Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	**GENERAL DIVISION**
File Number:	**2023/4055**
Re:	**RCWV**
	APPLICANT
And	**Minister for Immigration, Citizenship and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Senior Member Dr M Evans-Bonner**
Date:	**10 May 2024**
Place:	**Perth**

The Reviewable Decision, being the decision of a delegate of the Respondent dated 6 June 2023, is set aside and substituted with a decision that the cancellation of the Applicant's Visa is revoked under s 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth).

..............[Sgd]..

Senior Member Dr M Evans-Bonner

© Commonwealth of Australia 2024

CATCHWORDS

MIGRATION – *mandatory visa cancellation – decision of delegate of Minister not to revoke mandatory cancellation of the Applicant's Visa – character test – substantial criminal record – Applicant is a 35-year-old Sudanese national who arrived in Australia as a 20-year-old child – Direction No 99 – primary and other considerations – protection of the Australian community – nature and seriousness of the conduct – risk to the Australian community – family violence – strength, nature and duration of ties to Australia – Applicant does not meet tripartite test for being indigenous – best interests of minor daughter and two minor indigenous sons – expectations of the Australian community – legal consequences of the decision – extent of impediments if removed to Sudan – impact on victims – Reviewable Decision set aside and substituted*

LEGISLATION

Migration Act 1958 (Cth) ss 499, 499(1), 499(2A), 501, 501(3A), 501(3A)(b), 501(6), 501(6)(a), 501(7), 501(7)(c), 501CA, 501CA(4), 501CA(4)(b)(i), 501CA(4)(b)(ii)

CASES

DWK22 v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FedCFamC2G 393

DWK22 v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 1403

Mabo v Queensland (No 2) (1992) 175 CLR 1

Minister for Immigration, Citizenship and Multicultural Affairs v HSRN [2023] FCAFC 68

NTTH and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] AATA 1143

Plaintiff M1/2021 v Minister for Home Affairs [2022] HCA 17

Wightman and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] AATA 1208

SECONDARY MATERIALS

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Cth), *Direction No 90: Visa Refusal and Cancellation Under Section 501 and Revocation of a Mandatory Cancellation of a Visa Under Section 501CA* (8 March 2021)

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) paras 4(1), 4.1, 5.1, 5.1(3), 5.1(4), 5.2, 6, 7, 8, 8(1), 8(2), 8(3), 8(4), 8(5), 8.1, 8.1(1), 8.1(2), 8.1(2)(b), 8.1(2)(a), 8.1.1, 8.1.1(1), 8.1.2, 8.1.2(1), 8.1.2(2), 8.1.2(2)(a), 8.1.2(2)(b), 8.1.2(2)(b)(i), 8.1.2(2)(b)(ii), 8.2, 8.2(2), 8.2(2)(a), 8.2(2)(b), 8.2(3)(a), 8.2(3)(b), 8.2(3)(c)(i), 8.2(3)(c)(ii). 8.2(3)(c)(iii), 8.2(3)(d), 8.3, 8.3(1), 8.3(2), 8.3(3), 8.3(4), 8.3(4)(a)(i), 8.3(4)(a)(ii), 8.3(4)(a)(iii), 8.4, 8.4(4), 8.5, 8.5(1), 8.5(2), 8.5(2)(a), 8.5(2)(d), 8.5(3), 8.5(4), 9, 9(1), 9(1)(a), 9(1)(b), 9(1)(c), 9(1)(d), 9.1, 9.1(1), 9.1(2), 9.1.2(2), 9.1(3), 9.2, 9.2(1), 9.3, 9.3(1), 9.4, 9.4(1)

REASONS FOR DECISION

Senior Member Dr M Evans-Bonner

10 May 2024

BACKGROUND

1. The Applicant is a 35-year-old man who was born in Sudan. He arrived in Australia to reside permanently on 19 May 2009 when he was 20 years old (R1/1121, 1074).

2. On 3 September 2020, the Applicant's Class XB Subclass 202 Global Special Humanitarian visa (**Visa**) was mandatorily cancelled (**Cancellation Decision**) under s 501(3A) of the *Migration Act 1958* (Cth) (**Migration Act**) on the basis that he had a substantial criminal record and was serving a full-time custodial sentence of imprisonment (R1/1122).

3. On 11 June 2021, the Applicant applied for a Class XA - Protection visa (subclass 866) (**Protection Visa**). On 19 November 2021, a delegate of the Minister for Home Affairs (as the Respondent was then named) refused to grant the Protection Visa because the delegate was not satisfied that the Applicant was a person to whom Australia owed protection obligations (R1/1086-1120).

4. The Applicant was re-notified of the Cancellation Decision on 16 December 2021 (R1/13) and was invited to make representations to seek revocation of the Cancellation Decision.

5. The Applicant sought revocation of the Cancellation Decision on 11 January 2022 (R1/63). He provided a personal circumstances form and evidence in support of his revocation request (R1/67).

6. On 31 October 2022, the Migration and Refugee Division of this Tribunal affirmed the delegate's decision refusing to grant the Protection Visa (R1/1819). The Applicant unsuccessfully appealed that decision to the Federal Circuit and Family Court of Australia (**FCFCA**) (*DWK22 v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FedCFamC2G 393). He further appealed to the Federal Court of Australia who dismissed the appeal (*DWK22 v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 1403).

7. On 6 June 2023, a delegate of the Minister decided not to exercise discretion under s 501CA(4) of the Migration Act to revoke the Cancellation Decision (R1/12). This is the **Reviewable Decision** currently before me.

8. On 10 June 2023, the Applicant lodged an application seeking a review of the Reviewable Decision in the General Division of this Tribunal (R1/6).

9. However, on 30 August 2023, the Tribunal (differently constituted) affirmed the Reviewable Decision (R1/2203).

10. The Applicant sought judicial review of the Reviewable Decision in the Federal Court of Australia. On 27 October 2023, by consent, the Federal Court remitted the matter to the Tribunal on the basis that the Tribunal failed to consider a representation made by the Applicant, separate to his non-refoulement claims, that as a result of civil instability in Sudan, he faced a risk of harm upon return to that country and that the failure to consider that representation was material (R1/2346).

11. In approximately November 2023, the President of the Tribunal constituted me to hear and determine the remittal.

ISSUES

12. The issues that I need to determine are:

    (a) whether the Applicant passes the character test, as defined by s 501(6) of the Migration Act; and

    (b) if he does not pass the character test, whether I am satisfied that there is another reason why the Cancellation Decision should be revoked (see s 501CA(4) of the Migration Act).

THE HEARING AND THE EVIDENCE

13. This application was heard by Microsoft Teams on 10 and 11 April 2024, and 18 and 19 April 2024.

14. The Applicant was represented by Dr J Donnelly instructed by Mr Ziaullah Zarifi of Zarifi Lawyers. Dr Donnelly appeared for the Applicant pro-bono. I sincerely thank him for assisting the Tribunal and the Applicant in this manner. The Respondent was represented by Ms C Oppel of The Australian Government Solicitor.

15. The Applicant gave evidence at the hearing on the first two days.

16. On the third day the Applicant called the following persons to give evidence:

- the Applicant's partner, A.
- Forensic Psychologist Ms Leah Vircoe.
- the Applicant's Father, O.
- the Applicant's mother, H.

17. On the fourth day, the Applicant called the following persons to give evidence:

- A's mother, E.
- A's best friend, M.

18. The parties filed written closing submissions after the hearing.

19. I admitted the following documents into evidence at the hearing:

(a) Applicant's Reply Bundle, containing documents No.1-5, comprising 126 pages in the electronic version, with the last page number 98 (**Exhibit A1**).

(b) Smart Traveller update for Sudan, current at 9 February 2024, comprising 17 pages (**Exhibit A2**).

(c) Remittal Bundle, containing documents 1-5, comprising 2348 pages (**Exhibit R1**).

(d) Respondent's Bundle, labelled SB1-SB6, comprising 116 pages (**Exhibit R2**).

(e) Supplementary Remittal Bundle, containing documents 1-4, comprising 39 pages (**Exhibit R3**).

20. Due to the volume of documents (over 2,600 pages), I advised the parties that they specifically needed to bring the documents that they intended to rely upon to my attention.

21. I also had before me the Applicant's Statement of Facts, Issues and Contentions (**SFIC**) dated 9 February 2024 and the Respondent's SFIC dated 8 March 2024.

LEGISLATIVE FRAMEWORK

Migration Act

22. Subsection 501(3A) of the Migration Act provides that:

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

23. Subsection 501(6)(a) of the Migration Act provides that:

> *(6) For the purposes of this section, a person does not pass the* **character test** *if:*
>
> *(a) the person has a substantial criminal record (as defined by subsection (7)); or*
>
> (Original emphasis.)

24. A "*substantial criminal record*" is defined by s 501(7)(c) of the Migration Act as follows:

> *(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; or*
>
> (Original emphasis.)

25. Section 501CA of the Migration Act further provides, in part:

> *(1) This section applies if the Minister makes a decision (the* **original decision***) under subsection 501(3A) (person serving sentence of imprisonment) to cancel a visa that has been granted to a person.*

> (2) *For the purposes of this section,* **relevant information** *is information (other than non-disclosable information) that the Minister considers:*
>
> > (a) *would be the reason, or a part of the reason, for making the original decision; and*
> >
> > (b) *is specifically about the person or another person and is not just about a class of persons of which the person or other person is a member.*
>
> (3) *As soon as practicable after making the original decision, the Minister must:*
>
> > (a) *give the person, in the way that the Minister considers appropriate in the circumstances:*
> >
> > > (i) *a written notice that sets out the original decision; and*
> > >
> > > (ii) *particulars of the relevant information; and*
> >
> > (b) *invite the person to make representations to the Minister, within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision.*
>
> (3A) *The notice under subsection (3) must be given in the prescribed way.*
>
> (4) *The Minister may revoke the original decision if:*
>
> > (a) *the person makes representations in accordance with the invitation; and*
> >
> > (b) *the Minister is satisfied:*
> >
> > > (i) *that the person passes the character test (as defined by section 501); or*
> > >
> > > (ii) *that there is another reason why the original decision should be revoked.*
>
> (Original emphasis.)

Direction No 99

26. Section 499(1) of the Migration Act provides that the Minister may give written directions as follows:

> (1) *The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:*
>
> > (a) *the performance of those functions; or*
> >
> > (b) *the exercise of those powers.*

27. Further, s 499(2A) of the Migration Act states that "[a] *person or body must comply with a direction under subsection (1)*".

