181, [68].

8.1.2(2)(b) - The likelihood of the non-citizen engaging in further criminal or other serious conduct

228. The Applicant is a 29 year old man, who arrived in Australia on 29 June 2018, and first offended on 9 September 2020, a little over two years later. He blamed the upsets of his brother's death and the discovery of his wife's infidelity for his descent into drug use and offending. The Tribunal accepts that the Applicant's offending only commenced after those events. Present expert evidence is that he does not suffer any mental illness, and neither is there any evidence that he suffers any physical illness.

229. If the Applicant is returned to the community, it is his intention to reside with his wife and child. The Tribunal does not consider this to be a protective factor regarding his potential further offending, as he has in the past offended while living in the same family environment. He was able to conceal his drug use from his wife for a considerable period when they were living together, and there is a real likelihood that he would be able to do so again, should he continue to relapse into drug use. As I have found earlier, the Applicant accepted during cross-examination that majority of his offending was the result of him not being able to distinguish between right and wrong because of him being under the influence of drugs.[105] Therefore, were the Applicant to relapse into drug use, it is very likely that his family would not be protective factor preventing him from reoffending.

230. Queensland Corrective Service records[106] show that on admission to prison for his second incarceration, the Applicant was assigned a High security classification. He was assessed as having Risk of Reoffending Prison Version / (RoR-PV) score of 9 which indicated that he fell into the category of prisoners who posed a moderate risk of further general offending. **His recently sentenced offences were committed whilst he was on a suspended sentence, and this indicated a continuance of his offending behaviour.** (Emphasis added)**.** He had been named as the perpetrator of an assault of another prisoner over money issues but was not assessed as posing a risk to the safety and security of other. He had a poor response to court based orders. He had at times displayed behaviour not consistent with the rules and regulations of a correctional centre. A review of his violation history indicated that he incurred a number of adverse incidents and breaches of discipline.

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[105] Transcript, p 18, lines 22-38.
[106] Ex R1 p 884-888.

231. Since that time, the Applicant has expressed remorse for his criminal conduct, and he has completed a substantial number of courses aimed at his rehabilitation from drug dependence. The Applicant told Dr Kwok that he ceased his drug use in July 2022[107], however the ACICCRR shows that shows that he committed a string of offences regarding dishonesty and drugs in the months after the time when he told Dr Kwok that he had ceased drug use. Included among these was that on 1 August 2022, without permission, he withdrew thousands of dollars from his victim's bankcard. He explained this conduct saying that he was a drug addict at the time and could not tell right from wrong.[108] Moreover, he was charged with *Possessing Dangerous Drugs* on 23 September 2022, and being in possession of a hypodermic needle and a syringe the same day. It is difficult to escape the conclusion that he was not using drugs until at least around this time. The Tribunal doubts that the Applicant told Dr Kwok or the Tribunal the truth about the cessation of his drug use in July 2022.

232. The Tribunal also notes that the Applicant told Dr Kwok that at the time of his breaches of the DVO he did not know about the Order, however as explained previously in these reasons, it was served on him a matter of days before the breach incidents. He did not disclose this fact to Dr Kwok, and he denied knowledge of its existence.

233. Dr Kwok also noted that the Applicant made no mention of the call that he made to his former wife.[109]

234. Dr Kwok made her assessment of the Applicant's risk of reoffending in relation to family violence as low, partly in reliance on the fact that his victim, his ex-wife, was living in India, however the evidence before the Tribunal was that she lives in Brisbane, and it is unclear to the Tribunal whether or not this knowledge might have impacted her opinion. The Tribunal nevertheless accepts that there appears to be little prospect of the Applicant committing family violence against his current partner.

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[107] Ex R4 par 25.
[108] Transcript Day 1 p 18 lines 22-38.
[109] Ex R4 par 25.

235. The Applicant has not given Dr Kwok a full and frank disclosure of his conduct, and this raises a concern about what other matters he may have suppressed or misrepresented, and the extent to which this influenced her professional opinions.

236. In any event, the Applicant's conduct does not demonstrate genuine acknowledgement of or insight into his offending.

237. The Tribunal however accepts Dr Kwok's finding that the Applicant appears to be in the early stages of sustained remission for Substance Abuse Disorder. It remains to be seen if this can be sustained in the community. Dr Kwok has also stated that the Applicant's history of developing depressive symptoms, or an adjustment disorder made him more vulnerable than most individuals.[110] Dr Kwok said that lack of employment had contributed to the Applicant's past offending. The Tribunal digresses to note that whilst this may be so in respect of his most recent offending, it does not appear to have been the case at the time of his first sentencing appearance, as police records show that he was on a temporary student visa, which obviously had associated work rights[111].

