



Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number: **2024/1640**

Re: **VFQF**

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Senior Member Hon J Rau SC**

Date: **7 June 2024**

Place: **Adelaide**

The decision under review is affirmed.



[sgnd].....

Senior Member Hon J Rau SC

CATCHWORDS

MIGRATION – mandatory cancellation of Class WC Subclass 030 Bridging C visa under section 501(3A) – where Applicant does not pass the character test – Applicant has substantial criminal record – Applicant possesses prescribed equipment — Applicant engages in cultivating large commercial quantity of controlled plant – Applicant’s Bridging visa expired but he did not leave the country – Applicant has lived in Australia unlawfully – Applicant has obtained work in breach of his Bridging Visa condition – Applicant was working illegally in Australia – Applicant failed to declare his income – Applicant’s immediate family members are Australian citizen and permanent resident – Applicant has a biological son and a step son who are Australian citizens born here – whether the discretion to revoke the visa cancellation under section 501CA(4) should be exercised – consideration of Ministerial Direction No. 99 - decision under review is affirmed.

LEGISLATION

Migration Act 1958 (Cth)

CASES

Uelese v Minister for Immigration and Border Protection [2016] FCA 348

YNQY v Minister for Immigration and Border Protection [2017] FCA 1466

Afu v Minister for Home Affairs [2018] FCA 1311

Suleiman v Minister for Immigration and Border Protection [2018] FCA 594

FYBR v Minister for Home Affairs [2019] FCA 50

SECONDARY MATERIAL

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

REASONS FOR DECISION

Senior Member Hon J Rau SC

7 June 2024

INTRODUCTION

1. The Applicant seeks a review of the decision by a delegate of the Minister for Home Affairs (“**the Respondent**”) made under section 501CA(4) of the *Migration Act 1958* (Cth) (“**the Act**”) on 18 March 2024, not to revoke the mandatory cancellation of his Class WC Subclass 030 Bridging C visa (“**the Bridging Visa**”). His visa was cancelled on 20 February 2023 under section 501(3A) on the basis that he did not pass the character test.¹
2. Sections 501(6)(a) and 501(7)(c) of the Act provide that a person does not pass the character test if they have been sentenced to a term of imprisonment of 12 months or more. The Applicant fails the character test on account of his conviction for (1) *Possess prescribed equipment*, (2) *Abstract or divert electricity from power system*, (3) *Traffic in large commercial quantity of controlled drug (cannabis)* and (4) *Cultivating a large commercial quantity of controlled plants (cannabis)*, for which the Applicant was sentenced to a term of imprisonment of 2 years, 7 months and 6 days with a non-parole period of 16 months.²
3. The Applicant concedes that he does not pass the character test. The issue before the Tribunal is whether there is ‘*another reason*’ to revoke the mandatory visa cancellation pursuant to s 501CA(4)(b)(ii) of the Act.
4. The hearing was held in person on 30, 31 May 2024. The Applicant was represented by Dr Jason Donnelly of Latham Chambers and Mr Duy Ngo of Statewide Migration. The Respondent was represented by Mr Alex Chan of Sparke Helmore.
5. The Applicant gave evidence in person with the aid of an interpreter. As is often the case, this made the assessment of the Applicant’s demeanour and answers to questions somewhat more difficult. That said, the Applicant was frequently evasive in his responses. Some examples are given below.
6. He sought to present himself as the hapless victim of scammers and criminals. The truth, although unclear, is not likely to be so innocent. By his own admission, he was involved in working, without any lawful right to do so, in the black economy for many years, both in WA

¹ Exhibit 3, G-Documents, G3: Letter from the Department to the Applicant, 14 – 28.

² Ibid Attachment A: National Criminal History Check (dated 02.03.2023), 30.

and SA. He engaged with a “*middle man*”, who made what he now concedes was a totally false Protection Visa claim on his behalf, for the up-front cost of \$20,000 in cash. He was involved, at least in Adelaide, in working for a criminal gang producing commercial quantities of cannabis. In his evidence, he said that others “*took advantage*” of him. He presented himself as having been the victim of a string of unfortunate coincidences. I do not accept this.

7. Many of his claims were self-serving, and in my view, many were exaggerated. These are set out below, but an example is his swiftly developed connection to his most recent partner and her 2 children.
8. I do not regard the Applicant as a reliable witness. Where there is an alternative source of evidence to the Applicant’s, I generally prefer it.
9. On all of the evidence, it seems that during his lawful stay in Australia on a visitor’s visa between July and October of 2017, the Applicant made a firm decision not to return to Vietnam. His conduct since that time has involved various attempts to negotiate his way around and through the Australian immigration framework, to achieve that outcome. He concedes that the first of these attempts at least, was fraudulent, but that at the time, he was unaware of what was happening.
10. This first attempt involved an application for a Protection Visa. This is discussed in detail below.
11. The second attempt involved a brief marriage and a failed pregnancy.
12. The third involved an application for a Medical Treatment visa.
13. The most recent involves an application for a partner visa, with the Applicant’s current partner (Spouse 3), in part based on his biological connection with an infant born after he was imprisoned.³

³ Child B.

14. The Applicant called Spouse 3, as a witness. She attended in person. She required the assistance of an interpreter. She presented as being very keen to do whatever she could, to assist the Applicant to remain in Australia. She said that she was deeply committed to the Applicant. They have a son together, Child B. Her support for the Applicant is understandable in the context of her difficult personal circumstances. She has been in Australia since 2016. Her English is limited. She has been the victim of an abusive former partner. She is an only child whose parents remain in Vietnam. Her mother has visited to help her for periods, but she has her own commitments in Vietnam. She is a single mother, now with 2 young boys. The eldest, Child A has some behavioural problems. She requires ongoing financial and practical support to manage her family. The Applicant represents a chance for her to have practical and financial support in the future. It is from her perspective, practically and financially very beneficial for the Applicant to remain in Australia.
15. The Applicant called his oldest sister (Sister 1). She lives in Perth. She gave evidence by phone. She required the assistance of an interpreter. She has 2 daughters and a son. They are all adults. Her evidence diverged from that of the Applicant in certain important respects. This is discussed below. She was also evasive about certain matters, especially regarding the circumstances surrounding the Applicant's Protection Visa application in 2017. On balance, she was more credible than the Applicant.
16. The Applicant called his next older sister (Sister 2). She also lives in Perth. She gave evidence by phone. She required the assistance of an interpreter. She has 1 daughter and 3 sons. Three of these children are minors. Child C, D and E. They are discussed in more detail below.
17. Her evidence also diverged from that of the Applicant's in certain important respects. It was also different to the evidence given by Sister 1. This is discussed below. She was also evasive about certain matters, especially regarding the circumstances surrounding the Applicant's Protection Visa application in 2017. On balance, she was also more credible than the Applicant.

Background Facts

18. The Applicant was born in Vietnam.⁴ He has 4 older siblings.⁵ The Applicant is now 38 years old. He is a Vietnamese citizen.
19. On 20 May 1994, the Applicant's Sister 1 came to Australia. She is an Australian citizen.⁶
20. On 20 August 2000 the Applicant's Sister 2 came to Australia. She is a permanent resident.⁷
21. The Applicant claims that prior to his arrest,⁸ he would normally visit his sisters in WA 2-3 times per year.⁹ He undoubtedly stayed with them in WA during the period of his first visit to Australia in 2008 and for a period following his return here in 2017. How often he visited them after that is less clear.
22. On 6 March 2008, the Applicant's application for UL-679 - Sponsored Family Visitor visa ("Visitor visa 1"), was granted.¹⁰
23. On 13 March 2008, the Applicant arrived in Perth, Western Australia on Visitor visa 1.¹¹ The purpose of the visit was to have a holiday and spend time with his sisters and their families.
24. On 5 June 2008, the Applicant left Australia when Visitor visa 1 expired.¹²
25. I note that the Applicant apparently did not tell his migration agent about this visit, when giving instructions to him in 2023.¹³
26. Between 9 April and 15 July 2009, the Applicant completed a certificate (level B) in English.¹⁴

⁴ Ibid Attachment F: Personal Circumstances Form, 47.

⁵ Ibid 55.

⁶ Ibid Attachment H: Submission made by Mr Duy Ngo (dated 26 June 2023), 92-3 at [124].

⁷ Ibid 93 at [125].

⁸ Between July 2017 and April 2022.

⁹ Exhibit 3, G-Documents, Attachment H, 93 at [127].

¹⁰ Exhibit 5, Respondent's Tender Bundle, TB3: Documents from the applicant's Protection visa, 111.

¹¹ Ibid; Exhibit 3, G-Documents, Attachment V: Movement Record, 198.

¹² Exhibit 5, Respondent's Tender Bundle, TB3, 111.

¹³ Exhibit 3, G-Documents, Attachment H, 67 at [13].

¹⁴ Ibid Attachment I: Certificate of Foreign Language (dated 01.10.2009), 108.

27. On 1 May 2011,¹⁵ the Applicant says that he got married to X1 (“Spouse 1”), in Vietnam.¹⁶
28. This is not the only date that the Applicant has given for this marriage.¹⁷ Ms. Spouse 3 told the Tribunal that he had told her, that the marriage to Spouse 1 had occurred in 2009. He gave a different date in a later document.¹⁸ In his application for a Partner Visa dated 15 February 2023, he gave the date of this marriage to 12 July 2017.
29. He told the Tribunal that the latter was an incorrect date but could not explain why it was provided in an official document, lodged on his instructions, on his behalf.
30. On 6 December 2011, the Applicant obtained a *General Nursing* certificate from [Institution] Medical College, Vietnam.¹⁹
31. He said that getting work was hard in Vietnam if you did not have the right contacts or money to secure a position. He helped out in his parents’ baking business and later got a job in a factory that made drinking bottles. He did labouring work and made deliveries.
32. On 5 July 2017, the Applicant’s application for FA-600 - Sponsored Family visa (Visitor visa 2) was granted.²⁰
33. On 21 July 2017, the Applicant arrived in Australia on Visitor visa 2.²¹ The Applicant has remained in Australia, ever since.
34. A document setting out his visa history, agreed by the parties, entitled “Visa Calendar” is annexed hereto and marked Exhibit A.

¹⁵ According to his subsequent Protection Visa application, dated 11 September 2017.

¹⁶ Exhibit 5, Respondent’s Tender Bundle, TB3, 88.

¹⁷ It was subsequently changed to 12 July 2017, see Exhibit 5, Respondent’s Tender Bundle TB5, 166.

¹⁸ Exhibit 5, Respondent’s Tender Bundle, TB5, 189.

¹⁹ Exhibit 3, G-Documents, Attachment J: Certificate of General Nursing, 110-11.

²⁰ Exhibit 5, Respondent’s Tender Bundle, TB3, 111.

²¹ Ibid; Exhibit 3, G-Documents, Attachment V: Movement Record, 198.

35. On 11 September 2017, the Applicant lodged an application for a XA-866 Permanent Protection Visa (Protection Visa).²² The Applicant's claim for protection is summarised as follows:

- *"The applicant met some gangsters who he later learned were involved in gambling and selling drugs. On learning about their activities he reported them to the police. However as the police did not have enough evidence to charge them they were released from detention.*
- *The group gangsters learned about the applicant's report to the police and went to his home, where they tried to kill him, by beating him and messing his house.*
- *He was able to escape after his neighbours raised the alarm and reported the incident to the police. The gangsters subsequently ran away.*
- *Fearing they would return the applicant went into hiding until he was able to escape from Vietnam.*
- *The applicant sought help but the police officer claimed they couldn't search for the gangsters.*
- *The applicant decided to move overseas as he believed his safety would not be guaranteed in Vietnam.*
- *The applicant believes if he returns to Vietnam, the gangsters will injure, torture or kill him because they want revenge."*²³

36. In this application the Applicant stated that he was unemployed, had never been employed and was engaged in "help family business".²⁴ Presumably this was the family bakery business.

37. The Applicant told his Migration Agent – Mr Duy Ngo in 2023 that:

"he fell victim to a fraudulent migration agent who lodged a Protection visa (subclass 866) application on his behalf... he was unaware that a protection visa application had been lodged by this fraudulent migration agent... the agent told him to pay a large sum of money to lodge a visa for him that allowed him to stay in

²² Exhibit 5, Respondent's Tender Bundle, TB3, 87-123.

²³ Ibid TB3, 112; 98-100.

²⁴ Ibid TB3, 97.

Australia legally and gets Medicare. This agent was in Melbourne, but now he has lost contact and could not find him.”²⁵

38. He also claimed that *“he wished to apply for a student visa, so he could enrol in a nursing course in Australia and stay in Australia legally”*.²⁶
39. The Applicant could offer no explanation for the origin of the elaborate story involving gangsters, which was central to the application for a Protection Visa. He inferred that this was invented by the now uncontactable migration agent in Melbourne.
40. He claimed to have done no more than hand over \$20,000 in cash and his passport. He could not explain how the application for a Protection Visa contained many other details, clearly not sourced from his passport. For example, the full name and date of birth of his parents, his wife/spouse in Vietnam, date of marriage etc.
41. I do not accept the Applicant’s evidence on this topic. He knew a lot more about the Protection visa application than he was prepared to admit. The Applicant’s Sister 2 told the Tribunal that he also applied for Medicare and provided his fingerprints for the process of obtaining Protection Visa.
42. I do not accept that he was the totally innocent victim of a scammer.
43. There are two logical alternative explanations. The first is that the contents of the application for the Protection visa were true. If so, the Applicant was associated with gangsters in Vietnam. The second is that he somehow managed to engage with people making fraudulent claims, in order to secure a Protection visa.
44. He effectively told the Tribunal that the second option was true. He was emphatic that he had no fear of gangsters in Vietnam.

²⁵ Exhibit 3, G-Documents, Attachment H: Submission made by Mr Duy Ngo (dated 26 June 2023), 67-8 at [14].

²⁶ Ibid 68 at [15].

