Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number:	**2024/0303**
Re:	**Christopher Matthew Heneghan**
	APPLICANT
And	**Minister for Immigration, Citizenship and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Member A. Julian-Armitage**
Date of decision:	**9 April 2024**
Date of written reasons:	**17 May 2024**
Place:	**Brisbane**

Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal **affirms** the decision made by the delegate of the Respondent dated **16 January 2024** to not revoke the cancellation of the Applicant's visa.

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

Member A. Julian-Armitage

Catchwords

MIGRATION – Non-revocation of mandatory cancellation of a Class TY Subclass 444 Special Category (Temporary) visa – New Zealand citizen - where the Applicant does not pass the character test – where the applicant has a substantial criminal record - whether there is "another reason" why the decision to cancel the Applicant's visa should be revoked – consideration of Ministerial Direction No. 99 – decision under review affirmed

Legislation

Administrative Appeals Tribunal Act 1975 (Cth)
Migration Act 1958 (Cth)

Cases

FYBR v Minister for Home Affairs (2019) 272 FCR 454
Harrison and Minister for Immigration and Citizenship [2009] AATA 47; (2009) 106 ALD 666
LDDW and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] AATA 255
Tera Euna v Minister for Immigration and Border Protection [2016] AATA 301

Secondary Materials

Direction No. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA

REASONS FOR DECISION

Member A. Julian-Armitage

17 May 2024

INTRODUCTION

1. The Applicant is a 67-year-old man born in New Zealand. He arrived in Australia on 12 June 1982. Upon entry, he was granted his Class TY Subclass 444 Special Category (Temporary) visa ('**visa**').

2. On 21 March 2023, the Department of Home Affairs notified the Applicant of the mandatory cancellation of the visa pursuant to s 501(3A) of the *Migration Act 1958* (Cth) ('**the Act**'), because he did not pass the character test as he was serving a full-time custodial sentence of 12 months or more.[1] On 30 March 2023, the Applicant made written representations to the Respondent requesting the revocation of the cancellation of the visa.[2]

3. On 16 January 2024, a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs ('**the Respondent**') made the decision to not revoke the earlier mandatory cancellation,[3] which was delivered, by email, to the Applicant on the same date.[4] On 18 January 2024, the Applicant lodged the instant application before this Tribunal seeking review of the non-revocation decision.[5] I am satisfied that this Tribunal has jurisdiction to review the non-revocation decision pursuant to s 500(1)(ba) of the Act.

4. The application was heard in Brisbane on 25 and 26 March 2024. The Tribunal heard oral evidence from the Applicant, as well as the following parties:

    - Dr Steve Morgan;
    - Mr Zahir Shah;

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[1] Tr1, G9, p 56-62.
[2] Tr1, G15, p 137-138.
[3] Tr1, G3, p 14-17.
[4] Tr1, G3, p 14.
[5] Tr1, G1, p 1-3.

- Mr Bruce Hamilton;
- Ms Gail Mclean (the Applicant's wife); and
- Mr Osman Ali Ahmed.

5. The Tribunal also received written evidence with the totality of that material being consolidated into an Exhibit Register, a true and correct copy of which is attached to these Reasons and marked '**Annexure A**'.

LEGISLATIVE FRAMEWORK

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

> *The Minister may revoke the original decision if:*
>
> *(a) the person makes representations in accordance with the invitation; and*
>
> *(b) the Minister is satisfied:*
>
> *(i) that the person passes the character test (as defined by section 501); or*
>
> *(ii) that there is another reason why the original decision should be revoked.*

7. I am satisfied that the Applicant made the representations required by s 501CA(4)(a) of the Act.

8. There are therefore two issues presently before the Tribunal:

   (a) whether the Applicant passes the character test; or

   (b) whether there is another reason why the decision to cancel the Applicant's visa should be revoked.

Does the Applicant pass the character test?

9. The character test is defined in s 501(6) of the Act. It stipulates that a person will not pass the character test if they have a '*substantial criminal record*'. In turn, a '*substantial criminal*

record' is where a person has been sentenced to a term of imprisonment of 12 months or more.[6]

10. The Tribunal finds that the Applicant fails the character test,[7] due to him being sentenced to a term of imprisonment of five years (suspended for five years, after serving 20 months), for the offence of *Maintaining unlawful relationship with child.*[8] Accordingly, I find that he cannot rely on s 501CA(4)(b)(i) of the Act for the mandatory cancellation of his visa to be revoked.

Is there another reason for the revocation of the cancellation of the Applicant's visa?

11. In considering whether there is another reason to exercise the s 501CA(4) discretion, this Tribunal is bound by s 499(2A) of the Act and must comply with any directions contained therein. In the present case, *Direction No. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ('*Direction*' or '*Direction 99*') has application.[9]

12. For the purposes of deciding whether or not to revoke the mandatory cancellation of a non-citizen's visa, the Direction contains several principles that inform a decision-maker's application of the considerations relevant to the decision. These principles are found in paragraph 5.2 of the Direction are as follows:

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

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[6] See ss 501(6)(a) and 501(7)(c) of the Act.

[7] See *Harrison and Minister for Immigration and Citizenship* [2009] AATA 47; (2009) 106 ALD 666 at [63].

[8] Tr1, G9, p 57.

[9] Direction No. 99 commenced on 3 March 2023. It replaces Direction No. 90 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA.

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

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

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

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

13. 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.

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

(a) legal consequences of the decision;

(b) extent of impediments if removed;

(c) impact on victims; and

(d) impact on Australian business interests.

BACKGROUND AND OFFENDING

15. The Applicant's offending in this case commenced in his native New Zealand when in 1982, he was convicted of the offence of *Cultivate cannabis* and subsequently fined $500.[10] The Applicant's offending in this country commenced not long after his arrival in Australia, when he was convicted in the Mareeba Magistrates Court of *Drive motor vehicle whilst blood alcohol content was .06%*. He was convicted and fined and was disqualified from driving for a month. The Tribunal notes that Queensland transport records show the Applicant has accumulated a traffic infringement history, which includes speeding fines.[11] In his submissions, the Applicant stated that these were predominantly incurred by family members using the cars whilst visiting. The Applicant points to one of the speeding fines having been issued in October 2022, when he was in gaol.[12]

16. The Respondent contends that the Applicant also pleaded guilty to the offence of *Drunk in public place resist police or person assisting police*. The Applicant contends that with respect to that offence, the charge was struck out. The material before the Tribunal appears to evidence the offence having been in fact struck out.[13] Accordingly, the Tribunal will disregard this incident.

