Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number(s):	**2024/1282**
Re:	**Manpreet Singh Brar**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Senior Member Dr N A Manetta**
Date:	**22 May 2024**
Place:	**Adelaide**

The Tribunal affirms the decision under review.

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Senior Member Dr N A Manetta

CATCHWORDS

MIGRATION – mandatory cancellation of visa – whether 'another reason' for revocation of cancellation decision – Direction 99 – conviction of a serious offence involving dangerous operation of a motor vehicle causing death and grievous bodily harm – applicant determined to drive in Australia irrespective of limitations imposed upon him by Australian laws – applicant drove unlicensed again after he was charged with causing death by dangerous driving – breach of bail conditions – applicant sought a licence by deceiving authorities – best interests of minor children count substantially in applicant's favour – low risk of reoffending but seriousness of potential harm high – Australian community should be protected from the risk of serious future harm – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth)

CASES

Frugtniet v ASIC [2019] HCA 16; (2019) 266 CLR 250; (2019) 79 AAR 9

FYVY and Minister for Immigration, Citizenship and Multicultural Affairs (Migration) [2023] AATA 790

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v LJTZ [2021] FCA 92

SECONDARY MATERIALS

Minister for Immigration, Citizenship and Multicultural Affairs (Cth), Direction no. 99 — *Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (23 January 2023)

REASONS FOR DECISION[1]

Senior Member Dr N A Manetta

22 May 2024

1. This is an application by Mr Manpreet Singh Brar seeking a review of a decision of the respondent's delegate dated 27 February 2024.[2] By this decision, the delegate affirmed an earlier decision taken on 14 March 2023 to cancel Mr Brar's visa.[3] This earlier decision was taken under section 501(3A) of the *Migration Act 1958* (Cth) ('the Act') following Mr Brar's conviction of a serious offence. The offence consisted of causing death and grievous bodily harm by dangerous driving, and it resulted in Mr Brar being sentenced to a term of imprisonment of five years, part of which he had to serve on a full-time basis in jail. In these circumstances, section 501(3A) of the Act required the cancellation of Mr Brar's visa.

2. Mr Brar made a timely application for an internal review. When addressing the question of the reinstatement of Mr Brar's visa after its cancellation, the review delegate was required to answer two questions under section 501CA(4)(b) of the Act. The first question was whether Mr Brar passed the so-called 'character test' under the Act. Given his lengthy term of imprisonment, Mr Brar inevitably failed this test,[4] and the delegate's decision in this regard was clearly correct. The second question was whether, as Mr Brar did not pass the character test, there was 'another reason' for the cancellation of Mr Brar's visa to be revoked.

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[1] These reasons contain certain standard paragraphs that regularly appear in reasons I prepare; namely, [5] and [20].

[2] Ex R1, 10ff.

[3] A Class UF Subclass 309 Partner (Provisional) visa.

[4] A person sentenced to a term of imprisonment of 12 months or longer has a 'substantial criminal record' and thereby fails the test: see section 501(6)(a) and (7)(c) of the Act.

3. In addressing this second question, the delegate was required to apply any direction issued under section 499 of the Act. The delegate applied Direction no. 99 ('the Direction').[5] Having identified and evaluated the various matters required to be addressed under the Direction, the delegate concluded that on balance they did not favour revocation of the cancellation decision. The delegate then formally found that in light of this conclusion, and the earlier conclusion that Mr Brar had failed the 'character test', the jurisdiction under section 501CA(4) to revoke the cancellation decision was not enlivened. The delegate therefore declined to revoke the cancellation decision.[6]

TRIBUNAL'S TASK

4. Like the delegate, I must address the same two questions. I have already indicated that Mr Brar does not pass 'the character test'.

5. In respect of the second question, I too must apply the Direction. In a case like this, the Tribunal hears the matter afresh on the evidence before it. It does not merely review the delegate's decision for error, but reaches the correct or preferable decision on the evidence adduced before it.[7] It hears evidence and oral submissions and receives written documents and written submissions. It follows that the Tribunal may set aside the decision under review notwithstanding the absence of any error in the delegate's reasons if that is the correct or preferable decision on the evidence before it; equally, the Tribunal may affirm the decision under review notwithstanding the presence of a clear error in the delegate's reasoning if that is the correct or preferable decision on the evidence before it.

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[5] Minister for Immigration, Citizenship and Multicultural Affairs (Cth), Direction no. 99 — *Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (23 January 2023).

[6] Ex R1, 32-33, [104]-[105].

[7] See, for example, *Frugtniet v ASIC* [2019] HCA 16; (2019) 266 CLR 250; (2019) 79 AAR 9 at [51].

6. At the hearing before me, Dr Donnelly appeared for the applicant; Ms Letcher-Boldt, for the respondent. I am grateful to them for their assistance.