45. I believe that he knew, or ought reasonably to have suspected, that the application for the Protection visa was not legitimate.
46. He claims, through his agent, to have had “*no prior history of offending , abuse of drugs or involvement with anti-social peers*”.²⁷
47. The Applicant said that unnamed people had contacted his sisters because they “*knew about his situation*”. They promised to fix everything if he just handed over \$20,000 in cash and his passport.
48. He met the “*middleman*” at Sister 1’s house, only once. He says that he only found out about the details of the Protection visa application in 2018-19, after getting notified of the refusal decision. This happened when he asked someone who could understand English, to read it back to him in Vietnamese.
49. The Applicant was cagey about where the \$20,000 in cash came from. He said that his sisters had each loaned him money, but he could not recall how much from each. I find this to be inherently improbable.
50. He said that he has since paid the money back from his earnings at a farm, by weekly cash repayments. He told the Tribunal that it took him over 1 year to settle the \$20,000 debt. The whole debt was apparently settled in about 2018. It is difficult to understand how the debt could be repaid if he did not even know how much was owed. I also note that he told the Tribunal that he was earning \$12 per hour doing farm work. Saving for \$20,000 and covering his own living expenses over about a year, would be a remarkable achievement, even without the deduction of his income tax obligations.
51. Sister 1 said that the Protection visa application was arranged through someone that the Applicant knew. She told the Tribunal that the Applicant had arranged the meeting himself. She did not know much about it. He did borrow several thousand dollars in cash from her, maybe \$4-5,000, but she can’t recall how much. I find this unlikely.

²⁷ Exhibit 3, G-Documents, Attachment H, 88 at [100].

52. She has since been repaid.
53. The Applicant gave a different account. He said that his sisters organised the whole process and his only involvement in this activity was '*handing over the passport*'.
54. Sister 2 gave a similar account. She said that she had borrowed cash money from 3 friends to help him. The amount she lent to the Applicant was in excess of \$10,000. She said it was an effort to source the money for his Protection visa application. She was also unable to recall the exact figure of her own contribution but said that it was about \$5000 - \$6000 cash. It was paid in cash to the '*middle man*'. The loan has since been repaid by the Applicant.
55. The evidence from all of the witnesses concerning the \$20,000 and the Protection visa application was cagey, incomplete and contradictory. This includes the evidence given on this topic by the Applicant's sisters.
56. I was left with the distinct impression that they all knew a lot more about this episode, and the characters involved, than any were prepared to say.
57. On 21 October 2017, FA-600 - Sponsored Family visa (Visitor Visa 2) expired.²⁸
58. The Applicant's counsel submitted that from 22 – 29 October 2017, the Applicant was not here without a visa. Nothing turns on this short period.
59. On 30 October 2017, the Applicant was granted WA 010 Bridging visa A (Bridging visa A).²⁹
60. On 2 July 2018, a Delegate of the Minister for Home Affairs refused the Protection Visa application because he did not meet the criteria for a Protection Visa.³⁰
61. It appears the Applicant was not correctly notified of the refusal decision by the Department.

²⁸ Exhibit 5, Respondent's Tender Bundle, TB3, 111.

²⁹ Ibid.

³⁰ Ibid TB3, 115.

62. On 6 August 2018, Bridging Visa A expired.³¹
63. The Applicant gave contradictory evidence about whether he believed that he could work on the Bridging Visa. He spoke of working on a farm in WA. He was paid \$12 per hour cash. He paid no tax. He worked 10 or more hours per day, 4-5 days per week. He was vague about where he worked.
64. In 2019, the Applicant travelled from WA to Adelaide. He obtained some cash work on the farm operated by Vietnamese people.³² His evidence before the Tribunal in 2023 was that he worked in Australia in breach of the conditions of Bridging Visa A and Bridging visa C, as well as when he was an unlawful non-citizen.³³
65. Applicant worked on a farm owned by a Vietnamese farmer at Virginia. He was again paid in cash and paid no tax.
66. At around this time the Applicant's father was terminally ill. He said that he was asked to go back to Vietnam but could not do so because of Covid restrictions.
67. This is untrue, as the pandemic restrictions did not start until early 2020.
68. He said that an acquaintance/friend helped him to send \$200-300 per week to Vietnam because he did have an Australian bank account or identification.
69. Sister 2 told the Tribunal that the Applicant was working '*so hard*' in Adelaide at that time, to support his father in Vietnam, who had liver cancer. She referred to his time working in Adelaide as a '*sacrifice*', although at the time he was working illegally and without a visa.
70. On 13 June 2019, the Applicant claims to have divorced Spouse 1, in Vietnam.³⁴

³¹ Exhibit 3, G-Documents, Attachment H, 68 at [16]; Exhibit 5, Respondent's Tender Bundle, TB3, 133.

³² Ibid Attachment B, 33.

³³ Exhibit 5, Respondent's Tender Bundle, TB4, 155 at [23].

³⁴ Ibid TB5, 189.

71. There is no documentary evidence before the Tribunal to prove that the Applicant married Spouse 1, or if he did, that they were ever divorced.
72. In 2019, the Applicant claims to have married X2 (Spouse 2) in Adelaide.³⁵ According to the sentencing remarks of Judge Muscat, while in Adelaide the Applicant married a woman who sponsored him with a partner visa.³⁶ This woman is understood to be Spouse 2.
73. When that marriage ended, and his Partner visa had lapsed, the Applicant became *depressed and anxious*.³⁷
74. The Applicant subsequently changed the time line of this marriage/relationship to 30 June 2020, in his application for a Partner visa with Spouse 3.³⁸
75. There is no documentary proof of this marriage before the Tribunal.
76. It is unclear exactly when he first met Spouse 2.
77. This relationship with Spouse 2 lasted approximately 1 year.³⁹ He claims to have been the victim of serious abuse by Spouse 2. Mr Ngo provided a submission on his behalf, which states:

“19. Mr VFQF cites that during his marriage that he was completely dependent upon his wife financially. He alleges that that his wife was physically, financially, and emotionally abusive towards him and would engage in behaviour that falls within the pattern of coercive control such as isolating him from his support system by limiting his contact with his family and friends.

20. Mr VFQF further instructs that he was often in locked in his own house by his wife, [Spouse 2], with no ability to leave. During the last encounter of this nature, and sick of being locked up, he jumped out of a window which was one level from the ground to escape.

³⁵ Exhibit 3, G-Documents, Attachment H, 68 at [17].

³⁶ Ibid Attachment B, 33.

³⁷ Ibid Attachment B, 33.

³⁸ Exhibit 5, Respondent's Tender Bundle, TB5, 167.

³⁹ Exhibit 3, G-Documents, Attachment H, 68 at [17].

21. Further, Mr VFQF cites that during his marriage to [Spouse 2], she would always threat to report him to Australian Border Force and have his arrested and then deported. He cites that she would tell him that if he went to the police no one would believe him as he is a man and an illegal.

22. A 2018 report published by the Australian Institute of Health and Wellness indicates that 1 in 16 men, have experienced physical or sexual violence by a current or former partner.¹ It is difficult for culturally and linguistically diverse individuals to know that there are organisations which can assist them with family violence prevention and other issues. Mr VFQF is particularly vulnerable due to his limited English language skills.

23. Mr VFQF further report that **the marriage become more toxic and stressful once his wife miscarried, which led to the deteriorated of the marriage and [Spouse 2] left him.**

24. Mr VFQF faced significant emotional and financial hardships as a result of the relationship breakdown and family violence, necessitating professional treatment and support. Mr VFQF instructs that he was a depressive disorder following breakdown of the marriage by a general medical practitioner, he developed suicidal ideation, and engaged in drinking heavily to cope."⁴⁰

78. It is evident from this submission that the Applicant understood that at the time, he was illegally in Australia.
79. On 6 June 2020, he was re-notified by email of the refusal decision for Protection Visa.⁴¹
80. On 30 May 2021, The Applicant claims that his relationship with Spouse 2 ended.⁴²
81. On around 12 June 2021, the Applicant moved into a shared room, in the home where Ms X3 (Spouse 3) also resided.⁴³

⁴⁰ Ibid Attachment H, 68-9.

⁴¹ Exhibit 5, Respondent's Tender Bundle, TB3, 120-3.

⁴² Ibid TB5, 189.

⁴³ Exhibit 3, G-Documents, Attachment H, 70 at [25].

82. Spouse 3 had a child (Child A) from a previous relationship. He is now 6 ½ years old. She had been in an abusive relationship with the boy's father.
83. The Applicant came into Child A's life for the first time, when he met Spouse 3 in mid-June 2021.
84. His daily, unsupervised personal contact with Child A ended, with his remand and imprisonment some 9 months later, on 1 April 2022.
85. On 1 July 2021, the Applicant claims that he started a de facto relationship with Spouse 3,⁴⁴ just over 3 weeks after meeting her, after he moved into the same lodgings.
86. According to Spouse 3, the Applicant is "*the only father figure that [Child A] has ever known*".⁴⁵
87. The Applicant's agent also claims that the Applicant views Child A "*as his own and not as his stepson*".⁴⁶
88. On 15 September 2021, Dr Thanh-Tam Pham referred the Applicant to Ms Susan Lau, a psychologist, for treatment of depression, anxiety and stress issues. The detail of the referral letter is as follows:

*"Thank you for reviewing this patient and providing further psychotherapy as Mr [VFQF] presented with depression/ anxiety and stress. DASS D=42, A=12, S=30. He came to Australia on a holiday and **could not go back to Vietnam during Covid time** and he was married to someone who did not allow him to go out to see friends or go to work. He is now separated for 4 months. He recently has a new relationship for 1 month.*

Current and active past medical history: Non recorded.

Current medication: None recorded.

Allergy: No known allergies/ adverse reactions."⁴⁷

⁴⁴ Ibid Attachment H, 71 at [32].

⁴⁵ Ibid 92 at [120].

⁴⁶ Ibid 92 at [121].

⁴⁷ Exhibit 5, Respondent's Tender Bundle, TB3, 137.

89. This statement that the Applicant did not return to Vietnam because of Covid, is untrue.
90. On 16 September 2021, the Applicant lodged an application for Medical Treatment (subclass 602) visa.⁴⁸
91. He attached the referral letter of Dr Pham, Form 1507 – Evidence of Intended Medical Treatment and a copy of his passport.⁴⁹ He claimed:

*“I have been diagnosed with Depression/Anxiety and Stress as a consequence of being abused by my former partner, [Spouse 2].
I have been referred to a psychologist, Ms. Susan Lau for treatment.
The estimated cost for each session is \$100 and therefore, \$1,200 for the next 12 months.”*⁵⁰

92. He gave reason of his medical condition for which he intended to seek treatment for:

*“Condition: Mental illness
Give details: I have been diagnosed with Depression/Anxiety and Stress as a consequence of being abused by my former partner, [Spouse 2].
My former partner locked me up in her house 24/7.
I took the risk of jumping down from the upper floor to escape.
I have been referred to a psychologist for treatment.”*⁵¹

93. On 17 September 2021, the Applicant was granted the Bridging C Visa pending the Medical Treatment visa application.⁵²
94. On 17 September 2021, the Applicant received a letter from the Department of Home Affairs with intention to refuse the Medical Treatment visa application.⁵³ The detail of the letter is summarised as follows:

“ ...

⁴⁸ Exhibit 5, Respondent's Tender Bundle, TB3, 124-137.

⁴⁹ Ibid TB3, 135-7.

⁵⁰ Ibid TB3, 128.

⁵¹ Ibid TB3, 132.

⁵² Exhibit 3, G-Documents, Attachment H, 70 at [27]; Attachment T, 161.

⁵³ Exhibit 5, Respondent's Tender Bundle, TB3, 138.

*During the assessment of this application, Departmental systems were consulted and **the amount of time already spent in Australia gives rise to concern over the applicant's intention to be a genuine temporary entrant and their incentive to return to their home country.***

....

Departmental Records demonstrate that:

The applicant last arrived in Australia on 21 July 2017 as the holder of a Visitor (subclass 600) visa valid for a temporary stay as a visitor for three (3) months. The applicant has not departed since.

Whilst onshore the applicant has demonstrated their intention to [remain] permanently in Australia by lodging an application for a Permanent Protection (subclass 866) visa.

The application was refused however the applicant did not depart.

The applicant did not comply with visa validity and remained in Australia as an Unlawful Non-Citizen for over three (3) years since 07 August 2018 until the present.

The applicant now [makes] a request for a Medical Treatment (subclass 602) visa.

This is a short term [visitor] visa however the applicant requests a further extended stay of one (1) year.

This information is relevant to the consideration of the applicant's application as the following legislative criteria must be satisfied:

602.215

(1) The applicant genuinely intends to stay temporarily in Australia for the purpose for which the visa is granted, having regard to:

- (a) whether the applicant has complied substantially with the conditions to which the last substantive visa, or any subsequent bridging visa, held by the applicant was subject; and*
- (b) whether the applicant intends to comply with the conditions to which the Subclass 602 visa would be subject; and*

(c) any other relevant matter.

(2) However, subclause (1) does not apply if the requirements described in subclause 602.212(6) are met in relation to the applicant.

Although it is acknowledged that the applicant may be seeking medical treatment in Australia, the applicant must nevertheless satisfy the decision maker that they intend to comply with visa conditions, be a genuine temporary entrant and that they have incentive to depart Australia if a visa were to be approved.”⁵⁴

95. The Applicant was invited to provide a written response to support his claim within 7 days.⁵⁵ The Applicant requested for an extension of time to respond, and it was granted.⁵⁶

96. On 2 November 2021, the Applicant received a letter of refusal of the Medical Treatment visa application.⁵⁷ The Delegate refused his application because the conditions in clause 602.215 of the *Migration Regulations*⁵⁸ were not satisfied. The detail of the decision is summarised as follows:

“... In assessing whether the applicant satisfies clause 602.215, I have considered:

- whether the applicant has complied substantially with the conditions to which the last substantive visa, or any bridging visa, held by the applicant was subject.*
- whether the applicant intends to comply with the conditions to which the visa would be subject.*
- whether the applicant is attempting to obtain the visa to remain in Australia for a longer period, such as maintain ongoing residence in Australia.*
- the personal circumstances of the applicant that would encourage them to return to their home country at the end of the proposed stay.*
- the personal circumstances of the applicant in their home country that might encourage them to remain in Australia (for example, economic situation, civil disruption).*
- conditions that might encourage the applicant to remain in Australia.*

⁵⁴ Exhibit 5, Respondent's Tender Bundle, TB3, 138-9.

