Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number: **2022/5556**

Re: **Cornelius Lucas**

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Senior Member Theodore Tavoularis**

Date of decision: **20 June 2024**

Date of written reasons: **15 July 2024**

Place: **Brisbane**

Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), this Tribunal **sets aside** the decision made on 1 July 2022 by a delegate of the Respondent and **substitutes** it with a decision to revoke the mandatory cancellation of the Applicant's Class TY Subclass 444 Special Category (Temporary) visa.

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

Senior Member Theodore Tavoularis

Catchwords

MIGRATION – remittal - non-revocation of mandatory cancellation of a visa – failure to pass the character test – whether there is another reason to revoke the mandatory cancellation decision – consideration of Ministerial Direction No. 99 – risk of recidivism found to be low and acceptable – satisfactory levels of rehabilitation achieved by Applicant - where factors against outweighed by factors in favour in favour of revocation - Tribunal finding there is another reason to revoke the mandatory cancellation decision - decision under review set aside and substituted.

Legislation

Administrative Appeals Tribunal Act 1975 (Cth)
Migration Act 1958 (Cth)
Migration Regulations 1994 (Cth)

Cases

Bartlett v The Minister for Immigration and Boarder Protection [2017] AATA 1561
Harrison and Minister for Immigration and Citizenship (2009) 106 ALD 666
Hands v Minister for Immigration and Border Protection [2018] FCAFC 255
Ismail v Minister for Immigration, Citizenship and Multicultural Affairs [2024] HCA 2
Miller and Minister for Immigration, Citizenship and Multicultural Affairs [2024] AATA 175
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton [2023] HCA 17
PNLB v Minister for Immigration and Border Protection [2017] AATA 1561
Tera Euna and Minister for Immigration and Border Protection [2016] AATA 301
Walker v Minister of Home Affairs [2020] FCA 909

Secondary Materials

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

REASONS FOR DECISION

Senior Member Theodore Tavoularis

15 July 2024

INTRODUCTION

1. Mr Cornelius Lucas ('the Applicant') is a 27-year-old man, born in New Zealand on 5 May 1997. He first arrived in Australia in October 1998 as a one-year-old.[1] Since this initial arrival, his movement history in and out of Australia looks like this:

- departs 15 October 1998, returns 21 August 2002: absent from Australia for three years and 10 months;
- departs 4 September 2002, returns 31 January 2003: absent from Australia for five months;
- departs 20 February 2003, returns 2 August 2004: absent from Australia for 17 months;
- departs 16 August 2004, returns 14 August 2005: absent from Australia for five months;
- departs 10 February 2005, returns 2 November 2005: absent from Australia for nine months;
- departs 18 November 2005, returns 24 September 2008: absent from Australia for two years and 10 months;
- departs 19 October 2008, returns 18 January 2009: absent from Australia for three months;
- departs 15 February 2009, returns 14 August 2009: absent from Australia for six months;
- departs 23 December 2014, returns 27 January 2015: absent from Australia for one month;

[1] R1, p 58.

- departs 10 January 2016, returns 19 February 2016: absent from Australia for one month; and
- departs 20 March 2017, returns 30 December 2017: absent from Australia for nine months.

2. Therefore, since his initial arrival on 15 October 1998 the Applicant did, between that date of initial arrival and the date of his most recent arrival (30 December 2017), spend approximately 11 years and four months outside of Australia. So for that approximate 19 year period (i.e. from October 1998 to December 2017), he spent about eight of those years in Australia. From the date of his most recent arrival (30 December 2017) until now is a period of about six and a half years. This gives a total of about 14 and a half years that this Applicant has spent in Australia. He is currently 27 years of age and has therefore spent about 54 percent of her life in this country.

PROCEDURAL HISTORY

3. The Applicant's visa history in this country has transpired thus:
   - **13 August 2021**: he was notified of the mandatory cancellation of his then Class TY Subclass 444 Special Category (Temporary) visa ('the Visa') pursuant to section 501(3A) of the *Migration Act 1958* (Cth) ('the Act');
   - **20 August 2021:** the Applicant made representations seeking revocation of the abovementioned mandatory cancellation decision;
   - **1 July 2022:** a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs ('the Respondent') decided, pursuant to section 501CA(4) of the Act, not to revoke the mandatory cancellation decision. For the purposes of these Reasons, I will refer to this non-revocation decision as the '**Decision Under Review**';
   - **6 July 2022:** the Applicant applied to this Tribunal seeking review of the immediately preceding non-revocation decision made pursuant to section 501CA(4) of the Act;
   - **23 September 2022:** this Tribunal (differently constituted) affirmed the Decision Under Review; and

- **21 December 2023**: the Federal Court of Australia remitted the Tribunal's decision of 23 September 2022 for reconsideration according to law.

4. This proceeding therefore comprises the second ventilation of this application before this Tribunal. The evidence ventilated at the first hearing may be taken into consideration for present purposes. However, this second ventilation is a hearing *de novo* or a hearing anew. The Tribunal's task is, by definition, a stand-alone merits-based review of the totality of the evidence adduced at the first ventilation in this Tribunal and now in this second one.

5. The instant hearing proceeded before me by video[2] on 9 and 16 May 2024 ('the Hearing'). At the commencement of the Hearing the parties agreed that the Tribunal's list of material should be consolidated into an agreed Exhibit List[3] which is attached to these Reasons and marked as '**Annexure A**'. This Hearing received oral evidence from:

   - the Applicant;
   - the clinical psychologist, Dr Emily Kwok;
   - the Applicant's social friend, Ms Tina Fotu;
   - the Applicant's ex-partner, Ms Rhiarrna Opbroek;
   - the Applicant's sister-in-law, Ms Ulalei Tupu;
   - the Applicant's brother-in-law, Mr Ricky Rima Rikiau; and
   - the Applicant's partner, Ms Avon Tepu.

6. Both the previous ventilation of this matter and the instant ventilation before me were conducted during the currency of Ministerial Direction 99.[4] On 7 June 2024 the Respondent signed a new Ministerial Direction 110 which was stated to take effect on and from 21 June 2024. Given this change in Ministerial Direction I caused a short-form decision to be duly published to the parties on 20 June 2024 such as to ensure this Tribunal made a decision

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[2] That is to say, all parties appeared before the Tribunal by video including the respective representatives and the witnesses, both lay and expert, who gave evidence on behalf of the Applicant. The Respondent did not adduce any evidence via a witness.

[3] Transcript, p 6, lines 9-28.

[4] 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*.

pursuant to the prevailing Ministerial Direction that applied during both ventilations of this application before this Tribunal.

7. Attached to these Reasons and marked '**Annexure B'** is a true and correct copy of that short-form decision. Pursuant to the authority of *Khalil v Minister for Home Affairs* (2019) 271 FCR 326,[5] I now publish my detailed written reasons within a reasonable time after publication of my short–form decision.

LEGISLATIVE FRAMEWORK

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

> *4 The Minister may revoke the original decision if:*
>
> *(a) the person makes representations in accordance with the invitation; and*
>
> *(b) the Minister is satisfied:*
>
> *(i) that the person passes the character test (as defined by section 501); or*
>
> *(ii) that there is another reason why the original decision should be revoked.*

9. I am satisfied that the Applicant made the representations required by section 501CA(4)(a) of the Act. I am also satisfied this Tribunal has jurisdiction to review the non-revocation decision pursuant to section 500(1)(ba) of the Act.

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

(a) whether the Applicant passes the character test; and if not

(b) whether there is another reason to revoke the mandatory cancellation of the Applicant's Visa.

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[5] *Khalil v Minister for Home Affairs* (2019) 271 FCR 326 underscores that there is a distinction between the decision of the Tribunal, which discharges the obligation under s 500(6L) of the Act and the Tribunal's written reasons (which can be delivered later): See specifically, paras [41]–[48]. For present purposes, I caused the short-form decision to be published on 20 June 2024 so as to ensure the parties had their matter determined in accordance with the Ministerial Direction that prevailed at the time they ventilated the instant application before me.

Does the Applicant pass the character test?

11. The Applicant does not pass the character test as a matter of law.[6] He was sentenced to a custodial term of imprisonment for three years on 6 May 2021.[7] This head custodial term comfortably meets the respective threshold requirements appearing in section 501(6)(a) of the Act ('*substantial criminal record*') and section 501(7)(c) of the Act (*'sentenced to a term of imprisonment of 12 months or more'*). Accordingly, the Applicant cannot rely on section 501CA(4)(b)(i) of the Act for the mandatory cancellation of his Visa to be revoked.