STATEMENT OF CONCLUSION

7. I have decided to affirm the decision under review. I set out below a summary of the background facts, and then I explain my reasons for my decision. My reasons include further references to the salient facts when they arise in connection with the considerations I am required to address under the Direction.

BACKGROUND FACTS IN SUMMARY

8. Mr Brar is a citizen of India, where he was born in 1989. He arrived in Australia on 30 March 2009, and on the evidence before me, he arrived in Australia lawfully. He is presently married with two young children. He and his wife, Ms Kaur, are the owners of a house in Queensland that is subject to a mortgage. He has had a varied work history in Australia, and while he has not always been employed, he has endeavoured, in my opinion, to make a significant contribution to the support of his spouse and children. He has supported his wife during her nursing studies, for example, and she is now working as a nurse.

9. Mr Brar's criminal record in Australia was before me.[8] On 27 November 2017, Mr Brar was found guilty of three charges in the Maroochydore Magistrates Court. In essence, these charges, taken as a whole, amounted to a dishonest attempt by Mr Brar to obtain a further driver's licence after his own had been suspended. No conviction was recorded by the Court, but Mr Brar was fined $1,000.

[8] Ex R1, 34-35.

10. The background circumstances of this offending should be noted. I take them from the sentencing remarks of the District Court of Queensland that were delivered in respect of Mr Brar's most serious offending.[9] I have read the remarks carefully and rely upon them.

11. Mr Brar had had his licence suspended after he was convicted[10] of exceeding the speed limit five times. Mr Brar referred in his evidence to me to his having failed to pay certain speeding fines and toll charges. I assume that he was eventually prosecuted and convicted *in absentia*[11] of having exceeded the speed limit.

12. Whether that assumption is correct or not, what is of importance is that Mr Brar lost his right to drive under Queensland law, however that loss arose. At that point, he attempted to gain a second licence dishonestly. This attempted deception led to the charges which I have mentioned.

13. Despite the Magistrates Court proceedings and notwithstanding the suspension of his licence, Mr Brar decided to drive unlicensed. The sentencing remarks refer to Mr Brar 'driving unlicensed, essentially since 2016, up until' 1 November 2020.[12]

14. The date of 1 November 2020 is important. On this day, very serious criminal offending took place that I now describe. Mr Brar, who, as I say, was not permitted to drive under Queensland law, decided nevertheless to drive. He drove through an intersection in Kallangur,[13] against a red light that had been red, according to the sentencing Court, for

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[9] Ibid, 36ff.

[10] The sentencing remarks refer to 'convictions' in this regard: see Ex R1, 37.

[11] Mr Brar gave evidence that he has no recollection of attending court in relation to the speeding offences.

[12] Ex R1, 37.

[13] Which I understand to be a suburb of the City of Moreton Bay in the Pine Rivers District, approximately 25-30 kms north of central Brisbane.

approximately five to eight seconds before Mr Brar entered the intersection.[14] Mr Brar's speed as he drove through the intersection was determined to be 85 km per hour in a 60 km per hour zone. He did not brake. Mr Brar's car hit another car driven by a Ms Garcia, and it also struck two pedestrians, Mr and Ms Seibel, a married couple who were out walking their dog and who were lawfully crossing the intersection (since they were facing green pedestrian lights).

15. Mr Seibel was seriously injured in the collision, and he died, in fact, five days later. Ms Garcia suffered extensive injuries and one of these required surgery, without which she would most likely have died as well. Ms Seibel suffered extensive bruising to her body and a broken bone in her foot.[15]

16. As a result of his conduct, Mr Brar was charged with, and pleaded guilty to, one count of the dangerous operation of a motor vehicle causing death and grievous bodily harm. He also pleaded guilty to one summary offence of unlicensed driving.

17. Mr Brar was sentenced on 11 August 2022 to five years' imprisonment, which was to be suspended after 20 months. He was also sentenced to a further two months' imprisonment for his unlicensed driving that day. He was disqualified absolutely from obtaining a licence in the future. The sentence was backdated to the day Mr Brar was taken into custody; namely, 25 February 2022.

18. After completing the requisite non-parole period in jail, Mr Brar was released and transferred to immigration detention as his visa had been cancelled by that time. As I have said, his visa was required to be cancelled under the Act as a consequence of the Court's sentence.

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[14] Ex R1, 37.
[15] Ibid, 37-38.

19. For the sake of completeness, I mention a minor matter. While on bail awaiting the determination of his criminal proceedings, Mr Brar committed a criminal assault. This also amounted to a breach of his bail conditions. On 30 November 2021, he was found guilty and fined $700, but no conviction was recorded. The offending was clearly minor as no conviction was recorded, and I am clear that this incident cannot represent a 'tipping point' in my deliberations. I need not deal with it further.