17. The primary conviction for the Tribunal's consideration in this matter is the conviction on 14 April 2022 for the offence of *Maintain unlawful relationship with a child*. The Applicant was sentenced to five years imprisonment, to be suspended for five years, after serving 20 months. The maintaining period with respect to the offence spanned from 1 March 2012 to 31 March 2014. At the time of commencement of this offence, the Applicant was 53 years of age, and the victim was nine-years-old.[14]

18. The facts with respect to the Applicant's offending are nothing short of abhorrent. The victim was the Applicant's brother in law's granddaughter. As a result of this familial connection, the Applicant was known by the victim as "Uncle Chris", with the familial relationship creating

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[10] Exhibit Tr1, G5, p 44.
[11] Exhibit Tr2, TB1, p 1-2.
[12] Exhibit A4, p 1, para 1(d).
[13] See Exhibit Tr2, TB3, p 5.
[14] Exhibit Tr1, G21, p 209.

opportunities for the offending. In fact, the Applicant conceded in evidence that he would perpetrate the offence whenever the opportunity arose.

19. Based on the material before the Tribunal and on the submissions from the parties, the offending exhibits the following key characteristics:

- The offending was an abuse of trust that the victim had in the Applicant;
- The offending was repetitive in nature and grew more frequent with time;
- The offending became more serious with the passage of time; and
- As a result of the offending, the victim exhibits symptoms including PTSD, anxiety and depression, amongst other impacts.[15]

PRIMARY CONSIDERATION 1 – PROTECTION OF THE AUSTRALIAN COMMUNITY

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

21. In determining the weight allocable to this Primary Consideration 1, paragraph 8.1(2) of the Direction requires decision-makers to consider:

(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.

[15] Exhibit A1, p 3, para 10.

22. I will deal with each in turn.

The nature and seriousness of the Applicant's conduct to date

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

> *(a) without limiting the range of conduct that may be considered very serious, the types of crimes or conduct described below are viewed very seriously by the Australian Government and the Australian community:*
>
> *(i) violent and/or sexual crimes;*
>
> *(ii) crimes of a violent nature against women or children, regardless of the sentence imposed;*
>
> *(iii) acts of family violence, regardless of whether there is a conviction for an offence or a sentence imposed;*
>
> *(b) without limiting the range of conduct that may be considered serious, the types of crimes or conduct described below are considered by the Australian Government and the Australian community to be serious:*
>
> *(i) causing a person to enter into or being party to a forced marriage (other than being a victim), regardless of whether there is a conviction for an offence or a sentence imposed;*
>
> *(ii) crimes committed against vulnerable members of the community (such as the elderly and the disabled), or government representatives or officials due to the position they hold, or in the performance of their duties;*
>
> *(iii) any conduct that forms the basis for a finding that a non-citizen does not pass an aspect of the character test that is dependent upon the decision-maker's opinion (for example, section 501(6)(c));*
>
> *(iv) where the non-citizen is in Australia, a crime committed while the non-citizen was in immigration detention, during an escape from immigration detention, or after the non-citizen escaped from immigration detention, but before the non-citizen was taken into immigration detention again, or an offence against section 197A of the Act, which prohibits escape from immigration detention;*
>
> *(c) with the exception of the crimes or conduct mentioned in subparagraph (a)(ii), (a)(iii) or (b)(i) above, the sentence imposed by the courts for a crime or crimes;*
>
> *(d) the frequency of the non-citizen's offending and/or whether there is any trend of increasing seriousness;*
>
> *(e) the cumulative effect of repeated offending;*
>
> *(f) whether the non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending;*

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

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

Paragraph 8.1.1 considerations

24. **Sub-paragraph 8.1.1(1)(a)**: the essence of this area of the Direction provides for the types of offences committed within the genre of sub-paragraph (i), (ii) or (iii) to be viewed very seriously by the Australian Government and the Australian community. The Applicant's offending in this country includes an offence that falls squarely within this subparagraph.

25. It is clear from the facts and the evidence that an integral part of the offence of *Maintaining unlawful relationship with a child* falls within sub-paragraph (i) and also, given that the victim did not voluntarily engage in the offending, it follows that there must have been some level of force involved in the Applicant's actions, vis-à-vis the victim. In cross-examination, the Applicant accepted to grabbing the back of the victim's head.[16]

26. In the circumstances and based on the evidence, it is without doubt that the offending falls within sub-paragraphs (i) and (ii) and therefore favours a finding that the offending has been *very serious*.

27. **Sub-paragraph 8.1.1(1)(b)**: this area of the Direction refers to the types of crimes that may be considered serious by the Australian Government and the Australian community. The victim of the Applicant's offending is clearly a vulnerable member of the community, as it occurred at a time when she was only nine and continued over a two-year period.

28. Categorising the victim as a vulnerable member of the community stems from the fact that the victim was only a nine-year-old child and the Applicant was a member of her family who held a position of trust.

[16] See Transcript, p 43, line 36-45.

29. This Tribunal, differently constituted, considered such relationships and offending in this context in the following terms, in *LDDW and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*:[17]

> *Australian society abhors the sexual exploitation of children and insists that criminal sentences are sufficiently strong to protect children, punish offenders, and powerfully denounce such conduct. The legislature, at the state and Commonwealth level, has set relatively high maximum penalties for sexual crimes against children. Community abhorrence of such crimes arises from the inherent vulnerability of children, whose emotional maturity is not fully developed. They are consequently at a disadvantage when confronted with sexual conduct by adults. That disadvantage is undoubtedly amplified when the conduct is from a trusted figure.*

30. Therefore, the offending can comfortably be considered to engage the provisions of sub-paragraph (ii), favouring a finding that the Applicant's offending has been serious.

31. **Sub-paragraph 8.1.1(1)(c)**: looks to sentencing of certain non-precluded offending. The conviction for *Maintaining* falls within sub-paragraph (1)(a)(i) and (ii) and therefore I am precluded from considering the sentence imposed in that regard.

32. It is also noted that the remainder of the Applicant's offending has attracted non-custodial sentences both in Australia and New Zealand, mainly in the form of monetary penalties.

33. **Sub-paragraph 8.1.1(1)(d)**: two questions arise for consideration within this sub-paragraph. The first requires an assessment of the frequency of the Applicant's offending and the second is whether there is a trend of increasing seriousness. Whilst on the face of it, the Applicant's criminal history is not reflective of frequency, the nature of the conviction encompasses a period of two years with regular individual instances that make up the offence of *Maintaining unlawful relationship with a child*. This is the position the Respondent has taken and I agree it is the right course to take.