Is there another reason to revoke the mandatory cancellation of the Applicant's Visa?

12. In considering whether there is another reason to exercise the discretion in section 501CA(4) of the Act, the Tribunal is bound by section 499(2A) of the Act 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* ('Direction' or 'Direction 99') has application.[8]

13. 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 must inform a decision maker's application of the considerations relevant to the decision. The principles that are found in paragraph 5.2 of the Direction are as follows:

> *1 Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*
>
> *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] *Harrison and Minister for Immigration and Citizenship* (2009) 106 ALD 666 at [63].

[7] R1, p 30.

[8] 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.

14. 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.

15. 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.

PRIMARY CONSIDERATION 1: PROTECTION OF THE AUSTRALIAN COMMUNITY

16. 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 as a result of criminal activity or other serious conduct by non-citizens. Decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that this country confers on non-citizens in the expectation that they are, and have been, law abiding, that they will respect important institutions and that they will not cause or threaten harm to individuals or the Australian community.

17. 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.

18. I will consider each in turn.

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

19. 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.*

The Applicant's offending history

20. The first of the Applicant's sentencing episodes occurred on 22 October 2014. That offending saw him convicted on the following respective counts: (1) '*commit public nuisance*'; (2) '*assault or obstruct police officer*'; and (3) '*possession of a knife in a public place or a school*'. The learned Magistrate did not record a conviction for any of the charges, the Applicant was fined the sum of $300 and allowed two months to pay that fine. The

Applicant was aged 17 on 22 October 2014 and thus was a child. On the authority of *Thornton*[9], this Tribunal cannot have regard to these three convictions.

21. Having regard to the *Thornton*-affected convictions, the Applicant's offending history looks like this:

- his offending history (in terms of sentencing dates) runs from May 2020 to October 2021, a period of one year and five months;
- his offending has been dealt with at five separate sentencing episodes;
- he has received a fine in the sum of $500;
- he has received a single sentence of custodial time, that being for a head term of three years, to be suspended for an operational period of three years after serving nine months in actual custody;
- the type of offences he has committed can be broadly stated as:
    - breach of bail condition (x6);
    - property offending: enter premises and commit indictable offence by break (x1); and
    - property offending: robbery with actual violence armed/in company/wounded/used personal violence (x1).

Application of factors appearing at paragraph 8.1.1(1) of the Direction

22. The Applicant has committed an offence of violence for which he was convicted on 6 May 2021. This offending falls within the auspices of the chapeau to paragraph 8.1.1(1)(a) of the Direction and must be viewed as '*very serious*' offending. As best as I understood the offending history, there are no other convictions falling within any of the remaining componentry of paragraph 8.1.1(1)(a). There are no crimes of violence against women or children and the Applicant has not committed acts of family violence.

[9] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* [2023] HCA 17.

23. The chapeau to paragraph 8.1.1(1)(b) of the Direction adopts the '*serious*' descriptor to a non-citizen's offending. None of the categories referred to in paragraph 8.1.1(1)(b) of the Direction engage the Applicant's offending.

24. Paragraph 8.1.1(1)(c) of the Direction requires an examination of the sentences imposed on the Applicant as a guide for the assessment of a non-citizen's offending. None of the Applicant's convictions fall within any of the precluded categories stipulated in of this sub-paragraph: there are no crimes of violence against women or children and there have been no acts of family violence.

25. The sentences that have been imposed on the Applicant have comprised (1) the non-recording of a conviction and the imposition of a 12 month period of probation; (2) the non-recording of a conviction with the Applicant not being further punished for a specific offence; (3) the non-recording of a conviction with the imposition of a fine in the sum of $500; (4) the non-recording of a conviction with the Applicant not being further punished for a specific offence; and (5) the recording of a conviction and the imposition of a head custodial term of three years, to be suspended for an operative period of three years after serving nine months in actual custody.

26. The first four sentencing modalities are relatively unremarkable and do not reliably speak to the nature of the Applicant's offending. The imposition of a custodial term is well-known to be the last resort in the sentencing hierarchy. Terms involving custody are viewed as a reflection of the objective seriousness of the offending involved.[10] There is no question that circumstances of the offending leading to the Applicant's conviction for '*robbery with actual violence armed/in company/wounded/used personal violence*' is very serious offending. This paragraph 8.1.1(1)(c) militates in favour of such a finding.

27. Paragraph 8.1.1(1)(d) of the Direction looks at the frequency of a non-citizen's offending and/or whether there is any trend of increasing seriousness. Six of the eight offences before the Tribunal involved the Applicant breaching his bail. One of the two remaining offences relates to the '*break and enter*' offence. The remaining offence is the abovementioned very serious '*robbery with actual violence*' offending. The Applicant has compiled eight

[10] *PNLB v Minister for Immigration and Border Protection* [2017] AATA 1561 at [43].

convictions in a criminal history that, in sentencing terms, runs for one year and five months. On that metric, this is plainly frequent offending. However, the Applicant committed one of his eight offences (the '*break and enter*' offence) in August 2015 but was only sentenced for that offending in May 2020. If one adopts the metric of the dates when the offending was actually committed, we are talking about the commission of eight offences across a six-year period. This is obviously less frequent offending.

28. Can one detect a trend of increasing seriousness in the offending? The short answer must be '*yes*'. His first three convictions are for breaches of bail. His fourth conviction is for the '*break and enter*' offence. There is clearly an escalation of seriousness in this grouping of four convictions. His fifth and sixth convictions are, again, for respective breaches of bail. His seventh conviction is for his most serious offence, that being the '*robbery with actual violence*' offence that was convicted in May 2021.Once again, there is an obvious escalation of seriousness in this grouping of three convictions. I am therefore satisfied that there is a detectable trend of increasing seriousness to his offending which causes this paragraph 8.1.1(1)(d) to militate in favour of a finding that the totality of his offending should now be found to be, at the very least, '*serious*', more likely '*very serious*'.

29. Paragraph 8.1.1(1)(e) looks for any cumulative effects to be gleaned from the Applicant's pattern of offending. Six breaches of bail across a barely 18-month period is offending that has consumed an undue level of the community's policing and judicial sentencing resources. When a person breaches bail, that breach event triggers the occurrence of a number of other factors: (1) a warrant is usually issued for the arrest for the breaching party; (2) police are deployed to locate that party and to physically present that party to a court so the person can answer to their bail; and (3) a judicial sentencing officer must deal with the breach and sentence the breaching party accordingly.

30. Crossing the boundary of another community member's private property to unlawfully deprive that person of their property is offending that strikes at the heart of the community's right to acquire, use and enjoy the property they have lawfully acquired. Such conduct demonstrates an offender's complete lack of comprehension about the rights that other people have to their property.

31. Violent and brazenly dangerous offending against the person for the purpose of depriving them of their property has the potential for two things. First, and most obviously, such an

attack on a victim can result in significant physical and psychological harm to that victim. But all too often, such personal attacks-especially when a weapon such as a machete is involved – can go very awry. So second, it is not at all a stretch of the evidence to suggest and find that such offending could result in catastrophic harm to a victim. These cumulative effects of the Applicant's repeated offending cause this paragraph 8.1.1(1)(e) to militate in favour of a finding that the totality of the Applicant's offending should now be found to be, at the very least, '*serious*', more likely '*very serious*'.

32. It is common ground between the parties that paragraphs (f), (g) and (h) are not relevant to the instant determination. I agree and will put these paragraphs to one side for present purposes.

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

33. I have applied each of the relevant paragraphs appearing in paragraph 8.1.1(1) of the Direction to the evidence. The relevant paragraphs applicable to the instant facts safely lead me to the conclusion (and finding) that the totality of this Applicant's unlawful conduct in this country can be readily characterised as '*serious*', more likely, '*very serious*'. I so find.

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

34. **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.

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

> *(a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct;*
>
> *(b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:*
>
> *(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

36. The nature of the harm to either individual victims or the Australian community in the event of the Applicant reoffending is broadly analogous to the abovementioned cumulative effects of his offending. Were he to again breach his bail, then the respective resources of the police and the courts would be further expended in dealing with and regulating such a breach(s). Were he to again unlawfully break into and enter a community member's private premises for the purposes of unlawfully depriving that victim of their property, measurable financial loss would accrue to that victim. Were the Applicant to again become involved in the very serious conduct convicted as '*robbery with actual violence armed/in company/wounded/used personal violence*', then in addition to the victim's loss of their property, there is the very real possibility of, at least, physical and psychological harm. This could also result in catastrophic harm.