REASONS

Introductory remarks to the Direction

20. I now turn to the Direction. In *FYVY and Minister for Immigration, Citizenship and Multicultural Affairs (Migration)* [2023] AATA 790, I made certain prefatory remarks that I repeat here:

> [30] The Direction is framed against the stated objective of the Act, which is to regulate, in the national interest, the presence of non-citizens in Australia: see paragraph 5.1(1). The decision-maker is directed by paragraph 5.1(2) and (3) to consider the specific circumstances of the case. The explicit purpose of the Direction is to guide decision-makers in performing their functions under the Act: see paragraph 5.1(4).
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> [31] Principles appear under paragraph 5.2 of the Direction. These principles provide the framework within which decision-makers should approach their task. They are stated in paragraphs numbered (1) to (6). I set out some of the salient features of these principles.
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> [32] First, remaining in Australia is a privilege conferred on non-citizens in the expectation that they are law-abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community. Secondly, non-citizens who engage in criminal or other serious misconduct should expect to forfeit the privilege of remaining in Australia. Thirdly, the Australian community expects that the Australian Government should cancel visas or refuse non-citizens a right of entry where they have engaged in conduct that raises serious character concerns. This expectation arises whether or not the non-citizen poses a measurable risk of causing physical harm to the Australian community. Fourthly, Australia has a low tolerance of any criminal or other serious conduct by non-citizens who have been participating in and contributing to Australia for a short period of time only. A higher level of tolerance of criminal or other serious misconduct is extended to those who have lived in Australia for most of their life or from a very young age. The level of tolerance will rise with the length of time non-citizens have spent in the Australian community, particularly in their formative years. Fifthly, the nature of the non-citizen's conduct and the harm that would be caused if the conduct were to be repeated may be so serious that even strong countervailing considerations may prove an insufficient counterweight. In particular, I note that the inherent nature of certain conduct such as family violence and other types of specified conduct is so serious that even strong countervailing considerations may be insufficient,

> and this is so even if the non-citizen does not pose a measurable risk of causing harm to the Australian community.
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> [33] Informed by these principles, I am required under Part 2 of the Direction to take into account the considerations identified in sections 8 and 9. I add here that paragraph 7(1) directs me to give appropriate weight to information and evidence from independent and authoritative sources. Paragraph 7(2) also directs me to give greater weight "generally" to primary considerations over other considerations.

Application of the Direction

21. I turn now to apply the Direction. Paragraph 8.1(1) provides that decision-makers should keep in mind that the Government is committed to protecting the Australian community from harm as a result of criminal conduct. I am to have particular regard to the principle that remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are and have been law-abiding, respect important institutions and will not cause or threaten harm to individuals or the Australian community. I should bear this principle in mind and I do so.

22. Paragraph 8.1(2) provides that decision-makers should also give consideration to: (a) the nature and seriousness of the non-citizen's conduct to date, and (b) the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct. I now turn to consider each of these two matters.

23. Paragraph 8.1.1(1) provides that I must have regard to a number of matters set out in subparagraphs (a) to (h) when considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date.

24. I do not place Mr Brar's offending within either of the categories of 'violent crimes' or 'crimes of a violent nature against women' referred to in subparagraph (a).[16] These categories are directed, in my opinion, to deliberately violent crimes. There is no doubt, of course, that Mr Brar's dangerous driving led to a collision that may be described as 'violent' in one sense; but I do not think that it is the sort of crime intended to be embraced by subparagraphs (1)(a)(i) and (ii).

25. Nevertheless, I regard the offending in this case as very serious, noting that the examples given in the Direction are not intended to limit the category of conduct that may be considered very serious.[17] Mr Brar's conduct, as described in the sentencing remarks, needs to be examined very carefully in this regard. He was exceeding the prescribed maximum speed limit of 60 km per hour by 25 km per hour. A traffic light at an intersection Mr Brar was approaching had been red for approximately five to eight seconds before he entered the intersection. That is a lengthy period of time. Mr Brar made no attempt to brake. It must also follow that he had failed to keep a proper lookout while he was speeding.[18] Overall, his driving was dangerous.

26. The death of one pedestrian (Mr Seibel) and the injuries sustained by the other pedestrian (Ms Seibel) and by the driver of the other vehicle (Ms Garcia) fell within the range of foreseeable consequences to which Mr Brar's dangerous driving might be expected to give rise. Clearly enough, injury or death to other drivers or pedestrians who happened to be lawfully on the intersection at the time Mr Brar entered it at speed was a foreseeable consequence of his behaviour.

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[16] Two of Mr Brar's victims were women, namely, Ms Seibel and Ms Garcia.

[17] Cf the prefatory phrase, 'without limiting the range of conduct that may be considered very serious,…'

[18] The only alternative to this view is that Mr Brar saw the red light and decided to drive through the intersection anyway, which would make his offending even more culpable. I have assumed he failed to keep a proper lookout.

27. For this reason, I regard Mr Brar's conduct as very serious indeed. This conclusion is consistent with the head sentence of five years imposed by the Court.