238. Dr Kwok further noted that pro-social activities were a protective factor which the Applicant currently lacked, and she nominated job seeking as one such activity he was missing. However, as far as the future is concerned, job seeking, for this Applicant, looks to be easier said than done.

239. In order for this Applicant to usefully undertake job-seeking activities, he must first achieve work rights. It is not open to this Tribunal to grant him such rights. Even if the Tribunal finds in his favour, he will still not have work rights, and getting them may well prove to be problematic. Should the Applicant not be able to obtain work rights, then he will be missing an important pro-social activity identified by Dr Kwok, and the Tribunal is concerned that this may exacerbate the vulnerability identified by Dr Kwok and increase his risk of relapse into mental disorders which previously led to his offending.

240. Assuming that the Applicant is able to get work rights at some future time, he would still be faced with the further problem of finding employment, in an era where many employers

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[110] Ex R1 p 965 lines 14-17.
[111] Ex R1 p 815.

expect prospective employees to produce police clearances. Having regard to the Applicant's extensive and substantial criminal record, which critically includes a conviction for stealing as a clerk or servant, the Tribunal notes that this conviction was not specifically mentioned in Dr Kwok's report and was not the subject of evaluation in terms of his employment prospects or possible exacerbation of the identified vulnerability.

241. The Tribunal is concerned that the Applicant's path to work rights, and subsequent employment is by no means simple or guaranteed. He may, if permitted to remain in the community, face a lengthy and uncertain period of not just unemployment, but not even being able to lawfully seek employment. The Tribunal is concerned that lack of employment has contributed to the Applicant's offending in the past, and there is a real likelihood that it may do so in the future. Should he relapse into drug use, and in particular drive a vehicle again at high speed after taking drugs, the consequences could be very serious indeed.

242. Whilst the Applicant appears to have achieved some level of rehabilitation to date, for the foregoing reasons, there are foreseeable difficulties in his continuing to do so into the future.

243. Rehabilitation however, is not just a matter of overcoming drug dependence, it includes knowing and observing the difference between that which is right, and that which is not, including that which is lawful, and that which is not.

244. The Applicant, if returned to the community, proposed to work on a volunteer basis in his wife's cleaning business to assist his wife until he acquires legal working rights in Australia.[112] This sentiment was also echoed in his wife's oral evidence at the hearing.[113] Although this proposal in theory assists the Applicant, it does raise questions about whether it is practically achievable. The underlying basis that raises this dilemma is the Applicant's offending for '*stealing by clerks and servants*' which saw him receive an imprisonment sentence for six months. The Tribunal notes that this conviction may hamper the prospects of him working in his wife's business (even on voluntary basis) which in turn will make his job-seeking activity more challenging.

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[112] Ex R1, p 30 [30](a)-(b).

[113] Transcript, p 67, lines 17-26.

245. In view of this stated intention, and the other evidence discussed above, the Tribunal therefore finds that there is a very high risk that the Applicant will re-offend further in future.

246. Primary consideration 1 is therefore given very heavy weight against revocation.

Conclusion: Primary Consideration 1

247. Primary Consideration 1 weighs very heavily against revocation.

PRIMARY CONSIDERATION 2: FAMILY VIOLENCE

248. Paragraph 8.2 of the Direction provides:

> *1 The Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia. The Government's concerns in this regard are proportionate to the seriousness of the family violence engaged in by the non-citizen (see paragraph (3) below).*
>
> *2 This consideration is relevant in circumstances where:*
>
> *(a) a non-citizen has been convicted of an offence, found guilty of an offence, or had charges proven howsoever described, that involve family violence; and/or*
>
> *(b) there is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence, and the non-citizen being considered under section 501 or section 501CA has been afforded procedural fairness.*
>
> *3 In considering the seriousness of the family violence engaged in by the non-citizen, the following factors must be considered where relevant:*
>
> *(a) the frequency of the non-citizen's conduct and/or whether there is any trend of increasing seriousness;*
>
> *(b) the cumulative effect of repeated acts of family violence;*
>
> *(c) rehabilitation achieved at time of decision since the person's last known act of family violence, including:*
>
> *(i) the extent to which the person accepts responsibility for their family violence related conduct;*
>
> *(ii) the extent to which the non-citizen understands the impact of their behaviour on the abused and witness of that abuse (particularly children);*
>
> *(iii) efforts to address factors which contributed to their conduct; and*
>
> *(d) Whether the non-citizen has re-offended since being formally warned, or since otherwise being made aware by a Court, law enforcement or other authority, about the consequences of further acts of family violence,*

noting that the absence of a warning should not be considered to be in the non-citizen's favour. This includes warnings about the non- citizen's migration status, should the non-citizen engage in further acts of family violence.