⁵⁵ Ibid TB3, 139-41.

⁵⁶ Ibid TB3, 149.

⁵⁷ Ibid TB3, 143-6.

⁵⁸ *Migration Regulations* 1994 (Cth).

- *the presence of immediate family members in their home country, that is, does the applicant have more close family members living in their home country than in Australia.*
- *On 16 September 2021, the applicant lodged an application for a Medical Treatment visa. It is stated that they would like to remain in Australia to seek medical treatment.*

....

...Evidence of an appointment booking with a psychologist was provided which was later substantiated with a tax invoice showing that the applicant received psychological treatment on 06 October 2021. No further information has been provided.

....

*In their Medical Treatment visa application, **the applicant has not provided sufficient documentation to demonstrate their intention or incentive to depart Australia now or in the near future and Departmental records confirm that the applicant has unsuccessfully applied for a permanent visa in Australia.***

I find that their adverse migration history strongly indicates that the applicant intends to continue to seek a visa pathway to remain in Australia on an ongoing or permanent basis.

I have considered the claims and supporting evidence that the applicant has provided with their application. I find that the applicant is attempting to utilise the Medical Treatment visa pathway as a means to maintaining ongoing residence, and that they do not genuinely intend to remain in Australia on a temporary basis.

I am not satisfied that the applicant meets the requirements in Clause 602.215 in Schedule 2 of the Migration Regulations.

It is necessary for the applicant to satisfy subclause 602.215(1), as they have not satisfied the requirements of subclause 602.215(2). Subclause 602.215(2) requires the applicant to meet the requirements of subclause 602.212(6), which states:

Unfit to depart

(6) All of the following requirements are met:

(a) the applicant is in Australia;

(b) the applicant has turned 50;
(c) the applicant has applied for a permanent visa while in Australia;
(d) the applicant appears to have met all the criteria for the grant of that visa, other than public interest criteria related to health;
(e) the applicant has been refused the visa;
(f) the applicant is medically unfit to depart Australia due to a permanent or deteriorating disease or health condition, as evidenced by a written statement to that effect from a Medical Officer of the Commonwealth.

The applicant does not satisfy subclause 602.215(6) as they have not demonstrated that they are unfit to depart Australia.

Decision

As clause 602.215 is not met by the applicant, I find the criteria for the grant of a Medical Treatment visa are not met by the applicant. Therefore, I refuse the application by the applicant for a Medical Treatment visa.”⁵⁹

97. On 22 November 2021, the Applicant lodged an application with the Administrative Appeals Tribunal (“Tribunal”) for a review of the Delegate’s decision.⁶⁰ The hearing before the Tribunal was ultimately postponed for various reasons including the Applicant searching for representation,⁶¹ and Mobilong Prison being unable to facilitate the hearing at short notice.⁶²
98. On 1 April 2022, the Applicant was arrested by the police and remanded in custody.⁶³ He has been in custody or detention ever since.
99. At the time of his arrest, he was the holder of the Bridging Visa C, pending the ultimately unsuccessful challenge in the Tribunal, to the Medical Treatment visa refusal.
100. On 3 May 2022, Spouse 3 started receiving psychological treatment.⁶⁴

⁵⁹ Exhibit 5, Respondent’s Tender Bundle, TB3, 148-50.

⁶⁰ Ibid TB4: Documents from the Applicant’s Medical Visa application: 153 at [3].

⁶¹ Ibid TB4, 153 at [5].

⁶² Ibid TB4, 154 at [9].

⁶³ Exhibit 3, G-Documents, Attachment B, 35.

⁶⁴ Ibid Attachment H, 90 at [115].

101. In 2022, the Applicant's son [Child B] was born, in Adelaide.⁶⁵ The Applicant was already in custody. He has not been in the community at any time since Child B was born.

102. On 18 November 2022, psychologist Susan Lau prepared a report regarding Spouse 3. This states:

"I got your email requesting a report addressing the following issues.

I am a clinical psychologist, and Ms [Spouse 3] was referred to me by her GP, Dr Therese Phan, in relation to her anxiety and depression after her husband , Mr [VFQF], was arrested and is custody for charges of cultivating cannabis.

I first saw Ms [Spouse 3] on 7/4 and seeing her once 2- 3 weeks interval. She had been suffering from anxiety and depressive symptoms with constant crying, sleep disturbance, loss of appetite, loss of weight, hiding at home and worrying. I have been providing her with strategies to manage her stress and anxiety.

Ms [Spouse 3] has a 4 years old son by Mr [VFQF], and it had been difficult to manage going to work part-time (as a nail technician) (she stopped her part-time job), taking care of her son, while being pregnant and attended all medical appointments. Ms [Spouse 3] said that her husband had been very supportive and hands on and would do house chores and looking after their son. She did not have any support and worried that who would look after her son while she went to give birth. The difficult circumstance has definitely impacted on Ms [Spouse 3's] mental health.

Finally, Ms [Spouse 3] managed to apply for her mother to come to Adelaide to assist while she gave birth and to support her during this difficult time. Ms [Spouse 3's] mother is currently under the visitor's visa, and prepare to stay for 12 months. Therefore, it will give Ms [Spouse 3] some relief of taking care of the new born and the 4 years old.

The possible issues that face Ms [Spouse 3] would be managing the household without her husband, and take care of the newborn and young child as a single mother. Certainly it would have an impact on both children not having a father to grow up with for a long period of time. It may also affect Ms [Spouse 3's] mental

⁶⁵ Ibid Attachment T: Identity, 158.

health. If her mother is not able to stay for the period of Mr [VFQF]'s custody, the impact would even be greater.”⁶⁶

103. On 28 November 2022, the Applicant was convicted of *possessing prescribed equipment, abstracting or diverting electricity from power system, traffic in large commercial quantity of controlled drug (cannabis), cultivate large commercial quantity of controlled plant (cannabis).*⁶⁷

104. A Police Summary Occurrence Report describes the circumstances as follows:

“Vietnamese cannabis syndicate, numerous grow houses identified, multiple arrests. Attended [redacted] after receiving a Crime Stopper action (8/1/2022) and today the RP organised a SBOP to have locks changed as the tenant was not paying rent. Attended with Owner of property and locksmith. NIL Answer at the door. Search of outside of property while locksmith tried to enter. Could hear humming from an external wall of premises, from the double garage and a rear shed. There was discarded plant bases in the garden covered in shade cloth and sheet metal. GSW was used to enter premises. Locksmith drilled lock to gain access. TWO bedrooms inside the premises and both sheds had been modified into a hydroponics grow house. Approximately 150 small plants inside the premises, 40 large plants over 2 rooms in the double garage and 70 large plants over 2 rooms in the large rear shed - Totalling approximately 260 plants. Nil persons living at the address. Assessed by Confiscation Section.”⁶⁸

105. The Chief Investigator made the following comments:

*“Bail is strongly opposed due to:
Seriousness of offences and strengt of prosecution case having found the accused at the property
Offences carry lengthy terms of imprisonment
The co accused's appear to be little to no ties in SA or Australia.
One of the co accused's [redacted] has no ties in Australia and stated his wife lives in Vietnam*

⁶⁶ Exhibit 3, G-Documents, Attachment O: Letter from Clinical Psychologist - Susan Lay (dated 18.11.2022), 125.

⁶⁷ Ibid Attachment A, 30; Attachment B, 31-5.

⁶⁸ Exhibit 5, Respondent's Tender Bundle, TB1, 5 (as written in the original document).

These offenders appear to be in SA solely for the purpose of minding the cannabis crops

There is no suitable bail address for either accused. If granted bail, it is likely that accuseds would be bailed to live with other co accused's

Neither accused appears legally employed in SA

Two of the six co accused's have history in WA. One [redacted] has warrant in WA for identical offending, where 99 plants were found at a house. also has a warrant in SA from offending January 2021 at [redacted] for another large commercial qty of cannabis. Notwithstanding attempts made to locate [redacted] has not been located since January 2021, and has not contacted Police, albeit message have been left at various properties for him. [Redacted] was believed to be living at a Penington address in 2021, but attempts to locate him were unsuccessful with occupants believed to be providing false information as to his whereabouts and activities.

It is unclear how each of the accuseds is supporting themselves.

Police have grave fears that if granted bail, accused's would flee interstate or return to Vietnam.

Only [redacted] has a permanent visa. All other accused's are on bridging visas and it is likely in light of their arrests, their visas will be cancelled.”⁶⁹

106. In his sentencing remarks Judge Muscat of the SA District Criminal Court said:

“[VFQF], you have pleaded guilty to one count of cultivating a large commercial quantity of cannabis plants for sale and one count of trafficking in a large commercial quantity of cannabis. Each of these offences has a maximum penalty of life imprisonment, a fine of \$1 million, or both, signifying the extremely serious nature of offences of that kind. You have also pleaded to one count of being in possession of prescribed equipment used in relation to cultivation of the cannabis plants, which has a maximum penalty of two years imprisonment, or a fine of \$10,000, and one count of diverting electricity from a power system, which is an offence that has a maximum penalty of two years imprisonment, or a fine of \$20,000.

As part of a targeted investigation into the commercial cultivation and distribution of cannabis, police searched a property on [redacted address] on 1 April 2022. No one answered the door when the police attended. The police accessed the house

⁶⁹ Ibid TB1, 43 (as written in the original document).

through the roller door. Once the police were inside the house, it was apparent that the property was being used exclusively to cultivate and harvest cannabis.

You were discovered hiding behind a door in the front room. Another man was also hiding from the police in that room. Inside a wardrobe in that front room were 28 cannabis clones being grown under artificial lighting in a plastic container.

There were two other rooms inside the house which were set up for growing cannabis plants that had recently been harvested. Inside one room, there were six pots under artificial lighting. In the other room, there were 16 pots. Each of the pots had once contained a cannabis plant.

Inside the rear shed, police located 114 cannabis plants growing under artificial lighting with a watering system. These plants were growing in three separate rooms constructed within the shed, with the plants all of differing maturity. In one room, there were 12 medium-to-large cannabis plants growing. In the second room, there were another 12 medium-to-large cannabis plants, and in the third room were 33 small cannabis plants, 28 small-to-medium cannabis plants, and 29 medium-to-large cannabis plants being grown. All of the plants in the rear shed were growing in pots. In total, there were 142 cannabis plants being grown in various locations at the property.

There was evidence that cannabis had been harvested from plants with discarded or loose cannabis material scattered around the property. Inside the front room, where you were found hiding, were six garbage bags containing female cannabis buds, totalling 41.865 kg. That cannabis had been harvested from the plants that had been growing in pots inside the rooms in the house that I mentioned.

The electricity supply to the property had been diverted to bypass the meter.

Police removed a total of 126 high wattage globes, 87 lightshades, 98 ballast boxes (transformers), six carbon filters and a bud stripping machine.

What the police discovered was a house dedicated to the ongoing cultivation and harvesting of cannabis for sale.

The photographs tendered by the prosecution clearly depict the nature and scale of this commercial cannabis cultivation.

You have been assessed by Mr Fugler, who has provided a psychological report for sentencing.

You are 36 years of age. You were born in Vietnam and the youngest of five children. After completing your secondary education, you studied nursing and graduated after three years as a registered nurse.

Because your family was not influential or wealthy you were unable to secure employment in Vietnam as a nurse. Instead, you worked as a labourer producing water bottles before travelling to Australia in 2017 to visit your two sisters who were living in Perth.

You were married in Vietnam, but the marriage ended in 2016 after seven years.

You wanted to remain in Australia and work, so you paid \$20,000 to someone you believed was a migration agent to assist in your visa application. However, you were defrauded and the man who got paid the money disappeared.

In 2019, you travelled to Adelaide in the hope of finding cash work on various farms operated by other Vietnamese people. While in Adelaide, you married another woman who sponsored you with a partner visa. The marriage only lasted 12 months. You have claimed your wife was physically and emotionally abusive towards you and was controlling your behaviour and social contacts. The marriage was placed under further stress after your wife miscarried and the marriage eventually ended.

As a result, your partner visa lapsed and you became depressed and anxious. You sought help from your general medical practitioner, who referred you to a psychologist for treatment to assist you in managing your depression, anxiety and distress.

You were then granted a medical treatment visa, which meant that you were not able to undertake any paid employment. To add to your stress, your father died in Vietnam from liver cancer. You continue to grieve his passing.

You later became involved with another woman who supported you financially. She had a young child of her own. She has recently given birth to your child. I have been provided with a report from her psychologist. Following your arrest and

remand in custody, she has experienced anxiety and depressive symptoms. She has found it difficult to cope with caring for her five-year-old son and the newborn. You used to provide much help with caring for her child and household duties which enabled her to work part-time. She has struggled in your absence. However, her mother has arrived in Australia from Vietnam on a visitor's visa and is providing her with assistance. Obviously, should her mother not be able to stay in Australia throughout the time you remain in custody, your partner's mental health will be impacted as it was before.

There are serious consequences for you as a result of this offending. Your visa will be cancelled, and you must be deported to Vietnam, unless you can convince the Minister otherwise. I accept that the worry of this will have an impact on you serving your prison sentence. I also accept that you will experience hardship involved in having to leave behind your newborn son and your partner if you are deported to Vietnam.