28. I must have regard to the frequency of the non-citizen's offending.[19] This is the first and only instance of dangerous driving that appears in Mr Brar's record. Although Mr Brar has convictions for speeding according to the sentencing Court, I do not equate these with dangerous driving. I know nothing about the circumstances of the speeding offences: this was not canvassed in evidence before me. Some speeding is dangerous but other speeding, whilst potentially elevating risk, may not pose any serious risk to other road users. It all depends on the precise facts. I do not have any information about Mr Brar's five speeding convictions referred to by the District Court to make any informed judgment about their seriousness.[20]

29. I must have regard to the risk to the Australian community should Mr Brar commit further offences or engage in other serious conduct: paragraph 8.1.2. By subparagraph (1), I 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. That is an important principle in this case since Mr Brar's conduct led to death and significant personal injury.

30. The paragraph goes on to state that '[s]ome 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'. I do not interpret this part of the paragraph to mean that I should evaluate Mr Brar's conduct (and consequential harm arising from it) in isolation from the other

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[19] See paragraph 8.1.1(1)(d).

[20] In this regard, I note that I have given Mr Brar more credit than he has accorded himself in his submissions: see Ex A7, 4-5 [22]-[26].

considerations I am required to address in other parts of the Direction when deciding whether the risk of repetition is 'unacceptable'. I may only lawfully reach my decision in this matter after evaluating and weighing all considerations required to be addressed under the Direction. But this sentence does remind decision-makers that they should bear in mind that the consequences of a particular type of behaviour may be so harmful that even a very low risk of recurrence may prove 'unacceptable' despite other considerations favouring revocation of the cancellation decision. I do bear that principle in mind. It has self-evident force when death or serious injury has occurred and where that is a foreseeable consequence of future dangerous behaviour.

31. Subparagraph (2) of paragraph 8.1.2 concerns assessment of the future risk the non-citizen may pose to the Australian community. I must have regard to two matters 'cumulatively'; that is, in combination with one another.[21] The first is the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct. The second is the likelihood of this occurring.

32. So far as the first of these two matters is concerned, I have already pointed out that the death and serious injury suffered by community members in this case was a foreseeable consequence of Mr Brar's dangerous driving. Were Mr Brar to re-engage in that type of dangerous driving, or similarly dangerous driving, the most serious consequences (i.e., death or serious injury) to one or more community members could occur. The consequences would not inevitably occur, of course, but they might well do so.

[21] See *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v LJTZ* [2021] FCA 92, [26].

33. I must have regard to the likelihood of Mr Brar re-engaging in this type of dangerous conduct bearing in mind information and evidence on the risk of his reoffending and evidence of rehabilitation achieved by the time of the decision.

34. There are matters of concern in Mr Brar's history. For whatever reason, and despite otherwise being law-abiding, he has been quite determined to drive in Australia irrespective of the requirements of Australian law.

35. I do not attach much weight to Mr Brar's speeding. There are five instances only over a number of years, and, as I have said, I know nothing about those instances.

36. Of more concern, however, was the decision by Mr Brar to seek a further licence from the regulatory authority by deception after his licence was suspended. I accept that the charges in this regard must have been treated as minor when they came before the Magistrates Court since no conviction was recorded; but, when it is viewed in retrospect, Mr Brar's behaviour evidenced, in my opinion, quite some persistence in outlook. He decided he would drive (to suit his interests) despite Queensland law preventing him from doing so. When the attempt to obtain a licence by deception failed, he resorted to unlicensed driving for some years; and so again, there was quite some persistence in his approach to driving in Australia. He elevated his own preferences above compliance with the law.

37. Mr Brar gave evidence before me that on 1 November 2020 he was on his way to visit a friend. As I have observed, the sentencing remarks record that he was speeding by a margin of 25 km per hour and that he failed to slow down and stop for a red traffic light (which implies he failed to keep a proper lookout). All in all, his driving was dangerous on that day, and of course this was an essential ingredient of the offence of which he was convicted.

38. The sentencing remarks also refer to Mr Brar being fatigued, and having consumed cocaine two days earlier.[22] I do not count this misuse of drugs against Mr Brar if it was the source of his fatigue (and the sentencing remarks, based on agreed facts, imply fairly plainly that it was the source).[23] But it remains a fact that Mr Brar was fatigued that day, whatever the cause, and he needed to exercise additional care on that account.