28. On 23 January 2023, the Minister for Immigration, Citizenship and Multicultural Affairs made *Direction No 99: Visa Refusal and Cancellation Under Section 501 and Revocation of a Mandatory Cancellation of a Visa Under Section 501CA* (**Direction No 99**) under s 499 of

the Migration Act, which commenced operation on 3 March 2023. This Direction replaced the previous *Direction No 90: Visa Refusal and Cancellation under s501 and Revocation of a Mandatory Cancellation of a Visa under s501CA* made on 8 March 2021 (**Direction No 90**).

29. Paragraph 5.1 of Direction No 99 sets out "[o]*bjectives*", with paragraphs 5.1(3) and (4) being relevant to the current application:

> *(3) Under subsection 501(3A) of the Act, the decision-maker must cancel a visa that has been granted to a person if the decision-maker is satisfied that the person does not pass the character test because of the operation of paragraph (6)(a) (on the basis of paragraph (7)(a), (b) or (c) or paragraph (6)(e)) and the non-citizen is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory. A non-citizen who has had their visa cancelled under section 501(3A) may request revocation of that decision under section 501CA of the Act. Where the decision-maker considering the request is not satisfied that the non-citizen passes the character test, the decision-maker must consider whether there is another reason to revoke the cancellation given the specific circumstances of the case.*
>
> *(4) The purpose of this Direction is to guide decision-makers in performing functions or exercising powers under section 501 and 501CA of the Act. Under section 499(2A) of the Act, such decision-makers must comply with a direction made under section 499.*

30. Paragraph 5.2 of Direction No 99 sets out "[p]*rinciples*" which "*provide the framework within which decision-makers should approach their task of deciding whether to … revoke a mandatory cancellation under section 501CA*". The principles are:

> *(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*
>
> *(2) 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 the non-citizen poses a measureable* [sic] *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 cancellations 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 measureable [sic] *risk of causing physical harm to the Australian community.*

31. Informed by the principles set out in paragraph 5.2 of Direction No 99, when making a decision the decision-maker (in this case, the Tribunal – see definition of "*decision-maker*" in para 4(1) of Direction No 99) must consider the primary considerations listed in paragraph 8 of Direction No 99, and the other considerations listed in paragraph 9 where relevant (see para 6 of Direction No 99).

32. Specifically, paragraph 8 of Direction No 99 provides:

In making a decision under section 501(1), 501(2) or 501CA(4), the following are primary considerations:

(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;

(5) expectations of the Australian community.

33. Paragraph 9 of Direction No 99 lists other considerations to be considered as follows:

(1) In making a decision under section 501(1), 501(2) or 501CA(4), the considerations below must also be taken into account, where relevant, in

accordance with the following provisions. These considerations include (but are not limited to):

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

34. Guidance as to how a decision-maker is to apply the considerations in Direction No 99 can be found in paragraph 7, "[t]*aking the relevant considerations into account*", which provides:

> *(1) In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight.*
>
> *(2) Primary considerations should generally be given greater weight than the other considerations.*
>
> *(3) One or more primary considerations may outweigh other primary considerations.*

DOES THE APPLICANT PASS THE CHARACTER TEST?

35. The Minister may revoke the Cancellation Decision if the Minister is satisfied that the Applicant passes the character test (s 501CA(4)(b)(i) of the Migration Act).

36. The Applicant does not pass the character test due to the operation of s 501(6)(a) of the Migration Act because he has a "*substantial criminal record*" as defined by s 501(7) of the Migration Act, having been "*sentenced to a term of imprisonment of 12 months or more*" (s 501(7)(c) of the Migration Act).

37. On 20 February 2020 the Applicant was convicted of "*assault occasioning actual bodily harm (DV) – T2*" and was sentenced to an 18 month intensive correction order to be served in the community (R1/34). On 25 August 2020 the State Parole Authority of New South Wales revoked the Intensive Correction Order and ordered the Applicant to serve the remainder of his imprisonment as a full-time custodial sentence of imprisonment, being one year, one week and six days.

38. Thus, when his Visa was cancelled he was serving a full-time custodial sentence of imprisonment (s 501(3A)(b) of the Migration Act).

39. Consequently, the Applicant fails the character test, and the statutory power to revoke will only be enlivened if there is "*another reason*" why the Cancellation Decision should be revoked (s 501CA(4)(b)(ii) of the Migration Act).

IS THERE ANOTHER REASON WHY THE CANCELLATION DECISION SHOULD BE REVOKED?

PRIMARY CONSIDERATIONS

Protection of the Australian community (paras 8(1) and 8.1 of Direction No 99)

40. Paragraph 8.1(1) of Direction No 99 provides that:

> *(1) When considering protection of the Australian community, decision-makers should 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. In this respect, decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.*

41. Paragraph 8.1(2) of Direction No 99 then provides:

> *(2) Decision-makers should also give consideration to:*
>
> *a) the nature and seriousness of the non-citizen's conduct to date; and*
>
> *b) the risk to the Australian community, should the non-citizen commit further offences or engage in other serious conduct.*

Nature and seriousness of the conduct (paras 8.1(2)(a) and 8.1.1(1) of Direction No 99)

42. Paragraph 8.1.1(1) of Direction No 99 provides:

> *(1) In considering the nature and seriousness of the non-citizen's criminal offending or other conduct to date, decision-makers must have regard to the following:*
>
> *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 position 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, ,* [sic] *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 conduct or offence was committed in another country, whether that offence or conduct is classified as an offence in Australia.*

43. The parties agreed upon a schedule of the Applicant's criminal convictions. I thank them for working together to put this schedule together so that there was no double counting of any offences (for example, due to call ups).

44. The Applicant has 26 convictions. His first offence of "*possess prohibited drug*" was committed on 16 March 2012 and on 3 April 2012 the Orange Local Court imposed a fine of $1000.

45. His other offences include:

- Driving offences, including serious driving offences committed on 10 February 2014 including:
    - "*aggravated dangerous driving (occasioning grievous bodily harm)*".
    - "*fail to stop and assist after vehicle impact causing gbh* [grievous bodily harm] *– T1*".
    - "*take & drive conveyance w/o consent of owner – T2*".
    - "*drive with a high range PCA – 1st offence*".
    - "*dangerous driving occasioning grievous bodily harm – drive under the influence - T1*".
    - "*learner not accompanied by driver/ police officer/tester*" and "*learner driver not display 'L' plates as required*".
    - "*negligent driving (occasions grievous bodily harm) – 1st offence*". This offence involved the Applicant driving in the early afternoon after having consumed 8 litres of port since 9.00am. His car mounted a median strip, became airborne and collided with another vehicle. His passenger received minor injuries, but the driver of the other car was admitted to intensive care with major injuries. The Applicant fled the scene (R1/1805).
- On 19 November 2014, the Applicant committed the offences, "*drive, licence suspended under s 66 Fines Act – 1st off*" and "*drive with high range PCA – 2nd + offence*". The Applicant was driving with a friend as a passenger when he crashed the car. Police attended. The Applicant's blood alcohol level was tested, and he was found to be 0.182 grams of alcohol in 210 litres of breath. At the time, the Applicant's licence was suspended due to the 10 February 2014 offending (R1/1802).
- Property damage or destruction offences such as "*destroy or damage property (DV)*" committed on 17 July 2014, and "*destroy or damage property <=$2000 – T2*" committed on 16 January 2017. The 16 January 2017 offence involved the Applicant attending his ex-partner's home in an intoxicated state. She asked him to leave and locked the door. The Applicant started to yell at his ex-partner, putting his hand through a small pane of glass. He picked up a chair several times and threw it at his

ex-partner's mother's car and two windows. He hit the screen door with his hands, causing some of his blood to land on his ex-partner (R1/1791).

- On 25 June 2020, the Applicant committed the offences of "*stalk/ intimidate intend fear physical etc harm (domestic) – T2*", "*possess prohibited drug*" and "*destroy or damage property <=$2000 (DV) – T2" (two counts)*". The Applicant had returned home under the influence of alcohol and returned home. His mother was in the lounge room, and he started to kick items around the lounge room. His brothers attempted to calm him down. The Applicant was agitated and threatened to "*cut* [the] *throat*" of one of his brothers. The Applicant picked up an electric heater and threw it at a desk, destroying two computer monitors and damaging the heater. He also picked up an infant seat and threw it at a family member's car, which smashed the car window. He picked up several metal items that were in the front yard and threw them at the vehicle. He picked up another item, brandished it above his head and chased one of his brothers with it. When police arrived, they found the Applicant to be in possession of cannabis (R1/1775-1776).

- Offences involving threatened or actual violence including "*stalk/ intimidate intend fear physical etc harm (personal) – T2*" (two counts) and "*custody of knife in public place – first offence*" on 9 October 2016. The Applicant saw an acquaintance cutting up some meat and asked for some. The victim refused. The Applicant rode his bike away, before returning and threatening to kill everyone on the street and to kill the victim and "*rape* [his] *woman*". The victim confronted the Applicant and told him to go away. The Applicant took a swing at the victim. Another victim intervened and asked the Applicant to leave. The Applicant rode away again, returning shortly after to the other victim's front lawn. He picked up his bike, threw it to the ground, then took out a 20cm knife from his pants and threatened to kill the other victim who locked himself in his house until police arrived (R1/1793).

- Family violence offences including "*assault occasioning actual bodily harm (DV) – T2*" and "*contravene prohibition/ restriction in AVO (Domestic)*" committed on 2 July 2019. The Applicant became upset with his partner, A, for unloading the car, saying "*I'm a man, not a boy. I can look after myself*". He told her he wanted to slap her and "*get* [her] *eyes*". He then slapped her face, slapped her again, then she hit him. The Applicant's brother had to remove him from the area (R1/46).

- A "*resist officer in execution of duty*" offence on 17 December 2014.

46. The Applicant's offending occurred over approximately eight years between 16 March 2012 and 25 June 2020. Given the number of offences, his offending can be regarded as frequent. Overall, the Applicant's offending appears to be increasing in seriousness, as indicated by the penalties imposed gradually increasing. There would have been some cumulative effect in terms of burdening the resources of police, the courts and corrective services due to the number and frequency of his offences and his supervision in the community.