37. To summarise, I am satisfied that were the Applicant to re-commit his past offending, the nature of the harm it would cumulatively represent to either individual victims and the Australian community more generally would range from (1) undue consumption of the community's law enforcement, judicial sentencing and custodial resources; (2) measurable material and/or economic harm; (3) psychological harm; (4) actual physical harm; and (5) quite conceivably, catastrophic harm.

38. I will also find, pursuant to paragraph 8.1.2(1) of the Direction, that the harm resulting from the Applicant's recommission of offending convicted as (1) '*enter premises and commit indictable offence by break*'; and (2) '*robbery with actual violence armed/in company/wounded/used personal violence*' is so serious that any risk of its recommission would be unacceptable to the Australian community.

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

The Applicant's evidence

39. At the instant Hearing the Applicant spoke of the combined factors of trauma and alcohol abuse being the principal motivators behind his offending. He readily conceded his criminal history committed in this country. He has undertaken significant courses of rehabilitation involving his past disposition towards abusing illicit drugs and alcohol. For example, he completed a 12-week rehabilitative program with Drug Arm which he says assisted him to identify and address predispositive factors behind his offending.

40. He told the Hearing that the mental health counselling he has undertaken to date has shown him the extent to which the domestic violence he witnessed during his childhood has traumatised him and, in turn, made him vulnerable to excessive illicit substance and alcohol consumption. In rehabilitative terms, he has not been idle in prison. There is evidence of him participating in a number of rehabilitative classes and counselling sessions which he says has given him valuable insights into past choices that gave rise to his convictions.

41. His difficulties with alcohol abuse commenced at age 17 and he told the Hearing that he resorted to abusing alcohol as a means of coping with the abovementioned childhood trauma he experienced as a result of domestically violent conduct in his household. He conceded that he drank heavily until 6 May 2021[11] at which time he ceased consuming alcohol. He also conceded that he had failed to address his drinking problem prior to his incarceration on 6 May 2021 and had not engaged with substance abuse rehabilitation up until that time.

42. The Applicant provided details about his rehabilitative journey towards overcoming his alcohol addiction. He spoke of his time in prison as a significant turning point in his life which also gave him time to reflect on the extent to which his past and very poor choices had seriously impacted his capacity to effectively discharge his role as a father and partner. He spoke of rehabilitation showing him the way towards overcoming cravings for, and abuse

[11] That being the date of his sentencing for the *'robbery with actual violence'* offence for a head custodial term of three years.

of, alcohol together with the inevitable withdrawal symptoms that result from such a rehabilitative process.

43. During cross-examination, he made it clear that prison is no alcohol-free or drug-free zone. In prison, he said there was a ready availability of home-brewed alcohol and illicit drugs. Despite this, he spoke of having managed to avoid any return and re-involvement in such substance abuse. His evidence was strongly suggestive of a reality that it is a relatively straightforward matter for someone to resume or maintain a pattern of substance abuse in prison. Indeed, he told the Hearing it was probably easier to escape such challenges outside the prison context.

44. The Applicant told the Hearing that he has also engaged in a number of counselling and support programs in the form of '*Man Up'* and '*Respect for Man*'. His evidence was that participation in these programs has led him to source and connect with support networks and, in turn, has led to his participation in group sessions conducted by *SMART Recovery.*

The evidence of Dr Emily Kwok

45. Dr Kwok is a clinical and forensic psychologist. Her report is dated 22 April 2024 and relevantly appears in the material. She conducted a clinical assessment on the Applicant via video conference on 2 April 2024. She opined that the Applicant has experienced transient episodes of depression and she evaluated him for alcohol use disorder pursuant to applicable DSM-5[12] criteria. Dr Kwok concluded that the Applicant did satisfy the diagnostic criteria for alcohol use disorder during his nine-month period in prison but that he has also successfully abstained from alcohol for about the past four years.

46. She was able to identify remorse in the Applicant's demeanour in his past conduct and was of the opinion that he was able to demonstrate insight into the impact of alcohol on his behaviour and the harmful consequences thereof. Dr Kwok was of the opinion that the extent of the Applicant's self-awareness and understanding of the extent to which his abuse of alcohol has placed him in his present predicament was fundamentally connected to the assessment of his current state of rehabilitation and the further extent to which he could now be found to successfully transition from a custodial environment into the general

[12] Denoting, '*Diagnostic and Statistical Manual of Mental Disorders Fifth Edition*'.

community. With reference to such a transition, Dr Kwok expressed her findings in these terms:

> *'I am satisfied that Mr Lucas has made genuine efforts to address his alcohol-related problems. I acknowledge he has not had opportunities to practice his newly learnt skills in the community. I also note that he has a tendency to minimise, or be unaware of, problems where his functioning might be less than optimal. As such, if Mr Lucas is released from detention, it is recommended that he remains connected with SMART Recovery groups and Odyssey House for further monitoring and support.'*[13]

47. She thought the Applicant currently represents a low risk of committing further criminal offences. She expressed her findings in these terms: '*On the condition that Mr Lucas remains supported by Odyssey House and SMART Recovery groups, and that he lives with his current partner and connects with employment services, he presents as having a low risk of further criminal offences*.'[14]

48. Dr Kwok's report concludes with the following summary of her findings:

> *'Mr Lucas does not currently suffer from a mental disorder or illness….*
>
> *…..*
>
> *Mr Lucas suffered from Alcohol Use Disorder from around age 17 to the time before he went to prison…..*
>
> *….*
>
> *Mr Lucas has made genuine efforts to address his alcohol-related problems….it is recommended that he remains connected with SMART Recovery groups and Odyssey House for further monitoring and support….*
>
> *….*
>
> *Mr Lucas expressed remorse for his offending.*
>
> *Mr Lucas' offences occurred while he was suffering from Alcohol Use Disorder. I do not have evidence to indicate his criminal offending was contributed by any other condition.*
>
> *On the condition that Mr Lucas remains supported by Odyssey House and SMART Recovery groups, and that he lives with his current partner and connects with employment services, he presents as having a low risk of further criminal offences and low risk to the Australian community in terms of his general behaviour.'*[15]

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[13] A3, p 10 [66].

[14] A3, p 11 [73].

[15] A3, p 12 [74].

49. Dr Kwok was cross-examined at the instant Hearing. There appeared to be an initial challenge to the nature and extent of her engagement with the Applicant giving rise to her written findings. In addition to one and half hour video interview with the Applicant, she told the Hearing of having spent an additional six-eight hours in drafting her report. This process involved addressing the requirements of the Personality Inventory assessment which requires her to address some 300 questions about a number of the Applicant's psychological domains.

50. Dr Kwok was of the view that even though the Applicant does not presently meet the criteria for diagnosis of a mental disorder, the childhood trauma he experienced via exposure to domestic violence in his household renders him prone to symptoms of depression and distress. She told the Hearing that he resorted to alcohol to quell those depressive and melancholic thoughts and feelings but that he has since demonstrated a capacity to overcome any predisposition towards alcohol at such times in his life.

51. Dr Kwok emphasised in her oral evidence that the Applicant has maintained a connection to Odyssey House and the trajectory of his rehabilitative journey thus far does not give rise to any emergent need for individual counselling. She considers that he can be adequately supported by recovery groups in the community which could provide him with ongoing support.

52. To my mind, Dr Kwok importantly noted that while the Personality Inventory testing methodology she performed on him resulted in a quite positive and favourable psychiatric assessment, it is notable that he nevertheless remains motivated to stay connected to Odyssey House and other rehabilitative supports. She thought this voluntariness in the Applicant's approach to the rehabilitative process bodes well for his prospects of maintaining a pattern of rehabilitation in the community.

53. During her oral evidence she confirmed and endorsed her written opinion that this Applicant now represents a low recidivist risk. She did not think her final expert opinion on recidivist risk should be impacted or at all impugned because she did not conduct any standardised risk assessment test during her remotely conducted consultation with the Applicant. She says this is so because in reaching her opinion on risk, she took into account a significant amount of clinical and other supportive material.