In relation to your role in the offences, you have claimed that in October 2021, you attended a party, and there spoke with someone, telling him that you were desperate for work to help you survive. You were offered work involving the hydroponic cultivation of cannabis plants which had already been established. You were to look after the plants and ensure they were watered. You were told that you would be paid \$150 a day for doing that. While you knew cultivating cannabis was illegal, you did not appreciate the seriousness of the offences you were committing until after you were arrested and charged.

You claim that you have not received any payment for what you did, as you were told that you would be paid once the clones that were being grown were harvested.

Your counsel, Mr Williams, submitted that your role was confined to tending to the plants, and guarding the harvest of cannabis that was inside the bags until it was to be collected by the others to take elsewhere to dry and package. You have submitted that you were actually working at the property for about three weeks before your arrest. Even if that is true, that is hardly mitigatory, as you acknowledge that you were to have worked at the property until the clones matured to harvest, which could have been a number of months later.

It has been accepted by the prosecution that you are not the principal offender, and your role was as your counsel has submitted. It is also accepted by the

prosecution that while the harvested cannabis seized by the police weighed almost 42 kg, that when dried for sale it would have weighed around 15 kg. Not that this matters a great deal given your role in the offence was to guard the cannabis until it was collected by others and taken elsewhere for drying and packaging.

Despite your role being limited to tending to the plants and guarding the harvested cannabis, what you were doing is, nevertheless, extremely serious. You were part of a large scale operation in the cultivation and trafficking of cannabis in large commercial quantities. You played an important role in maintaining the crop and guarding the harvest. Without workers like you prepared to perform this role the operation would not have been able to produce an output and those in charge would not have been able to make the substantial profits associated with this illegal activity that they were expecting.

General deterrence is therefore a very important sentencing consideration in these cases. Those who involve themselves or are thinking of getting involved in the commercial cultivation and trafficking of cannabis must be deterred.

For the offences of cultivating a large commercial quantity of cannabis and trafficking in a large commercial quantity of cannabis, it is appropriate to impose a single sentence of imprisonment. You will be imprisoned for four years. As you pleaded guilty within four weeks of your first appearance in court, you are entitled to a discount on this sentence of up to 35%. Despite being caught red-handed, I will allow you the full discount, which reduces the sentence to two years, seven months and six days imprisonment.

For the offence of diverting the electricity supply, you will be imprisoned for six months. The sentence will be reduced to three months and 27 days to reflect the 35% sentencing discount for having pleaded guilty so early.

For the offence of possessing the prescribed equipment, you will be imprisoned for 10 months. For some reason, that charge was laid on a separate information in the Magistrates Court. You are entitled to a sentencing discount of up to 40% for pleading guilty, which I will allow, reducing this sentence to one of six months imprisonment.

I order that all sentences be served concurrently, meaning that the total sentence is two years, seven months and six days.

Taking into account your personal circumstances, I will fix a non-parole period of 16 months.

The sentence will commence from 1 April 2022 when you were arrested by the police and remanded in custody.”⁷⁰

107. On 1 February 2023, the Applicant appeared before the Tribunal, while in prison. He gave evidence by phone and presented arguments in relation to the Medical Treatment Visa application refusal.⁷¹
108. On 2 February 2023, AAT Member Symons, affirmed the decision of the Delegate not to grant a Medical Treatment Visa to the Applicant (AAT 1).⁷²
109. The Applicant did not seek judicial review of this decision.
110. On 15 February 2023, the Applicant applied for a Partner (subclass 802) Visa (Visa 5), while in prison, with the assistance of his Migration Agent – Mr Duy Ngo.⁷³
111. On 16 February 2023, Child B was granted Australian citizenship.⁷⁴
112. On 18 February 2023, the Applicant was notified of an invalid application in relation to his application for the Partner Visa:

“Your application for a visa is invalid because it did not meet Item 1301(3)(e) of Schedule 1 of the Migration Regulations 1994 (the Regulations):

Item 1303(3)

Other:

(e) Applicant is not in immigration detention or in criminal detention and has not escaped from either immigration detention or in criminal detention.

As you were in criminal detention at the time of application for the bridging visa, your application for an associated bridging visa is invalid. Invalid applications

⁷⁰ Exhibit 3, G-Documents, Attachment B, 31-5.

⁷¹ Exhibit 5, Respondent's Tender Bundle, TB4, 154 at [10] – [11].

⁷² Ibid TB4, 152-8.

⁷³ Ibid TB5, 159-97.

⁷⁴ Exhibit 3, G-Documents, Attachment T, 157.

cannot be considered. Your application has not been accepted and will not be assessed against the visa criteria for grant or refusal.

Your immigration status

*You currently hold a Bridging C (class WC) Bridging C (subclass 030) visa. This visa will currently **cease on 09 March 2023.***⁷⁵

113. There is no merits review of an assessment that an application is invalid.⁷⁶
114. On 20 February 2023, the Bridging Visa C was cancelled under s 501(3A).⁷⁷
115. On 27 February 2023, the Department informed Mr Ngo the Partner visa application was refused under s 501F(2) of the Act.⁷⁸
116. On 9 March 2023, the Bridging Visa C would have ceased in any event by operation of law.⁷⁹
117. Even if the cancellation of the Bridging Visa C was to be revoked in this review, it would still have expired on 9 March 2023, and the Applicant would still not hold a visa that would permit his return to the Australian community.
118. The parties were however agreed that if the cancellation of the visa were to be revoked, by operation of law under s 501F(4), the previously refused Partner Visa application, would be revived.
119. This in turn may then constitute a basis upon which a Bridging Visa E may be applied for.
120. On 18 April 2023, Sister 1 provided a statutory declaration in the following terms:

"1. My name is [Sister 1], and I am writing this letter to plead on behalf of my younger brother, VFQF, who is presently serving a sentence at Mobilong prison for his crime for cultivating cannabis.

⁷⁵ Exhibit 5, Respondent's Tender Bundle, TB5, 200.

⁷⁶ Ibid TB5, 201.

⁷⁷ Exhibit 3, G-Documents, G3, 14; Attachment W: Notice of Cancellation (dated 20.02.2023), 200-5.

⁷⁸ Exhibit 5, Respondent's Tender Bundle, TB5, 202.

⁷⁹ Exhibit 5, Respondent's Tender Bundle, TB5, 201.

2. I can confidently say that he is a responsible man who deeply cares for his family. As his older sister. I got married and had children quite early. I have three kids, and when I gave birth to my first child, my brother was only ten years old. Every time I visited Vietnam with my children, he would look after and play with them so that I could help our parents in their bakery. When I returned to Australia, he missed me and the children dearly, so I invited him to visit us in Australia. Although he did not live with us, he often cooked our children's favorite dishes and brought them to our house.

3. When he married his second wife in Adelaide, I visited them frequently and saw that he always took care of the household chores: cooking, washing clothes, and tidying up the house. As soon as his wife returned from work, she would find delicious meals and a neat home waiting for her. Even when he lived with his current wife, [Spouse 3], and her son, [Child A], I visited them in Adelaide and saw how he took care of [Child A] as if he were his own child. He looked after the boy and played with him while his wife was at work. I was delighted to learn that they recently welcomed their son, [Child B] (born on [date, month] 2022).

4. I also learned from his wife that she suffered from severe depression during her pregnancy, and she could not have managed to care for both children without his help. My brother knew he couldn't be there to support his wife and children before the birth of [Child B], so he asked his wife to invite her mother to come to Australia to help care for the family during his imprisonment. On January 20, 2023, my sister-in-law, her two children, and her mother visited me in Perth for a week. Since they stayed at my house instead of a hotel. I knew how important his wife and children were to him. He would call them 5-7 times a day just to talk to [Child A] and ask about their well-being, what they ate, and what they were doing. [Child A] was also delighted whenever he spoke with my brother.

5. I had a chance to talk to my brother via Zoom, and I saw the joy on his face every time he saw his wife and children on the iPad screen. I asked [Child A] if he liked talking to his father, and he said yes. He then told my brother that he wanted to visit him in prison. My brother asked me to take him to visit on the weekend.

6. I cannot stress enough the negative impact on the family if [VFQF] were to leave Australia. His absence would leave his wife struggling to care for their children, especially with her history of depression. [Child A] and [Child B] would lose their loving father, and the family would be left with a void that could never be filled. The

thought of them being separated breaks my heart, as I have seen firsthand the love and care he has given to them.

7. Please consider this heartfelt plea for my brother, who deeply loves and cares for his family. I genuinely believe that his presence is crucial for the well-being of his loved ones, and I humbly ask for your understanding and compassion. Thank you.”⁸⁰

121. On 24 April 2023, Spouse 3 provided a statutory declaration in the following terms:

“1. My name is [Spouse 3], the partner of VFQF, who is currently imprisoned for cannabis cultivation and facing the risk of visa cancellation. I humbly request your compassion and understanding in considering my partner’s case as I outline the immense emotional, financial, and physical difficulties our family will face if he is forced to leave Australia.

2. Firstly, I would like to explain our family situation. I have a young son, [Child A], from my previous partner who abused me. As a result, I had to seek help and claim family assistance from the Australian Vietnamese Women’s Association.

3. [Child A] grew up with the absence of his biological father. However, VFQF, despite not being [Child A’s] biological father, has been an incredibly loving and devoted father figure to him.

4. Before his incarceration, VFQF took care of [Child A] while I went to work, as he could not work on his visa. He was responsible for everything a father does for his young child — feeding him, bathing him, playing with him, helping him with homework, comforting him when he was upset, and teaching him valuable life lessons. [Child A] and VFQF have developed a strong bond, and I am afraid that separating them would have severe emotional consequences for both of them.

5. VFQF and I also have a young child together, [Child B], who is only a few months old. If VFQF were to be deported, I would have to raise both [Child A] and [Child B] alone. This would cause immense financial strain on our family. I currently work

⁸⁰ Exhibit 3, G-Documents, Attachment R: Statutory Declarations and translations from Mr VFQF’s sister, 142.

in a low-wage job, and without VFQF's support, I would struggle to provide for our children's basic needs, such as food, clothing, and shelter.

6. Additionally, losing VFQF would leave our family emotionally devastated. He is the cornerstone of our family, providing love, support, and guidance to both [Child A] and [Child B]. His absence would not only affect our children but also me, as I rely on his emotional support to overcome past traumas and navigate the challenges of everyday life.

7. Physically, taking care of two young children without VFQF's help would be incredibly taxing. Between working long hours and attending to the needs of our children, I would face immense exhaustion and stress. This would undoubtedly affect my ability to provide a nurturing and stable environment for our children, which they desperately need.

8 In light of these hardships, I humbly request that you consider my husband's case with leniency and compassion. VFQF made a mistake, and he is ready to accept the consequences of his actions. However, I ask you to take into consideration the detrimental impact his deportation would have on our family.

9. Please allow him the opportunity to remain in Australia, not only for his sake but also for the well-being of our children, [Child A] and [Child B]. We are a family that desperately needs to stay together to heal and thrive.

10. Thank you for taking the time to read my plea, and I hope you will consider our family's unique circumstances with empathy and understanding.”⁸¹

122. On 24 April 2023, Spouse 3’s mother – [Y] provided a statutory declaration in the following terms:

“1. I am writing this letter on behalf of my son-in-law, VFQF, who is currently serving time in Mobilong prison for his crime. As a mother and grandmother, I am deeply concerned for the well-being of my daughter, her children, and their future.

⁸¹ Exhibit 3, G-Documents, Attachment R: Statutory Declarations from Mr VFQF's Spouse 3, 134-5.

2. My daughter has been living with VFQF in a defacto relationship since July 2021, and I can attest that he is a responsible individual who has always taken care of his family. He has been a loving husband to my daughter and a caring father to his stepchild, [Child A]. The couple has also just given birth to their common child, [Child B], on [date, month] 2022.

3. While I am aware that VFQF has been convicted for cultivating cannabis and will be released from prison soon. I am devastated to hear that his visa has been cancelled, which means he will not be allowed to stay in Australia afterwards. This decision has had a severe impact on our family, especially on my innocent grandchildren.

4. As the grandmother, I have been here in Australia only to visit my daughter and her family, and I have to leave soon. My daughter has been struggling to raise their two young children alone, without the love and support of their father. With my departure, there will be no one to help her take care of the children. As a grandmother, it pains me to see my grandchildren suffer in this way. They cry themselves to sleep every night, longing for their father's embrace. They deserve to grow up with the love and guidance of both parents, and I implore you to consider this when making your decision.

5. It is of utmost importance that VFQF gets to remain in Australia to take care of my daughter, and most importantly, for my innocent grandchildren. They need their father now more than ever, and I pray that you will give them the chance to be reunited as a family once again.

6. I understand that VFQF has made a mistake, but I firmly believe that he has learned from it and is remorseful for his actions. He has been using his time in prison to reflect on his actions and make plans for his future. He is willing to do whatever it takes to make things right, and I am confident that with the right support and guidance, he can turn his life around.

7. I am pleading with you to show compassion and mercy for VFQF and his family. My daughter has built a life in Australia, and it would be devastating for her if her partner was removed from her. My grandchildren are Australian citizens, and they should be with their father and live as a family.

*Thank you for your attention to this matter.*⁸²

123. On 24 April 2023, Sister 2 provided a statutory declaration in the following terms:

“1. My name is [Sister 2], I am currently living in Australia. I am writing this letter to request for my younger brother, VFQF, who is currently serving a sentence at Mobilong prison for his crime.

2. I can confirm that he is a responsible man who always cares for his family. As we are only 6 years apart in age. I have loved him since we were young.

3. Back in Vietnam when we were little, our family had a large bakery. Due to our large family and busy bakery, VFQF and I often lived with our grandmother. He loved to help her with household chores and often helped our parents at the bakery. Since he lived with our grandmother since childhood, he had a dream of becoming a nurse to take care of our grandmother, all family members, and everyone around him.

4. Despite being the youngest in the family, he did not take advantage of this and was not lazy or indulgent. He always tried his best to study well. Even after getting married, he continued to study to fulfill his dream of becoming a nurse and obtaining a nursing degree recognized by the school and education department in Vietnam.