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[17] [2021] AATA 255 at [45]; Exhibit R1, p 8, para 27.

34. The Southport District Court sentencing Judge dealt with the Applicant's increased frequency and severity over time, stating that:[18]

> "*In addition, and as I'll detail further, it became more frequent as you got older. It was more than once a month during the period of the charge. You visited the complainant's house every week, mostly on Friday night or the weekend*".

35. It is difficult to argue with the position of both the sentencing Judge and the Respondent. Therefore, I find that there has been frequency in the offending. With respect to the second question of whether there is a trend of increasing seriousness, I find that the nature of the offence is inherently serious and has been such throughout the period of the offending.

36. **Sub-paragraph 8.1.1(1)(e)**: the cumulative effect of the Applicant's offending can be gleaned from the prolonged and repeated incidences of abuse that the victim was subjected to. It is clear from the victim's impact statement that she has sustained a number of serious consequences over a long period of time, as contained in her victim impact statement:[19]

> *"I felt I could not go to anyone and did not know who to tell or who could save me. My constipation issues worsened. I had difficulty sleeping and my concentration at school also worsened.*
>
> *…*
>
> *I would get flashbacks of various acts that Chris did to me".*

37. Furthermore, the victim's mother provided her own impact statement which details the far-reaching effects and consequences of the Applicant's offending, as:[20]

> *"I told my mother and my husband about [redacted, the victim's] disclosure. I was worried for my [m]other's health in hearing about it, as she had only just lost her husband a year ago and her health had not been good. My mother had played a*

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[18] Exhibit Tr1, G6, p 46.
[19] Exhibit Tr2, TB5, p 34.
[20] Exhibit Tr2, TB5, p 27-29.

large role in caring for [redacted, the victim] since her birth and she was in shock after hearing of the abuse and would not stop shaking.

My husband had been in [redacted, the victim's] life since the age of three and found it very difficult to digest the information … [he] cried and kept repeating "sorry I didn't protect you". It was very distressing to see this.

…

It was very difficult to take on this disclosure of abuse by [redacted, the victim]. I could not stop crying for days.

38. It is obvious from both of these victim statements that the Applicant's offending has had a huge impact on not only the victim, but her immediate family.

39. Therefore, I am of the view that the cumulative effects discernible from the Applicant's offending, on a cumulative basis, favours a finding that his unlawful conduct in Australia has been serious in the extreme.

40. **Sub-paragraph 8.1.1(1)(f)**: this is a case where the Applicant has provided false or misleading information to the Department. On 15 August 2017 and 7 May 2018, the Applicant completed incoming passenger cards on which he ticked "*no*" to the question "*do you have any criminal convictions*".[21] The Applicant says that while he gave an incorrect answer in ticking "*no*", it does not follow that he provided false or misleading information to the Department by failing to disclose the drug offence, noting that the matter was dealt with back in 1982.[22] The Applicant contends that he was not aware that the impugned drug offence resulted in a conviction.[23]

41. It is difficult to comprehend how a trained lawyer would not be aware whether or not he had a conviction, as he states.

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[21] Exhibit Tr1, G12, p 70-71.
[22] Exhibit A1, p 4-5, para 17.
[23] Ibid.

42. **Sub-paragraph 8.1.1(g)**: the considerations in this sub-paragraph are not relevant to the conduct of this Applicant.

43. **Sub-paragraph 8.1.1(h)**: as addressed above, the Applicant's offending includes an offence committed in New Zealand; *Cultivate cannabis*, which clearly would also be an offence in Australia.

Conclusion about the nature and seriousness of the Applicant's conduct

44. Upon applying each of the relevant sub-paragraphs contained in paragraph 8.1.1(1) of the Direction, I am satisfied that the evidence before me leads me to the conclusion that the totality of the Applicant's unlawful conduct in this country has been very serious.

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

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

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

> *(a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and*
>
> *(b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:*
>
> > *(i) information and evidence on the risk of the non-citizen re-offending; and*
> >
> > *(ii) evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since the most recent offence; and*

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

The nature of the harm to individuals or the Australian community were the Applicant to engage in further criminal or other serious conduct

47. It is clear from the nature of the Applicant's offending that were he to engage in further criminal offending in the nature of his past criminal history, namely, the child sexual offending, there is little doubt that such conduct could cause deep physical, psychological and conceivably financial harm to individuals.

48. It is unquestionable that were the Applicant to re-offend in the same nature as his previous offending, children would be highly vulnerable to emotional and psychological harm caused by unlawful relationships, and that the potential consequences include long-term trauma, affecting mental health, self-esteem and the ability to form healthy relationships in future[24]. This position has been readily conceded by the Applicant.

The likelihood of the non-citizen engaging in further criminal or other serious conduct

49. I now turn to consider the likelihood of this Applicant engaging in further criminal or other serious conduct. The evidence indicates that the Applicant has engaged in mental health treatment with DGM Psychology in Spring Hill. It is the Applicant's position that he is a low risk of re-offending,[25] and has been required to be registered on the Child Protection Offender Register, which he says, will act as a very significant deterrent against him re-offending.[26]

50. It is the Respondent's position that the risk of the Applicant re-offending is "*unacceptable*".[27] This view is, in part, based on it being recommended that the Applicant undertake the

[24] Exhibit A1, p 5, para 21.
[25] Exhibit A1, p 5-6.
[26] Exhibit A1, p 6.
[27] Exhibit R1, p 10, para 30.

Medium Intensity Sexual Offending Program, whilst incarcerated, and he did not do so.[28] At the outset, I share the Respondent's concerns that this course of rehabilitation has not been undertaken in circumstances where, on the Applicant's own admission, his attraction has not been isolated to the subject victim.[29]

Information and evidence on the risk of the non-citizen re-offending including evidence of rehabilitation

51. The Tribunal is in receipt of clinical psychological reports in relation to the Applicant's recidivistic risk, together with oral evidence, provided by Dr Steve Morgan and Mr Bruce Hamilton.

Dr Steve Morgan

52. Dr Steve Morgan, Registered Psychologist, from DGM Psychology, prepared two reports that are in evidence before this Tribunal. They are the report dated 26 February 2022, which was prepared in relation to the Applicant's sentencing for the *Maintaining* offence,[30] with an updated report dated 12 November 2023.