Findings about recidivist risk

54. I have had regard to the Applicant's own evidence and the evidence sought to be adduced on his behalf. I now summarise my findings about recidivist risk:

- the Applicant has been exposed to significant childhood trauma as a result of the domestic violence in his household that he was compelled to witness;
- this trauma, in turn, compelled depressive and melancholic thoughts in his psychopathological demeanour;
- these depressive and melancholic thoughts destabilised and disoriented him such that he resorted to a serious abuse of alcohol;
- this substance abuse predisposition further disoriented and destabilised him such that he became a willing participant in some very serious offending;
- the extent to which his substance abuse issues contributed to his incapacity to resist the spontaneous coercion of others was not lost on the learned sentencing Judge[16] who sentenced him for the *'robbery with actual violence'* offence. The learned sentencing Judge noted that: '*Mr Feely*[17] *submitted it was spontaneous offending, that the uncle was the lead offender. I accept that. Quite clearly, he led you astray and was a shocking example to you, and, of course, he was the one armed with the machete and used it.*';[18]
- Dr Kwok's evidence is both credible and incapable of being impugned. While she may predicate her finding of low recidivist risk on the Applicant maintaining a pattern of contact and support from community rehabilitation groups such as Odyssey House and SMART Recovery, she thought there were strong prospects of the Applicant doing so in circumstances where the Personality Inventory testing tended to present the Applicant in a favourable light with no emergent requirement for further rehabilitative intervention.

[16] His Honour Judge Chowdhury DCJ.
[17] The Applicant's legal representative at the sentencing hearing on 6 May 2021.
[18] R1, p 34, lines 11-14.

Assessment of recidivist risk

55. I am comfortably satisfied that Dr Kwok's recidivist risk assessment of *low* can be accepted both in terms of (1) the methodology she adopted in reaching that assessment; and (2) the specific aspects of the Applicant's demeanour which she identified as rendering him as a person favourably disposed to maintaining a pattern of involvement with rehabilitative services in the community. I will therefore find that this Applicant now represents a *low* recidivist risk of committing further criminal offences.

Sub-paragraph 8.1.2(2)(c)

56. The Direction also contains a reference to sub-paragraph 8.1.2(2)(c). With reference to this specific sub-paragraph, this matter does not involve a '*refusal to grant a visa to a non-citizen*'. It involves an application for the '*revocation*' of a decision refusing to revoke the earlier mandatory cancellation of the Applicant's Visa. This specific paragraph is not relevant to the determination of this application.

Conclusion for Primary Consideration 1:

57. With reference to the weight attributable to this Primary Consideration 1:

    (a) I have found the nature and seriousness of the Applicant's conduct to date has been of an at least '*serious'* nature, more likely '*very serious*';

    (b) I have had regard to the totality of the Applicant's offending history. I am satisfied that in the event of its recommission, the nature of the harm it would cumulatively represent to either natural person or the Australian community more generally would range from (1) undue consumption of the community's law enforcement, judicial sentencing and custodial resources; (2) measurable material and/or economic harm; (3) psychological harm; (4) actual physical harm; and (5) quite conceivably, catastrophic harm;

    (c) I have also found, pursuant to paragraph 8.1.2(1) of the Direction that the harm resulting from the Applicant's recommission of offending convicted as (1) '*enter premises and commit indictable offence by break*'; and (2) '*robbery with actual violence armed/in company/wounded/used personal violence*' is so serious that any risk of its recommission would be unacceptable to the Australian community; and

(d) I have found that this Applicant now represents a *low* recidivist risk of committing further criminal offences.

58. My analysis of the material leads me to a finding that this Primary Consideration 1 is of a *'strong, but not determinative',* level of weight towards this Tribunal affirming the Decision Under Review.

PRIMARY CONSIDERATION 2: FAMILY VIOLENCE

59. The parties are of one mind that this Primary Consideration 2 is not relevant to the instant determination.[19] I agree and will allocate a neutral weight to this Primary Consideration 2.

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

60. Paragraph 8.3(1) of the Direction states:

> *(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.*

61. The subsequent sub-paragraphs 8.3(2) and 8.3(3) of the Direction provide guidance to a decision-maker in how to determine the weight allocable to a person's ties to his child/ren and social links wherein the child/ren and the social links of the person are Australian citizens or permanent Australian residents and/or who have a right to remain in Australia indefinitely.

62. In the assessment of any other ties a person may have in Australia, paragraph 8.3(4) of the Direction requires a decision-maker to 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*

[19] See A1, p 11 [67]; R2, p 6 [31].

(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 non-citizen began offending soon after arriving in Australia.

63. The Applicant's supplementary material[20] prepared for the purposes of the instant Hearing very helpfully contains a 12-page summary[21] of his links to the Australian community. I will use and rely on this document for the purposes of identifying people in Australia with whim the Applicant may have ties with particular reference to the respective classes of those people expressed in paragraphs 8.3(1),(2) and (3). As mentioned, the ,material contains a detailed 12-page summary which carries the title '*Link to Australian Community (Parents, Siblings, Uncles, Aunts, Grand Parents, Adult Children, Friends)*'. For ease of reference I will refer to this list as '*Master List*'.

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

64. It is first necessary to identity the Applicant's following immediate family members in Australia who are citizens, permanent residents or people who have a right to remain in Australia indefinitely. Based on what appears in the Master List I am able to identify the following people as immediate family members in Australia:

- **Ms Avon Tepu – the Applicant's current partner**: the Applicant has known Ms Avon Tepu for 17 months and describes her as his current partner and '*my world*'. He says '*Avon is the most amazing mother/life, ever since meeting her my life has changed dramatically…*'. The Applicant's evidence about Ms Avon Tepu is corroborated by the written and oral evidence she provided to the instant Hearing;
- **Ms TE KMLL – the Applicant's minor-aged sister:** he has known his younger sister her whole life and he says '*I've watched her grow into a clever young lady. Our bond is like no other.'* He says this younger sister is '*the best aunt to my daughter*'. This sister did not provide any written or oral evidence to the instant proceeding**;** and

[20] A2.

[21] A2, pp 24-35.

- **Ms Te Aroha Lucas – the Applicant's adult sister:** the Applicant says he helped to raise this sister and that '*I was a father figure for my sister's growing up….in Australia…*' This sister did not provide any oral or written evidence to the instant proceeding.

65. I am satisfied that the Applicant's ties to his abovementioned immediate family members in Australia are both palpable and strong. There is a convincing historical element behind such a finding because it seems clear that he has been a constant presence in the lives of his two sisters thus far. With particular reference to Ms Avon Tepu, there is little or nothing to cavil with a finding that the relationship is genuine and has every prospect of developing further in the event of the Applicant's return to the Australian community.

66. I have had regard to the state of the evidence around this sub-paragraph 8.3(1) with regard to the Applicant's ties with these immediate family members in Australia. I am satisfied that these people I have identified referrable to this sub-paragraph 8.3(1) would be adversely impacted in the event of the Applicant's removal to New Zealand. This finding is subject to the caveat that for their interests to be taken into account, each of these three people must be Australian citizens, Australian permanent residents or persons who have a right to remain in Australia indefinitely. I will make the assumption that each of these three people fall into at least one of the qualifying categories contained in paragraph 8.3(1) of the Direction. I am of the view that the Applicant's ties with these three people are strong and that those ties militate in favour of the allocation of a heavy level of weight in favour of the Applicant pursuant to this Primary Consideration 3.

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

67. I interpret this component of Primary Consideration 3 to require me to determine whether more weight should be allocated to the Applicant's ties to Australia in circumstances where he may have biological and/or stepchildren who are Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely. I will make the following presumptions: (1) the term '*child/ren*' in this particular paragraph includes both biological and stepchildren and that (2) it does not include nieces, nephews and other children with whom the Applicant may have ties in Australia.

68. As best as I understood the material, there are three children falling within the auspices of this paragraph 8.3(2). They are the two minor children of Ms Avon Tepu. Their names are Child N (aged 12 years) and Child A (aged three years). The third child is the Applicant's biological child from his previous relationship with Ms Rhiarnna Opbroek, Child AH (aged five years).

69. For present purposes I will presume and find that these three children are Australian citizens, Australian permanent residents and/or that they have a right to remain in Australia indefinitely. Further, I am satisfied that pursuant to the High Court authority of *Ismail*[22] it is not '*repetitious weighing*' or '*double counting*' to take the interests of these three minor children into account for the purposes of this paragraph 8.3(2) and later, for the purposes of paragraph 8.4 of the Direction. For the present purposes of this paragraph 8.3(2) I am of the view that the Applicant's ties with these three minor children are strong and that those ties militate in favour of the allocation of a heavy level of weight in favour of the Applicant pursuant to this Primary Consideration 3.