249. During the course of the previous hearing, the Applicant admitted having engaged in threatening behaviour against his ex-wife:[114]

> *'MS HO: Mr Singh, I just have one more question, do you accept that - sorry, in relation to the DVO, sorry - do you accept that contacting the victim, including texting her on several occasions and sending her a video of you drinking weed killer, or purporting to, that kind of communication is threatening?*
>
> *INTERPRETER: Can you say this again?*
>
> *MS HO: Sorry, do you accept that contacting the victim on several occasions, including sending a video in which you purport to drink weed killer is threatening behaviour?*
>
> *INTERPRETER: Yes.'*

250. In his closing submissions before the previous Tribunal Dr Donnelly accepted that this established family violence for the purposes of the Direction[115]:

> *'My learned friend asked the applicant yesterday about his contact with his ex-wife, and he accepted that his contact - his contact with the ex-wife would've had a negative impact on her, specifically about sending a video of drinking weed-killer and whether that was threatening conduct, and he accepted that it was. Plainly, that's family violence, and I think that concession has to - has to be made.'*

251. Before the present Tribunal, the Applicant denied this conduct, and claimed he had not understood the question at the previous Tribunal hearing. He then proceeded to give a lengthy rambling and evasive answer, before accepting that he had been convicted in relation to that conduct.[116] He also agreed that the conduct which was the basis for his conviction was threatening and harassment. [117]

252. The Tribunal notes that before the sentencing magistrate, the alleged facts were not challenged by his legal representative. The Tribunal is unable to go behind this conviction.[118]

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[114] Ex R1 p 935 lines 1-15.

[115] Ex R1 p 968 lines 22-27.

[116] Transcript Day 1 p 21 lines 14-30.

[117] Ibid p 22 lines 10-23.

[118] *HZCP v Minister for Immigration and Border Protection* [2019] FCAFC 202 at [68] and [191].

253. Having regard to the available evidence and the concession made by Dr Donnelly, the Tribunal is satisfied that the Applicant has engaged in acts of family violence against his ex-wife in breach of a DVO as alleged and for which he was sentenced to one months' imprisonment.

254. Primary Consideration 2 is therefore enlivened in this case, as this conviction renders it so in consequence of paragraph 8.2(2)(a) of the Direction.

255. Having regard to subparagraph (3) of paragraph 8.2 of the Direction, the Tribunal finds:

- the Applicant's family violence conduct has been confined to the episode described, and there is no trend of increasing seriousness;
- as the Applicant's family violence conduct is confined to one episode, there is no cumulative effect of such conduct;
- it is difficult to discern rehabilitation achieved in circumstances where the Applicant continues to deny family violence conduct even though he has done courses aimed at his rehabilitation; and
- there is no relevant evidence before the Tribunal.

256. The Tribunal considers that Primary consideration 2 should weigh heavily against revocation.

Conclusion: Primary Consideration 2

257. Primary Consideration 2 weighs heavily against revocation.

PRIMARY CONSIDERATION 3 THE STRENGTH, NATURE AND DURATION OF TIES TO AUSTRALIA.

258. Paragraph 8.3(1) of the Direction requires consideration of any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.

259. Paragraph 8.3(2) of the Direction requires consideration of a non-citizen's ties to Australia and that more weight should be given to a non-citizen's ties to his or her child and/or children

who are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.

260. Paragraph 8.3(3) requires consideration of the non-citizen's strength duration and nature of any family or social links generally with Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely.

261. Paragraph 8.3(4) requires consideration of the strength, nature and duration of any other ties that the non-citizen has to the Australian community. In doing so, decision makers must have regard to:

> *(a) The length of time the non-citizen has resided in the Australian community, noting that:*
>
> *(i) considerable weight should be given to the fact that a non-citizen has been ordinarily resident in Australia during and since their formative years, regardless of then their offending commenced and the level of that offending; and*
>
> *(ii) more weight should be given to the time the non-citizen has resided in Australia where the non-citizen has contributed positively to the Australian community during that time; and*
>
> *(iii) less weight should be given to the length of time spent in the Australian community where the non-resident was not ordinarily in Australia during their formative years and the non-citizen began offending soon after arriving in Australia.*

Consideration of paragraph 8.3 Strength, nature and duration of ties

262. The Applicant arrived in Australia on 29 June 2018. He has been either in prison or immigration detention for approximately one third of his time in Australia.