39. I do note expressly that the sentencing remarks imply that Mr Brar was not under the influence of cocaine or another substance when he was driving on 1 November 2020.[24] As I understood Dr Donnelly's oral submissions, he did not put to me that Mr Brar was in fact affected by cocaine (or another substance) when he drove on the morning of 1 November 2020 (other than being fatigued). Dr Donnelly submitted, however, that the choices Mr Brar was generally making at that stage of his life were poor. By way of contrast with the position then, Mr Brar commenced the use of Sublocade as a medicinal therapy while in jail, and had undertaken SMART recovery and other courses. His risk profile has changed for the better. This submission is echoed partly in Mr Brar's own written statement, which refers to the changes he has noted in himself.[25] I shall deal with this submission below.[26]

40. It is fair to conclude that Mr Brar's decision to drive on 1 November 2020 was antisocial. He ought not to have been driving at all since it was unlawful for him to do so and his decision in this regard reflected an ongoing persistence on his part to continue to drive in Australia; he ought not to have been speeding, which was contrary to law and potentially dangerous in the circumstances; and he needed to keep a proper lookout for, and obey,

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[22] Ex R1, 38, line 40: "I also accept that there is no evidence inconsistent with your instructions that the cocaine was used some two days earlier."

[23] Ibid, 38.

[24] Ibid, 39.

[25] Ex A2.

[26] At [44] below.

traffic lights and other signs, which he failed to do. I do not say that he ought not to have been driving at all on account of his fatigue, but fatigue was a factor that self-evidently heightened his need to be vigilant on the road (if, indeed, he chose to drive unlawfully as in fact he did).

41. The sentencing remarks further record that Mr Brar drove after he was charged with the offence of causing death by dangerous driving and while he was on bail. This was a further breach of Australian law, and, as the Court remarked, it constituted a breach of his bail conditions.[27] That is an important aspect of the matter in my opinion so far as future risk is concerned because, despite the enormity of what Mr Brar had done (that is, in causing the death of a person and serious injuries to two others through his dangerous driving), he decided again to breach Queensland law as well as his bail conditions. Bail is granted to a person in order to allow that person to live in the community pending trial, but it is a clear expectation that there be compliance with Australian law. Mr Brar did not comply.

42. On the other hand, so far as risk is concerned, I accept that Mr Brar has now experienced a lengthy period in jail, and in immigration detention as well following on from the cancellation of his visa. The aggregate period is now well over two years. I also accept that Mr Brar has experienced genuine remorse. One could not be human and fail to experience a strong degree of guilt in killing a person and in injuring two others in the way Mr Brar did.

43. I bear in mind also that Mr Brar must appreciate that he could well have killed himself that day. He could scarcely fail to appreciate in retrospect the foolhardiness of the risk his dangerous driving posed to himself. He also understands, as only those who are facing

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[27] Ex R1, 39.

deportation can understand, that his criminal offending has brought him to the verge of permanent removal from Australia and so to the verge of the destruction of his familial ties. He also understands that if he remains in Australia, the balance of his five-year jail sentence will hang over his head, so to speak, for some considerable time – until 2027 in fact – and it will be imperative for him to be scrupulous in his observance of the law if he is to avoid serving the balance of his term in jail. All this provides a very strong deterrent effect, indeed.

44. Dr Donnelly put to me, as I have already indicated, that Mr Brar has addressed his past drug misuse[28] and this is relevant to the assessment of his future risk. I accept this submission but in part only. I accept that Mr Brar has abstained from illicit drugs for some years now and in fact undertook medicinal therapy, Sublocade, that would have assisted him in this regard while in jail, although Mr Brar said he undertook the therapy to assist him deal with his anxiety and insomnia. I accept also that Mr Brar has undertaken courses addressing addictive behaviours, amongst others, and is keen to continue with psychological counselling. Those are important steps in Mr Brar's overall rehabilitation. I also accept – or am prepared to assume in Mr Brar's favour – that his decision-making processes were generally somewhat impaired through some occasional drug use, through the stresses of unemployment during the Covid pandemic, and through an overall psychological stress.

45. But I do not attribute Mr Brar's decision to drive on 1 November 2020 to any overwhelming psychological dysfunction caused by drug misuse, or otherwise caused, that distorted his rational thought processes substantially on that day. I bear in mind that Mr Brar had decided as long ago as 2016 to drive without a licence and had even sought to obtain a licence

[28] The submission in Ex A8, [16] is that Mr Brar does not deny past drug misuse, but denies he was a long-term user. I have proceeded on this basis.

unlawfully after his licence was suspended. He has chosen over a number of years to drive in defiance – to put the matter plainly – of his legal obligation under Australian law not to drive. Each instance of driving contrary to Australian law over these years reflected a decision Mr Brar took on that particular occasion. I do not say that he drove unsafely on any of those prior occasions, but he drove in defiance of his contrary legal obligation nevertheless. His decision to drive on 1 November 2020 was an example of his prioritising convenience over his legal obligation. Although fatigued from having consumed cocaine some two days earlier,[29] Mr Brar had not, according to the sentencing Court, consumed cocaine or any other substance on the morning of 1 November 2020, when he decided to drive in the manner that he did, with such serious consequences for others. Indeed, if he had been under the direct influence of cocaine, that would make his future risk profile worse in my opinion.