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

70. This paragraph looks at the strength, nature and duration of the extent of any ties the Applicant may have with (1) other family members; or (2) social contacts/links in Australia. The limiting proviso on this inquiry is that these two categories of people with whom the Applicant may have ties must be Australian citizens, Australian permanent residents and/or people who have a right to remain here indefinitely. Based on what appears in the Master List I am able to identify the following people as immediate family members in Australia:

- **Mr Richard Hohepa, the Applicant's uncle**: the Applicant says he has a '*very close and loving relationship with my uncle Richard*'. He previously worked for this uncle in furniture delivery. The Applicant maintains regular contact with this uncle via video calls whom he describes as '*…like a father figure to me growing up*' who would be '*heavily impacted*' by the Applicant's removal to New Zealand. While Mr Hohepa did not give oral evidence at the instant Hearing, the transcript of the previous Tribunal ventilation is available and his oral evidence to that hearing he corroborates what the Applicant has to say;

[22] *Ismail v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 2.

- **Ms Rangimahana Lucas, the Applicant's aunty**: the Applicant has known this aunt for '*my whole life she raised me as her own.*' He says she is '*a mother figure to me…we have a loving relationship.*' The Applicant says '*She will be really sad if I am deported from Australia.*' While this aunt did not give oral evidence at the instant Hearing, the transcript of the previous Tribunal ventilation is available and her oral evidence to that hearing corroborates what the Applicant has to say;
- **Mr Wesley Buhse, the Applicant's family friend**: the Applicant talks about having '*a close relationship with Wesley as we have worked along side of each other for 3 years delivering furniture….*' The Applicant says their respective daughters '*…are very close basically cousins.*' He says that '*I consider Wesley a really good brother of mine that I love dearly.*';
- **Ms Deena Ingham, the Applicant's family friend**: she is the partner of Mr Wesley Buhse. The Applicant considers Deena '*a sister*'. He adds that '*Our daughters are around the same age. They look after each other and they absolutely love one another.*' Ms Ingham did not give oral evidence at the instant Hearing but the transcript of the previous Tribunal ventilation is available. Her oral evidence to that hearing corroborates what the Applicant now says;
- **Ms Rebekah Banner-man Nolan, the Applicant's family friend:** the Applicant refers to her in these terms: '*I have known Rebekah for quite some time now, I'm really good brothers with her father*'. He adds that her father and the family have always been there for me in time of need. Ms Banner-man Nolan did not give oral evidence at the previous hearing or at the instant Hearing. The material does not contain evidence of any written statement from her;
- **Mr Wayne Carlson, the Applicant's friend/Boss:** the Applicant says '*I have a really good friendship with Wayne we have known each other for 4+ years as we use to work together delivering furniture for Super Amart. Outside of work we are really good mates that consider each other brothers, our families also have done outings together, I have spent nights at his house with his family.*' Mr Carlson did not give oral evidence at either the previous hearing of the instant one. His written statement in the material[23] corroborates what the Applicant now says;

[23] A2, p 23.

- **Ms Melissa Price, the Applicant's aunt:** the Applicant says he has a good relationship with Ms Price and that '*…she had been a part of our family for many years, she dated my aunt for 10+ years.*' He describes her as having '*…played an important roll [sic] in my life being there for me mentally and emotionally someone i could consult whenever I needed.*' He thinks Ms Price '*will be highly impacted with the rest of my family if I was to be deported.*' Ms Price did not give oral evidence at the previous hearing or the instant one. The material does not contain any written statement from her;

- **Ms Jessica Pakatyilla, the Applicant's family friend:** the Applicant says he has known Ms Pakatyilla for many years and that he has a virtual family-type relationship with her. The Applicant is Godfather to Ms Pakatyilla's daughter even though he is yet to meet the child. Ms Pakatyilla did not give oral evidence at the previous hearing or the instant one. The material does not contain any written statement from her;

- **Ms Tiarn Nutley, the Applicant's family friend**: the Applicant says he has known Ms Nutley for many years and that their respective families '*have been to a lot of outings, events etc.*' He adds that '*I have left my daughter in their care for the night many times, i consider her a sister to me and a [sic] aunt to my beautiful kids*'. Ms Nutley did not give oral evidence at the previous hearing or the instant one. The material does not contain any written statement from her;

- **Mr Barry Benussi, the Applicant's family friend**: Mr Benussi has recently married the abovementioned Ms Nutley. He described Mr Benussi as '*…a great person let alone Husband and father, i wouldn't want my sister to [sic] with anyone else he's a great guy,….*'. Mr Benussi did not give oral evidence at the previous hearing or the instant one. The material does not contain any written statement from her;

- **Ms Ulalei Tupu, the Applicant's sister-in-law**: the Applicant has known this sister-in-law '*…for nearly 2 years now…*' He says '*I have a close relationship with her, husband and 3 kids. We keep in contact nearly everyday via Video calls with her family and my family.*' Ms Ulalei Tupu provided oral evidence to the instant

Hearing together with a written statement.[24] Her evidence corroborates what the Applicant now has to say;

- **Mr Ricky Rima Rikiau, the Applicant's brother-in-law:** the Applicant notes that he and Mr Rikiau '*are close in laws i have known Ricky for quite some time now….We keep in contact via video calls or social media….Ricky and his family have been to my house many times to spend Christmas and other events.*' He regards Mr Rikiau as '*great father & husband someone I will surround myself with'.* Mr Rikiau provided both oral and written evidence[25] to the instant Hearing. His evidence now corroborates what the Applicant has to say;

- **Mr Pare Hilton Ayton Eli, the Applicant's adult nephew:** the Applicant claims to have known this adult nephew for as long as he has known this nephew's parents. He keeps in contact with this adult nephew via video calls and has an intention to be a positive role model in the life of this adult nephew. The adult nephew did not give oral evidence at either the previous or instant Tribunal hearing. The material does not contain any written statement from him;

- **Ms Rhiarnna Opbroek[26], the Applicant's ex-partner**: the relationship between the Applicant and Ms Opbroek ended at the beginning of 2023. In her oral evidence to the instant Hearing she spoke about the biological daughter she shares with the Applicant, namely Child AH. She confirmed that she and the Applicant maintain contact via telephone calls as often as possible. Even though their relationship has ended, Ms Opbroek supports the bond between the Applicant and Child AH. In cross-examination she said that she did not recall the Applicant as a heavy drinker and that he only occasionally drank with friends and was not habitually intoxicated. She confirmed that she communicates with the Applicant as often as her schedule allows, particularly when Child AH asks to speak with the Applicant. She told the instant Hearing that she and the Applicant have had a healthy discussion about custody and access arrangements, reaching an agreement that Child AH will be primarily parented by her and spend every second weekend with the Applicant assuming he is returned to the community. She told the instant Hearing that she has no concerns with leaving Child AH with the

[24] A2, p 5.
[25] A2, pp 15-16.
[26] Note to reader: Ms Opbroek does not appear in the Applicant's Master List.

Applicant. In response to questions from me, she confirmed that even though their personal relationship is at end, she nevertheless regards the Applicant as a social friend due to their shared responsibility for their biological child, Child AH; and

- **Ms Tina Fotu[27], Applicant's friend**: the friendship between Ms Fotu and the Applicant derives from her employment at the Brisbane Immigration Detention Centre where she led cultural classes and Bible studies at the time he was detained at the facility. She gave oral evidence to the instant Hearing and her evidence seemed focussed on the impact of him taking up the Christian faith. She was not cross-examined but in response to certain questions from me, she thought the Applicant had wasted his talents in the past but that he now had an interest in religion and art.

71. I have had regard to the state of the evidence around this sub-paragraph 8.3(3) with regard to the Applicant's ties with the abovementioned list of other family and/or social contacts in Australia. For present purposes, I will content myself with finding that all of the people I have identified referrable to this sub-paragraph 8.3(3) would be adversely impacted in the event of the Applicant's removal to New Zealand. This finding is subject to the caveat that for their interests to be taken into account, each of these people must be Australian citizens, Australian permanent residents or persons who have a right to remain in Australia indefinitely. I will make the assumption that each of these people fall into at least one of the qualifying categories contained in paragraph 8.3(3) of the Direction.

72. I am of the view that the Applicant's ties with these people are palpable and strong and that those ties militate in favour of the allocation of a heavy level of weight in favour of the Applicant pursuant to this Primary Consideration 3. I add this note: I am mindful that some of the above listed other family and/or social contacts are mentioned only by the Applicant and that there is no corroborating evidence from some of those people. If there had been a higher level of consistency between the people identified by the Applicant and those people giving actual evidence to the instant or previous hearing, I would have allocated very heavy weight to this sub-paragraph 8.3(3) in favour of the Applicant.