<u>26 February 2022 report</u>

53. As stated earlier, this first report was prepared prior to the Applicant's sentencing. Dr Morgan saw the Applicant on 23 February 2022, at DGM Psychology at Spring Hill, upon referral from the Applicant's then solicitors, for the purposes of the preparation of a pre-sentence report. It confirms that the Applicant sought psychological assistance at around April 2021 (but not prior), when he was referred to and commenced treatment with Mr Hamilton. At the time of the report, the Applicant had attended some 10 to 12 sessions, which he had described as helpful.[31]

54. The report primarily considered the recidivistic risk through the lens of actuarial measures, via the Static-99R protocol, Risk of Sexual Violence Protocol (**RSVP**) and Personality

[28] Exhibit R1, p 10, para 30.4; Exhibit Tr1, G13, p 126-127.
[29] Exhibit R1, p 11, para 30.4; Exhibit Tr1, G21, 208-209.
[30] Exhibit Tr1, G21, p 204-217.
[31] Exhibit Tr1, G21, p 208-209.

Assessment Inventory (**PAI**) protocol. His Static-99R score indicated a low risk whilst the RSVP score assessed the Applicant as being "*a limited risk to the community*[32]".

55. Further, Dr Morgan's report goes on to provide the negatives associated with the Applicant's condition, mainly the seriousness of the sexual deviancy offending over a long period, as well as a finding that the Applicant ought to abstain from cannabis use.[33]

56. Following this, the substantive formulation of the report is as follows:

> *"[The Applicant] is assessed as being of low risk in terms of re-offending, this by his consideration via the Static-99R and Risk for Sexual Violence Protocol (RSVP) tools. Given this, his remorse and acceptance of responsibility, commitment to treatment, prior laudable work history … [the Applicant] represents limited risk to the community in terms of further offending*".[34]

57. During cross-examination, Dr Morgan advised this Tribunal that the Applicant had exhausted treatment that can be undertaken whilst in custody. He went on to state that upon the Applicant's release into the community (presumably either in Australia or New Zealand) he would need to have a post-release treatment plan in place, irrespective of the level of risk, as low risk does not equate to *no* risk.

58. Another aspect of Dr Morgan's report, which is of concern, is confirmation that the metrics of the tests utilised did not deal with or measure deviancy. Dr Morgan confirmed that the Applicant only completed one assessment test during his interview, that being the PAI assessment, which "*is not a test to assess sexual deviancy or paraphilia*".[35]

59. In addition, Dr Morgan opined that the Applicant should abstain from cannabis use which, although it was not canvassed any further, implies that it may be in issue.

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[32] Exhibit Tr1, G21, p 216.
[33] Exhibit Tr1, G21, p 216.
[34] Exhibit Tr1, G21, p 215.
[35] Exhibit Tr1, G21, p 212.

12 November 2023 report

60. This updated report of 12 November 2023 was provided for the purposes of risk assessment. In addition to the Static 99-R and RSVP psychometric tools, Dr Morgan also utilised the Sexual Offenders Risk Appraisal Guide (SORAG). A similar finding of "*low risk*" was made based on positive and negative factors.[36] Again, my concerns are that the report is silent as to the Applicant's particular deviancy.

61. In this report, Dr Morgan also mentions the negatives as being "*the seriousness of [the Applicant's] offending, with manifest breach of trust in his protective and caring role for his victim, his deviancy at that time – and his failure to desist from offending; and the need to adaptively manage his future sexual needs post release*".[37] In addition, Dr Morgan refers to "*[the Applicant] disclosed and retains unmet sexual needs, advised as discussed with his wife at length and that may need him to utilise the future services of a sex worker*".[38]

Bruce Hamilton

62. The Tribunal also received evidence from another forensic psychologist, Mr Bruce Hamilton, also from DGM Psychology, together with two short letters dated 28 February 2022 and 10 November 2023.

63. The letter of 28 February 2022 contains a disclaimer that it is not intended as a risk assessment report. The letter of 10 November 2023 confirms that the Applicant undertook a number of sessions with him between April 2021 and February 2022 prior to sentencing and whilst he was incarcerated with further sessions conducted between July and October 2023 on a fortnightly to three-weekly basis via video-conference calls. Once again, this letter contains a disclaimer that it is not a representation of a risk assessment and as such does not provide much assistance to this Tribunal in relation to recidivism.

[36] See Exhibit Tr1, G24, p 236-237.
[37] Exhibit Tr1, G24, p 237.
[38] Exhibit Tr1, G24, p 237.

Assessment of recidivist risk

64. In the main and given that Mr Hamilton's letters specifically preclude any recidivistic assessment, this Tribunal can only take into consideration Dr Morgan's reports in considering the Applicant's actual recidivist risk.

65. Dr Morgan's and Mr Hamilton's reports and letters do not particularise a relapse prevention plan. Although Mr Hamilton has referred to relapse prevention plans involving mechanisms to deal with future risks, neither he nor Dr Morgan proffered any specifics in relation to plans, in either their reports/letters or during oral evidence. In addition, the Applicant also failed to particularise any such post-release plan, except save for the mention of the possibility of participating in future group-based offence-specific therapy, which would reportedly assist the Applicant in reducing the risk.[39]

66. Despite the risk having been categorised as low, it was conceded by Dr Morgan that low risk is not devoid of all risk, as mentioned above. It would have been comforting for this Tribunal to have been furnished with a cogent relapse plan by either of the experts who gave evidence, or the Applicant himself for that matter. Dr Morgan's report disclosed that the Applicant advised him that he may need to resort to the services of sex workers in future. He also disclosed to Dr Morgan that he has been attracted to pre-pubescent females not limited to the victim.[40] For all these reasons, I am led to the conclusion that there is a real and unacceptable risk of the Applicant re-offending in the vein of his previous conduct.

Conclusion: Primary Consideration 1

67. With respect to the weight attributable to this Primary Consideration 1, I find:

    (1) The nature and seriousness of the totality of the Applicant's conduct to date to have been very serious;

    (2) That were the Applicant to re-offend in any aspect of his history, it could give rise to physical, psychological and conceivably financial harm with doubtless long-term adverse mental health results; and

[39] Exhibit Tr1, G21, p 216.
[40] Exhibit Tr1, G21, p 214.

(3) That in respect of recidivist risk, the Applicant represents a real and unacceptable recidivistic risk.

68. On my consideration and analysis of all the material, I am led to the finding that this Primary Consideration 1 confers a heavy weight against the revocation of the mandatory cancellation of the Applicant's visa.