46. For the sake of completeness, I also note that I do not accept that Mr Brar blacked out, or lost consciousness, at the wheel before he entered the intersection. Mr Brar mentioned in his evidence that he thought this had happened; but that does not form part of the sentencing remarks, and I have no evidence (apart from Mr Brar's belief that this occurred). In my opinion, Mr Brar's belief was not a reliable account of the moments leading up to the accident; and that is not at all surprising since the collision was a very serious one that affected him substantially as well.

47. All in all, having balanced all these factors, I regard the risk of Mr Brar driving dangerously in the future as low, but not nil. He may choose to drive again despite not holding a licence to do so – even though he has been disqualified for life – and he may choose to ignore Australian law and drive unsafely to suit his preferences on the day. I do not believe that

[29] Ex R1, 38.

the risk can be said to be entirely excluded, although I do regard it as low. In reaching this conclusion, I do give Mr Brar credit for doing what he can at this point to effect a complete rehabilitation of his life. The numerous courses he has undertaken after his offending do evidence his determination to acknowledge the difficulties in his life and to make prosocial choices. The courses in question are set out and described in some detail in Mr Brar's Statement of Facts, Issues and Contentions.[30] I accept the submission[31] that Mr Brar's approach 'enhances [his] overall mental and emotional stability, thereby indirectly reducing the likelihood of dangerous driving behaviours'.

48. There is no family violence for me to consider under paragraph 8.2.

49. I must take into account the strength, nature and duration of Mr Brar's ties to Australia: see paragraph 8.3. Mr Brar's family would be immediately and substantially affected by his deportation. The immediate family unit comprises Mr Brar, his wife and two children. He also has a brother. The impact of the decision not to revoke the cancellation of Mr Brar's visa would be considerable. Mr Brar's wife, Ms Kaur, who gave evidence and provided a statement,[32] pointed to a very severe emotional impact upon her and the family and to a financial impact as Mr Brar will be unlikely to earn sufficient money to remit to Australia from India after his own expenses are met. I accept that view. Indeed, Mr Brar may need money from Australia or elsewhere in order to support himself in India.

50. Mr Brar's children will also be severely impacted. He has two children aged five and nearly two, respectively. They have built a connection with him despite his residing either in jail or in immigration detention from February 2022 onwards. They have visited him. They will

[30] Ex A7, 7-11, [39]-[58].
[31] Ex A8, 2-3 [10]-[12].
[32] Ex A4.

lose their father, and along with that, they will lose the practical support that he could be expected to provide as they grow older. I accept that Ms Kaur may have to sell the family home, which is subject to a mortgage, as a result of Mr Brar's deportation so as to make ends meet. The impact of Mr Brar's deportation will be very significant indeed for this family.

51. I accept also that the older child may feel the loss more intensely as he is about five years of age while the younger child is not yet two, and I weigh that separately; but both children individually will be heavily affected by the loss of their father. Psychological problems in a child's development frequently follow the loss or absence of a parent. I attach substantial weight to the desirability of preserving stable family life.

52. I accept also that there are other family members in Australia who will be affected by Mr Brar's deportation. A number of extended family members provided statements to the Tribunal. These included statements from Mr Brar's younger brother, Mr Harmanpreet Singh Brar, who arrived in Australia earlier this year on a Temporary Graduate visa;[33] from Mr Dilvir Singh Brar, a cousin, who is present in Australia on a student visa;[34] and from Satwinder Singh Cheema, Mr Brar's brother-in-law, also in Australia on a student visa.[35] They also gave oral evidence. They record their intention to remain in Australia, and their statements attest to their strong personal links to Mr Brar.

53. Mr Brar has had a varied work history in Australia, where he has resided since 2009, which is some considerable period of time. He began work as a restaurant cook shortly after arriving. This job lasted a few years, he said, in his oral evidence. He then drove a taxi for approximately a year. He was then unemployed for some years, from approximately, 2013

[33] Ex A1.
[34] Ex A3.
[35] Ex A5.

to 2017 he said. He then worked as the retail manager of a tobacco store, until the outbreak of the Covid pandemic in 2020, which saw him lose his position unfortunately. He has also made a contribution to the Australian community through charitable work, for example, through the preparation/donation of food through his Sikh Temple and the donation of money.[36] Ms Kaur gave evidence that Mr Brar supported her during her nursing studies. He has contributed to a successful marriage and to the building of a relatively stable homelife and he has worked where work has been available to him. These aspects of his life conform to Australia's expectations of its residents.

54. I must also have regard to the best interests of minor children in Australia: paragraph 8.4. I have adverted to these earlier, but I acknowledge that the Direction requires me to have regard to them as a separate factor, thereby giving them additional emphasis. Their interests count very substantially. The relationship in question is a parental one. The children are still very young and need ongoing parental guidance and support, as I have said. As I have also said, both have a relationship with Mr Brar even though the second child is very young, indeed, not yet two years of age.