263. He married an Australian citizen in October 2021, and has a daughter Child A about to turn two who is also an Australian citizen. He also has a friendship with his wife's sister, Ms Harpreet Kaur who has returned to India, and this relationship does not provide a relevant tie.

264. The Applicant was taken into custody when Child A was nearly three months old and has not lived under the same roof with her since. The Tribunal accepts that there is a close and strong bond between the Applicant and Child A, and that were he to be deported there would be a real risk of her suffering long term adverse emotional, psychological and financial hardships. The Tribunal gives increased weight to the interests of Child A.

265. The Applicant has some friends who have spoken in support of him. His ex-wife lives in Brisbane. The Tribunal does not consider this relationship to constitute a relevant tie.

266. The Applicant had work rights until December 2020. He worked during the period prior to that date. He has also contributed to his local Sikh community when he has been at liberty to do so.

267. The Applicant's current wife Ms Kaur works extreme hours starting as early as 2 am and finishing as late as 7:00 pm, seven days per week, and manages only four hours sleep per night. She is a contract cleaner with three full time, and a number of part-time employees. She has a close and loving relationship with the Applicant and needs him to support her with caring for their Child A, who is showing some behavioural issues.

268. Ms Kaur is heavily in debt and has been paying rent as well as costs of the construction of her new home which she commenced in November 2023. She has been paying all travel and living expenses for her parents and has also been paying the Applicant's legal expenses.

269. She also suffers a range of physical and mental health concerns and is worried about developing cancer in the next 12 months. Her work hours render it virtually impossible for her to utilise conventional childcare, as she starts work before, they open, and finishes after they close. While the Applicant has been in prison or immigration detention, she has been managing with the support of her parents who have come from India over the past 17 months to help her. Their visas have expired, and they are returning to India around the time of this decision and do not anticipate returning to Australia for 10 years. Ms Kaur has expressed fears that after her parents return to India, she will not be able to cope, and may have to close down her business, and dismiss her employees.

270. The Tribunal accepts that Ms Kaur is in great need of the familial support the Applicant can give to her domestically even if he does not have work rights. His support as a husband and father, and his ability to care for their child while she works or if she is ill is of great concern to her. If he is able to acquire work rights, he would be able to help her shoulder her significant financial burdens.

271. The Tribunal accepts that if the Applicant remains in Australia, he will give Ms Kaur much needed personal and emotional comfort and assistance even if he is not permitted to work, provided he does not reoffend. The Tribunal also accepts that his ties to his daughter will strengthen to her benefit, and he should be able to help her grow up in a healthy environment, again, provided he does not reoffend.

272. All of the foregoing weighs in favour of revocation of the mandatory cancellation of the Applicant's Visa. However, there are countervailing considerations. Although the strength and nature of his ties to Australia are very strong, the duration of those ties is relatively short. The Applicant is not entitled to the benefit of para 8.3(4)(a)(i) of the Direction because he has not spent his formative years in this country. He is entitled to the benefit of para 8.3(4)(a)(ii) of the Direction, but only to a limited extent owing to the limited period during which he can be said to have contributed to the Australian community. The Tribunal does not consider time spent in prison or immigration detention to be time spent contributing to the Australian community.

273. Further, the Applicant was only in the country for a little over two years before he began offending, and this lessens the weight attributable to this Primary Consideration.

274. Cumulatively, the strength, nature, and duration of the Applicant's ties to Australia weigh heavily in favour of revocation.

Conclusion Primary Consideration 3

275. Primary Consideration 3 weighs heavily in favour of revocation.

PRIMARY CONSIDERATION 4: THE BEST INTERESTS OF MINOR CHILDREN IN AUSTRALIA

276. Paragraph 8.4(1) of the Direction compels a decision-maker to make a determination about whether cancellation or refusal under s 501, or non-revocation under s 501CA, is in the best interests of a child affected by the decision. Paragraphs 8.4(2) and 8.4(3) respectively contain further stipulations. The former provides that for their interests to be considered, the relevant child (or children) must be under 18 years of age at the time when a decision about whether or not to refuse or cancel the visa or not to revoke the mandatory cancellation decision is being made. The latter provides that if there are two or more relevant children,

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

277. Paragraph 8.4(4) of the Direction provides a list of factors to be considered in determining the best interests of the minor children. Those factors relevantly comprise for present purposes:

> *(a) the nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);*
>
> *(b) the extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;*
>
> *(c) the impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;*
>
> *(d) the likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;*
>
> *(e) whether there are other persons who already fulfil a parental role in relation to the child;*
>
> *(f) any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);*
>
> *(g) evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the non-citizen, or has otherwise been abused or neglected by the non-citizen in any way, whether physically, sexually or mentally;*
>
> *(h) evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.*

278. There is only one child relevant for the purposes of this Primary Consideration, Child A, who will not turn 18 for the next 16 years.