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[27] Note to reader: Ms Fotu does not appear in the Applicant's Master List.

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

73. 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:

(i) whether the Applicant has been ordinarily resident here during his formative years?[28] The Applicant first came here as a one-year-old in 1998. Since arriving, he has spent considerable time outside of Australia. Be that as it may, he has nevertheless spent 54 percent of his life in this country. I am satisfied that the Applicant has been ordinarily resident in Australia during his formative years. This component of paragraph 8.3(4) of the Direction does assist the Applicant because he did spend his formative years here;

(ii) whether the Applicant has positively contributed to the Australian community during his time here?[29] The Applicant has worked in the furniture removal industry during his time here. He has also obtained work experience and skills in the areas of turf-laying, scaffolding, brick laying and cleaning. In terms of a community contribution the Applicant said in his oral evidence that '*…on Saturday, I spend a lot of time volunteering for the Rugby club as well.*'[30] The Applicant has therefore made some measure of contribution to the Australian community through his employment and (to an extent) his community contributions via his volunteering work at the Rugby Club. This means that this component of paragraph 8.3(4) of the Direction affords a strong level of weight towards a finding about the strength of his ties to Australia;

(iii) can the weight 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?[31] With reference to the first

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[28] Paragraph 8.3(4)(a)(i) of the Direction.
[29] Paragraph 8.3(4)(a)(ii) of the Direction.
[30] Transcript, p 9, lines 14-15.
[31] Paragraph 8.3(4)(a)(iii) of the Direction.

question, I have already found that he has spent his formative years here. With reference to the second question, the Applicant's movement history confirms he initially arrived here in 1998 as a one-year-old and has spent 54 percent of his life here. His first conviction in Australia[32] occurred in May 2020. A period of over 20 years post-arrival is not '*soon after arriving in Australia.*' The weight allocable to the strength of the Applicant's ties to Australia cannot be impugned pursuant to this specific sub-paragraph 8.3(4)(a)(iii) of the Direction due to him (1) having spent his formative years here and (2) the fact that he did not begin offending soon after arriving here.

74. Accordingly, I am of the view (and I find) that based on my analysis of the evidence around subparagraphs 8.3(4)(a)(i)-(iii) of the Direction, a heavy level of weight is allocable to this paragraph 8.3(4) in favour of the Applicant.

Conclusion: Primary Consideration 3

75. I have referred to the four relevant components of this Primary Consideration 3. I am of the view, after having analysed the evidence relevant to each of those four components to which it applies, that the totality of that evidence points to a *heavy* level of weight being allocable to this Primary Consideration 3 in favour of a finding that this Tribunal should restore the Applicant's Visa status to remain here.

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

76. This Primary Consideration requires a decision-maker to consider what impact a decision to refuse or not revoke cancellation of a visa will have on children who are and will continue to be under the age of 18 years of age at the time of the decision.[33] The Direction further requires that the best interests of each child must be considered individually if there are more than one minor child/ren identified.

[32] That is, the first conviction I can take into account for determining the instant application.
[33] Paragraphs 8.4(1) and 8.4(2) of the Direction.

77. In assessing the best interests of each child/ren, a decision-maker is required to take into account:[34]

> *(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.*

Identification of relevant minor child/ren

78. Again very helpfully, the Applicant has provided a list of relevant children[35] falling within the definitional auspices of paragraph 8.4(2) of the Direction. I will divide the children into two broad groups. The first group will comprise his biological child (Child AH, aged three years) plus his two stepchildren (Child N, aged 12 years and Child A, aged three years). The second group will comprise some 13 children who the Applicant describes as a '*niece*' or '*nephew*' or someone he has known for '*his/her whole life*'. It would be logistically absurd to apply the factors appearing paragraph 8.4(4) of the Direction to each

[34] Paragraph 8.4(4) of the Direction.
[35] A2, pp 36-44.

and every one of the 16 children across both groups. I will review the evidence around each group and then apply the paragraph 8.4(4) factors to each of the two groups.

First group of children (Child AH, Child N and Child A)

79. The biological mother of the child (Child AH) shared with the Applicant, Ms Rhiarnna Opbroek gave evidence at the instant Hearing. She spoke of Child AH experiencing difficulties with anxiety particularly after the physical removal of the Applicant from her life. Ms Opbroek told the Hearing that Child AH frequently expresses that she misses the Applicant and that she thinks Child AH has a deep emotional bond with him. The Applicant maintains a level of frequency of contact with Child AH, most usually by telephone. She told the Hearing that she and the Applicant had openly discussed parenting arrangements for Chid AH. Their intention was that Ms Opbroek would have primary care/custody of Child AH but that she would spend every second weekend with the Applicant.

80. The Applicant refers to Child AH in the abovementioned list of minor children in these terms:

> *'[Child AH] is my first born daughter. if i were to be deported my daughter would be majorly impacted as her life is here in Australia, she schools here everything she needs is here so therefore if i was to be deported i wont be able to see my daughter as i will not allow anyone to interrupt her schooling and her life here in Australia.'*[36]

81. In her evidence to the instant Hearing Ms Avon Tepu spoke of the strong bond her two children (Child N and Child A) have developed with the Applicant. She is of the view that the children regard him as a father figure. She told the instant Hearing that the Applicant is in regular communication with them. Child N has certain developmental issues and Ms Avon Tepu spoke of the Applicant's supportive and guiding role in the lives of both of the children.

82. The Applicant refers to Child A in the abovementioned list of minor children in these terms:

> *'[Child A] is my Step daughter whom I love very much, She has played a very important role in my life which also depends on me to be there for her. I also play a very important role in her life as a father figure we have created a strong bond. i plan on being there for every milestone she achieves in her life, she along with the rest of my kids depend on me to be there for them to be that positive role model, father*

[36] A2, p 36.

to be there for them. If i was to be deported it would affect my daughter dramatically as our bond is very strong.'[37]

83. He also refers to Child N in the abovementioned list of minor children in these terms:

> *'[Child N] is My stepson that also looks forward to me coming home, we have also created a strong bond between each other. My absence has taken a big toll on my partner and all 3 of my kids. My partner and kids all depend on my return, my kids are the ones that help me fight to be a better person for them. i can I I honestly say that the rehabilitation I have undergone has helped me grow as a person, father and husband.'*[38]

Application of factors at paragraph 8.4(4) of the Direction to the first group of children

84. **Sub-paragraph (a):** there seems little or nothing to cavil with the proposition and finding that there is a parental nature and a certain durability in the relationship between the Applicant and these three children. Granted, there has been a period of absence of the Applicant from the lives of these children but that is not to suggest that the contact he has had with them has been anything other than meaningful and significant in their lives. I am of the view that this sub-paragraph (a) strongly militates in favour of a finding that it is in the best interests of these three children for the Applicant's Visa status to remain in Australia being restored to him.

85. **Sub-paragraph (b):** one need look no further than the respective evidence of Ms Opbroek and Ms Avon Tepu to be satisfied of the very strong likelihood that the Applicant will play a positive parental role in the respective futures of these three children. There is something like 34 cumulative parenting years until each of these three children attain the age of 18 years. There is plenty of time for the Applicant to establish, maintain and grow a positive parental role in the lives of these three children. I am of the view that this sub-paragraph (b) strongly militates in favour of a finding that it is in the best interests of these three children for the Applicant's Visa status to remain in Australia being restored to him.

86. **Sub-paragraph (c):** there is no evidence before the Tribunal that any of the Applicant's past criminal offending has, or that any future such offending would, impact any of these

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[37] A2, p 36.
[38] A2, p 37.

three children. This sub-paragraph can be put to one side and rendered neutral for present purposes.

87. **Sub-paragraph (d):** it seems clear that despite his physical removal to either prison or immigration detention, the Applicant has maintained a consistent pattern of non-in-person contact with these three children. The harsh reality is that were he removed to New Zealand, that type of contact would still be able to be maintained. But it seems to me patently unfair to allow this sub-paragraph to militate against an applicant. Simply because an applicant has made the effort of keeping in contact with relevant children while incarcerated and/or detained should not, in my respectful view, be deployed against that Applicant by suggesting that telephone or video contact is possible from New Zealand. I will put this sub-paragraph to one side and render it neutral for present purposes.