55. Ms Kaur proposes to remain in Australia if her husband is deported, and the children will stay with her. It is very substantially in the children's interests to have one-on-one contact with their father. I do not place any weight on remote contact with him from India as a substitute. Given the financial circumstances of the family, I do not believe there will be any realistic opportunity for one-on-one contact between Mr Brar and his children for many years to come, if at all. Ms Kaur will also have to concentrate her energies on working full-time to support her young family, and so she will have commensurately less time to devote to the children as a parent.

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[36] See Mr Brar's statement at Ex R1, 66.

56. I accept, therefore, that the children's interests favour very substantially the revocation of the cancellation decision.

57. I must have regard to the expectations of the Australian community: paragraph 8.5. I acknowledge what appears in subparagraph (1). As 'a norm' – but not as an inflexible rule – the Australian community expects the Government not to allow Mr Brar to remain in Australia given his serious misconduct. This expectation applies, I note, regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.[37] Moreover, I am not to evaluate the expectations of the Australian community in a particular case but should proceed on the basis of the views as articulated in paragraph 8.5.[38] I take this consideration into account.

58. I must also have regard to so-called 'other' considerations: see section 9 of the Direction. The legal consequence of my affirming the decision under review would be the deportation of Mr Brar to India and his permanent exclusion from Australia. I must have regard to the extent of impediments Mr Brar would face on removal to India, and also to the impact on victims of my decision.

59. Dr Donnelly advised me at the hearing that Mr Brar did not advance a case that he was owed *non-refoulement* obligations arising from his adherence to the Sikh religion. Dr Donnelly did, however, submit that Mr Brar would face both impediments and discrimination in India on his return there. I agree that Mr Brar would face significant impediments in India on deportation. First, I accept that he would have less access to important psychological treatment. He is presently undertaking psychological counselling and he gave evidence

[37] Paragraph 8.5(3).
[38] Paragraph 8.5(4).

that it has helped him. He wishes to continue it with a Dr Warren. I accept that he would face difficulties in finding appropriate psychological counselling and treatment and that he would also be far less likely to be able to afford it. That is an important aspect of my consideration of the matter because it does appear that Mr Brar may well have psychological issues that would benefit from treatment.

60. I accept also that Mr Brar could well face discrimination in his own country on the basis of his Sikh religion. The extent of this impediment would be determined, at least in part, by where he might choose to settle. All things being equal, Punjab would be, perhaps, a preferable place to settle from this perspective, as Punjab is a majority Sikh state according to the DFAT Report before me;[39] but it is not clear at this stage where Mr Brar would settle if he were deported. Mr Brar adverted to concerns he had about discrimination and cited by way of example the horrific massacres of Sikhs at the time of partition in the 1940s and the 1984 Government-ordered massacre of civilians at the Sikh Golden Temple. (There were riots throughout India against Sikhs at this time.) Mr Brar's wife, Ms Kaur, also adverted to present-day discrimination against Sikhs in Indian society in her evidence to me. I accept that there are still divisions in Indian society along religious grounds, exacerbated by the present Government's strongly Hindu nationalist orientation.[40] Mr Brar's adherence to Sikhism could make finding work and resettlement in India more difficult for him.

61. In addition, I believe that if Mr Brar were deported, he could well face a period of unemployment, and it could well be a prolonged one. He now has a serious criminal record in Australia, which may well inhibit his employment prospects in India. I am also prepared

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[39] See Ex A6, 41 [3.63] (*DFAT Country Information Report India* 29 September 2023).
[40] Ibid, 70.

to assume that the loss of his licence in Australia may well have entailed, or may well entail in the future, the loss of his Indian driving licence. He may be prevented from ever re-acquiring one. That could well be a serious impediment for him in securing work. Accordingly, I proceed on the basis that Mr Brar would face considerable hurdles in resettling in India, and I bear in mind in particular that on the evidence before me he no longer has any family members or extended family members in India to call upon for support. These are matters that weigh substantially in Mr Brar's favour.

62. I note further that Mr Brar may not be eligible to claim unemployment benefit in India as he has no work history there.[41] So, it will be imperative for Mr Brar to find work, but, as I say, he may have real difficulties in that regard. By way of contrast, Mr Brar gave evidence that he will immediately return to employment in Australia if he is released to the community.

63. Section 9 requires me to have regard to the impact on victims of my decision. I have given this neutral weight in my deliberations. I heard evidence from one direct victim, Ms Seibel, who was herself injured by Mr Brar's dangerous driving; and from two others, Mr Seibel's (i.e., the deceased's) son (Mr Aaron Seibel), and the deceased's brother (Mr Jeff Seibel).