279. The Applicant's daughter, Child A, will be two years old in July 2024, and is an Australian citizen, who lives with her mother. Child A has been cared for by her mother and maternal grandparents since her father was taken into custody on 24 September 2022 when she was a little under three months old. The Applicant played a role in caring for her prior to his arrest and incarceration.

Paragraph 8.4(4)(a) Nature and duration of relationship

280. The relationship is parental and existing, however the Applicant is not Child A's primary caregiver. The Applicant was present in her life for the first three months, but there has been an extended period of very limited contact since that time owing to his incarceration and immigration detention. The child nevertheless knows who he is and seeks his company. There are no court orders which impact the Applicant's contact with Child A. However, the extended period of limited contact lessens the weight to be given to this consideration.

281. Paragraph 8.4(4)(a) weighs moderately in favour of revocation.

Paragraph 8.4(4)(b) Likely future positive role

282. The full extent to which the Applicant is likely to play a positive future role in Child A's life hinges on whether he can maintain abstinence from drugs and drug related and other offending. Child A does not turn 18 for the next 16 years, and as I have found earlier in these reasons, I have concerns about the Applicant maintaining abstinence for this period . If the Applicant successfully abstains from drugs and his offending conduct , he will be able to play a positive role in Child A's life as a father supporting her physically, emotionally and psychologically, and sharing parenting responsibilities with Ms Kaur, and supporting her domestically. Should he be able to secure work rights, he will also be able to support her financially. In any event, this Tribunal accepts that he may play a positive role in Child A's life even if he is not able to contribute financially.

283. There are no court orders which would impede the Applicant from playing a positive future role in Child A's life.

284. Paragraph 8.4(4)(b) weighs moderately in favour of revocation.

Paragraph 8.4(4)(c) Impact of prior conduct

285. There is no evidence before the Tribunal that the Applicant's prior or likely future conduct has had or will have any negative impact on Child A.

286. Paragraph 8.4(4)(c) is given neutral weight.

Paragraph 8.4(4)(d) Effect of separation

287. Should the Applicant be separated from Child A in consequence of his deportation, the Tribunal accepts that this may well have a significant adverse long term impact on Child A. The Tribunal accepts that contact via electronic means is a poor substitute for physical presence, companionship and support. An added adverse consequence for Child A would be that her mother would continue to face the various problems and fears she has described to this Tribunal, and this could lessen her time and capacity to carry out her role as a single mother. The Applicant would be absent from milestone events in Child A's life, and she would have limited opportunities to be in his presence.

288. Paragraph 8.4(4)(d) weighs very heavily in favour of revocation.

Paragraph 8.4(4)(e) Parental role

289. Ms Kaur presently fulfills the parental role in respect of Child A. Until recently she has had the support of her parents in doing so, however they were to return to India shortly after the conclusion of the hearing of this case. Ms Kaur will face a significant struggle to carry out parental roles without the support of the Applicant.

290. Paragraph 8.4(4)(e) weighs very heavily in favour of revocation.

Paragraph 8.4(4)(f) Views of the children

291. No views of Child A have been placed before the Tribunal owing to her infancy. The Tribunal nevertheless accepts that a child of her age would fervently hope for her father to remain in Australia.

292. Paragraph 8.4(4)(f) weighs very heavily in favour of revocation.

Paragraph 8.4(4)(g) Exposure to family violence

293. There is no evidence before the Tribunal so as to enliven this consideration.

294. Paragraph 8.4(4)(g) is given neutral weight.

Paragraph 8.4(4)(h) Emotional trauma

295. There is no evidence before the Tribunal so as to enliven this consideration.

296. Paragraph 8.4(4)(h) is given neutral weight.

297. The Tribunal concludes that the best interests of the Applicant's daughter Child A weigh very heavily in favour of revocation.

Conclusion: Primary Consideration 4

298. Primary Consideration 4 weighs very heavily in favour of revocation.

PRIMARY CONSIDERATION 5: THE EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

The relevant paragraphs in the Direction

299. In making the assessment for weight to be allocated to Primary Consideration 5, paragraph 8.5(1) of the Direction provides that the Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that he may do so, the Australian community, as a norm, expects the government to not allow such a non-citizen to enter or remain in Australia.