PRIMARY CONSIDERATION 2: FAMILY VIOLENCE

69. I am satisfied, and the parties agree, that this Primary Consideration 2 is not applicable.[41] I allocate neutral weight to this consideration.

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

70. The Direction requires decision-makers to have regard to the strength, nature and duration of an Applicant's links to the Australian community. There are four requisite considerations to be addressed in this paragraph 8.3. I will address each in turn.

71. On the evidence before me, it appears that the Applicant's nuclear family for the purposes of Primary Consideration 3, as well as minor children to be considered for the purposes of Primary Consideration 4, are as follows.

Immediate family members:

- The Applicant's wife Gail Mclean;
- The Applicant's step-son Rahim; and
- The Applicant's minor step grandchild.

Extended family members:

- Four minor great nephews;

[41] Exhibit R1, p 11, para 32; Exhibit A1, p 6, para 26.

- A minor great niece;
- Three adult great nephews, Ali, Ayaan and Zaman;
- Some eight adult nephews;[42] and
- Some five adult nieces.[43]

72. In addition to the above, the Applicant has claimed to have several brothers-in-law and sisters-in-law. In total, some 14 nieces and nephews have been listed in PCF.[44]

73. Of these extended family members, only Mr Zahir Shah (the Applicant's nephew) and Mr Osman Ahmed gave oral evidence. I will deal with the evidence of these two family members later in these Reasons.

Paragraph 8.3(1): Consideration of the impact of this decision on the Applicant's *immediate* family members

74. This sub-paragraph requires me to firstly identify the Applicant's immediate family in Australia who are citizens, permanent residents or persons who have the right to remain indefinitely in Australia. The immediate family consists of his wife Mrs Mclean, step-son Rahim (and presumably Rahim's wife) and their child (the Applicant's step grand-child). The evidence is clear that all these persons identified are Australian citizens, except for Rahim's wife, about whom there is no certainty. Regardless of whether she is a citizen or not, she was born in New Zealand and presumably would have the right to reside indefinitely in Australia.

75. Given the nature of the Applicant and Mrs Mclean's financial holdings in Australia, should the Applicant be required to return to New Zealand, on her evidence, Mrs Mclean would have to remain in Australia until such time as arrangements could be made in terms of the legal practice and any properties the parties may own here. It is accepted that the Applicant and Mrs Mclean would experience difficulties due to the separation. However, those

[42] See Exhibit Tr1, G16, p 156.
[43] See Exhibit Tr1, G16, p 156.
[44] See Exhibit Tr1, G16, p 150, 156.

circumstances would be no different in the short term to those experienced when the Applicant was incarcerated and detained.

76. The Applicant's wife is older than him and on her evidence, suffers from some health issues, which were not corroborated by medical evidence. In any event, these ailments appear to not be so serious preventing her from being able to run the legal practice. She has testified that she has a large family, mostly in Australia and would find it very difficult to be separated from all of them, as she plays a strong matriarchal role to her many brothers and sisters, nieces and nephews and their children. She also states that she would move to New Zealand should the Applicant be required to leave Australia.

77. The Applicant and Mrs Mclean have made much of the fact that as a solicitor, she has had to take over her husband's role in the practice as practice manager, something that she has found very difficult, given that she had hoped to have been retired by now. It is, however, worth mentioning that her nephew Zahir also works as a solicitor in the practice and has been considered by the Applicant and his wife as part of the succession plan of the practice.

78. The Applicant's step-son and step-daughter-in-law did not appear or give evidence. In addition, they did not provide any written statements in support of the Applicant. Consequently, this Tribunal is not in a position to make findings with respect to the impact this decision would have on the Applicant's step-son and his step-son's wife.

79. The Applicant's minor step grand-child (and the probable impact on her should the Applicant be required to leave Australia) has been considered in the below sub-paragraphs, on the basis that the Applicant has listed this child as part of his immediate family.

Paragraph 8.3(2): Consideration of the Applicant's ties to Australia having regard to a child/ren who are Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely

80. This element in Primary Consideration 3 requires a determination of whether more weight should be given to the Applicant's ties to Australia where he has Australian citizen biological children.

81. At the outset, the Applicant has no biological children. The Applicant has listed his step-granddaughter, four great nephews and a great niece as minor children with whom he claims to have a close and meaningful relationship[45]. All of these people have a right to remain indefinitely in Australia. The Applicant does not play a parental role in his step-granddaughter's life. However, there is some evidence that he and his wife have provided financial support to this child's parents, since they were married in 2007. There is no reason why this level of financial support could not be continued if the Applicant and his wife were to re-locate to New Zealand.

82. The Applicant is currently serving a suspended sentence and is likely required to be on the Child Protection Offender Register. Presumably, the Applicant will remain on the Register for some time, which presumably will curtail the level of contact he has with the named minor children.

Paragraph 8.3(3): Strength, nature and duration of ties with any family or social links generally

83. This element in Primary Consideration 3 requires me to consider the strength, duration and nature of any family or social links. As well as the abovenamed family members, the Applicant has referred to four friends, who have provided statements to this Tribunal.[46]

84. Given that the Applicant has been in Australia for over four decades, it is difficult to argue with the proposition that he has strong familial and social ties in this country, simply based on the duration of his residence here, and these ties are certainly being taken into consideration by this Tribunal.

85. The following members of the Applicant's family have provided statements in his support, which have been given due consideration. The contents of the statements all share a similar thread in that they attest to the Applicant's role in their lives, his community-based activities and general readiness to assist them:

- <u>Riaz Shah – the Applicant's nephew</u>

[45] Exhibit A1, p 11, para 60.
[46] See Exhibit Tr1, G27, p 342-354.

Mr R Shah's mother is the sister of the Applicant's wife. In his statement, Mr R Shah generally refers to the Applicant's participation in his sporting activities, school events and extra-curricular pursuits. It is obvious that he has fond memories of having the Applicant in his life as he was growing up.

- Salmaan Dean – the Applicant's nephew

  Mr Dean views the Applicant as a substitute father figure, given that his own father has not had a big impact in his life. He resided with the Applicant and his wife during year 11 and 12 of high school and professes to enjoy a good relationship with him.

- Umul Shah – the Applicant's sister-in-law

  Ms U Shah is the Applicant's wife's sister who lives in New South Wales. The main contention in her statement is in relation to the negative impact the Applicant's departure from Australia would have on her sister, Mrs Mclean.