47. Some of the Applicant's offences, such as drug possession for personal use, and some of his property damage offences are at the lesser end of the scale of seriousness, as is suggested by the Court imposing fines. However, offences involving violence and threatened violence are more serious. Threatening someone with a knife has the potential to escalate, resulting in serious injury or loss of life. He has committed very serious driving offences including driving offences whilst under the influence of alcohol. The driving offences committed on 10 February 2014 and 19 November 2014 that I outlined above both resulted in accidents that could have proved fatal. For example, the accident the Applicant caused on 10 February 2014 resulted in the victim having life threatening injuries and being admitted to intensive care. The Direction also provides that family violence offences should be regarded as serious, regardless of the sentences imposed. For example, the Applicant slapping his partner on 2 July 2019 should also be regarded as being serious.

48. When viewed overall, I find that paragraph 8.1.1 of Direction No 99, the nature and seriousness of the conduct, weighs strongly against the revocation of the Cancellation Decision.

The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct (paras 8.1(2)(b) and 8.1.2 of Direction No 99)

49. Paragraph 8.1.2(1) of Direction No 99 provides:

> *(1) In considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some 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.*

50. Paragraph 8.1.2(2) of Direction No 99 provides, in part, in relation to assessing risk:

> (2) *In assessing the risk that may be posed by the non-citizen to the Australian community, decision-makers must have regard to, cumulatively:*
>
> a) *the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and*
>
> b) *the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:*
>
> i. *information and evidence on the risk of the non-citizen re-offending; and*
>
> ii. *evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken).*
>
> …

Nature of the harm (para 8.1.2(2)(a) of Direction No 99)

51. Broadly speaking, I am required to assess the risk of harm to the Australian community if the Applicant were to engage in further criminal or other serious conduct. This firstly requires a consideration of the nature of the harm to individuals or the Australian community should he engage in further criminal or serious conduct (para 8.1.2(2)(a) of Direction No 99).

52. The nature of the harm if the Applicant were to commit further drug offences is varied, however they are generally less serious than violent offences. Possessing drugs supports the illicit drug trade in the Australian community. The prevalence of drugs in the community causes harm to the community on many levels, including drug related crimes such as violence and theft, increases in property and health insurance premiums, as well as mental and other health issues for drug users, and the negative impact that this can have on their families.

53. The nature of harm if the Applicant were to commit further general offences (for example offences involving property damage) is varied and may include financial and psychological harm to members of the Australian community. The nature of harm that results from such offending is generally less serious than the harm which results from violent offences.

54. The Applicant has convictions for contravening domestic violence orders involving threats of violence and stalking. The Applicant has also committed an offence involving actual violence. These types of offences can make victims fearful of their safety, and therefore such offending can have a negative psychological impact. Restraining orders are in place

to protect the safety of those protected, and so breaching them can cause psychological and even physical harms to victims, depending on the nature of the breach.

55. A primary purpose of road traffic and driving laws is the protection of road users. For example, prohibitions against driving whilst suspended exist to ensure that persons driving cars are appropriately qualified and safe to do so. Prohibitions against driving under the influence of drugs or alcohol exist to ensure that drivers are not unsafe to themselves and others by driving when they are impaired. Contraventions of these laws can result in serious consequences, including fatalities from road traffic accidents, as well as physical and psychological injuries to innocent road users. Should the Applicant drive under the influence of alcohol again, he would be at increased risk of having an accident. This could have dire consequences for members of the public (including innocent road users and pedestrians) who could potentially suffer physical injuries, loss of life, and psychological harm.

Likelihood of engaging in further criminal or other conduct: Information and evidence on the risk of reoffending and evidence of rehabilitation (para 8.1.2(2)(b) of Direction No 99)

56. Next, I am required to consider the likelihood of the Applicant engaging in further criminal or other serious conduct if he were permitted to remain in the Australian community, taking into account information and evidence on the risk of reoffending, and evidence of rehabilitation, giving weight to time spent in the community since the most recent offence (sub-paras 8.1.2(2)(b)(i) and (ii) of Direction No 99).

57. As I mentioned above, the Applicant has committed 26 offences over approximately eight years between 16 March 2012 and 25 June 2020. He has had opportunities for supervision in the community and yet he has reoffended and has been returned to custody. He has not been deterred by fines and sentences of suspended and custodial imprisonment. This history of frequent offending and failure to be deterred by various penalties suggests that there is a likelihood of reoffending.

58. The Applicant suffers from mental health issues. Forensic Psychologist Ms Leah Vircoe assessed the Applicant and wrote reports dated 10 August 2023 and 5 April 2024. In her most recent report Ms Vircoe's opinion was that the Applicant continues to meet the DSM-5 diagnostic criteria for post-traumatic stress disorder (**PTSD**), persistent depressive disorder, substance use disorder (cannabis and methamphetamine) in sustained remission within a controlled environment, and alcohol use disorder (A1/37). Ms Vircoe stated that the

Applicant continued to experience symptoms of sleep dysfunction, and intrusion symptoms (nightmares and flashbacks).

59. In her August 2023 report Ms Vircoe assessed the Applicant's risk of general offending as being medium (according to the Level of Service Inventory – Revised (LSI-R)). In her April 2024 report, she stated that "*there has been limited change*" to this risk profile and added that his risk of serious intimate partner violence was low, and low moderate for more minor forms of intimate partner violence (A1/37).

60. In her more recent report Ms Vircoe noted that the Applicant had been engaging in psychological intervention in immigration detention, including with the Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (**STARTTS**). Ms Vircoe stated that the Applicant had been compliant with pharmacological intervention including antidepressant and antipsychotic medications and a sleep aid. She observed that the Applicant's symptomatology had improved which was consistent with his ongoing trauma focussed therapy and medication (A1/35-36).

61. I note that the Applicant had previously engaged in rehabilitation in the past, but those attempts were unsuccessful, and the Applicant reoffended. Those attempts included residential rehabilitation in 2015, and a three month alcohol and drug rehabilitation program in 2017. He also attended an intake assessment with a drug and alcohol counsellor in January 2020, but then made no further contact with the service. In August 2020, community corrections recommended that his intensive corrections order be revoked because "*his offending is escalating in both frequency and seriousness*" and "*has been afforded numerous opportunities to engage in treatment to address his offending behaviour. His response has consistently been passively complacent and superficial until recently when he was forced to move out of his family home and had to rely on his partner to provide him with accommodation*" (R1/1721; 150, 1728, 1736-1737). At the hearing Ms Vircoe was asked about the Applicant's failure to engage in rehabilitation for his addictions in the past. Ms Vircoe's opinion was that during those times "*was he wasn't very help-seeking*", his underlying mental health disorders were not being treated, and there was at that time a "*stigma*" regarding mental health treatment and "*a tendency to internalise some of his emotional responses at that point*". Ms Vircoe's opinion was that this had now "*shifted somewhat*" (transcript/154). She commented that in 2020, the Applicant's "*offending needs were offered some intervention however his mental health, and potential substance use,*

but the underlying mental health conditions which exacerbated risks for both anti-social behaviours and drug and alcohol use were not afforded treatment at that point" (transcript/155). This evidence indicates that the Applicant has had a shift in attitude which has enabled him to make progress with his rehabilitation.

62. The Applicant has had longstanding issues with drugs and alcohol. Ms Vircoe recorded that he started drinking at the age of 10 in Sudan and he continued to drink into his adult years. He first used cannabis at the age of 10 also. He first used methamphetamine in 2015 or 2017 with an escalation in 2018 (R3/13 and 26). Ms Vircoe recorded that the Applicant used drugs and alcohol as a form of self-medication to cope with symptoms of depression and PTSD (A1/36). The Applicant has not consumed drugs or alcohol since approximately 2020 (R1/1854).

63. The Respondent has submitted that the Applicant has been dishonest about being exposed to extreme trauma as a child, and specifically his evidence that he witnessed the death of one of his siblings, found another sibling's deceased bodies on the street, and that he was a child soldier (RSFIC, para [29.4]). The Applicant's evidence was inconsistent in the documentary evidence. For example, in one recorded account he stated that it was his sister who had been shot, and in another, his brother had been shot (transcript/155-156). This evidence was also inconsistent with his mother's evidence about how her children had died.

64. Ms Vircoe was aware of the inconsistencies but thought they could be explained because she did not directly ask about his brother's death and focussed more on the Applicant's sister (transcript/156-157). The following answer given by Ms Vircoe during cross-examination is also helpful because it indicates that despite the inconsistencies, what is consistent is that the Applicant was exposed to childhood trauma and does suffer from PTSD (transcript/158):

> *I understand that there are some inconsistencies on the death of which sibling at which time. I can understand the concern there. However from reading the other background collateral information that was available his symptoms of PTSD, irrelevant as to who was the one that he witnessed and who wasn't have been documented for some time. So while there may be some inconsistency in the exact nature of what he witnessed it does appear that there was a trauma background in that and that has been consistently reported throughout the documentation and his symptom presentation has been consistently reported to numerous mental health professionals particularly over the last few years as well as when he was in Corrective Services. On admission there was reports also of experiencing symptoms that would be consistent with depression and PTSD.*

65. My view of Ms Vircoe was that she understood her role as an independent expert, and that when confronted with the inconsistencies in the Applicant's evidence, she was able to take them into account, and explain the factual basis as to why it was her opinion that the Applicant had suffered childhood trauma and suffered from PTSD and other mental health disorders.

66. I am also of the view that some of the inconsistencies may be attributable to difficulties that the Applicant has with memory. I note the following exchange during the examination in chief (transcript/151):

DR DONNELLY:	*Now you indicated also in that paragraph the clinical assessment of post traumatic stress disorder. Now that disorder, does that impact a person's memory or has* [sic] *the prospect of affecting a person's memory?*
MS VIRCOE:	*Look it definitely can. Post traumatic stress disorder can impact a person's memory in a number of ways. It can either heighten memory for traumatic events. Things like flashbacks and re-living the experience which RCWV definitely has described particularly in my first assessment with him in 2023. It also can lead to some destruction in permanent and consolidated memories as well. However it was more prominent for RCWV, the heightened recall of events of traumatic experiences he'd experienced in his past.*
DR DONNELLY:	*So when you refer to disruption are you referring to what can lead a person to give inconsistent versions of events, or what do you mean by disruption?*
MS VIRCOE:	*So, depression, PTSD and mental disorders, these type of internalising disorders can impair a person's level of concentration and ability to – yes, so to have a timeline of evidence. And when I assessed RCWV on the first occasion he definitely struggled with recalls of dates and he could provide a very narrative response, but the way he dated things was somewhat impaired. This could be related to his PTSD and depression, or it could just be that he struggles with dates more generally. Because I did not assess him prior to having these conditions it's hard to determine whether it was related exactly to those conditions or not. But that is something that can be impaired, the depression with the PTSD.*

67. I also note that during an IHMS (International Health and Medical Services) mental health consultation on 14 July 2017, the psychologist observed that: "*Client appeared lost at times during the consult and appeared forgetful and was not able at times to focus on the topic*".