5. He is also a loving husband. When he married his first wife in Vietnam, I went back to visit my family and saw that he had to study during the day and work in the evening to pay for his tuition and support the future life of the couple. They also had a child together, but unfortunately, the fetus was lost at only 4 weeks old. He was very sad and cried a lot.

6. Since then, the couple had many conflicts and separated in 2015. He came to visit me and my sister in 2017 with a tourist visa. The visa conditions did not allow him to work, so he spent all his time taking care of my three children while I was working. He took care of them as if they were his own children.

⁸² Exhibit 3, G-Documents, Attachment R: Statutory Declarations from Spouse 3's Mother, 138.

7. When he applied for asylum, an Immigration Agent cheated him out of a lot of money, making him an illegal immigrant in Australia. He then moved to Adelaide to start over and met his second wife. I thought he had finally found his happiness, but he lost another child with his second wife when the fetus was only 11 weeks old. He called me and cried a lot, and he also drank a lot of alcohol. Because I was busy with three young children, I couldn't fly to see him, but only gave him advice.

8. At that time, it was 2019, and he really wanted to give up everything and return to Vietnam to be with our parents, but he couldn't due to COVID restrictions. A few months later, he called me and said he had separated from his second wife and left with nothing. The pain did not end there because two months later, our father passed away from liver cancer, and he couldn't see our father for the last time.

9. In October 2021, he and his current wife, [Spouse 3], took a trip to Perth to celebrate my birthday. It wasn't easy for him to have a child of his own, so he loved and took good care of his wife's son, [Child A], and [Child A] also loved him. At that time, his wife also told me that they wanted to have a child together. Since he had lost two children, I also hoped that he would not lose another one. I was very happy to learn that they had just had a child together, [Child B], on [date, month], 2022.

10. Although I know that VFQF was convicted of growing marijuana and will soon be released from prison, I am very sad to learn that his visa has been canceled, meaning that he will not be allowed to stay in Australia afterwards.

11. I believe that if VFQF is not allowed to stay in Australia, it will be detrimental to his family because he is a responsible man who always cares for his loved ones. He has already suffered the loss of two children and the recent death of his father. He has a wife, a step child and a newborn child who will need his support and care. If he is forced to leave Australia, he will not be able to provide for his family, and his wife and children may be left without a father figure.”⁸³

124. On 18 June 2023, psychologist Susan Lau prepared another report regarding Spouse 3. This states:

“Ms [Spouse 3] was re-referred to me to have psychotherapy again in April 2023. I had seen Ms [Spouse 3]. between April 2022 to September 2022 due to her

⁸³ Exhibit 3, G-Documents, Attachment R: Statutory Declarations from VFQF's second Sister, 146-7.

adjustment disorder with depression and anxiety as her partner was arrested and was going through legal process for growing marijuana.

Ms [Spouse 3] had given birth to her second son last year and her mother has come over to assist and support her with her child birth and care. Ms [Spouse 3]'s stress and depression was exacerbated due to partner being sentenced to go to jail. Her husband may be deported to Vietnam and her mother is due to go back to Vietnam in September 2023 because of her visa condition. Ms [Spouse 3] feels being alone and fears that she may not be able to look after both children and work at the same time.

I am providing some parenting strategies, and strategies to cope with the stress and anxiety for Ms [Spouse 3] I will continue to see her.”⁸⁴

125. On 31 July 2023, the Applicant became eligible for automatic parole. He was taken into Immigration Detention.⁸⁵
126. On 22 September 2023, Spouse 3's mother returned to Vietnam due to the expiry of her visa.⁸⁶ This made things difficult for Spouse 3 because she was unable to manage working and looking after 2 young children without help from her mother.
127. On 22 March 2024, Spouse 3's mother returned to Australia.⁸⁷ The Tribunal was advised that she was to return to again Vietnam in early June 2024.
128. On 24 April 2024, the Applicant provided another statement.⁸⁸ On the same day Spouse 3 also provided another statement.⁸⁹

⁸⁴ Exhibit 3, G-Documents, Attachment O1: Letter from Susan Lay Psychological Services regarding [Spouse 3] (dated 18.06.23), 127.

⁸⁵ Exhibit 5, Respondent's Tender Bundle, TB2, 81.

⁸⁶ Exhibit 3, G-Documents, Attachment U: Correspondence from Ms [Spouse 3] and Mr VFQF requesting home detention and supporting documentation, 162, 164, 167.

⁸⁷ Ibid 168.

⁸⁸ Exhibit 4.2, Applicant's Tender Bundle, 1-5.

⁸⁹ Exhibit 4.2, Applicant's Tender Bundle, 10-12.

129. The Applicant's mother, oldest sister, and older brother are still living in Vietnam. He has other relatives there as well. Spouse 3's family also lives in Vietnam, though not in the same town as the Applicant's family.

130. If the Applicant were to be released into the community, he says:

"[128] Since he has been taken into custody, the bond between him and his sisters has strengthened as they have stood in support of him and tried to assist his partner, and the couple wish to relocate to live near to them in the future.

[129] Mr VFQF instructs that he and his family intend on moving to Perth after his release, so his children can have more family around them whilst growing up. If he is granted permission from the South Australian Parole Board. However, he is aware that he may be subject to conditions such as a particular place to live for a certain period of time following his release on parole."⁹⁰

131. The Applicant's criminal history, commencing in 2022. A copy of his record of convictions is annexed hereto and marked "B".

LEGISLATIVE FRAMEWORK

Does the Applicant Pass the Character Test?

132. The Applicant was sentenced by Judge Muscat of the District Court of South Australia to a term of imprisonment of 2 years, 7 months and 6 days.⁹¹

133. The Tribunal finds that the Applicant has a "*substantial criminal record*" and, therefore, he does not pass the character test. This is not disputed by the Applicant. The Tribunal must consider whether "there is another reason why the original decision should be revoked".

⁹⁰ Exhibit 3, G-Documents, Attachment H, 93 at [128]-[129].

⁹¹ Ibid Attachment A, 30.

Is there another reason why the original decision should be revoked under section 501CA(4)?

134. In considering whether to exercise this discretion, the Tribunal is bound by s 499(2A) to comply with any directions made under the Act. In this case, *Direction No 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (“the Direction”) has application.⁹²
135. For the purposes of deciding whether to refuse or cancel a non-citizen’s visa or whether or not to revoke the mandatory cancellation of a non-citizen’s visa, paragraph 5.2 of the Direction contains several principles that must inform a decision maker’s application of the considerations identified in Part 2 where relevant to the decision.
136. The principles that are found in paragraph 5.2 of the Direction may be briefly stated as follows:
- (1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia’s law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.
 - (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 measurable risk of causing physical harm to the Australian community.

⁹² On 15 April 2021, the former applicable direction, *Direction No. 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*, was revoked and was replaced by Direction 90, this in turn was replaced by Direction 99 on 3 March 2023.

- (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. However, Australia may 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.
- (5) With respect to decisions to refuse, cancel, and revoke cancellation of a visa, Australia will generally afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age. The level of tolerance will rise with the length of time a non-citizen has spent in the Australian community, particularly in their formative years.
- (6) Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the noncitizen'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 8.5(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.

137. Paragraph 6 of the Direction provides that:

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

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

- (1) protection of the Australian community from criminal or other serious conduct;
- (2) whether the conduct engaged in constituted family violence;
- (3) the strength, nature and duration of ties to Australia;
- (4) the best interests of minor children in Australia; and

(5) expectations of the Australian community.

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

- a) legal consequence of the decision;
- b) extent of impediments if removed;
- c) impact on victims; and
- d) impact on Australian business interests

140. I note the importance of the Other Considerations being “*other*” considerations, as opposed to “*secondary*” considerations. As noted by Colvin J in *Suleiman v Minister for Immigration and Border Protection*:⁹³

“...Direction 65 [now Direction 99] makes clear that an evaluation is required in each case as to the weight to be given to the 'other considerations' (including non-refoulement obligations). It requires both primary and other considerations to be given 'appropriate weight'. Direction 65 does provide that, generally, primary considerations should be given greater weight. They are primary in the sense that absent some factor that takes the case out of that which pertains 'generally' they are to be given greater weight. However, Direction 65 does not require that the other considerations be treated as secondary in all cases. Nor does it provide that primary considerations are 'normally' given greater weight. Rather, Direction 65 concerns the appropriate weight to be given to both 'primary' and 'other considerations'. In effect, it requires an inquiry as to whether one or more of the other considerations should be treated as being a primary consideration or the consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply.”⁹⁴

Offending History

141. The Applicant’s criminal record as produced by the Australian Criminal Intelligence Commission is outlined at Annexure B.

Primary Consideration 1 – Protection of The Australian Community

142. In considering this Primary Consideration 1, paragraph 8.1 of the Direction requires decision-makers to keep in mind the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. Decision-makers should have particular regard to the principle that entering or

⁹³ [2018] FCA 594.

⁹⁴ Ibid [23].

remaining in Australia is a privilege that this country confers on non-citizens in the expectation that they are, and have been, law abiding, that they will respect important institutions and that they will not cause or threaten harm to individuals or the Australian community.

143. In determining the weight applicable to Primary Consideration 1, paragraph 8.1(2) of the Direction requires decision-makers to give consideration to:
- a) The nature and seriousness of the non-citizen's conduct to date; and
 - b) The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

The Nature and Seriousness of the Applicant's Conduct to Date

144. When assessing the nature and seriousness of a non-citizen's criminal offending or other conduct to date, paragraph 8.1.1(1) of the Direction specifies that decision-makers must have regard to a number of factors. I will now turn to addressing these considerations.
145. **Sub-paragraph (a)** of paragraph 8.1.1(1) of the Direction provides that without limiting the range of conduct that may be considered very serious, violent and/or sexual crimes; crimes of a violent nature against women or children (regardless of the sentence imposed); or acts of family violence (regardless of whether there is a conviction for an offence or a sentence imposed) are viewed very seriously by the Australian Government and the Australian community.
146. The Applicant was involved in a commercial scale Cannabis production enterprise. In excess of 40 kgs of cannabis buds were found on the site. It seems that this enterprise was being operated by a Vietnamese criminal group. The Applicant was apparently one of several Vietnamese nationals, "*with little or no ties to SA or Australia*", who were "*minding the cannabis crops.*"⁹⁵
147. Drug offences of this magnitude are very serious.

⁹⁵ Exhibit 5, Respondent's Tender Bundle, TB1, 43.

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

- (i) causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;
- (ii) crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the 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, , or an offence against section 197A of the Act, which prohibits escape from immigration detention.

149. The Applicant does not pass the character test based on his offending.

150. He has also been residing in Australia unlawfully for some years. He has, by his own admission, been working in the black economy and evading taxes for most of the time from 2017 until his arrest in April 2022.

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

152. As a first-time offender, the Applicant was sentenced to a significant term of imprisonment of 2 years, 6 months and 6 days.⁹⁶ This is indicative of very serious offending.
153. **Sub-paragraph (d)** of paragraph 8.1.1(1) of the Direction requires a decision-maker to have regard to the frequency of a non-citizen's offending and whether there is any trend of increasing seriousness.
154. There is only one episode of offending known. There is no trend as such.
155. **Sub-paragraph (e)** of paragraph 8.1.1(1) of the Direction requires a decision-maker to have regard to the cumulative effect of an Applicant's repeated offending.
156. There is no record of repeat drug offending.
157. **Sub-paragraph (f)** of paragraph 8.1.1(1) of the Direction requires a decision-maker to have regard to whether a non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending.
158. The Applicant has given various accounts of his history in his many visa applications. A significant example is the account given in support of his Protection Visa application, which he has subsequently repudiated and blamed upon a now vanished, shady migration agent.
159. There are also questions regarding the facts regarding his marriage to and/or divorce from Spouse 1 and Spouse 2.
160. **Sub-paragraph (g)** of paragraph 8.1.1(1) of the Direction requires a decision-maker to have regard to whether the non-citizen has re-offended since being formally warned 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).
161. There is no evidence of this.

⁹⁶ Exhibit 3, G-Documents, Attachment A, 30.

162. **Sub-paragraph (h)** of paragraph 8.1.1(1) of the Direction requires a decision-maker to have regard, where the offence or conduct was committed in another country, to whether that offence or conduct is classified as an offence in Australia.
163. There is no evidence of this.
164. I do not consider factors (d), (e), (g) and (h) of paragraph 8.1.1(1) of the Direction apply to the Applicant's offending or circumstances. The rest of the relevant sub-paragraphs of paragraph 8.1.1(1) of the Direction, in their totality, weigh heavily against revocation of the cancellation of the Applicant's visa.

The Risk to the Australian Community Should the Applicant Commit Further Offences or Engage in Other Serious Conduct

165. Paragraph 8.1.2(1) provides that in considering the need to protect 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.
166. Paragraph 8.1.2(2) provides that in assessing the risk that may be posted 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;
 - 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; and
 - c) where consideration is being given to whether to refuse to grant a visa to the non-citizen - whether the risk of harm may be affected by the duration and purpose of the non-citizen's intended stay, the type of visa being applied for, and whether there are strong or compassionate reasons for granting a short stay visa.