- Salikat Albi – the Applicant's sister-in-law

  Ms Albi is married to Mrs Mclean's brother and attests to the Applicant providing support, including financial, to her son during his university studies. Her statement goes on to mention the significant attachment her family has to the Applicant.

86. In addition, people from the Applicant's friendship circle, including colleagues and associates, have provided statements which this Tribunal has taken into consideration.

- Karen Hansler – who was employed at the Applicant's firm when he was a principal;

- Keith Hunter – a retired legal practitioner who associated with the Applicant in the Small Practice Alliance of Solicitors and says that he has known the Applicant for some 13 years;

- Anthony Jamieson – a legal practitioner who has known the Applicant since about 2018 when he accepted briefs from his firm;

- Kenneth Oliver – a lay friend of the Applicant's who met him at around 1988.

87. At this juncture, it is appropriate to address the evidence of two members of the Applicant's extended family, Mr Zahir Shah and Mr Osman Ahmed.

Mr Zahir Shah

88. Mr Shah, in oral evidence, stated he was a legal practitioner since 2018, having practised in New South Wales and Queensland. He is the son of Mrs Mclean's sister and states that the Applicant has been like a second father to him. Mr Shah currently works in the Applicant's and Mrs Mclean's legal practice. He spoke at great length about the Applicant's connection to him, his family and their community. He referred, amongst other things, to the Applicant's involvement in the Islamic community in Victoria, soccer coaching and charitable activities.

89. Mr Shah confirmed that he was aware of the nature of the Applicant's offending and went on to say:

> *"He's [the Applicant] lost his career. He has suffered immense embarrassment and shame. His reputation's been completely shattered.*
>
> *…*
>
> *And that's how I view it in the context of both an Australian citizen, as a member of the profession, and as a person who subscribes to Islamic faith and that ethnic community."*

90. Mr Shah's oral evidence mirrors the contents of his statutory declaration, which clearly evidences that he has a strong connection with the Applicant. On the evidence before this Tribunal, it is safe to presume that Mr Shah is one of the Applicant's family members that the Applicant had in mind to take over the legal practice. Given Mr Shah's some six years of experience as a legal practitioner, he may be sufficiently experienced to be able to run the practice.

Mr Osman Ahmed

91. Mr Ahmed is the Applicant's brother-in-law (he is Mrs Mclean's brother) and also gave oral evidence and provided a statutory declaration. He sheds light on the nature of the Applicant's legal practice and how many members of the Applicant's extended family have worked in the practice and been provided with legal experience over the years, including the victim's mother. It is Mr Ahmed's evidence that he characterised the Applicant to be like a second father, however the specifics of the relationship, including golf outings and weekend visits are more indicative of a close friendship. In fact, Mr Ahmed's own words indicated that the Applicant was his "*buddy*".

Paragraph 8.3(4): Consideration of the nature of the Applicant's ties to the Australian community having regard to the length of time he has resided here

92. This component of Primary Consideration 3 requires me to look at the length of time the Applicant has resided in the Australian community and to take account of the following three elements:

(a) whether the Applicant has been ordinarily resident here during his formative years.

(b) whether the Applicant has positively contributed to the Australian community during his time here.

(c) can the weight be allocable to the strength of the Applicant's ties to Australia based on the length of time he has spent in the Australian community be lessened because (1) he did not spend his formative years here and (2) he began offending soon after arriving here?

93. The Applicant spent his formative years in New Zealand, having arrived in Australia in 1982 in his mid-twenties. He has been here for some 40-odd years. The Applicant's brother and sister live in New Zealand, with the only familial ties in Australia being his wife's family. He has practised law in this country, both as an employee and as a principal for the majority of the time that he has been here and has also participated in several sporting groups. In addition, after meeting his wife and converting to Islam, together with his wife he established the Muslim Community Legal Centre in Melbourne.

94. In terms of his community involvement, the material is clear as to the Applicant's extensive involvement with the Islamic community in several States. As a legal practitioner, he also has long-standing ties with the legal fraternity.

95. With respect to sub-paragraph (c), I have already found that the Applicant did not spend his formative years here. Furthermore, he did commit an offence soon after arriving (the traffic conviction in Mareeba), but not in the nature of the subject offending.

Conclusion: Primary Consideration 3

96. In applying the relevant components of Primary Consideration 3 to the evidence and facts before me, I find that the evidence in its totality points to a finding that this Primary Consideration 3 is of considerable, but not determinative weight, in favour of exercising the power to revoke the mandatory cancellation of the Applicant's visa.

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

97. I must determine whether the non-revocation of the Applicant's visa would be in the best interests of minor children in Australia that would be affected by the decision (per paragraph 8.4(1) of Direction 99). This primary consideration only applies with respect to children under the age of 18 years at the time of the decision (paragraph 8.4(2) of Direction 99).

98. In the circumstances, the relevant minor children include those stipulated above, but I will transpose them again here for completeness: the Applicant's step-granddaughter, great niece and four great nephews. The Applicant's Statement of Facts, Issues and Contentions confirms that these are the relevant children to be considered pursuant to this Primary Consideration 4.[47]

99. The Applicant maintains that he is a positive adult influence with respect to these minor children and makes much of the fact that he is referred to as "Uncle Chris". He contends that he has been involved in these children's lives, including that of one of his great nephews who he says is autistic. It is important to note the relatively young age of these children and the fact that the Applicant, due to his incarceration and subsequent detention, has not been

[47] See Exhibit A1, p 11, para 60.

in physical contact with them for some time now. It is reasonable to surmise that the relationship with these children can continue to be fostered remotely.

100. The Applicant's relationship with these children has been described by him as close and meaningful. However, on the material before me, there is nothing to suggest that it is any different to, or more remarkable than, any relationship that a great-uncle would enjoy with his extended family. In this vein and on the Applicant's own material, the COVID-19 travel restrictions also impacted his ability to physically see these children and nothing has been said as to whether these relationships were negatively impacted substantially.

101. The situation may be more complex with respect to the Applicant's step-granddaughter as she appears to spend more time with the Applicant and his wife at their home. I accept that, like all grandchildren, the step-granddaughter would enjoy spending time with her grandparents. Notwithstanding, there is nothing in the material to suggest that either the Applicant or his wife are her primary caregivers.

102. Should the Applicant and his wife relocate to New Zealand, the family, including this child, could physically visit as well as maintain regular video or phone contact.