The Psychologist further observed: "*Memory appeared to fluctuate during the consult and I frequently has* [sic] *to redirect the conversation*" (R1/1184).

68. Based on the evidence before me, I do not think that it can be readily concluded that the Applicant has fabricated claims of trauma as an excuse for his substance abuse and offending. The evidence supports a finding that the Applicant did experience childhood trauma, most probably through witnessing violence and due to the deaths of family members and friends from violence when he was a child in Sudan. A further example in support is that he was assessed in July 2021 by a clinical psychologist, Ms Yvette Aiello, who had extensive experience working with survivors of trauma at STARTTS. Ms Aiello also opined that the Applicant presented with symptoms of PTSD and persistent depressive disorder (R1/135). I doubt very much that the Applicant could effectively manufacture symptoms of trauma that would be accepted by a person with such experience if there was no foundation for them. His inconsistent evidence can perhaps be explained in part by his issues with memory due to his PTSD and depression. I have no reason to doubt the diagnosis that the Applicant suffers from PTSD and the other mental health conditions stated by Ms Vircoe. It is my view that he suffers from those conditions due to his childhood trauma and that he used drugs and alcohol as a form of self-medication which significantly contributed to his offending.

69. Since he has been in immigration detention, the Applicant has engaged in rehabilitation to address his trauma and substance abuse. Ms Aiello observed that he was sad and remorseful for the impact drug use had on his life and had been researching treatment options for addiction including approaching IHMS staff to discuss suboxone treatment. Ms Aiello also reported that as well as undergoing counselling at STARTTS (from approximately July 2021 – see R1/156), the Applicant has completed the Smart Recovery program to try to address his drug use (R1/133-134). He has also undertaken voluntary courses in detention including "*Drug and Alcohol Abuse 101*" (August 2022), "*Anger Management 101*" (September 2022), "*Etiquette 101*" (September 2022), "*Basic Parenting 101*" (October 2022), "*Positive Parenting Techniques*" (November 2022), "*Personal Finance 101: How to Manage Your Money*" (November 2022), "*Creating an Effective Sales Team*" (November 2022) (R1/1195-1201). A letter dated 8 June 2023 also states that he had engaged with Odyssey House Community Programs and that he had attended four SMART recovery online groups (R1/2050). There is confirmation from IHMS that the Applicant has

attended 38 appointments with a psychologist in immigration detention between 15 August 2023 to 14 July 2021 (R3/37-38).

70. Relevantly, a report from a Senior Counsellor dated 19 July 2023 provided the following summary of the Applicant's attempts to rehabilitate (R1/2129):

> *Since being detained at the North West Point IDC* [Immigration Detention Centre] *on Christmas Island, Mr.* [Applicant] *has participated in several Drug and Alcohol programs and has reported no further use of drugs or alcohol whilst in detention. I believe that he understands the detrimental effect of abuse of drugs and alcohol on his physical and mental health, and how the consequences of his past actions have affected him and his family.*
>
> *In addition, Mr.* [Applicant] *has also participated in online programs addressing the issue of domestic violence, and understands how his culture, past trauma and inability to manage stressful situations have affected previous behaviour with his partner. He has expressed extreme remorse when describing his part in the incident that led to his detention, and extreme sadness and distress at being separated from his family as a result.*
>
> *Mr.* [Applicant] *reports that his family is "the most important thing" in his life and reports to be in daily contact with his wife and children since being detained. It is my observation that Mr.* [Applicant] *has had time to reflect and gain some insight regarding the reasons for his past actions and the offences that followed, and also how he might respond differently in future situations.*
>
> *Further I believe that the length of time that Mr.* [Applicant] *has spent incarcerated and in detention will act as a deterrent against further offending and that he has expressed a genuine desire to engage in rehabilitative services if released into Australian community and to build a more positive future for him and his family.*

71. The Applicant is fearful of being returned to Sudan because he fears for his safety and is concerned that that he will not be able to receive adequate treatment for his mental health issues. He is concerned about not having accommodation, not having any social or family connections there, and not being able to sustain himself. He has also spent several years in prison and immigration detention. These factors are likely to have a deterrent effect in that they may motivate him not to resume drug use and to reoffend.

72. I note a recent assessment from IHMS by a psychologist dated 9 January 2023 which records the Applicant having spoken extensively about his family and that he blames himself for putting his family under stress due to his being in immigration detention. That assessment provides a risk assessment that his risk of self-harm and harm to others is low (R1/1186).

73. The Applicant also has a pro-social support network around him. I was impressed by his partner A, who was intelligent and insightful regarding the Applicant's past conduct and offending. A's mother, E and father, W, are also willing to offer support and to help the Applicant. The Applicant's parents and extended family are also willing to offer support. So is A's best friend, M. I do note, however, that their past support did not stop the Applicant from reoffending and using drugs in the past. However, he now appears to appreciate the negative impact that his offending has had on his family and children, as well as on his broader family in Australia and is fearful of being separated from them.

74. Of concern, however, was that whilst the Applicant appeared to appreciate the impact of his offending on his family, he was not fulsome in accepting responsibility for his actions. He blamed the drugs and alcohol for some of his offending behaviour, saying that a sober person would not have acted in that way.

75. The Applicant also has a plan that if he is released into the community he will provide for his family, be involved in his sons' lives, try to reconnect with his daughter, will spend quality time with his extended family and that he will continue with his rehabilitation (A1/6-7).

76. In summary, the following factors are protective and suggest a lower risk of reoffending:

- Although there are inconsistencies in the Applicant's recollections, I have found that he suffered from childhood trauma which contributed to diagnosed mental health conditions and his alcohol and drug abuse, which in turn contributed to his offending. The Applicant's mental health conditions have been diagnosed, and they have improved following trauma specific counselling and medication.
- Although the Applicant has not been successful with rehabilitation in the past, his attitude has changed, and he has shown a commitment to engage in ongoing counselling and rehabilitation.
- The Applicant has completed voluntary programs in immigration detention which shows a willingness and motivation to change. He has also engaged in extensive counselling to address his drug use and trauma.
- He has had a period of abstinence from drug and alcohol use which may also assist him to stay drug free in the community, which may in turn reduce the likelihood of his reoffending.

- The deterrent effect of the time the Applicant has spent in prison and immigration detention away from his partner, children, and extended family. He appreciates the effect that his absence has had on them, and his plan includes looking after his family and involvement in his children's upbringing.
- The Applicant is fearful of returning to Sudan and of not being able to access mental health treatment and sustain himself, which is likely to have a deterrent effect.
- His IHMS assessment as a low risk to himself and others, although I note this is an assessment in the context of immigration detention, which is a controlled environment.

77. The following factors are not protective or suggest some likelihood of reoffending:

- The Applicant has committed 26 offences over an approximate eight year period and has not been deterred by fines, community based orders, suspended and custodial sentences of imprisonment. This past behaviour suggests a likelihood of reoffending.
- The Applicant had a significant alcohol and drug addiction and used those substances to self-medicate his mental health conditions which were caused by childhood trauma. He still suffers from PTSD and other mental health conditions and his underlying trauma is still being treated.
- The Applicant did not fully accept responsibility for his offending, blaming drugs and alcohol for his actions.
- Ms Vircoe noted the Applicant was a medium risk of general offending, a low risk of serious intimate partner violence, and low-moderate risk for more minor forms of intimate partner violence.
- The Applicant has been unsuccessful with rehabilitation attempts in the past and has relapsed to substance abuse and has reoffended.

78. Overall, after balancing the protective factors against those that suggest a likelihood of reoffending, and Ms Vircoe's assessment of the Applicant, I find that the Applicant is likely to be a moderate likelihood of general reoffending and a low likelihood of family violence offending.

79. Given the nature of the offending, and the likely harm that could result, the Applicant’s offending is very close to falling into the class of offences whereby any risk would be unacceptable.

80. Overall, after considering the nature of the harm that could result if the Applicant reoffended, and the low likelihood of the Applicant committing further offences, I find that paragraph 8.1.2 of Direction No 99, being the risk to the Australian community should the Applicant commit further offences, weighs strongly against the revocation of the Cancellation Decision.

Summary on para 8.1 of Direction No 99

81. I have found that paragraph 8.1.1 and paragraph 8.1.2 both weighed strongly against the revocation of the Cancellation Decision. Therefore, overall, I find that primary consideration 8.1, being the protection of the Australian community, weighs strongly against the revocation of the Cancellation Decision.

Family violence committed by the non-citizen (paras 8(2) and 8.2 of Direction No 99)

82. Paragraph 8.2 of Direction No 99 requires decision-makers to have regard to family violence committed by the non-citizen:

> *(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.*

83. Family violence is defined in the interpretation section of Direction No 99 at para 4(1), which provides, in part:

> **family violence** *means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the* ***family member****), or causes the family member to be fearful. Examples of behaviour that may constitute family violence include:*
>
> a) *an assault; or*
>
> b) *a sexual assault or other sexually abusive behaviour; or*
>
> c) *stalking; or*
>
> d) *repeated derogatory taunts; or*
>
> e) *intentionally damaging or destroying property; or*
>
> f) *intentionally causing death or injury to an animal; or*
>
> g) *unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or*
>
> h) *unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or*
>
> i) *preventing the family member from making or keeping connections with his or her family, friends or culture; or*
>
> j) *unlawfully depriving the family member, or any member of the family member's family, or his or her liberty.*

84. The following definition, in paragraph 4(1) of Direction No 99 is relevant:

> **member of person's family**, *for the purpose 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.*

85. Paragraph 8.2(2) of Direction No 99, stated above, sets out the circumstances where this primary consideration will be relevant. Firstly, it is relevant where the applicant has been convicted of an offence, has been found guilty, or has had charges proven that involve family violence (para 8.2(2)(a) of Direction No 99). It will also be relevant where there is some information or evidence from independent and authoritative sources indicating that the applicant has been involved in the perpetration of family violence (para 8.2(2)(b) of Direction No 99).

86. The Applicant has been convicted of offences involving family violence. Above under the first primary consideration, I outlined the offence on 16 January 2017 where the Applicant put his hand through the pane of glass, threw a chair several times at a car and two windows and hitting the screen door. That offence was committed against the Applicant's ex-partner who was the mother of his child, and the child was present. The Applicant's ex-partner was therefore a member of his family because they were in an intimate personal relationship. I infer from the fact that his ex-partner locked the door to exclude the Applicant from entering her house that she would have felt fearful. Damaging property also falls within the definition of family violence. I therefore find this was a family violence offence.