Nature of harm should the Applicant engage in further criminal or other serious conduct

167. Assessing the nature of the harm to individuals or the Australian community that may occur if the Applicant were to engage in further criminal or other serious conduct, is informed by the nature of his offending to date, including any escalation in his offending. This assessment also notes that the Direction provides that the Australian community's tolerance for harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, is so serious that any risk that it may be repeated may be unacceptable (Paragraph 8.1.2(1)).
168. The Applicant's criminal conduct is very serious.
169. The direct impact of illicit drugs on the community is enormous. The indirect impact is also very serious. The resources of law enforcement, the Courts and Corrections are all burdened by this conduct. Other criminal conduct is also associated with this offending and not just by the commercial producers. Consumers of drugs also offend in various ways.
170. The community tolerance of this behaviour is very low, indeed "*any risk that it may be repeated may be unacceptable.*"⁹⁷

Likelihood of engaging in further criminal or other serious conduct

171. The Applicant entered a plea of guilty, which is generally regarded as going to credit. In his case however, he was literally discovered by police "*hiding behind a door in the front room*"⁹⁸ of a rented property, being used for the sole purpose of producing hydroponic cannabis.
172. In these circumstances, the prospect of mounting a successful defence to the charge would have been close to zero. I place little weight on the Applicant having made a virtue of necessity, by entering a plea and getting a 35% sentence discount in the process.⁹⁹
173. The Applicant was clearly involved with a Vietnamese criminal gang in Adelaide.

⁹⁷ Paragraph 8.1.2(1)

⁹⁸ Exhibit 3, G-Documents, Attachment B, 31.

⁹⁹ Exhibit 3, G-Documents, Attachment B, 34.

174. The Applicant's record regarding non-compliance with immigration laws since being in Australia, includes a lengthy period as an illegal alien.¹⁰⁰
175. He has been involved in what he now claims to have been a fraudulent application for a protection visa. I do not accept that his role was as innocent as he claims.
176. The Applicant has worked on farms in Australia, he says, due to the language barrier. Indeed, that was what he was doing when he was arrested. He has worked in breach of Visa conditions, and he has worked while living in Australia as an unlawful non-citizen.¹⁰¹
177. The Applicant admitted that he did not declare his income, or pay tax.
178. I note the finding in AAT 1 that:

"24. The Tribunal raised as an issue with the applicant his immigration history including the fact that he did not depart Australia (prior to the expiry of his Bridging visa) when his application for a Protection visa was unsuccessful. The Tribunal noted that it may find that he was using his application for a Medical Treatment visa to maintain ongoing residence in Australia and not because he is in need of medical treatment. He declined to respond.

25. In view of the above, the Tribunal finds that the applicant has not complied substantially with condition 8101 of his last substantive visa, being a Visitor visa, and that he has not complied substantially with his subsequent Bridging visa.

26. In considering the applicant's intention to comply with the conditions to which the subclass 602 Medical Treatment visa would be subject, the Tribunal notes that conditions 8101 (must not engage in work in Australia) and 8201 (must not engage in any studies or training for more than 3 months) are mandatory conditions in the circumstances of this case. In his application for the subclass 602 Medical Treatment visa, the applicant stated that he would be supported by another person in response to a request to show how his stay in Australia will be funded. He stated that his fiancée, [Spouse 3], would pay for all his costs. He stated that the sessions with the psychologist will cost \$100.00 per session totalling \$1,200.00 for the next 12 months. He did not provide the Department with any evidence from his fiancée

¹⁰⁰ Between 7 August 2018 and 11 October 2021; see also Exhibit 5, Respondent's Tender Bundle, TB4, 155 at [21].

¹⁰¹ Exhibit 5, Respondent's Tender Bundle, TB4, 155 at [23].

in relation to her willingness or her ability to pay for his living costs and medical expenses in Australia.

27. The applicant has not filed any documentary evidence with the Tribunal in relation to his financial circumstances or his fiancée's financial circumstances and what arrangements, if any, have been made for the payment of his medical treatment in Australia. During the hearing, the applicant gave evidence that he is currently an inmate at Mobilong Prison in South Australia serving a sentence of two years and seven months with a non-parole period of sixteen months for drug related offences. He expects to be released on 31 July 2023.

28. The Tribunal asked the applicant whether he is receiving counselling at the gaol. He responded no. He stated that he plans to receive treatment after he is released from gaol from the same psychologist who treated him previously. When asked why he is not receiving treatment now, he responded that the psychologist he consulted told him that he should listen to music and do gentle breathing exercises. He still applies that now but does not have the desire to listen to music. When asked why he needs a psychologist to do this, he responded that he needs a professional to show him the correct breathing method to release stress like in yoga. That would help him. When asked how long his treatment will take, he responded that he did not know.

29. The applicant gave evidence that he does not own any assets in Australia. He then stated that he has a bank account with a few hundred dollars. He has no debts. His partner has no assets or debts. She works in a nail shop. When asked how much his counselling sessions cost, he responded that he paid nearly \$200.00 per session for the psychologist and Vietnamese interpreter. His partner has a mental health problem and is seeing the same psychologist. When asked how he will pay for his medical treatment, he responded that he would work on the farm and his partner would also support him to pay for his medical treatment.

30. The Tribunal raised a number of issues with the applicant. The Tribunal noted that in his application for a Medical Treatment visa he stated that his partner would financially support him and pay for all his costs in Australia. During the hearing, he stated that he would work on the farm and use that money to pay for his medical treatment and his partner would also support him. The Tribunal noted that his partner did not attend the hearing to give oral evidence and she did not provide any documentary evidence to the Department or the Tribunal in relation to whether

she is willing to financially support him and has the financial capacity to do so during his stay in Australia. He declined to respond.

31. The Tribunal raised as an issue with the applicant the fact that if he is granted a Medical Treatment visa it will be subject to a no work condition. The Tribunal noted that he did not have the financial resources to support himself and pay for his medical expenses without working and doubted that his partner would be able to support herself, two children and him and pay for his medical expenses. The Tribunal noted that it was concerned that he would have to work to support himself and his family once released from gaol in breach of the 'no work' visa condition. He responded that he could stay home and look after the children so his partner could work. This response does not address the issues raised with him or alleviate the Tribunal's concerns.

32. The Tribunal is not satisfied, on the evidence before it, that the applicant intends to comply with condition 8101 (must not engage in work in Australia) if granted a subclass 602 Medical Treatment visa.

....

36. The Tribunal asked the applicant whether he has made any arrangements to depart Australia once released from gaol. He responded no. He does not have any intention of departing Australia. His partner and his child are here so he is not leaving. All he wants is to go home to his partner and children. One child is four months old and the other is five years old.

.....

39. Having considered all the evidence, the Tribunal is not satisfied that the applicant genuinely intends to stay temporarily in Australia for the purpose for which the visa is granted. Therefore, the Tribunal finds that he does not meet the requirements of cl 602.215.”¹⁰²

179. The Applicant has demonstrated a lack of candour and honesty since he overstayed his Visitor Visa 2 back in 2017.

¹⁰² Exhibit 5, Respondent's Tender Bundle, TB4,156-8.

180. Mr Fugler, psychologist expressed the opinion that “*I doubt he will be inclined to repeat offending*”.¹⁰³
181. Nevertheless, I give little weight to the Applicant’s assurances regarding his future conduct. His entire history in Australia since his Visitor Visa 2 expired in 2017, has been inconsistent with respecting our laws.
182. The Applicant has shown little evidence of past treatment for his claimed serious mental health conditions.
183. He has no concrete plans for any future treatment for his claimed mental health conditions.
184. He has no lawful prospect of earning any income, without an appropriate visa.
185. The best that he can offer is a suggestion that if released, he can look after Child A and Child B, thereby enabling Spouse 3 to work as a nail technician.
186. Most unusually in this case, if the Visa cancellation is revoked, the Applicant still will have no valid visa and he will remain in detention.
187. Any release to the community would depend on him then seeking and being granted, a Bridging Visa E, as discussed above.
188. On a very narrow view of the matters presently before the Tribunal, there is almost no risk of him reoffending. A favourable decision in this Tribunal will not result in his immediate release.
189. A favourable decision would however re-enliven the Applicant’s Partner Visa application, thereby making possible an application for a bridging visa. If such a visa were to be granted, he would return to the community. The terms upon which such a visa may be granted, is a matter of pure speculation.
190. I am left with a possibility that **if** this cancellation is revoked, the Applicant **may** be ultimately released into the community.

¹⁰³ Exhibit 3, G-Documents, Attachment H, 85 at [85].

191. If the cancellation is **not** revoked, the Applicant **will** be subject to removal from Australia and prohibited from returning.¹⁰⁴
192. If the Applicant were to be ultimately released into the community as a result of the revocation of the Visa cancellation, I would, based on his record, assess him as presenting an ongoing risk of reoffending. His behaviour in Australia since 2017, is littered with illegal conduct.
193. As it is, I note cl 8.1.2(2)(c) of the Direction 99.
194. The fact that the Applicant will not immediately be released if the cancellation is revoked, (if ever), obviously reduces the immediate risk of reoffending.

Conclusion: Primary Consideration 1

195. On balance, Primary Consideration 1 still weighs against the revocation of the Applicant's visa cancellation.

Primary Consideration 2: Family Violence

196. There is no evidence of Family Violence. This Primary Consideration is neutral.

Primary Consideration 3: Ties to Australia

Paragraph 8.3 of the Direction provides:

(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.

(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,

¹⁰⁴ Unless he was able to demonstrate that he was owed protection. He has no such current claim.

Australian permanent residents and/or people who have a 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.

(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 noncitizen has been ordinarily resident in Australia 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 the time the non-citizen has resided in Australia where the non-citizen has contributed positively to the Australian community during that time; and
- iii. less weight should be given to the length of time spent in the Australian community where the non-citizen was not ordinarily resident in Australia during their formative years and the noncitizen began offending soon after arriving in Australia.

197. The Applicant came to Australia and has remained here since 21 July 2017.¹⁰⁵

198. Since October 2017, the Applicant has been in Australia either unlawfully, or on a Bridging visa.¹⁰⁶

¹⁰⁵ Aside from his visit in 2008.

¹⁰⁶ See Exhibit A.

199. He was 31 years old when he came here. All of his formative years were spent in Vietnam.
200. The Applicant has limited English language skills and required an interpreter to assist him at the Hearing. He is limited in his capacity to engage with the broader Australian community as a result.
201. He is for this reason also limited in his employment opportunities.¹⁰⁷
202. There is no evidence of him having paid taxes, in spite of his claim to having worked illegally as a farm hand. Working in the cash economy is not a positive contribution.
203. There is no evidence of him having made any positive contribution to our community through lawful employment, indeed it was his pursuit of money through criminal means that resulted in his conviction for serious drug offences.
204. The Applicant has 2 sisters and their children, residing in Australia. One sister is a citizen.¹⁰⁸ Three of these children are minors. They live in WA, so he has seen them all infrequently. He has not lived in WA since about 2018-19. He can contact them by electronic means, whether he is in Adelaide or in Vietnam.
205. The Applicant has Spouse 3, Child A and Child B in Australia.¹⁰⁹
206. The Applicant may be an important financial and practical support to Spouse 3. She would be distressed if he were returned to Vietnam. Her mental health may suffer if he was removed. She does however have close family in Vietnam, in particular her mother. She could return there with the Applicant, if she chose to do so.
207. At the hearing, a primary reason that both the Applicant and Spouse 3 gave for not wanting to return to Vietnam was that each of the boys have food allergies and they are concerned about the level of medical care they would receive in Vietnam.

¹⁰⁷ Exhibit 3, G-Documents, Attachment M: Department of Correctional Services Offender Case Note, 117.

¹⁰⁸ Ibid Attachment F, 55.

¹⁰⁹ Ibid.

208. The Applicant and Spouse 3 also expressed their concern about uncertainty of employment opportunity in Vietnam.
209. Spouse 3 told the Tribunal that she has known about the boys' allergies at least since last year. The first time that they were mentioned and elevated to the status of a major concern was during this hearing. Nothing about this particular concern explicitly appears in any earlier statements. No medical evidence in support was led.
210. I accept that the boys may have allergies. According to Spouse 3, an allergic reaction is treated with medicine, presumably an antihistamine. There was no expert evidence to suggest that these allergies could not be managed by diet and appropriate medication.
211. The claims about the gravity of food allergies, even if based in truth, have the elevated character of a recently seized upon, convenient excuse. I give them little weight.
212. The Applicant's connection with Child A and Child B is discussed in more detail under Primary Consideration 4 (below).
213. The Applicant cites Child B as his primary reason for wanting to remain in Australia.¹¹⁰ As previously mentioned, there is no good reason why Child A and B could not return to Vietnam with the Applicant, if they all wanted to stay together. They are both however, Australian citizens and should ideally not be removed from this country, against their will.
214. The Applicant's connection to Spouse 3's mother carries no weight as she is and has been only a visitor from Vietnam.
215. Spouse 3 has suggested that she may send Child B to Vietnam to be cared for by her mother there, if the Applicant is not able to return to the community in Australia.¹¹¹ Again, this suggests that there is no reason why the family could not relocate, if they wished to do so.
216. The Applicant also says:

¹¹⁰ Ibid Attachment G, 61.

¹¹¹ Ibid 63.

“144. Mr VFQF claims that his return would place emotional and financial strain on his family.

145. Since he has been taken into custody, the bond between him and his sisters has strengthened as they have stood in support of him and tried to assist his partner, and the couple wish to relocate to live near to them in the future.

146. Mr VFQF's partner in the period has suffered greatly. She has developed anxiety, stress and undergone immense psychological hardship in the absence of her partner. She wishes to be reunited so that they may continue their relationship.

147. If Mr VFQF's family move to Vietnam with him, the children will be separated from familiar support systems, such as extended family, friends, and their home country's infrastructure and services. This lack of support can have emotional and practical implications.

148. Adjusting to a different education system, food, lifestyle, and social expectations can be a significant challenge for children.

149. Mr VFQF's children may have experience visa and citizenship issue if they are required to move and then live in Vietnam.”¹¹²

Conclusion: Primary Consideration 3

This consideration weighs slightly in favour revocation of the cancellation of the Applicant's visa.

Primary Consideration 4: The best interests of minor children in Australia

217. Paragraph 8.4(1) of the Direction requires a decision-maker to make a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA is in the best interests of a child affected by the decision. Paragraphs 8.4(2) and 8.4(3) respectively contain further considerations. The former provides that for their interests to be considered, the relevant child (or children) must be under 18 years of age at the time when

¹¹² Exhibit 3, G-Documents, Attachment H, 97 at [144]-[149].

a decision about whether or not to refuse or cancel the visa or not to revoke the mandatory cancellation decision is being made. The latter provides that if there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

218. Paragraph 8.4(4) of the Direction sets out a number of factors to take into consideration with respect to the best interests of minor children in Australia. Those include, relevantly:

- 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.