300. Paragraph 8.5(2) of the Direction directs that a visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:

> *(a) acts of family violence; or*
>
> *(b) causing a person to enter into, or being party to (other than being a victim of), a forced marriage;*
>
> *(c) commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual*

nature, as well as other serious crimes against the elderly or other vulnerable persons in the form of fraud, extortion, financial abuse/material exploitation or neglect;

(d) commission of crimes against government representatives or officials due to the possession they hold, or in the performance of their duties; or

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

(f) worker exploitation.

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

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

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

303. Paragraph 8.5(4) is consistent with the decision of the Full Court of the Federal Court in *FYBR v Minister for Home Affairs* [2019] FCAFC 185 at [68] ("**FYBR**") which affirmed the approach established in previous authorities that it is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an Applicant's circumstances or evidence about those expectations. The Tribunal is to be guided by the Government's views as to the expectations of the Australian community, which are to be found in the Direction.[119]

Analysis – Allocation of Weight to this Primary Consideration 5

304. In Ex A1, it was submitted that the Tribunal would have regard to the Applicant's personal circumstances and moderate the weight against the Applicant to be given to this

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

consideration.[120] Reliance for this proposition was placed on *Ali v Minister for Immigration and Citizenship and Multicultural Affairs ("Ali").*[121]

305. This submission is rejected.

306. Ali was raised in argument[122] in the High Court case of *Ismail v Minister for Immigration, Citizenship and Multicultural Affairs*[123] by Mr Hooke SC where the same proposition was put.

307. The High Court made clear[124] that para 8.4(4) of Direction 90 (now para 8.5 of Direction 99) expressly precluded such a course, and that the personal circumstances of the Applicant were to be brought to account in the ultimate task of weighing the various competing considerations:

> *'49. ……The point the plaintiff makes is that, as the expectations of the Australian community would have been affected by knowledge of the plaintiff's personal circumstances, the delegate was required to, but did not, weigh those personal circumstances in deciding what ultimate weight to give to the expectations of the Australian community.*
>
> *50. If the delegate was required to weigh the plaintiff's personal circumstances in deciding what ultimate weight to give to the expectations of the Australian community, no inference can be drawn that the delegate did not do so. A decision-maker's written reasons for a decision are often structured in sequence. The sequential structure of reasons, so that each topic is dealt with under a separate heading, is not generally a sufficient reason to infer that in dealing with one matter the decision-maker has forgotten the substance of the preceding parts of the reasons or is unaware of the substance of the subsequent parts of the reasons. Nor would it be readily inferred from mere sequential structuring and dealing with each topic under its own heading that a decision-maker had quarantined the assessment of each topic from every other topic. As previously noted, in the present case, moreover, the concluding section of the delegate's reasons discloses an overall weighing of all considerations against each other. In so doing, the delegate expressly weighed the plaintiff's personal circumstances against, amongst other things, the expectations of the Australian community.*
>
> *60. Further, para 8.4 does not stipulate that, in assessing what weight is to be given to the expectations of the Australian community, the decision-maker must attribute to that hypothesised community knowledge of the personal circumstances of the applicant for the visa as known to the delegate. To the contrary, para 8.4(4)*

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[120] A1, p 20 [129]-[130].

[121] [2023] FCA 559.

[122] [2023] HCA Trans 111.

[123] [2024] HCA 2.

[124] Ibid at paras 49-52.

stipulates that the decision-maker is to proceed on the basis of the Australian Government's views as set out in para 8.4 "without independently assessing the community's expectations in the particular case".

61. Paragraph 8.4(4) is to be understood as directing the decision-maker not to attempt to infer what the expectations of the Australian community would be "in the particular case" (that is, with the knowledge of the delegate about the applicant's personal circumstances), but to proceed on the basis that the views of the Australian Government set out in para 8.4(1)-(3) are the relevant norm described as the expectations of the Australian community. That norm, as applicable by reference to the terms of para 8(1)-(3), is then to be weighed with other relevant matters as required by paras 6 and 7 of Direction 90. The delegate's reasoning accords with these requirements.'

308. See also the recent decision of Katzmann J in *QDWQ v Minister for Immigration Citizenship and Multicultural Affairs.*[125]

309. Having regard to para 8.5(2)(a) the Applicant's acts of family violence raise the expectation that he should not continue to hold a visa which flows from overall history of extensive acts of fraud, stealing dishonesty, and his traffic history which presents a serious danger to other road users.