87. Another family violence offence (also mentioned above) was committed on 2 July 2019. The victim of that incident was the Applicant's partner A, who is the mother of his two sons. As they are in an intimate relationship, A is a member of the Applicant's family. That incident involved the Applicant slapping his partner twice in the face. An assault falls within the definition of family violence. The slaps appear to have been done to coerce or control A because the Applicant did not want her lifting heavy items from the car because he thought it was his job to do so. I therefore find that this offence also meets the definition of family violence.

88. On 25 June 2020, the Applicant committed the offence of "*stalk/intimidate intend fear physical etc harm (domestic) – T2*" and a property damage offence. The victims were his mother and brothers and there was also a child present (the police incident report does not state the relationship of the child to the Applicant). The Applicant was living in the same household as his mother who is therefore a member of his family. I am unclear whether his

brothers resided in the house as well. The Applicant damaged a heater and computer screens and a car window in this incident. He was also throwing metal items in the front yard and ran towards his brother brandishing the metal. The incident report records that his brother feared he would be assaulted. I infer that the Applicant's mother and brothers would have been fearful. As I have mentioned, property damage falls within the definition of family violence (R1/1775). I find that these offences meet the definition of family violence.

89. For completeness, at the hearing A was asked about an incident on 7 August 2020 that resulted in police applying for an apprehended violence order to protect her. The Applicant had come to A's house and had poured petrol on himself on the back step, which had seeped into the laundry. A's evidence at the hearing was that she was not fearful for herself and did not feel threatened, but she was very concerned for the Applicant's well-being and called police so they could do a welfare check on him (R1/1773; transcript/ 139-141).

90. The Applicant also has convictions for contravened family violence orders.

91. On 1 February 2015, his partner arrived home to find him under the influence of alcohol in her home when there was an apprehended domestic violence order in place. When police arrived, the Applicant answered the door and asked him if he had consumed any alcohol. He stated that he had consumed two long necks that day. This contravened a domestic apprehended violence order which required him not to approach A or their two-year-old son for at least 12 hours after drinking alcohol or taking illicit drugs (R1/1798).

92. Similarly, on 1 November 2017, police attended the home of the Applicant's partner, A to do a compliance check. The Applicant was present and admitted to having two schooners of beer. This also contravened a domestic apprehended violence order which required him not to approach A or their two-year-old son for at least 12 hours after drinking alcohol or taking illicit drugs. Police recorded the Applicant as being very cooperative and that the Applicant appeared to genuinely believe he had to be drunk to breach the order (R1/57-58).

93. On 28 June 2018, the Applicant consumed alcohol and then went to visit A. He knocked on A's front door and they argued. A contacted her father to ask him to take their child away because she and the Applicant were arguing. As the father arrived, the Applicant entered the house. A told the Applicant she was pregnant. The Applicant refused to leave. A began

to push the Applicant out of the house with her hands to his chest, and whilst she was doing so one of her fingernails was ripped off (R1/1717).

94. These breaches did not involve any conduct that would meet the definition of family violence, and there is insufficient evidence to conclude that A was scared.

95. With respect to the Applicant's offending and conduct that does meet the definition of family violence, there is a trend of increasing seriousness because the Applicant's most recent offences, the 2 July 2019 offence where the Applicant slapped his partner twice, and the offending against his mother and brothers, are the most serious. The family violence offences were committed against two former partners and the Applicant's mother and brothers, and so there may have been some cumulative effect of repeated offending in terms of burdening police resources (para 8.2(3)(a) and (b) of Direction No 99).

96. Although the report from a Senior Counsellor dated 19 July 2023 refers to the Applicant undertaking online programs addressing domestic violence, I do not have specific details of any. This may be a reference to the "*Anger Management 101*" course in September 2022. However, it does not appear that the Applicant has engaged in intensive treatment for domestic violence offending. In his statement dated 4 April 2024, the Applicant stated that he deeply regrets exposing his children to family violence. However I am not certain as to the extent that he accepts responsibility or understands the impact of that behaviour because at the hearing he appeared to blame his conduct on being under the influence of alcohol, saying that if he was sober, he would not have done those bad things (transcript/84) (para 8.2(3)(c)(i)-(iii) of Direction No 99).

97. The Applicant has not received any formal warnings about the consequences of further acts of family violence (para 8.2(3)(d) of Direction No 99).

98. In summary, the Applicant's breaches of restraining orders were non-contact breaches. The offence where he slapped his partner, and the offences involving his mother and brothers show a slight escalation in seriousness. The three incidents resulting in offences involved several family members, including two former partners and his mother or brothers. The Applicant has done limited, if any, rehabilitation concerning family violence and there is some doubt about his insight because he blamed his conduct on being intoxicated.

99. After balancing the above considerations, I find that this primary consideration weighs moderately against the revocation of the Cancellation Decision.

The strength, nature and duration of ties to Australia (paras 8(3) and 8.3 of Direction No 99)

100. Paragraph 8.3(1) of Direction No 99 provides that:

> *(1) Decision-makers must consider any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.*

101. Paragraphs 8.3(2) and (3) of Direction No 99 direct decision-makers to consider the non-citizen's ties to any children, and the strength, duration, and nature of any family or social links to members of the Australian community who are citizens, permanent residents or who have an indefinite right to remain in Australia:

> *(2) In considering a non-citizen's ties to Australia, decision-makers should give more weight to a non-citizen's ties to his or her child and/or children who are Australian citizens. Australian permanent residents and/or people who have the right to remain in Australia indefinitely.*
>
> *(3) The 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.*

102. Further, in paragraph 8.3(4) of Direction No 99, decision-makers are required to consider the strength, nature and duration of any other ties that the non-citizen has to the Australian community. Specifically:

> *(4) Decision-makers must also consider 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 Australian during and since their formative years, regardless of when their offending commenced and the level of that offending; and*
>
> *ii. more weight should be given to 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-citizen was not ordinarily*

resident in Australia during their formative years and the non-citizen began offending soon after arriving in Australia.

103. The Applicant's partner, A, mother, father, sister and three brothers live in Australia. His extended family members are in Australia, including aunts and uncles, cousins, nieces and nephews (R1/88).

104. The Applicant's partner A is an indigenous woman. She suffers from several physical health conditions as well as mental health conditions and is finding it difficult to raise her two sons without the Applicant. She has made the difficult decision to relocate to Sudan with the children if the Applicant is deported. Her father's family was part of the Stolen Generations, and she does not want her children to be separated from their father. She is also concerned that if the Applicant is deported, and something were to happen to her, that her children may not have anyone to look after them and may need to go into state care. A has already made enquiries with the Sudanese embassy in Australia to obtain information about moving to Sudan (transcript/131-132). If A moves to Sudan, she will be physically separated from her parents, and from her indigenous culture in Australia. It is likely to be very difficult for her to relocate to Sudan which is an unfamiliar country where she will not speak the language. She may face discrimination, and I am concerned that she will not receive adequate medical care and mental health support. The Applicant's relationship with A, an indigenous Australian, is also indicative of his strong ties to Australia.

105. The Applicant's mother does not want him to go back to Sudan and is worried about where he will stay and that he will have no means of supporting himself. She stated that she will be "*devastated*" to be separated from her son, her grandchildren and A. She stated that the thought of the Applicant being deported is causing her "*severe anguish and grief every day and has had devastating impact on* [her] *personally emotionally and has affected* [her] *quality of life*" (transcript/183; R1/105-107).

106. The Applicant's father will also be emotionally impacted if the Applicant is deported to Sudan and if A and the children join him. In a statement dated 20 September 2021, he stated that he feared for his son's safety in Sudan and (R1/110):

> *We would face significant emotional hardships if my son, my lovely grandchildren or his partner is returned to Susan. We will be devastated that our families are separated and that separation will no doubt be permanent and we may never hear from them again.*

107. A’s parents, who have written letters of support for the Applicant, will likely suffer emotional detriment if I affirm the Reviewable Decision because they will be separated from their daughter and grandsons if they relocate to Sudan.

108. A's best friend M, who is also an indigenous woman, is also likely to suffer emotional detriment if the Applicant is deported, and if A and the children join him. She expressed concerns that losing the Applicant feels like a repetition of the Stolen Generation where people were forcibly taken from their families (A1/11).

109. The Applicant’s brother, H, has stated that the family is struggling without the Applicant who has been a support for both himself, and their siblings, and that his mother (as well as his father) have been “*much stressed*” (R1/115). The Applicant’s cousin, E, also wrote that the Applicant’s absence has “*put a lot of strain on my Aunty, Uncle,* [A]*, his brother’s, sister’s, and his young children*” (R1/117).

110. The support that the Applicant’s partner A, his parents, A’s parents, M and the Applicant’s cousin and brothers are providing him, and their strong views that he should be able to stay in Australia, is indicative that the Applicant has very strong ties to the Australian community.

111. As I have mentioned, the Applicant’s partner A is an indigenous Australian and the Applicant has been accepted into her indigenous family. In a statement dated (R1/1847-1848), the Applicant stated:

> *I have been with my current partner for over 10 years. My partner is an aboriginal woman and through her I was introduced to members of her immediate and extended* [BL] *family over the years.*
>
> *When I was in orange, we regularly caught up with other members of the tribe and were regularly invited to family gatherings and other important events. Through those events and catch ups, I formed a strong bond with* [A’s] *family and other cousins, aunts, uncles, elders and other members of* [BL] *family. During those years I also learnt a lot about aboriginal culture, was taught how paint aboriginal art and have also played digeridoo in the past.*
>
> *In 2017, after birth of our son* [K] *and many years of my interactions with all members of* [BL] *family, I and* [K] *were officially welcomed and accepted as members of the* [BL] *family at a smoking ceremony in* [location omitted]. *This ceremony was attended by many members of the* [BL] *family including many elders. There were no objections to our acceptance into the Tribe by any members of the* [BL] *family.*
>
> *Our acceptance into the* [BL] *family is also formalised by inclusion of our names in the official book of* [book name omitted] *at page 76. While I accept that there is a spelling error in the book which states my name to be* [[Applicant’s name [incorrect]]

> *instead of* [Applicant's name]. *However, the book clearly records my date of birth and place of birth to be Khartoum Sudan. Therefore, the spelling error is just that.*
>
> *I accept that I am not a biological descendent from an indigenous people. However, my two biological children have aboriginal bloodline and both are descendants of* [BL]*.*
>
> *After my official acceptance, I self-identify as an aboriginal person and consider Australia to be my country as I have been accepted by the indigenous people of this country, through its customs and tradition in a smoking ceremony as a member of* [BL] *tribe/family in 2017.*

112. The Applicant's acceptance into A's family was symbolised in a smoking ceremony (transcript/130; R1/1890-1891).

113. In written closing submissions, the Applicant accepted that he does not satisfy the first limb of the tripartite test stated by Brennan J in *Mabo v Queensland (No 2)* (1992) 175 CLR 1, namely biological descent from indigenous people. He nevertheless tried to argue that he could still establish that he is an Australian Aboriginal (and therefore that he does not fall within the aliens power in s 51(xix) of the Constitution and therefore cannot be deported) despite not establishing that first limb. I am not persuaded by that submission. The current state of the law is that the tripartite test is applicable, and it is for a Court, and not this Tribunal, to decide otherwise. However, the Applicant has an indigenous partner, two indigenous children, has been accepted by A's family as being part of the BL family tribe, and identifies as being indigenous. I find that this is indicative of his having very strong ties to Australia.