219. In relation to the relevant minor children in Australia, the Applicant says:

"133. As per subsection 8.3(2) of the Direction, the decision maker should give more weight to a non-citizen's ties to his children who are Australian citizen. Mr VFQF has two Australian citizen children.

134. Mr VFQF due to his incarceration has missed the birth of his child, a joyous event, and has also been unable to meet or bond with the newborn child. He also misses his stepson and his partner and pines for them. He hence wishes to be at home to assist his partner with all chores and take care of the children.

135. Mr VFQF is the only father figure [Child A] has ever known as his biological father is not in his life. On instructions, we submit that Mr VFQF and his stepson [Child A], have a close-knit relationship and [Child A] looks forward to seeing him during prison visits.

136. On [DOB] 2022, [Spouse 3], gave birth to Mr VFQF's biological son, [Child B], who is an Australian citizen. Mr VFQF's son was born whilst Mr VFQF has been in prison. On instructions, we submit that Mr VFQF regrets that he was in prison when his son was born, and he has not been there to assist his de facto partner with during the first few months of his life.

137. The Full Court of the Federal Court explained in *Sebastian v Minister for Immigration, Multicultural Affairs and Indigenous Affairs*, in cases of visa cancellations, the initial assumption is that the best interests of a child will generally be served by remaining with their parents, 'especially kinds of considerations which would be relevant to a child's interest; those of human development including their health, happiness and social and educational development.'

138. Presently, their mother, [Spouse 3], is both the primary caretaker as well as provider for the family, whereas earlier, she had support of Mr VFQF, who would take care of [Child A] at home, allowing her to work and better provide for the family. Whilst [Spouse 3]'s mother has been visiting her daughter and assisting with her grandchildren, her visa is only temporary, and her mother intends on returning to Vietnam. His mother in law's statutory declaration dated 24 April 2023 in support of her sons-in-law revocation application has been submitted.

139. As [Child B] is an infant, Mr VFQF wishes to take care of his son. We hence submit upon the best interests of both the minor children to have their father stay with them.

140. Mr VFQF's absence from Australia will force [Spouse 3] to give up her work and look after her children which would cause Mr VFQF's family be burden on the Australian public system.

141. *By not setting aside or revoking the decision to cancel Mr VFQF's bridging visa will preventing him from returning to Australia will likely permanently separate [Child B] and [Child A] from their father and deprived them from having a meaningful relationship with her father. The relationship between a parent and their children whether biological or through a relationship with their mother is unique and cannot be replaced by any other type of relationship.*

142. *We submit that cancelling Mr VFQF's visa will cause irreparable harm to [Child A] and [Child B] and deprive them of one of the most important figures that they will ever have. This is made even more important due to [Child A] and [Child B]'s vulnerable ages and his lack of ability to understand why their father is required to be absent from their lives, if he is forced to leave Australia."*¹¹³

220. In relation to the relevant minor children in Australia, Spouse 3 says:

"1. My name is Ms. [Spouse 3].

2. I was born on [DOB]. I am [X] years of age. I am an Australian citizen.

3. I provide this statement in support of my partner's review application before the Administrative Appeals Tribunal (the Tribunal). In preparing this statement, I have been assisted by Dr Jason Donnelly (barrister) and Mr Duy Ngo (registered migration agent).

4. My partner's name is [VFQF].

Family

5. Living in Adelaide as a mother of two young children, one 6 years old and the other almost 2, my days are a constant juggle. I work as a nail technician, which thankfully only demands about 8 hours of my week, allowing me some flexibility. Despite this, my life is far from simple.

6. I reside in [suburb], close to where my partner is currently held in detention. This proximity means I can visit him frequently, almost five days a week, and we speak daily on the phone. Our children also see their father regularly, which is bittersweet, as it's tough explaining his absence to them.

¹¹³ Ibid 94-6 at [133]-[142].

7. *My mother, visiting from overseas on a short visa, stays with us until early next year. Her presence is a relief but also a reminder of the approaching challenges when she leaves. I hope my partner can be home by then to help, as managing alone has been overwhelming.*

8. *The responsibility of caring for our boys primarily falls on me, and it's been incredibly stressful. I often feel inadequate in my ability to meet their needs, especially since the younger one falls ill frequently, and so does the older one.*

9. *Compounding the physical exhaustion is my battle with depression, which began during my last pregnancy and has persisted. This has led me to see a psychologist regularly, every month or two, to navigate these turbulent emotions and find some grounding amidst the chaos.*

10. *In addition to the emotional support, I try to bring a taste of home to my husband by delivering Vietnamese food and cakes to him, a small comfort in our strained circumstances. My days blend into a mix of caring for my children, supporting my husband, and stealing moments to address my mental health. It's a tough balancing act, and most days, I'm just trying to keep everything from falling apart.*

11. *Living in Adelaide, I've been renting a house where the rent hits \$500 every week. My partner has been living with me since 2021, adding to the household dynamics. We face regular bills that come monthly, including utilities like gas, which runs about \$330 every three months, plus electricity, water usage, phone expenses, and internet costs.*

12. *My physical health has been a significant challenge. I suffer from persistent back pain and body aches, which are a constant burden. On top of that, I deal with frequent stomach aches and ongoing sinus issues. These health problems add layers of difficulty to my daily life, affecting my ability to work comfortably and care for my family. Managing these symptoms while keeping up with daily responsibilities and financial obligations is often overwhelming, making every day a test of endurance.*

The Future

13. *Looking ahead, my family faces a significant upheaval. If my partner is deported to Vietnam, my youngest son, [Child B], will need to return to Vietnam. This means I'll be staying here with my oldest, [Child A], who can't go to Vietnam. It's essential for me to provide [Child A] with the best education possible, and I believe that*

staying in Australia is the key to that. However, this situation forces us to split our family, a decision that weighs heavily on me every day.

14. [Child A's] well-being is particularly concerning. He has a very strong bond with my partner, whom he refers to often and relies on for emotional support. My partner, whom [Child A] sees as a pivotal figure in his life, used to pick him up while I was at work.

15. [Child A] trusts my partner deeply, turning to him first with any school issues, including times when he faced bullying. My partner has been proactive, directly engaging with the school and teachers to address these problems. Unfortunately, one of the reasons for [Child A's] ongoing depression and anxiety is his separation from my partner. They share a close male bond, and [Child A] often finds it easier to talk to him than to me.

16. To maintain our family connection, I ensure we have daily video calls with the children and my partner, trying to bridge the physical distance between us as much as possible. Despite these efforts, the strain of our situation is palpable.

17. Our family is in a de facto relationship, rooted deeply in love and mutual care, yet challenged by circumstances. This complex dynamic of separation, dependency, and emotional support from afar defines our daily lives, as we navigate the hurdles of education, emotional health, and maintaining familial bonds across distances.

18. I will be absolutely devastated if my partner is deported to Vietnam. It would also cause lifelong hardship and seriously adverse consequences for my children.”¹¹⁴

221. The Applicant has only had limited contact with Child A and has been incarcerated for the whole of Child B's life.
222. If the cancellation were to be revoked, the Applicant would still be incarcerated and liable to deportation, in the absence of some future successful visa application.

¹¹⁴ Exhibit 4.2, Applicant's Tender Bundle, 10-12.

223. The Applicant says that cancellation would enable him to help with child-care and so permit Spouse 3 to work as a nail technician. This however is not what will happen if the Applicant were to be successful in these proceedings. He would remain where he is, at least for the time being.
224. As discussed elsewhere, he would at best, have a chance to make another visa application. The ultimate prospect of any such application being successful, is far from certain.
225. If the Applicant were returned to Vietnam, he could continue to contact the children electronically. If he obtained work, he may be able to offer some modest financial support, accepting that wages in Vietnam are lower than here.
226. It is suggested by Spouse 3 that if the Applicant were to return to Vietnam, Child B would also be sent there. There is no obvious reason why Spouse 3 and Child A could not also join him there.
227. I accept that the boys should not have to relocate and that to do so would be difficult and disruptive for them.
228. I accept that it would be beneficial for the boys to have a stable male figure in their lives.
229. Child B is an infant and an Australian citizen, but he would have a maternal and paternal grandmother, at least 1 aunt and 1 uncle and his father there to care for him, if indeed they relocated.
230. The proposal of sending Child B to Vietnam, is not a matter to weigh in the Applicant's favour.
231. In the context of their contact with the Applicant, it may be of little consequence to the children, whether the cancellation is revoked or not. He would remain in detention, at least for the time being.
232. If he is returned to Vietnam, they can still communicate with him electronically as they predominantly do now. If they were to go there with him, they would be with him all the time.

233. It is **indirectly** relevant however, in that a revocation **may** give rise to the opportunity for a future visa application by the Applicant, to be favourably considered.
234. Child C is a boy aged 12. He is the son of Sister 2. He lives in Perth with his family. The Applicant has never had a primary caring role as such. Child C had some direct contact with the Applicant when he was in Perth in 2017-18. Since then, contact has been occasional on rare visits, or when the Applicant has been on the phone to his mother. It would probably be slightly in his interest to have his uncle remain in Australia, but they could remain in contact electronically, as they now do, wherever the Applicant was.
235. Child D is a girl aged 10. She is the daughter of Sister 2. She lives in Perth with her family. The Applicant has never had a primary caring role as such. Child D had some direct contact with the Applicant when he was in Perth in 2017-18. Since then, contact has been occasional on rare visits, or when the Applicant has been on the phone to his mother. It would probably be slightly in her interest to have her uncle remain in Australia, but they could remain in contact electronically, as they now do, wherever the Applicant was.
236. Child E is a boy aged 8. He is the son of Sister 2. He lives in Perth with his family. The Applicant has never had a primary caring role as such. Child D had some direct contact with the Applicant when he was in Perth in 2017-18. Since then, contact has been occasional on rare visits, or when the Applicant has been on the phone to his mother. It would probably be slightly in his interest to have his uncle remain in Australia, but they could remain in contact electronically, as they now do, wherever the Applicant was.
237. The Applicant placed little emphasis on his relationship with Child C, D and E in his materials. Most of the details regarding them were extracted by the Tribunal during the hearing.

Conclusion: Primary Consideration 4

238. Having regard to all of the above, including the fact that a favourable decision will only give rise to a **chance** that the Applicant **may** be released from detention in the future, Primary Consideration 4 is neutral. At best, it would only slightly favour revocation.

Primary Consideration 5 – The Expectations of The Australian Community

The relevant paragraphs in the Direction

239. In making the assessment for weight to be allocated to Primary Consideration 5, paragraph 8.5(1) of the Direction provides that the Australian community expects non-citizens to obey Australian laws while in Australia. I should consider whether the Applicant has breached, or whether there is an unacceptable risk that he would breach, this expectation by engaging in serious conduct.
240. Paragraph 8.5(2) of the Direction directs that a visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of the following kind:
- (a) acts of family violence; or
 - (b) causing a person to enter into, or being party to (other than being a victim of), a forced marriage;
 - (c) commission of serious crimes against women, children or other vulnerable members of the community such as the elderly or disabled; in this context, 'serious crimes' include crimes of a violent or sexual nature, as well as other serious crimes against the elderly or other vulnerable persons in the form of fraud, extortion, financial abuse/material exploitation or neglect;
 - (d) commission of crimes against government representatives or officials due to the 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.
241. Paragraph 8.5(3) of the Direction provides that the above expectations of the Australian community apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.
242. Paragraph 8.5(4) of the Direction provides guidance on how the expectations of the Australian community are to be determined. This paragraph states:

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

243. Paragraph 8.5(4) is consistent with the decision of the Full Court of the Federal Court in *FYBR v Minister for Home Affairs* [2019] FCAFC 185 which affirmed the approach established in previous authorities that it is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an Applicant's circumstances or evidence about those expectations. The Tribunal is to be guided by the Government's views as to the expectations of the Australian community, which are to be found in the Direction.¹¹⁵
244. Paragraph 8.5 contains a statement of the Government's views as to the expectations of the Australian community, which operates to ascribe to the whole of the Australian community an expectation aligning with that of the executive government which the decision maker must have regard to.

Analysis – Allocation of Weight to Primary Consideration 5

245. Accordingly, in assessing the weight attributable to Primary Consideration 5, it is necessary to have regard to the following matters:
- a. the Applicant's criminal record as set out in Annexure B
 - b. The Applicant's status as an illegal non-citizen for many years working in the black economy.
 - c. the other matters set out above

Conclusion: Primary Consideration 5

246. Primary consideration 5 weighs heavily against revocation of the cancellation of the Applicant's visa.

¹¹⁵ See *Uelese v Minister for Immigration and Border Protection* [2016] FCA 348; *Afu v Minister for Home Affairs* [2018] FCA 1311; *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 and *FYBR v Minister for Home Affairs* [2019] FCA 500.

OTHER CONSIDERATIONS

247. It is necessary to look at the Other Considerations listed at paragraph 9 of the Direction.

(a) Legal consequence of the decision:

248. In relation to this the Applicant says:

“156. As per paragraph 9.1 of the Direction, the decision maker is required to consider the legal consequences of a decision on a non-citizen, including having regard to Australia’s non-refoulement obligations in respect of unlawful non-citizens.

157. Mr [VFQF’s] bridging visa continues to be cancelled, he will not be a holder of a visa in Australia, and he would become an unlawful non-citizen as he does not hold any other Australian visa. If this occurs, Mr [VFQF] will be liable to be detained and liable for removal from Australia.

158. Mr [VFQF’s] onshore partner visa application will continue to be affected as it will continue to be deemed refused under s501F(2) of the Act. This is because where visa application is refused or a visa is cancelled under s 501, any other nonprotection visa held by that person is taken to have been cancelled.