Conclusion: Primary Consideration 5

310. Primary consideration 5 weighs very heavily against revocation.

PARAGRAPH 9: OTHER CONSIDERATIONS

311. Under the heading Other Considerations paragraph 9(1) of the Direction provides a non-exhaustive list of considerations as follows:

(a) legal consequences of the decision;

(b) extent of impediments if removed;

(c) impact on victims; and

(d) impact on Australian business interests.

[125] [2024] FCA 178.

(a) Legal consequences of the decision

312. In consequence of an adverse decision, the Applicant will continue to be detained pursuant to s. 189 of the Act, pending his removal under s. 198. At present, no protection finding has been made under s. 197C, and it remains open to the Applicant to seek such a finding by means of applying for a Protection visa.

313. To the extent that the Applicant raises non-refoulement obligations, the Tribunal defers consideration of non-refoulement obligations until such time as the Applicant seeks a Protection visa, and the matter can be addressed in proper detail as provided for by the Act.

314. Otherwise, the Applicant has no other visa options available to him, and he will be deported and permanently excluded from Australia. Whilst these are inevitable legal consequences of an adverse decision, they are the consequences intended by the Parliament.

315. The Applicant has claimed to be in fear of his cousin who has allegedly has criminal links in India and has threatened and tried to blackmail the Applicant. As stated in the preceding two paragraphs, this Tribunal will defer the assessment of these claims to a Protection visa assessment, a pathway which remains open for the Applicant to pursue.

316. Accordingly, this consideration is given neutral weight.

(b) Extent of impediments if removed

317. Paragraph 9.2(1) of the Direction directs a decision-maker to take into account the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:

(a) the non-citizen's age and health;

(b) whether there are any substantial language or cultural barriers; and

(c) any social, medical and/or economic support available to that non-citizen in that country.

318. The matters raised by the Applicant regarding his cousin were raised in the alternative as an impediment to his return. His evidence on this point has been rejected, and are not regarded as raising an impediment to his return.

Paragraph 9.2(1)(a) - Age and health

319. The Applicant is a 29 year old male. He has a history of drug abuse but appears to be in good physical health. However, in relation to his mental health, he does have the vulnerability referred to by Dr Kwok. To the extent that he is currently receiving treatment, that treatment is preventive rather than curative.

320. The Tribunal accepts that like all deportees, the Applicant is likely to suffer emotional stress in consequence of his deportation, and separation from his wife and daughter and this could irritate the vulnerability described by Dr Kwok. He may also face some difficulties finding employment in consequence of his substantial criminal record, particularly having regard to his work related conviction.

321. The Applicant's age and physical health do not presently appear to present any significant impediment to his return to such work. However, the Tribunal accepts that the Applicant's mental health may be affected if he were to be separated from his immediate family in Australia.

322. Paragraph 9.2(1)(a) of the Direction weighs strongly in favour of revocation.

Paragraph 9.2 (1)(b) Substantial language or cultural barriers

323. It has not been submitted that the Applicant will encounter any substantial language barriers on his return to India.

324. It has however been submitted that he may suffer cultural barriers.

325. The Applicant will be returning to the culture in which he grew up, and with which he is well familiar. The Tribunal accepts that there may be some cultural and family issues arising from his divorce and criminal history, as well as any mental illness should he suffer a relapse.

326. Paragraph 9.2(1)(b) of the Direction is given moderate weight in favour of revocation.

Paragraph 9.2(1)(c) - any social, medical and/or economic support available to that non-citizen in that country

327. The Tribunal is required to consider the extent of any impediments the Applicant may face in establishing himself and maintaining basic living standards (in the context of what is generally available to other citizens of that country), in regard to the matters listed in paragraph 9.2(1)(c).

328. It was accepted by the Applicant during cross-examination that should he have to return to India, he will be able to stay with him mother and son in their home.[126] The Applicant also accepted that he has few '*property*' in his name in India.[127] Considering these accepted findings the Tribunal is of the view that the Applicant will have social and economic support available to him in India. The Applicant submitted that the medical support available to him in India would not be equivalent to what is available to him here in Australia. To whatever extent this may be true, the Tribunal accepts that there may be some disparity in the level of medical support available to him in India compared to what he is available to him in Australia. However, there is no evidence before the Tribunal that the Applicant will not be able to access what is generally available to other citizens in terms of social, medical and/or economic support.