114. The Applicant has three minor children who are Australian citizens. His two sons are indigenous. Considerable weight should therefore be afforded to this tie (para 8.3(2) of Direction No 99).

115. The Applicant has been a resident in Australia for 15 years, having arrived as a 20-year-old adult. Consequently, the Applicant was not a resident in Australia during his formative years, which would attract considerable weight, but he has been a resident in Australia for a lengthy amount of time (para 8.3(4)(a)(i) of Direction No 99).

116. In his statement dated 4 April 2024, the Applicant stated that he has made positive contributions to the Australian community through employment, paying tax, and through "*voluntary engagements*" with the aboriginal community in Orange, and in cultural activities celebrating Sudanese and aboriginal heritage (A1/3). In his personal circumstances form

he stated that he had undertaken volunteer work in the Sudanese community and "*volunteer for church*" (R1/94). I give some weight to these contributions (para 8.3(4)(a)(ii) of Direction No 99).

117. Whist the Applicant was not a resident in Australia during his formative years, he did not start offending soon after arriving in Australia (para 8.3(4)(a)(iii) of Direction No 99). He arrived in Australia on 19 May 2009, and his first offence was committed on 16 March 2012, nearly three years after his arrival in Australia. Therefore, I do not think that this factor should diminish the weight to be given to the Applicant's time in Australia.

118. All the Applicant's family reside in Australia. His family members, particularly his partner, A, his parents, and his brothers will suffer emotional detriment if the Applicant is removed from Australia. The Applicant has three children in Australia, which is a strong tie, and which Direction No 99 says should be given more weight. The Applicant has been a resident in Australia for 15 years and although he did not spend his formative years in Australia, that is still a significant amount of time. He has also made some positive contributions. He also identifies as an indigenous Australian. On balance, I find that the Applicant has very strong ties to Australia and the strength, nature, and duration of the Applicant's ties to Australia weighs very strongly in favour of revocation of the Cancellation Decision.

Best interests of minor children in Australia affected by the decision (paras 8(4) and 8.4 of Direction No 99)

119. Paragraph 8(4) of Direction No 99 states that in making a decision under s 501CA(4), "*the best interests of minor children in Australia"* is a primary consideration.

120. Direction No 99 states that decision-makers must determine whether the decision under review is, or is not, in the interests of a child affected by the decision. The first three paragraphs of 8.4 provide:

> *(1) Decision-makers must make a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA is, or is not, in the best interests of a child affected by the decision.*
>
> *(2) This consideration applies only if the child is, or would be, under 18 years old at the time when the decision to refuse or cancel the visa, or to not revoke the mandatory cancellation of the visa, is expected to be made.*
>
> *(3) 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.*

121. Paragraph 8.4(4) of Direction No 99 sets out the factors that the decision-maker must consider where relevant:

> *(4) In considering the best interests of the child, the following factors must be considered where relevant:*
>
> *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.*

The Applicant's daughter, Y

122. The Applicant has a daughter, Y, from his relationship with his former partner. Y was born in August 2012 and is approximately 11 and a half years old. The Applicant stated that he does not have a good relationship with his ex-partner (transcript/24).

123. There was a period when the Applicant did not have contact with Y because the Applicant's partner cut off his contact due to his issues with drugs. A mental health consultation with a psychiatrist on 25 March 2021 recorded that: "*Also has child from previous relationship (9-year-old daughter) but no contact with this child as states ex-partner cut off contact due to drug use issues*" (R1/1181).

124. In a statement dated 8 May 2023, the Applicant stated (R1/1175):

> *I would also like to be a part of my daughter,* [Y's] *life, who is 12 years of age. She needs her father in her life and needs my support until she is an adult and can stand up on her own feet. I can be of no assistance to her if I am continued to be held in detention or deported to Sudan.*

125. At the hearing the Applicant initially stated that he tried to speak to Y approximately once a month by telephoning other family members. He also stated that Y "*sometimes*" calls him from her mother's phone. However, during cross-examination, the Applicant stated that he last spoke to his daughter directly "*maybe two years ago*" and further stated "*we rarely talk*" (transcript/22-24 and 72). Y lives with her mother and grandmother (transcript/22-24).

126. In a statement dated 24 July 2023, the Applicant stated that if he is returned to Sudan (R1/1857):

> *My daughter* [Y] *will never see me again and she and I will be denied an opportunity to reconnect, rebuild our relationship and for me to play a fatherly role in her life.*

127. The relationship between the Applicant and Y is parental, so it should be given greater weight. However, the Applicant has had limited meaningful contact with Y for at least three to four years, possibly longer, apart from possible telephone contact.

128. There is a substantial amount of time until Y turns 18, some six and a half years. She may benefit from having her father in her life if her mother permits contact and if the Applicant remains abstinent from drugs and alcohol.

129. As I detailed above under the family violence primary consideration, there was a family violence offence on 16 January 2017 involving the Applicant's ex-partner (Y's mother) when Y was present in the house. At that time Y would have been approximately five years old. There is no evidence as to whether this had any impact on Y or caused her any emotional trauma. If the Applicant resumes contact with Y and her mother, and continues to use alcohol and drugs, there may be a slight risk of future family violence.

130. Although the Applicant may be able to continue telephone contact with Y if he was removed to Sudan, Y would be denied the opportunity to reconnect with her father and to have him physically present in her life.

131. Y’s mother fulfils a parental role. They live with Y’s grandmother, but it is unclear as to the role Y’s grandmother plays in caring for Y.

132. In summary, the relationship is parental, but the extent to which the Applicant has had meaningful contact with Y is unclear. There is a lengthy time until Y turns 18 (including her formative teenage years) and there is no evidence that anyone other than her mother (and possibly her grandmother) cares for her. It is unclear whether Y’s mother will allow the Applicant contact with Y in the future given that she does not have a good relationship with him and previously cut off contact due to his drug use. However, if the Applicant is deported Y will be deprived of the possibility of reconnecting with her father, which may cause her emotional and practical detriment in the future.

133. On balance, I find that the revocation of the Cancellation Decision is in the best interests of Y. I find that her interests weigh slightly in favour of the revocation of the Cancellation Decision.

The Applicant’s sons, KH and KA

134. The Applicant has two minor sons with his current partner, A. They are KH, born in February 2019 (5 years old) and KA, born in April 2015 (nine years old) (R1/90).

135. The relationship is parental and so it should be given more weight. There has been a period of absence of several years, but the Applicant is in daily contact with the children through phone calls and messages. The Applicant’s partner, A, stated that the Applicant “*enjoys a very close bond*” with his sons. She further stated that, “*Despite all his problems he was always a good father to his children and has always made positive financial, emotional and practical contribution to my and his children’s life*” (R1/101).

136. The Applicant appears to be a loving father who wants to be physically present in his sons’ lives. There is a substantial amount of time until they turn 18, some 13 and nine years, during which time the Applicant is likely to play a positive role if he can abstain from drug and alcohol use and does not reoffend. I also note that the Applicant has completed a voluntary course on parenting whilst he has been in immigration detention.

137. The Applicant has engaged in family violence against the children’s mother in the past. As I outlined above in the section on family violence, the apprehended domestic violence

orders that the Applicant breached by coming to visit A whilst intoxicated or after he had consumed alcohol were also protecting one or both children. There is, however, no evidence that the Applicant's conduct harmed the children or otherwise had a negative impact on them, other than the negative impact that his separation is likely to have had on them. A's evidence supports such a conclusion. In a statement dated 20 September 2021 stated A stated (R1/101):

> *Even in times that there was an AVO preventing him from coming in contact when he was drunk or under the influence, he made sure that the children's needs were met. He never did anything that harmed our children or put the life of our children at risk of harm or drank or took drugs in the presence of our children.*
>
> *He has also never been violent towards them or has acted in any way that is aggressive and has put their interests above his own.*
>
> *So I would say that he has always played a positive parental role in the lives of his children and now that he is not in the community, I and my children are facing financial, emotional and practical hardships. In fact we are having a very tough time right now.*

138. The Applicant's partner, A, is caring for the children, but she is struggling to care for them by herself. She has numerous health issues, including severe depression and anxiety, and she has prioritised caring for the children over her own mental health treatment. She is also struggling financially. She feels that due to her health issues she is not able to provide the best care to the children. Her evidence was that she desperately needs the Applicant to be present to help her care for the two boys (R1/99).

139. A and the children are indigenous. A has made the difficult decision to move to Sudan with the children if the Applicant is deported there. A's father's family was a part of the Stolen Generations, and she does not want the family unit to be separated. In that context, the decision is understandable. However, I do not think the children's best interests are served by them being relocated to Sudan, a country that is culturally very different to Australia, and that is experiencing war and civil unrest. I discuss the situation in Sudan below under the consideration of the extent of impediments if removed. Further, if the Applicant is returned there, he may not be able to receive adequate mental health treatment and there is a risk that he may relapse to alcohol and drug use. A has serious physical and mental health issues, and I am also concerned about her ability to access health services in Sudan. This would seriously impact on the Applicant and A's ability to care for the children in Sudan. The children would also be separated from their extended family in Australia, and I am very concerned that they would be separated from important cultural connections in Australia,

and that their ability to learn about and engage with their indigenous culture would be significantly compromised if they moved to Sudan. I find that the children would suffer serious detriment if they were moved to Sudan.

140. For completeness, and for the reasons set out above, I also find that if the children stayed in Australia with their mother and the Applicant was deported to Sudan, they would suffer emotional, practical and financial detriment.