88. **Sub-paragraph (e):** Child AH is primarily parented and, even if the Applicant returns to the community, will remain primarily parented by Ms Opbroek. However, the pleasing reality is that the Applicant and Ms Opbroek have commendably reached an agreement about contact time for the Applicant in the event he returns to the community. The position is clearer in relation to his two step-children because the evidence makes it abundantly clear that he will live with Ms Avon Tepu and share parental duties for those two step-children with her. This sub-paragraph does not weigh against the Applicant.

89. **Sub-paragraph (f):** we know from Ms Opbroek that Child AH is pining for the physical return of the Applicant. There is no reason to doubt Ms Opbroek's evidence in this regard. The two step-children are likewise openly receptive to the Applicant coming to reside with them and for him to otherwise perform a parental role in a physically-present way. Child N has written a supportive letter[39] the terms of which are as follows:

> *'To Cornelius Lucas.*
>
> *Thank you for everything you have done, [unreadable text] and cant wait for you to come this year 2024. I cant wait for you to watch My games and support Me and my sister. Cant wait for you to come and take care of My mum and support her. You are a loving and caring person to my family, you have made My mum happy agin, and my sister, and I appreciate that. Cant wait to play video games with you When you come back. Thank you for always checking up on us, and spending time with me and my sister. xoxo*

[39] A2, p 47.

From: [Child N]'[40]

[Errors in original]

90. The material also contains a series of photographs of the Applicant communicating with these children and those photographs can only be viewed in one way-that is, that the Applicant is close to these children. I am of the view that this sub-paragraph (f) strongly militates in favour of a finding that in the best interests of these three children for the Applicant's Visa status to remain in Australia being restored to him.

91. **Sub-paragraphs (g) and (h):** the evidence is silent about any of the elements appearing in both of these sub-paragraphs both of which should be put to one side and rendered neutral for present purposes.

Findings about the first group of three children

92. Having regard to the evidence referrable to the applicable componentry of paragraph 8.4(4) of the Direction, I arrive at a finding that a heavy level of weight should be allocated to the best interests of these minor children in Australia who would be affected by the Applicant's permanent removal to New Zealand.

Second group of children – 13 nieces and/or nephews and/or someone the Applicant has known for his/her whole life

93. As mentioned, there are some 13 children comprising this second group. The evidence around them is verging on the self-serving and convenient. This can be seen in the nature of the Applicant's respective descriptions about the extent to which he now claims a connection to these 13 children. For example, his connection to them is expressed in the following broad terms:

- '*[name of child redacted]…is my partner's brother's daughter who is my niece, i have spoken to her many times via video call*';
- '*[name of child redacted] is my partner's brother's daughter which i also have a relationship with, we also speak via video call….';*

[40] A2, p 47.

- *'[name of child redacted]…is my Nephew i've been around his whole life before I was incarcerated. I have played a role in his life as his uncle….*';
- *'[name of child redacted] …i have known my niece…her whole life watching her grow into a bright young lady….';*
- *'[name of child redacted]….is the youngest sibling to my nephew and niece i've also spent a lot of time with my niece as they also come to my house nearly everyday after school to spend time with their cousin my daughter';*
- *'[name of child redacted]….is my sister in law's son whom i speak to via video call i always check up on my nephews to see how they are doing';*
- *'[name of child redacted] is also the son of my in-laws whom i also speak to via video call and direct phone calls';*
- *'[name of child redacted]…is my nephew my partner's best friend of 20 years he is the eldest son of 3. I make regular contact with my nephews and niece offering support whenever it is needed';*
- *'[name of child redacted] is the youngest sibling of [name of parents redacted], my niece dearly care about as much as my kids';*
- *'[name of child redacted] i have a close bond with [this particular child] as he reminds me of myself as a kid strong headed always trying to be there for his mother….';*
- *'[name of child redacted] is my niece whom i always keep in contact with….';* and
- *'[name of child redacted] …i have known [this particular child] as long as i have known her parents and sister whom I also keep in regular contact with…'*

Application of factors at paragraph 8.4(4) of the Direction to the second group of children

94. **Sub-paragraph (a):** it may be the case that there is some type of relationship or familiarity between the Applicant and these children but it cannot be found to be a parental relationship. This is not to suggest that there has been no existing relationship between the Applicant and these children. But I am cautious about his evidence relating to the claimed extent of his non-in-person contact with these children. In addition, the evidence around the nature of his relationship with them appeared to carry a consistently

self-serving tone. At best, this sub-paragraph moderately militates in favour of a finding that the best interests of these 13 children are served by the Applicant receiving a Visa to remain here.

95. **Sub-paragraph (b):** it is not likely that the Applicant will play any type of parental role in the future lives of these children. The evidence points to him playing a positive role but that such role would be limited to that of the '*loving uncle*' as opposed to a more regimented parental role. In cumulative terms, there are plenty of parenting years left to run until all of these children attain the age of 18 years. So he has plenty of time to become even better known as their loving uncle (or other equivalent). This sub-paragraph moderately militates in favour of a finding that the best interests of these 13 children are served by the Applicant receiving a Visa to remain here.

96. **Sub-paragraph (c):** there is no evidence before the Tribunal that any of the Applicant's past criminal offending has, or that any future such offending would, impact any of these 13 children. This sub-paragraph can be put to one side and rendered neutral for present purposes.

97. **Sub-paragraph (d):** taking his evidence at face value, the Applicant has made the effort to maintain a consistent pattern of non-in-person contact with these 13 children. Again, the harsh reality is that were he removed to New Zealand, that type of contact would be able to be maintained. As I found with the other three children, it seems to me patently unfair to allow this sub-paragraph to militate against an applicant. Simply because an applicant has made the effort of keeping in contact with relevant children while incarcerated and/or detained should not, in my respectful view, be deployed against that applicant by suggesting that telephone or video contact is possible from New Zealand. I will put this sub-paragraph to one side and render it neutral for present purposes.

98. **Sub-paragraph (e):** there is little or nothing to cavil with the proposition (and finding) that these 13 children are parented by other people. I will put this sub-paragraph to one side and render it neutral for present purposes.

99. **Sub-paragraph (f):** we do not have any views of from any of these 13 children about how they would feel in the event of the Applicant's removal to New Zealand. I will put this

sub-paragraph to one side and render it neutral for present purposes. In any event, a significant percentage of these 13 children are too young to provide any such views.

100. **Sub-paragraphs (g) and (h):** the evidence is silent about any of the elements appearing in both of these sub-paragraphs both of which should be put to one side and rendered neutral for present purposes.

Findings about the second group of 13 children

101. Having regard to the evidence referrable to the applicable componentry of paragraph 8.4(4) of the Direction, I arrive at a finding that a moderate level of weight should be allocated to the best interests of these 13 minor children in Australia who would be affected by the Applicant's permanent removal to New Zealand.

Conclusion: Primary Consideration 4

102. When I conjoin the heavy weight allocable to the best interests of the first group of three children with the moderate weight allocable to the second group of 13 children, I safely arrive at a finding that a cumulative *heavy* level of weight is allocable to this Primary Consideration 4 in favour of the Applicant.

PRIMARY CONSIDERATION 5: EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

103. 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.[41] 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.'*[42]

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

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

[42] 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.

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

105. This Applicant has breached the Australian community's expectations by his record of criminal offending in this country which is evidenced by a eight breaches of the Australian criminal law. Therefore, the Australian community, *'as a norm'* expects the Australian Government not to allow him to remain in Australia.

106. 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:[43]

(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.

107. None of the Applicant's eight offences fall within the auspices of the abovementioned sub-paragraphs 8.5(2)(a)-(f). Even though none of the Applicant's offending falls within the

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

auspices of sub-paragraphs 8.5(2)(a)-(f), there remains a deemed expectation that the Australian community expects the Australian government can and should refuse to set aside the mandatory cancellation of his Visa.

108. 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;[44]

(c) Australia will generally afford a higher level of tolerance towards 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;[45]

(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;[46]

(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;[47] 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

[44] Paragraph 5.2(4) of the Direction.
[45] Paragraph 5.2(5) of the Direction.
[46] Paragraph 5.2(5) of the Direction.
[47] Paragraph 5.2(6) of the Direction.

non-citizen does not pose a measurable risk of causing physical harm to the Australian community.[48]

109. In relation to sub-paragraph (a) of the immediately preceding paragraph [108], the term '*limited stay visa*' is not defined in the Act. The Applicant in this case held a Class TY Subclass 444 Special Category (Temporary) visa until it was mandatorily cancelled on 13 August 2021. This Visa permits a citizen of New Zealand to remain in Australia indefinitely.[49] As the Visa permitted the Applicant to remain in Australia without any limit on the duration of his stay, the Visa held by the Applicant cannot be classified as a limited stay visa.[50] Therefore, this sub-paragraph (a) is not applicable to the Applicant.