329. Paragraph 9.2(1)(c) of the Direction is given moderate weight.

Conclusion Paragraph 9.2 Extent of impediments if removed

330. This consideration weighs strongly in favour of revocation.

(c) Impact on victims

331. Paragraph 9.3(1) states that decision-makers must consider the impact of the s 501 or 501CA decision on members of the Australian community, including victims of the non-citizen's criminal behaviour, and the family members of the victim or victims, where

[126] Transcript, p 23, lines 38-41.
[127] Transcript, p 23, lines 43-45; p 24, lines 1-2.

information in this regard is available and the non-citizen being considered for visa refusal or cancellation, or who has sought revocation of the mandatory cancellation of their visa, has been afforded procedural fairness.

332. It was submitted for the Applicant that this consideration was not relevant[128], and the Tribunal accepts this submission.

333. Paragraph 9.3 of the Direction is given neutral weight.

(d) Impact on Australian business interests

334. Paragraph 9.4(1) of the Direction requires that decision makers, must consider any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia, noting that an employment link would generally only be given weight where the decision under section 501 or 501CA would significantly compromise the delivery of a major project, or delivery of an important service in Australia.

335. It was submitted for the Applicant that his deportation would adversely affect his wife's business.

336. The Tribunal accepts that if the Applicant remains in Australia, even without work rights, he will be able to provide invaluable personal and emotional support to his wife, strictly outside the scope of the business, particularly in the absence of her parents who are returning to India. The Tribunal accepts that this support will assist Ms Kaur by relieving her to some degree of the worry about providing proper care for Child A, and freeing her up to concentrate on her business.

337. This other consideration weighs strongly in favour of revocation.

Conclusion as to Paragraph 9: Other Considerations

338. Overall, the Tribunal considers that the other considerations weigh strongly in favour of revocation.

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[128] Exhibit A1 par 170.

CONCLUSION

339. The Tribunal is now required to weigh all of the Considerations in accordance with the Direction.

340. In considering whether there is another reason to exercise the discretion afforded by s501CA(4) of the Act to revoke the mandatory visa cancellation decision, The Tribunal finds as follows:

- Primary Consideration 1 weighs very heavily against revocation;
- Primary Consideration 2 weighs heavily against revocation;
- Primary Consideration 3 weighs heavily in favour of revocation;
- Primary Consideration 4 weighs very heavily in favour revocation;
- Primary Consideration 5 weighs very heavily against revocation; and
- The totality of Other Considerations weighs strongly in favour of revocation.

341. Primary considerations have been given greater weight than other considerations.

342. In determining weight to be given to the various considerations, the Tribunal has had regard to paragraphs 5.2(1), (2), (3), (4), and (6) and 8.1.2 of the Direction.

343. The Tribunal considers that in this case, the nature of the Applicant's conduct, and the harm that could be caused were it to be repeated is so serious that even strong countervailing considerations are insufficient to justify revoking the mandatory cancellation, and that any risk of its repetition is unacceptable.

344. Application of the Direction therefore weighs against revocation of the cancellation of the Applicant's Visa.

345. The Tribunal is therefore not prepared to revoke the mandatory cancellation of the Applicant's Visa.

DECISION

346. Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal **affirms** the decision made by a delegate of the Respondent on 27 June 2023 to not revoke the mandatory cancellation of the Applicant's Class WC Subclass 030 Bridging C visa.

I certify that the preceding 346 (three hundred and forty-six) paragraphs are a true copy of the reasons for the decision herein of Member R. Maguire

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

Associate

Dated: 14 May 2024

Dates of hearing:	**15 and 16 April 2024**
Dates final submissions received:	**20 April 2024 (from Applicant)** **7 May 2024(from Respondent)**
Counsel for the Applicant:	**Dr Jason Donnelly (Latham Chambers)**
Solicitors for the Applicant:	**Zarifi Lawyers**
Solicitor for the Respondent:	**Ms Gabrielle Ho (Lawyer)** **Clayton Utz Lawyers**

ANNEXURE A

EXHIBIT	DESCRIPTION OF EVIDENCE	DATE OF DOCUMENT	DATE RECEIVED
RESPONDENT SUBMISSIONS			
R1	Remittal bundle	Various	8 February 2024
R2	Statement of Facts, Issues and Contentions	3 April 2024	3 April 2024
APPLICANT SUBMISSIONS			
A1	Statement of Facts, Issues and Contentions	7 March 2024	7 March 2024
A2	Applicant's supplementary bundle	Various	25 March 2024
A3	Psychologist report for Ms Manpreet Kaur	2 April 2024	8 April 2024
A4	Statement from Mr Surinder Singh	29 March 2024	8 April 2024