141. In conclusion, I find that revocation of the Cancellation Decision is in the best interests of KH and KA. I find that their interests weigh strongly in favour of revocation of the Cancellation Decision.

The Applicant's minor nieces, nephews and cousins

142. There is minimal, and general, information concerning the Applicant's minor nieces, nephews and cousins. They are listed in the Applicant's SFIC, para [79]) as follows:

- Nephews: nine year old IJ, and four year old LW.
- A two year old niece, EW.
- Minor cousins: MO, aged 17, MA, aged 14, MM, aged 16, SM, aged 12 and K, aged 10.

143. The SFIC, at para [80], states that the Applicant has a "*positive and nurturing relationship*" with these children and that he communicates with them through telephone, video calls, and text messaging. It is further acknowledged that the children are cared for by their parents.

144. With respect to the Applicant's nephew, IJ, the Applicant stated in his personal circumstances form that he was very close to IJ because IJ and his mother (the Applicant's sister MO) lived with the Applicant's mother. The Applicant was also living there with them and said that he became a "*fatherly figure*" because IJ "*does not have a father*" (R1/93).

145. In his statement dated 8 May 2023, the Applicant stated the following, which suggests that IJ's father is in his life (R1/1175):

My ongoing detention has also had a negative impact on my sister [M] *and her minor son* [IJ] *(12). I speak regularly to* [MO], [IJ] *and* [J] *(my brother in law* [J]*) via video call on regular basis. I would say that I have a close and loving relationship with [M],* [IJ] *and my brother in law* [J]. *I would like to be given an opportunity to be a part of and play a positive and productive uncle-role in* [IJ's] *life. My children also have close relationship with* [IJ] *and they would be emotionally affected if we all return to Sudan.*

I have a close and loving relationship with my three cousins, who are all married and have families of their own in Australia. I continue to remain in contact with them on a weekly basis. I also have a close and loving relationship with all of them. All of my cousins have minor children, and their children also have a close and loving relationship with me. I would like me and my children to remain a part of their lives and would like my children to grow up with their cousins in the safety of Australia.

146. More generally, in a statement dated 4 April 2024, the Applicant stated (A1/4):

The fabric of my life in Australia is woven with the threads of community, family and a deep sense of belonging. My nephews, niece, and cousins are an integral part of this family tapestry. Our shared moments, conversations, and support for one another stand as a testament to the positive influence I strive to be in their lives. …

147. Based on this limited information, it is difficult to assess the best interests of these children. The relationships are non-parental, and the children appear to have parents to care for them. There appears to be some communication through telephone, video calls, and text messaging which could continue if the Applicant was returned to Sudan. The Applicant has been in prison and immigration detention for several years and so meaningful contact has been limited. He is unlikely to have met his two-year old niece. The Applicant seems to be keen to play a part in the children's lives, and if he can abstain from drugs and alcohol, and does not reoffend he may be able to play a positive role. If the Applicant is deported, the children would be separated from the Applicant's two sons who he says he is close to. He seems to have had the closest relationship with IJ. Overall, I find that the best interests of the Applicant's minor nephews, nieces and cousins weighs in favour of the revocation of the Cancellation Decision. I find that their interests should be given slight weight.

Expectations of the Australian community (paras 8(5) and 8.5 of Direction No 99)

148. A decision-maker must consider the expectations of the Australian community when making a decision under ss 501 or 501CA.

149. These expectations are set out in paragraph 8.5 of Direction No 99, which provides:

(1) The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so,

the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia.

(2) In addition, 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 is 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 position 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.

(3) The above expectations of the Australian community apply regardless of whether the non-citizen poses a measureable [*sic*] *risk of causing physical harm to the Australian community.*

(4) 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.

150. I must give effect to the "*norm*" stipulated in paragraph 8.5(1) of Direction No 99, being that the Australian community expects non-citizens to obey Australian laws whilst in Australia. This will, in most cases, weigh against revocation of a cancellation decision if that expectation has been breached or if there is an unacceptable risk that it may be breached in the future. As demonstrated by his criminal history, the Applicant has breached this expectation by not obeying Australian laws. Consequently, the expectation of the Australian community would be that the Applicant's Visa should remain cancelled (para 8.5(1) of Direction No 99).

151. As is evident from the reference to the "*norm*" in paragraph 8.5(1) of Direction No 99, I am being told unequivocally what the community's expectations are. Further, paragraph 8.5(4) of Direction No 99 confirms more explicitly that the Australian community's expectations are what the Government deems them to be, because decision-makers are directed to proceed based on the Government's views about community expectations without independently assessing them (see *Minister for Immigration, Citizenship and Multicultural Affairs v HSRN* [2023] FCAFC 68 at [41]-[44]).

152. I agree with the observations of Senior Member Morris in *NTTH and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 1143, which were adopted by Deputy President Boyle in *Wightman and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 1208 (***Wightman***). I note that Deputy President Boyle was writing about the previous Direction No 90, however the wording in Direction No 99 is identical in this regard, and therefore those observations apply equally to Direction No 99.

153. In *Wightman*, Deputy President Boyle stated, at [85]–[86]:

> *… Direction 90 superseded Direction 79 on 15 April 2021. Senior Member Morris in* NTTH and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (**NTTH**) *at [194] noted that the provisions of Direction 90 contain generally similar wording to the corresponding provisions in Ministerial Direction No 65 (**Direction 65**), the predecessor to Direction 79. Those corresponding provisions in Direction 65 were considered by the Full Court of the Federal Court of Australia in* FYBR v Minister for Home Affairs (**FYBR**)*.*
>
> *Senior Member Morris at [195] and [196] of* NTTH *summarises the view expressed by the Full Court in* FYBR *and the adoption of some of the language of the judgment in* FYBR *into Direction 90 as follows:*
>
> > 195. It was the Court's view that it is not for a decision-maker to make his or her own personal assessment of what the 'expectations' of the Australian community may be. In this respect, the expectations articulated in the Direction are *deemed* — they are what the executive government has declared are its views, not what a decision-maker may derive by some other assessment or process of evaluation.
> >
> > 196. It is significant that the new Direction imports the statement that the expectations of the Australian community are to be considered as a 'norm', which I take to be an acknowledgement of the approach taken by the plurality of the Court in *FYBR*. ...
>
> (Original emphasis and footnotes omitted.)

154. Further detail about the Australian community's expectations with respect to certain types of conduct is given in paragraph 8.5(2) of Direction No 99. That paragraph states that the

Australian community expects that the Australian Government should cancel a non-citizen's visa if they raise serious character concerns through specific conduct listed in sub-paragraphs 8.5(2)(a)–(f), including "*acts of family violence*" (8.5(2)(a)). The Applicant has engaged in conduct that meets the definition of family violence. He also has a conviction on 27 July 2015 for "*resist officer in execution of duty – T2*". The Direction also includes "*commission of crimes against government representatives or officials … in performance of their duties*" as being in in this category (8.5(2)(d)).

155. Paragraph 8.5(3) of Direction No 99 further confirms that the Australian community's expectations are what the Government deems them to be, by effectively telling decision-makers that the stated expectations apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.

156. Further, paragraph 8.5(4) of Direction No 99 tells decision-makers that this consideration is about the expectations of the Australian community as a whole. It directs decision-makers to proceed based on the Government's articulated views without assessing the community's expectations in the particular case. I therefore cannot speculate about what the community's views might be about the Applicant's situation.

157. I therefore find that the primary consideration in paragraph 8.5 of Direction No 99, being the expectations of the Australian community, weighs strongly against the revocation of the Cancellation Decision.

OTHER CONSIDERATIONS (PARA 9(1) OF DIRECTION NO 99)

158. As I outlined above, Direction No 99 directs decision-makers to have regard to a non-exhaustive list of several other considerations to the extent they are applicable.

Legal consequences of decision under section 501 or 501CA (para 9(1)(a) and 9.1 of Direction No 99)

159. Paragraph 9.1 of Direction No 99 identifies the legal consequences that decision-makers must bear in mind when making a decision under ss 501 or 501CA of the Migration Act.

160. The first sub-paragraph, 9.1(1), of Direction No 99, outlines that an unlawful non-citizen is liable for removal from Australia, notwithstanding any non-refoulement obligations:

> (1) *Decision-makers should be mindful that unlawful non-citizens are, in accordance with section 198, liable to removal from Australia as soon as reasonably practicable in the circumstances specified in that section, and in the meantime, detention under section 189, noting also that section 197C(1) of the Act provides that for the purposes of section 198, it is irrelevant whether Australia has* non-refoulement *obligations in respect of an unlawful non-citizen.*

161. In other words, if I affirm the Reviewable Decision, the Applicant will likely be removed to Sudan as soon as is reasonably practicable and he will remain in immigration detention until he is removed.

162. The next two sub-paragraphs of Direction No 99, 9.1(2) and (3), address Australia's non-refoulement obligations:

> (2) *A* non-refoulement *obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has* non-refoulement *obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act, particularly the concept of 'protection obligations', reflects Australia's interpretation of* non-refoulement *obligations and the scope of the obligations that Australia is committed to implementing.*
>
> (3) *International* non-refoulement *obligations will generally not be relevant where the person concerned does not raise such obligations for consideration and the circumstances do not suggest a* non-refoulement *claim.*

163. The Applicant has raised non-refoulement claims in this application. However, those claims were comprehensively considered by the Migration and Refugee Division of this Tribunal, who handed down a decision on 31 October 2022 (**MRD Decision**). That Tribunal was not satisfied that the Applicant was a person to whom Australia owed protection obligations. As is contemplated in para 9.1.2(2) of Direction No 99, the protection visa process is a specifically designed process that allows for a detailed consideration of non-refoulement claims (see generally *Plaintiff M1/2021 v Minister for Home Affairs* [2022] HCA 17). Further, on appeal to the FCFCA, the Court found that there was no jurisdictional error, and a further appeal to the Federal Court found no error of law in the FCFCA's decision.

164. At the hearing, Dr Donnelly submitted that circumstances in Sudan had materially changed since the MRD Decision and indicated that he would be taking me to documents to support that submission (transcript/12-14). However, I was not specifically directed to any such

documents or country information that would suggest any material change in the Applicant's circumstances on return. Therefore, I cannot see any reason not to accept the findings of the earlier Tribunal regarding those claims, and I am not satisfied that non-refoulement obligations are owed to the Applicant on the evidence and submissions before me.

165. In conclusion, if I were to affirm the Reviewable Decision, the Applicant's removal from Australia would be a consequence of the operation of Australia's migration laws. Further, as I am not satisfied that non-refoulement obligations apply to the Applicant, I give this consideration neutral weight.