159. As the legal consequence of a decision not to revoke or set aside the decision to cancel Mr [VFQF]’s bridging visa under s 501 of the Act is that he would be liable for removal from Australia, a further consequence of that removal Mr [VFQF] will also then be prevented under ss 48(1)(b)(i) and 501E of the Act from applying for a visa of any other class other than a visa of a prescribed class such as a protection visa. We also note that based on his current circumstances, Mr [VFQF] is not eligible to be granted an Australian protection visa.

160. These legal consequences should weigh in favour against affirming cancellation or the setting aside of the original decision in Mr [VFQF’s] circumstances.”¹¹⁶

¹¹⁶ Exhibit 3, G-Documents, Attachment H, 99-100 at [156]-[160].

249. Even if the cancellation of the Bridging Visa C was to be revoked in this review, it would still have expired on 9 March 2023, and the Applicant would not hold a visa that would permit his return to the Australian community.
250. If Bridging Visa C cancellation is **not** revoked, any other pending visa application would be refused.
251. This situation is no different to any other former visa holder, who's mandatory visa cancellation is not revoked.
252. This Other Consideration is neutral.

(b) Extent of Impediments if Removed

253. Paragraph 9.2 of the Direction directs a decision-maker to take into account the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:
- (a) the non-citizen's age and health;
 - (b) whether there are any substantial language or cultural barriers; and
 - (c) any social, medical and/or economic support available to that non-citizen in that country.

254. In relation to this the Applicant says:

"163. On instruction, we submit that Mr [VFQF] would suffer significant financial and psychological hardship if his bridging visa continues to be cancelled. Mr [VFQF] instructs our office that it is unlikely that he would be readily able to find work as he has been away from Vietnam for six years.

164. Mr [VFQF] has been previously diagnosed with a depressive disorder which may require treatment or support for emotional distress if he is removed from his partner and children and deported back to Vietnam. Mr [VFQF] has previously reported on suicidal idealisations, and this should weigh in favour of revocation.

165. In a research paper from *Innovations in Global Mental Health*, stated that “Vietnam has a weak mental health system governance with no mental health policy and legislation and an ineffective action plan.”

166. In 2022, the *Borgen Project* reported that:

...mental health in Vietnam carries a high level of stigma and taboo. In the Vietnamese culture, many believe that mental health is a misfortune. Vietnamese society often believes that negative circumstances, including illnesses, serve as punishments for previous sins. Many also believe that “angry ancestral spirits” possess people suffering from mental illness. Families often feel shame when a member of the family struggles with mental illness.”

167. When dealing with mental health and psychosocial problems, the response, and services unavailable remains largely inadequate with the added culture stigma. Should Mr [VFQF] be removed from Australia and deported to Vietnam, this could cause a significant step backwards in terms of receiving the mental health services that he needs.

168. Further, if his de facto partner, would go back to Vietnam to be with him, she would also not be able to access the services readily available to her now as an Australian permanent resident and soon to be Australian citizen. This should be taken into consideration to weigh in favour of revocation.

169. Mr [VFQF] concedes that there are no substantial language or cultural barriers if he was to return to Vietnam.

170. Further, we are instructed that there is no social or economic support available to Mr [VFQF] back in Vietnam. His father has passed away. His mother is very old and requires assistance from his brother and sister to take care of her. Further, both his brother and sister have their own families to take care of and are not in the same financial position as his two Australian residing sisters.”¹¹⁷

255. The Applicant is 38 years old.

¹¹⁷ Exhibit 3, G-Documents, Attachment H, 101-2 at [163]-[170].

256. He has some mental health issues as set out above. It is not clear what the prognosis is for these. It is unclear what if any further treatment might be required and whether such treatment, is available in Vietnam.
257. He spent all of his formative years in Vietnam.
258. There are no cultural or linguistic barriers to prevent the Applicant returning to Vietnam. To the extent that such barriers exist, they are all in Australia, where the Applicant is unfamiliar with the language.
259. The Applicant has provided extensive documentation to the Tribunal regarding the social, medical and economic support available in Vietnam.¹¹⁸
260. The Applicant states that:

“25. I am 38 years old and diagnosed with a depressive disorder. If deported, the separation from my established support networks in Australia—including family, friends, and mental health professionals—would severely exacerbate my condition. The loss of these supports can increase feelings of isolation and loneliness, significantly impacting my mental health. Additionally, the stigma surrounding mental health in Vietnam could prevent me from seeking necessary care due to fear of negative judgment.

26. Vietnam's healthcare system, particularly in mental health services, faces significant challenges including limited access to qualified professionals and adequate facilities. The healthcare system relies heavily on outdated methods and suffers from a disparity in healthcare distribution, particularly affecting rural areas. High out-of-pocket expenses and underfunding further strain the system, complicating access to essential treatments for individuals like me.

27. The economic challenges I would face upon return include difficulty in securing stable employment, due to my criminal record and status as a deportee. The stigma of being a deportee and having a criminal record can significantly hinder employment opportunities, as employers often avoid hiring individuals they

¹¹⁸ Exhibit 4.1, Applicant's Tender Bundle.

perceive as legal risks. Furthermore, the psychological impact of deportation could negatively affect my job performance and social reintegration.

28. I would face considerable legal and financial hardships upon return. I am not eligible for unemployment benefits in Vietnam, as eligibility requires contributions to the unemployment insurance fund, which I have not met. Moreover, my ability to contribute financially to my family in Australia would be severely compromised, affecting their well-being as well.

29. My removal would cause emotional distress not only to myself but also to my family remaining in Australia, disrupting our lives and the stable environment we have built together. The emotional and practical support I provide my family is irreplaceable, and my absence would place a significant burden on them.

30. My continued presence in Australia is crucial for managing my health condition, maintaining my family's stability, and fulfilling my societal roles without the added burdens of reintegration into a society that presents numerous significant challenges.”¹¹⁹

261. The Applicant would be able to access the same social, medical and economic support in Vietnam as any other citizen. This Other Consideration does not require a comparison of the equivalent supports in Australia and Vietnam.
262. The Applicant has family in Vietnam who can support him. His mother and 2 other siblings live there.
263. There is no reason to assume that the Applicant would not be able to obtain unskilled work, such as he has done in Australia, in Vietnam. In fact, he has qualifications recognised in that country to do nursing work.
264. This consideration is neutral.

¹¹⁹ Exhibit 4.2, Applicant's Tender Bundle, 4-5.

(c) Impact on victims

265. This consideration is neutral.

(d) Impact on Australian business interests

266. This consideration is neutral.

Findings: Other Considerations

267. The application of the Other Considerations in the present matter can be summarised as follows:

(a) legal consequence of decision under s 501 or s 501CA: neutral

(b) extent of impediments if removed: neutral

(c) impact on victims: neutral

(d) the impact on Australian business interests: neutral

CONCLUSION

268. It is necessary to weigh up all of the primary and other considerations.

269. Primary consideration 1 weighs against revocation.

270. Primary consideration 2 weigh is neutral.

271. Primary consideration 3 weighs slightly in favour of revocation.

272. Primary consideration 4 is neutral.

273. Primary consideration 5 weighs heavily against revocation

274. The Other considerations are neutral.

275. The Applicant has only spent two periods lawfully in Australia, with a substantive visa. This was a short-term visitor's visa on both occasions.
276. The first was a 3-month period between March and June 2008, when he visited his sisters in WA – Visitor Visa 1.
277. The second was between July and October 2017, Visitor Visa 2.
278. The Applicant held a Bridging visa A between 30 October 2017 and 6 August 2018, when it expired.
279. The Applicant has spent most of the last 7 years unlawfully in Australia. I give him no credit for the time during which he was unlawfully in our community.
280. His main positive contribution appears to have been providing practical support to Spouse 3 and Child A during the approximately 9 months during which he was present in their daily lives. Even then, he was not contributing financially. He told the Tribunal was never paid for his role in the cannabis crop.
281. He has been incarcerated for all of Child B's life.
282. He obtained the Bridging visa C which is the subject of these proceedings on 17 September 2021. The Bridging Visa C was granted pending the determination of his application for a Medical Treatment visa.
283. The Medical Treatment visa was refused on 2 November 2021. This refusal was affirmed by AAT 1 on 2 February 2023.
284. The application upon which the issue of the Bridging Visa C was predicated, was conclusively determined against the Applicant.
285. On 20 February 2023 the Bridging Visa C was cancelled under s 501(3A).
286. The Bridging Visa C expired on 9 March 2023.

287. The Applicant has no other current valid visa application pending.
288. If the cancellation under s 501(3A) were to be revoked, the Applicant's previously refused Partner Visa application would be revived by operation of law. He would then be able to apply for a Bridging Visa E.
289. Whether such a visa would be granted and if so on what conditions, is presently a matter of speculation.
290. All that is clear is, **if** the cancellation of the visa is revoked, the Applicant **may** obtain a visa in the future, that would enable him to return to the community.
291. The Applicant would be likely to remain in detention pending the determination of any such application.
292. These proceedings are therefore being pursued, in effect, to give the Applicant a chance to make a further application.
293. In my opinion, Primary Considerations 1 and 5 totally dwarf the slight weight in favour of revocation provided by Primary Considerations 3. This would remain the case, even if against my findings, some slight weight was given to the interests of minor children.
294. The nature of the Applicant's offending is so serious that in all of the circumstances, even a small risk of him returning to the community and reoffending is unacceptable.
295. The fact that a failure to revoke the cancellation will have other legal consequences under the Act, does not assist the Applicant. This is the way in which the Act is designed to operate. It applies to all visa holders who commit serious criminal offences in this country.
296. In my view, the proper application of the Direction favours the Tribunal not exercising the discretion to revoke the cancellation of the Applicant's Visa. I find that there is not "another reason" pursuant to s 501CA(4)(b)(ii) to revoke the original decision.

DECISION

297. The decision under review is affirmed.

I certify that the preceding two-hundred and ninety-seven (297) paragraphs are a true copy of the reasons for the decision herein of Senior Member Hon J Rau SC.

.....[sgnd].....

Associate

Dated:	7 June 2024
Date of hearing:	30, 31 May 2024
Advocate for the Applicant:	Dr Jason Donnelly (Latham Chambers) Mr Duy Ngo (Statewide Migration)
Advocate for the Respondent:	Mr Alex Chan (Sparke Helmore)

ANNEXURE A – LIST OF EXHIBITS

Exhibit no.	Lodged by	Document
1	Applicant	Statement of Facts, Issues and Contentions
2	Respondent	Statement of Facts, Issues and Contentions
3	Respondent	G-Documents
4	Applicant	1. Applicant's Tender Bundle, Part 1 2. Applicant's Tender Bundle, Part 2
5	Respondent	Respondent's Tender Bundle

ANNEXURE B – APPLICANT’S OFFENDING HISTORY

Court	Court Date	Offence	Court Result
SA – District Court	28.11.2022	1. Possess prescribed equipment 2. Abstract or divert electricity from power system 3. Traffic in large commercial quantity of controlled drug Cultivate large commercial quantity of controlled plant	1. Convicted 6 months imprisonment 2. Convicted 3 months 27 days imprisonment concurrent. 3. Convicted 2 years 7 months 6 days imprisonment Head Sentence: 2 years 7 months 6 days imprisonment from 1.04.2022 Non parole period 16 months

EXHIBIT A – VISA CALENDAR

Visa Calendar														
2008	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec		
	Not in Australia		Proper visa – UL 679 Sponsored Family Visitor Visa (Visitor Visa 1) 13 March, Applicant arrived in Australia 5 June, Applicant left Australia				Not in Australia							
Not in Australia until 21 July 2017														
2017	Jan	Feb	Mar	Apr	May	June	21 July	Aug	Sept	21 Oct	22-29 Oct	30 Oct	Nov	Dec
	Not in Australia						Proper visa – FA-600 Sponsored Family Visitor Visa (Visitor Visa 2) 21 July, Applicant arrived in Australia 11 September, Applicant applied for XA 866 (Permanent Protection Visa) 21 October, the visa expired, the Applicant continued to stay beyond this date			Applicant's Counsel submits that this period is 'not unlawful'		30 October, WA 010 Bridging Visa A was granted		
2018	Jan	Feb	Mar	Apr	May	June	July	6 Aug	7 Aug	Sept	Oct	Nov	Dec	
	WA 010 Bridging Visa A 2 July, Delegate refused to grant Protection Visa								In Australia as unlawful non-citizen					
2019	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec		
	In Australia as unlawful non-citizen 6 June, Applicant was re-notified by email of the refusal of decision													
2020	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec		
	In Australia as unlawful non-citizen													
2021	Jan	Feb	Mar	Apr	May	June	July	Aug	16 Sept	17 Sept	Oct	Nov	Dec	
	In Australia as unlawful non-citizen 16 September, Applicant lodged an application for a Medical Treatment Visa									17 September, WC Subclass 030 Bridging Visa C was granted 2 November, Delegate refused to grant Medical Treatment visa 22 November, Applicant appealed the Delegate's decision with the AAT				
2022	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec		
	WC Subclass 030 Bridging Visa C 1 April, Applicant was arrested and remanded in custody 28 November, Applicant was sentenced													
2023	Jan	20 Feb	21 Feb	9 Mar	10 Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Nov	Dec
	WC Subclass 030 Bridging Visa C 1 Feb, Applicant appeared before the AAT 2 Feb, AAT Tribunal Member affirmed the decision of the Delegate, not to grant Medical Treatment visa 15 Feb, Applicant Applied for a Partner Visa 18 Feb, Applicant was notified that his Partner visa application 'deemed to be refused' (as agreed by parties)		Bridging Visa C Revoked	Bridging Visa C Expired	No visa – Imprisoned – detention									
2024	Jan	Feb	Mar	Apr	May	June	July	Aug	Sept	Oct	Nov	Dec		
	No visa – detention													