64. I appreciate from their honest evidence, candidly given, that they have suffered grievously as a result of Mr Brar's offending. Mr Seibel's death has affected each of them very substantially. But, as I indicated at the hearing, I am required to have regard to the impact *of my decision* on the victims.[42] These three witnesses could not disentangle, so to speak, the impact of Mr Brar's offending upon them (which is not relevant to my decision under this

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[41] See Ex A7, 26 [139]-[141].

[42] See paragraph 9.3 of the Direction.

part of the Direction) from the impact of my decision either to allow Mr Brar to stay or alternatively to deport him.

65. Having heard the witnesses' evidence, I also formed the view that they bear a substantial hostility towards Mr Brar. I understand fully why that hostility exists in the circumstances of Mr Brar's offending. A husband, a father, and a brother has had his life cut short brutally and senselessly. As a consequence of their profound loss, however, none of these three witnesses was able, in my opinion, to bring to bear in their evidence a sufficient degree of objectivity about the likely ongoing effects on them of Mr Brar's remaining in Australia or of his deportation. Moreover, I was left with the impression that irrespective of any decision I might make to affirm the decision under review, the impact on the Seibel family of Mr Brar's criminal offending would continue to remain highly significant, indeed profound, for them well into the foreseeable future. That impact will continue to impede the resumption by them of a normal life.

66. For these reasons, I do not believe this consideration should be accorded weight in my decision-making: it is a neutral consideration.

Weighing the Considerations

67. I turn now to weighing the various considerations I have identified. I must weigh all considerations I have identified. I am struck in this case by what the reality of deportation would mean for the Brar family, including for Mr Brar himself. The effect of my decision will be to destroy this family unit. I accept the evidence of Mr Brar's spouse, Ms Kaur, that she would not follow him to India although she intends to remain married to him. She would lose day-to-day contact with her life partner, therefore. There are profound consequences for a family when one parent is no longer present. I accept that Mr Brar would face not only the

loss of his wife and family but also substantial difficulties in re-establishing himself in India, including possible discrimination. These are enormous consequences for each member of the family and for the family considered as a unit.

68. The consequence of a decision to affirm the decision under review would be inevitably the fracturing of this family unit, and it would entail a very serious impact upon Mr Brar himself. I also note here expressly that children are very often the unfortunate victims of the poor choices one or other parent makes. In one sense, the Brar children, and Ms Kaur also, have had to endure so far the consequences of Mr Brar's choice to drive his vehicle dangerously, and they would face further hardship and disruption to their lives if I affirmed the decision under review. The Brar children would grow up without the emotional support and affection of a father and without his contribution to their financial support if I affirmed the decision under review. Life would be very difficult for this family. It might mean at a practical level the loss of the family home. It will certainly entail more difficult financial circumstances and a very large degree of emotional turmoil. These are matters that I need to weigh most carefully as a stable family unit is fundamental to the wellbeing of individuals and to that of Australian society as a whole.

69. On the other hand, however, the direct consequence of Mr Brar's dangerous driving was the death of a road user and injury to two others. The consequence fell within the range of foreseeable consequences that might have arisen from Mr Brar's dangerous driving that day. Although I have found there to be a low risk of reoffending, I have not found Mr Brar to be at no risk of reoffending. When I consider even a low risk of reoffending in conjunction with the extremely serious potential harm future dangerous driving by Mr Brar might cause, I must weigh very carefully a decision to allow him to remain in Australia. I must weigh this aspect of the matter in light of the Direction, which clearly expresses a concern that the Australian community should be protected from the risk of serious future harm. In this case,

the death of a community member was a foreseeable and direct consequence of the offending behaviour as were the injuries to the other two road-users. Death remains a foreseeable consequence of any future repetition of Mr Brar's behaviour as does serious injury. That is a matter that I must weigh very seriously in circumstances where I am not persuaded that Mr Brar poses no future risk to the Australian community of driving dangerously despite his permanent disqualification from holding a licence.

70. I have weighed all the matters I have identified in these reasons very carefully. I have found this a very difficult case. I have placed at the forefront of my thinking the impact of my decision upon the Brar family (including Mr Brar himself) for the reasons I have given. I have decided, however, that, on balance, after applying the Direction and weighing all factors in favour of revocation, non-revocation of the cancellation decision is the preferable outcome. I have concluded, therefore, that there is not 'another reason' for the cancellation decision to be revoked for the purposes of section 501CA(4)(b)(ii) of the Act. It follows, in my opinion, that I should not set aside the decision under review, but should, to the contrary, affirm it.

FORMAL DECISION

71. The Tribunal affirms the decision under review.

I certify that the preceding seventy-one (71) paragraphs are a true copy of the reasons for the decision herein of Senior Member Dr N A Manetta

……[sgnd]……..
Associate

Dated: 22 May 2024

Dates of hearing:	**8 and 13 May 2024**
Advocate for the Applicant:	**Dr Jason Donnelly** **Latham Chambers**
Advocate for the Respondent:	**Ms Emma Letcher-Boldt** **Clayton Utz**