Conclusion: Primary Consideration 4

103. As the first point of call, it is always the preferable view that the best interests of minor children are to enjoy a strong and close relationship with their immediate family. In the present circumstances, these children have parents who have not delegated their parental roles to the Applicant and, therefore, are able to maintain their relationship with him through means such as phone and video. Accordingly, I am of the view that in considering the best interests of the minor children, Primary Consideration 4 is of considerable, but not determinative, weight in favour of the revocation of the mandatory cancellation of the Applicant's visa.

PRIMARY CONSIDERATION 5: EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

104. The Direction makes clear that the expectations of the Australian community apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.[48] The Direction further explains:

> *'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 [in paragraph 8.5(1)–(3) of the Direction], without independently assessing the community's expectations in the particular case.'*[49]

105. With reference to the propositions in paragraph 8.5(1) of the Direction, this sub-paragraph is expressed thus:

> *The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia.*

106. This Applicant has breached the Australian community's expectations by the nature of his criminal offending in this country, which by any standard is universally viewed as an abhorrent and particularly reprehensible breach of Australian laws. Therefore, the Australian community, '*as a norm*' expects the Australian Government not to allow him to remain in Australia.

107. The Direction also states that visa cancellation or refusal, or non-revocation of a 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:[50]

> *(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;*

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[48] Paragraph 8.5(3) of the Direction.

[49] Paragraph 8.5(4) of the Direction. Paragraph 8.5(4) codifies the position laid down by the Full Court of the Federal Court in *FYBR v Minister for Home Affairs* (2019) 272 FCR 454.

[50] Paragraph 8.5(2) of the Direction.

(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.*

108. The Applicant's offending falls squarely within the parameters of sub-paragraph (c) above, as an offence committed against a child. As such, the Australian community would expect that the Australian Government can and should cancel the Applicant's visa (or, specific to the present case, that the cancellation of the visa not be revoked).

109. The remaining question is whether there are any factors which modify the Australian community's expectations. This question is informed by the principles in paragraphs 5.2(4), (5) and (6) of the Direction. In summary these are:

(a) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa;

(b) the Australian community has a low tolerance of any criminal or other serious conduct by non-citizens who have been participating in, and contributing to, the Australian community for only a short period of time;[51]

(c) 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;[52]

(d) the community's level of tolerance will rise based on the length of time a non-citizen has spent in this country and, in particular, whether their formative years were spent here;

[51] Paragraph 5.2(4) of the Direction.

[52] Ibid.

(e) the nature of a non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify a visa outcome that is not adverse to the non-citizen;[53] and

(f) if a non-citizen's unlawful conduct is inherently of the type captured by any of the categories stipulated in paragraph 8.5(2)(a)-(f)(inclusive) of the Direction, then even strong countervailing considerations may not assist a non-citizen even where the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.

110. In relation to sub-paragraph (a) above, the term "limited stay" is not defined in the Act. In the present case, the Applicant held a Class TY Subclass 444 Special Category (Temporary) visa. This type of visa permits New Zealand citizens to remain in Australia without any limitation on their duration of stay. Therefore, the Applicant did not hold a visa that can be classified as a limited stay visa. Hence, this sub-paragraph does not apply.

111. In relation to sub-paragraph (b) above, the Applicant does not invoke the operation of this sub-paragraph, as he has spent more than four decades in this country.

112. With respect to sub-paragraph (c), the Applicant has spent the major part of his life in this country, which would allow him a higher level of tolerance of his criminal conduct by the Australian community.

113. With respect to sub-paragraph (d), the Applicant did not spend his formative years in this country, arriving here after university in his mid-twenties.

114. With respect to (e), the Applicant's conduct during the offending period has been of such a serious nature, that the harm that would be caused were it to be repeated, would be so serious, that it deprives the Applicant of any countervailing considerations with respect to the non-revocation decision.

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[53] Paragraph 5.2(5) of the Direction.

115. With respect to (f), it is without question that the Applicant's unlawful conduct was inherently of the type foreseen by this sub-paragraph and as such, would weaken any countervailing considerations that may have assisted him, regardless of whether or not he poses a measurable risk to the Australian community.

Conclusion: Primary Consideration 5

116. Primary Consideration 5 confers a heavy level of weight against revocation of the mandatory cancellation of the Applicant's visa.

OTHER CONSIDERATIONS

Other Consideration (a): Legal consequences of the decision

117. Per paragraph 9.1(1) of the Direction, decision-makers must be mindful that unlawful non-citizens are liable to removal from Australia as soon as practicable, and in the meantime, detention. I acknowledge that in the event of a non-revocation decision, the Applicant will be liable to removal from Australia as soon as reasonably practicable and will not be able to apply for another visa while in Australia (with the exception of a protection visa).[54]

118. As far as I understand the evidence before me, there is no claim and otherwise nothing on the material to suggest, that Australia's non-refoulment obligations are enlivened in respect of the Applicant.

119. The Respondent concedes that a consequence of the Tribunal affirming the decision under review would be that the Applicant will be liable to removal from Australia as soon as reasonably practicable and will not be able to apply for another visa while in Australia (with the exception of a protection visa). The Respondent says this reality weighs neither for nor against the Applicant.

120. Conversely, the Applicant refers to the same consequences, but says that this weighs heavily in the Applicant's favour.

121. I agree with the Respondent that neutral weight should be allocated to this consideration.

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[54] Ss 189, 198 and 501E of the Act; Exhibit R2, p 13, para 47-49.

Other Consideration (b): Extent of impediments if removed

122. 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.*

123. **Paragraph 9.2(1)(a)**: the Applicant is about 65 years of age and claims to have health issues, namely skin cancer, prostate issues and high cholesterol. He also claims to experience neuropathic pain, diaphragmatic paralysis, gastroesophageal reflux and cervical disc prolapse. None of these conditions are such that could not be treated to a similar standard in New Zealand that he, as a citizen of that country, would be entitled to access. Additionally, the Applicant in his closing written submissions lists a substantial amount of ailments, some of which have arisen as a result of his incarceration and subsequent detention, particularly those of a mental health nature. As to his claims of physical ailments, this Tribunal has not been furnished with any medical evidence in respect of these, other than a health summary from his doctor on the Gold Coast.[55]

124. **Paragraph 9.2(1)(b):** The Applicant is a citizen of New Zealand and has spent his formative years there. He would not encounter any substantial language and cultural barriers in re-establishing himself there. This Tribunal has previously found that "*New Zealand is culturally and linguistically similar to Australia*".[56]

125. **Paragraph 9.2(1)(c):** this component deals with any social, medical and/or economic support available to the Applicant in New Zealand. It is conceivable that the Applicant would be able to establish a social life in New Zealand in a relatively short period of time, as he has family there (a brother and a sister). There is nothing preventing the Applicant from securing a managerial role in a legal practice in New Zealand similar to the role he would play in his wife's legal practice on the Gold Coast. If that were not the case, New Zealand

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[55] Exhibit Tr1, G30, p 439.