Extent of impediments if removed (paras 9(1)(b) and 9.2 of Direction No 99)

166. Paragraph 9.2(1) of Direction No 99 provides:

> *(1) Decision-makers must consider 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 substantial language or cultural barriers; and*
>
> *c) any social, medical and/or economic support available to them in that country.*

167. The Applicant is 35 years of age. He meets the DSM-5 diagnostic criteria for PTSD, persistent depressive disorder, substance use disorder (cannabis and methamphetamine) in sustained remission within a controlled environment, and alcohol use disorder. He requires four separate medications for his mental health issues, together with ongoing counselling. As is evident from his diagnosis of substance use disorder and alcohol use disorder, he has had a significant history of drug and alcohol addiction.

168. All the Applicant's family are in Australia. He has no known relatives in Sudan. His evidence was that his extended family members in Sudan fled Sudan or have been killed. He would not have any family or social support if he was returned there, including any savings or accommodation (R1/1859-1860). There was a reference in one of the Applicant's statements to the family having land in the Nuba Mountains, and he stated that he would have to make a temporary shelter over that land if he was returned to Sudan (R1/1867). However, I do not know what the current situation is concerning that land, given the family

fled Sudan in approximately 2004. There is no evidence that the Applicant would have the funds or the ability to construct accommodation for himself on that land, and he was not asked about it at the hearing. I therefore do not think that this land, even if it was vacant and available to the Applicant, would assist him to establish and maintain basic living standards if he was returned to Sudan.

169. I have accepted that, despite inconsistencies in the Applicant's evidence, he suffered childhood trauma in Sudan that has given rise to his mental health conditions. The Applicant is concerned that he will not be able to access mental health assistance or counselling to deal with his trauma in Sudan, and that in turn this will affect his ability to find employment, and given a lack of social welfare, that he will not be able to subsist (R1/1860). Being returned to a place where he suffered trauma and where he has no family or social support may exacerbate his mental health and substance abuse issues.

170. The DFAT Country Information Report – Sudan, 27 April 2016 (**DFAT Report**) states that, "*a lack of capacity and resources means that Sudanese overall have poor access to health care and poor health outcomes, particularly outside major urban centres*" (R1/203). Recent travel advice (current at 1 April 2024) (**Travel Advice**) refers to medical facilities in Khartoum as "*basic*" and "*inadequate elsewhere*" (A1/49). This supports the Applicant's concerns about being able to access mental health treatment and counselling.

171. Further, the DFAT Report states that "*the main issue facing returnees is the perceived lack of financial support provided for effective reintegration into Sudanese society, particularly in Khartoum*" (para 5.39 at R1/224). This supports the Applicant's concerns about being able to support himself financially.

172. I also note the Applicant's father's evidence that the family fled the country in 2004 because he was accused of being a traitor by rebel groups (R1/103). Consequently, the family is likely to have left the country without valid exit visas. Consequently, there is a risk that upon arrival the Applicant may be detained and questioned (DFAT Report, para 5.35-5.37 at R1/223).

173. The Applicant stated that he does not speak his "*mother tongue*" fluently and that he has hardly spoken Sudanese Arabic after arriving in Australia (R1/1880). However, the Applicant was assisted by a Sudanese Arabic interpreter in these proceedings, and so I do

not think there would be any significant language barriers if he returned to Sudan. There are, however, likely to be cultural barriers. The Applicant left Sudan in approximately 2004 when he was approximately 16 years old and lived in Egypt for several years (R1/1880). His lack of a work history there and his status as a returnee may make it difficult to find employment. He has an indigenous partner and identifies as being indigenous as part of his identity. This is likely to make it difficult for the Applicant to return to Sudan and adjust to the culture there.

174. The Travel Advice advises that Australians should not travel to Sudan and should consider leaving as soon as possible (A1/39). It states that the security situation is volatile, and that violence can escalate at short notice. There is a civil war, civil unrest and political tension, a threat of terrorism, and of crime, including kidnapping for ransom being a serious risk (A1/39-46). Thus, the Applicant's safety concerns are legitimate, and although other citizens of Sudan face those risks, they are likely to be particularly difficult for the Applicant to cope with given the length of time he has resided in Australia, and his lack of any family or social supports in Sudan.

175. The Applicant is likely to face emotional detriment if he was returned because he would be separated from, and would not be able to reconnect with, his Australian citizen daughter. He would not be able to return to Australia to visit her or for any significant events in her life.

176. I find that there are substantial impediments that the Applicant would face in establishing himself and maintaining basic living standards if removed to Sudan. He is unlikely to be able to access adequate medical care and medication for his mental health issues, and his rehabilitation from drug and alcohol use is likely to cease if he is returned to Sudan, placing him at risk of relapse. This in turn is likely to impede his ability to find employment and to sustain himself. Overall, the hardship the Applicant would suffer if he were returned to Sudan weighs in favour of the revocation of the cancellation of his visa.

177. I find that this consideration weighs strongly in favour of the revocation of the Cancellation Decision.

Impact on victims (paras 9(1)(c) and 9.3 of Direction No 99)

178. Paragraph 9.3(1) of Direction No 99 provides that:

> (1) *Decision-makers must consider the impact of the section 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 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.*

179. The victims of the Applicant's offending include his mother, two brothers and his partner, A.

180. As I discussed above, the Applicant's partner would be seriously impacted if I were to affirm the Reviewable Decision. That is because she is an indigenous woman, with two indigenous children she shares with the Applicant. Her evidence, which I accept as truthful was that she would move to Sudan with the children and the Applicant if he were returned there. As an indigenous woman who does not speak the language, she may face discrimination, isolation and she is likely to be solely dependent on the Applicant. A would face significant detriment if I affirm the Reviewable Decision.

181. Also, with respect to the strength, nature and duration of the Applicant's ties to Australia primary consideration that I discussed above, the Applicant's mother has expressed strong views that she will be emotionally impacted if he is not able to stay in Australia. The evidence of the Applicant's brother also suggested he and his brothers would be impacted as well and that they are keen for the Applicant to remain in Australia. I find that the Applicant's mother and brothers will be detrimentally impacted due to the loss of their son and brother, and their worry for his wellbeing and the wellbeing of A and the children if I affirm the decision and he is unable to remain in Australia.

182. There is no information before me regarding the effect of a decision to revoke or not to revoke the Cancellation Decision on the Australian community (other than as discussed above under the protection of the Australian community and the expectations of the Australian community primary considerations).

183. Consequently, I find that this other consideration weighs strongly in favour of the revocation of the Cancellation Decision.

Impact on Australian business interests (paras 9(1)(d) and 9.4 of Direction No 99)

184. Paragraph 9.4(1) of Direction No 99 states that decision-makers should consider the impact of a decision whereby the Applicant is not allowed to remain in Australia on any business interests. It provides:

> *(1) 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.*

185. There is no evidence that any business interests would be impacted if the Applicant is not permitted to remain in Australia.

186. I therefore find that this consideration is not relevant.

THE WEIGHING EXERCISE

187. The Applicant does not pass the character test under s 501 of the Migration Act.

188. I have therefore considered whether there is another reason to revoke the Cancellation Decision, having regard to the primary and other relevant considerations in Direction No 99.

189. For the reasons set out above, I made the following findings about the relevant primary considerations in Direction No 99. These were:

- The protection of the Australian community from criminal or other serious conduct primary consideration weighed strongly against the revocation of the Cancellation Decision.
- The family violence primary consideration weighed moderately against the revocation of the Cancellation Decision.
- The strength, nature, and duration of the Applicant's ties to Australia weighed strongly in favour of the revocation of the Cancellation Decision.
- The best interests of the Applicant's minor daughter, Y, weighed slightly, and the best interests of his two minor sons both weighed strongly, in favour of revocation of the Cancellation Decision. The best interests of the Applicant's minor nieces,

nephews and cousins weighed slightly in favour of revocation of the Cancellation Decision.

- The expectations of the Australian community weighed strongly against the revocation of the Cancellation Decision.

190. I made the following findings with respect to the other considerations that were relevant. These were:

- I gave neutral weight to the other consideration of the legal consequences of the decision.
- The extent of impediments if removed other consideration weighed strongly in favour of revocation of the Cancellation Decision.
- The impact on victims consideration weighed strongly in favour of revocation of the Cancellation Decision.

191. I have weighed the primary and other considerations against each other and after doing so, I am satisfied that the weight I have assigned to each of them is appropriate.

192. As can be seen from this summary of my findings, the primary and other considerations in favour of revocation, and against revocation, are finely balanced.

193. Overall, I find that the primary considerations of the best interests of the Applicant's two minor indigenous sons, the strength, nature and duration of the Applicant's ties to Australia including his indigenous partner, connections to the indigenous community, and the significant impediments that the Applicant is likely to face if returned to Sudan (particularly due to his mental health conditions), which all weighed strongly in favour of revocation of the Cancellation Decision, were determinative in this application.

194. The impact on victims (particularly the Applicant's partner, A) which weighed strongly, and the best interests of the Applicant's minor daughter, Y, and niece, nephews and minor cousins which both weighed slightly in favour of revocation of the Cancellation Decision, further added to the overall weight being in the Applicant's favour.

195. I find that the considerations that weighed in favour of the revocation of the Cancellation Decision outweighed the considerations that weighed against the revocation of the

Cancellation Decision. Those were the primary considerations of the protection of the Australian community which weighed strongly, the expectations of the Australian community which weighed strongly, and the family violence primary consideration which weighed moderately, against the revocation of the Cancellation Decision.

196. In summary, I am satisfied that there is another reason why the Cancellation Decision should be revoked. Therefore, the correct or preferable decision is to set aside the Reviewable Decision, and to substitute a new decision that the Cancellation Decision should be revoked.

DECISION

197. The Reviewable Decision, being the decision of a delegate of the Respondent dated 6 June 2023 is set aside and substituted with a decision that the cancellation of the Applicant's Visa is revoked under s 501CA(4)(b)(ii) of the *Migration Act 1958* (Cth).

I certify that the preceding 197 (one hundred and ninety seven) paragraphs are a true copy of the reasons for the decision herein of Senior Member Dr M Evans-Bonner

................[Sgd].......................................
Associate

Dated: 10 May 2024

Date of hearing:	**10 and 11 April 2024; 18 and 19 April 2024**
Representative for the Applicant:	**Dr J Donnelly (pro bono) instructed by Mr Z Zarifi of Zarifi Lawyers**
Representative for the Respondent:	**Ms C Oppel, The Australian Government Solicitor**