[56] *Tera Euna v Minister for Immigration and Border Protection* [2016] AATA 301, at [101].

has similar economic support regimes to that in Australia, which the Applicant could avail himself of until such time as his assets in Australia could be sold.

Findings on impediments

126. In relation to treatment for the Applicant's claimed medical conditions, the treatment that the Applicant can avail himself of in New Zealand would not be too dissimilar to what would be on offer to him here in Australia. In fact, there is evidence that his own brother has recently had a similar ailment to him that was treated successfully within the New Zealand system. I am of the view that Other Consideration (b) confers minimal weight in the Applicant's favour with respect to the revocation of the mandatory cancellation of the Applicant's visa.

Other Consideration (c): Impact on victims

127. Neither party has agitated the relevance of this Other Consideration (c). I do not view it as relevant and treat it neutrally.

Other Consideration (d): Impact on Australian business interests

128. The Applicant contends that despite feasibly not being able to practice, he is still able to manage the day-to-day business of his law practice with his wife remaining as the principal solicitor. It is his wife's evidence that the business has suffered greatly since her husband's incarceration and the subsequent loss of his ability to practice, as he was the pivotal figure within that business.

129. I accept that the Applicant's situation has had an impact on an Australian business interest. However, this would have always been the case, given the nature of the actual business being a law firm and the requirement that the principal, or a solicitor working within such a business, would be required to be a fit and proper person. The impact on this business would be equally affected regardless of whether the mandatory cancellation of the Applicant's visa is revoked or otherwise.

130. Notwithstanding this, the crux of the Applicant's and his wife's contentions are that the day-to-day functioning and operations of the firm requires his input and guidance. The Applicant has been providing guidance during his time in gaol and detention and could continue to do so from New Zealand in the same manner.

131. Further, in the Applicant's closing submission, he mentions that his wife cannot mentally continue with the business and that she is overwhelmed by the workload. Indeed, it was the wife's oral evidence that these issues stem from the Applicant's inability to engage in legal practice due to the loss of his Practising Certificate. Clearly, the issues in relation to the business are inherent due to the Applicant's offending and subsequent loss of his practising certificate.

132. The success or otherwise of this Australian business does not stem from whether or not the Applicant is in Australia, but is a natural consequence of his offending, which gave rise to the subsequent loss of his Practising Certificate. Should his wife decide to remain in Australia until a viable plan is put in place for the legal practice, there is nothing preventing the Applicant from assisting her in the short-term remotely from New Zealand. For that matter, the other members of the wife's family who work in the business may have the capacity to assist with the day-to-day running of it. Therefore, I am of the view and so find, that this Other Consideration (d) confers minimal weight in the Applicant's favour with respect to the revocation of the mandatory cancellation of the Applicant's visa.

Findings: Other Considerations

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

(a) Legal consequences of the decision: is of neutral weight;

(b) extent of impediments if removed: is of minimal weight in favour of revocation of the mandatory cancellation of the Applicant's visa;

(c) impact on victims: is of neutral weight; and

(d) impact on Australian business interests: is of minimal weight in favour of revocation of the mandatory cancellation of the Applicant's visa

CONCLUSION

134. Pursuant to s 501CA(4)(b) of the Act, there are two alternate conditions for exercising the power to revoke the mandatory cancellation of the Applicant's visa: either the Applicant must be found to pass the character test; or I must be satisfied that there is another reason, pursuant to the Direction, to revoke the cancellation. As noted above, the Applicant does not pass the character test.

135. In considering whether I am satisfied if there is another reason to revoke the mandatory visa cancellation decision, I have had regard to the considerations referred to in the Direction. I find as follows:

- Primary Consideration 1: weighs heavily against revocation of the mandatory cancellation.
- Primary Consideration 2: weighs neutrally.
- Primary Consideration 3: weighs considerably, but not determinatively, in favour of revocation of the mandatory cancellation.
- Primary Consideration 4: weighs considerably, but not determinatively, in favour of revocation of the mandatory cancellation.
- Primary Consideration 5: weighs heavily against revocation of the mandatory cancellation.

136. I have found that the combined weights I have allocated to Primary Considerations 1 and 5 respectively, are sufficient to outweigh the combined weights I have allocated to Primary Consideration 3 and 4, and Other Consideration (b) and (d).

137. A holistic view of the evidence relevant to the Primary and Other Considerations in the Direction therefore favours affirming the Respondent's decision under review made on 16 January 2024.

DECISION

138. Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal **affirms** the decision made by the delegate of the Respondent dated 16 January 2024 to not revoke the cancellation of the Applicant's visa.

I certify that the preceding 138 *(one hundred and thirty-eight) paragraphs are a true copy of the reasons for the decision herein of Member A. Julian-Armitage.*

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

Associate

Dated: 17 May 2024

Date of Decision:	9 April 2024
Date of Hearing:	25 March 2024
	26 March 2024
Representative for the Applicant:	Dr Jason Donnelly of Counsel
	Instructed by Potts Lawyers
Representative for the Respondent:	Mr Douglas Freeburn of Counsel
	Instructed by Sparke Helmore

ANNEXURE A – EXHIBIT REGISTER

EXHIBIT	DESCRIPTION OF EVIDENCE	PARTY	DATE OF DOCUMENT	DATE RECEIVED
A1.	Applicant Statement of Facts, Issues and Contentions	A	19/02/2024	20/02/2024
A2.	Statement of Applicant		19/02/2024	
A3.	Qld Corrective Services “Preparatory Program Memorandum” document		05/10/2023	
A4.	Supplementary Statement of Applicant		19/03/2024	
A5.	Applicant Reply		19/03/2024	
A6.	Supplementary Statement of Gail Mclean		20/03/2024	
A7.	Applicant Closing		01/04/2024	
R1.	Respondent Statement of Facts, Issues and Contentions	R	06/03/2024	12/03/2024
R2.	Respondent Closing	R	04/04/2024	
Tr1.	Section 37 G-Documents	-	-	30/01/2024
Tr2.	Tender Bundle	-	-	12/03/2024