110. In relation to sub-paragraph (b) of the abovementioned paragraph [108], the Applicant has spent about 54 percent of his life in Australia since arriving here as a one-year-old in 1998. He is currently aged 27 years. He has a work history in Australia. He has fathered one biological child in Australia and is involved in the care of two step-children in Australia. Whatever participation in, and contribution to, the Australian community he may have made during his time here cannot be safely found to have been '*short'*. Therefore, the Australian community's tolerance is not lowered by this part of the principles in 5.2(4) of the Direction.

111. In relation to sub-paragraph(c) of the abovementioned paragraph [108], I repeat that the Applicant has, since his arrival in 1998, spent about 54 per cent of his life in Australia and that he has spent his formative years here. He is currently 27 years of age. This means the Australian community has a higher than usual tolerance of criminal or other serious conduct by this Applicant.

112. In relation to sub-paragraph (d) of the abovementioned paragraph [108] I am of the view that the length of time the Applicant has spent here (i.e. 14 and a half years since his arrival in 1998) facilitates a raising of the community's level of tolerance for his offending. This finding can be augmented due to him having spent his formative years in this country.

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[48] Paragraph 5.2(6) of the Direction.
[49] Regulation 444.511 of the *Migration Regulations 1994* (Cth).
[50] *Walker v Minister of Home Affairs* [2020] FCA 909 at [29].

113. In relation to sub-paragraph (e) of the abovementioned paragraph [108], I am not of the view that the balancing exercise between (on the one hand) the harm that would be caused by the Applicant re-committing his criminal offending of the same type and magnitude already committed and (on the other hand), whatever countervailing considerations may work in his favour, is necessarily a principle referable to the community's expectations for present purposes. This is because I am of the view that the sheer scope and extent of his offending and its resulting harm thus far has been of such a serious magnitude as to dispel any applicable countervailing considerations.

114. In relation to sub-paragraph (f) of the abovementioned paragraph [108], I have found that none of the Applicant's eight offences fall within the categories stipulated at sub-paragraphs 8.5(2)(a)-(f) of the Direction. Given that finding, there may be found to be some strong countervailing considerations in his favour that may assist the Applicant. I am therefore not of the view that the nature of his offending effectively precludes any countervailing considerations working in his favour.

115. Having regard to the above discussion around sub-paragraphs (a)–(f) (inclusive) referenced in paragraph [108] of these Reasons, I am of the view that the Australian community's expectations *are slightly* modified such that the community does have a higher than usual tolerance of criminal conduct by the Applicant. Even though none of the Applicant's offending falls within the auspices of sub-paragraphs 8.5(2)(a)-(f), there remains a deemed expectation that the Australian community expects the Australian government can and should refuse to set aside the mandatory cancellation of his Visa. I so find.

Conclusion: Primary Consideration 5

116. Primary Consideration 5 confers *a strong* level of weight in favour of this Tribunal affirming the Decision Under Review.

OTHER CONSIDERATIONS

Other Considerations (a): Legal consequences of the decision; (c): Impact on victims and (d): Impact on Australian business interests

117. I acknowledge the Applicant's contentions about the potential for two legal consequences arising from an adverse outcome for the Applicant in the instant matter. They being (1) irreversible exclusion from re-entering Australia; and (2) the possibility of the Applicant

remaining in immigration detention until removal to New Zealand which would result in his liberty being '*constrained*'.

118. Neither of these contentions facilitate the activation of the terms of paragraph 9.1 of the Direction. If the instant outcome is adverse to the Applicant, the law is plain and clear. The Applicant will be liable to removal from Australia as soon as reasonably practical. This may involve a period of ongoing lawful detention pursuant to section 189 of the Act. With particular reference to the contention about '*irreversible exclusion*' from entering Australia, section 501E of the Act would prohibit the Applicant from making an application for another visa. Thus, the contention about irreversible exclusion is rendered vacuous by the operative effect of section 501E of the Act.

119. Given (1) the non-engagement of the provisions of paragraph 9.1 of the Direction and (2) the operative effect of section 501E of the Act, it would be unsafe to allocate any weight to the two contended legal consequences of an adverse decision for the Applicant in the instant application. Neutral weight can only be allocated to this Other Consideration (a).

120. Both parties agree[51] that Other Considerations (c) and (d) are not relevant to the instant determination. I will put both of them to one side and render them neutral for present purposes.

Other Consideration (b): Extent of impediments if removed

Factors to be taken into account

121. 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.*

[51] A1, p 21 [128]; R2, p 9 [49].

122. **Paragraph 9.2(1)(a)**: the Applicant is 27-years of age and of an age bracket where it can safely be found that he is in the prime of his life. Dr Kwok made it clear that he '*Does not currently suffer from a mental disorder or illness.*'[52] I will accept the submission in the Applicant's SFIC to this effect: '*The applicant suffers from asthma. The applicant does not suffer from many material adverse physical or mental health issues.*'[53] I am satisfied that the Applicant's age and state of mental and physical health are not impediments to his return and resettlement in New Zealand.

123. **Paragraph 9.2(1)(b):** the evidence is not suggestive of any substantial language or cultural barriers impeding the Applicant's re-settlement in New Zealand. The Applicant has made multiple return trips to New Zealand since initially arriving here as a one year old in 1998. He has had ample opportunities to maintain a constant pattern of familiarity with New Zealand's cultural norms. This Tribunal (differently constituted) has previously noted: '*New Zealand is culturally and linguistically similar to Australia. There are no significant linguistic or cultural barriers facing the applicant if he returns to New Zealand*.'[54] This is my view (and finding) as well. There are no substantial language or cultural barriers impeding the Applicant's return and re-settlement in New Zealand.

124. **Paragraph 9.2(1)(c):** this sub-paragraph looks for any social, medical and/or economic support available to the Applicant in New Zealand. First, with reference to the medical support, the Applicant is in a good state of physical and mental health. He has no emergent healthcare requirements given his age and physical constitution. Were he to require medical support in New Zealand, he would have access to the same level of public healthcare as would be available to other citizens of that country. The question of medical support in New Zealand is not an impediment to his return and re-settlement there.

125. Second, in terms of economic support available to the Applicant in New Zealand, the Applicant has an established pattern of remunerative employment in Australia and there is little or nothing to suggest he would not be able to find employment in similar fields of work in New Zealand. Should he require government-type benefits during an interim phase of re-settling in New Zealand, he will have available to him the same level of such benefits as

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[52] A3, p 9 [66].
[53] A1, p 20 [121].
[54] *Tera Euna and Minister for Immigration and Border Protection* [2016] AATA 301, [101].

would be available to other qualifying citizens of that country. The question of economic support in New Zealand is not an impediment to his return and re-settlement there.

126. Third, I will look at whether a lack of social support in New Zealand now presents as an impediment to his return and re-settlement there. This is what he says in his written statement from earlier this year:[55]

> *'7. As I stand at this crossroad, the prospect of relocating to New Zealand looms over me not as a return to familiarity but as an exile into uncertainty. My life, in its entirety - the bonds I've nurtured, the community I've integrated into, and the family I've built - is rooted deeply in the soils of Australia. The concept of "home" has become synonymous with this land, where each relationship represents a chapter of my journey towards redemption and growth.*
>
> *8. In stark contrast, New Zealand, though the land of my birth, now feels like a distant reality. The connections that once tied me to that place have frayed over time, leaving behind a void where family and friends once stood. This absence of a support system is not merely a matter of emotional consequence but a foundational crack that threatens the stability of any attempts to rebuild my life there. Facing the world without the essential scaffolding of loved ones is a prospect that fills me with deep apprehension.'*

127. During his evidence-in-chief in the instant Hearing, he spoke of his parents still living in New Zealand as well as other family living in that country:

> *'DR DONNELLY: All right. Okay, so is it fair to say that your main concerns about going back to New Zealand are – you accept that you have your parents there, you have family back there, but your main concern is, really, I think as you said, being separated from your family in Australia, particularly your children?*
>
> *APPLICANT: Correct.*
>
> *DR DONNELLY: What I think you describe as – and I'm just trying to paraphrase so I make sure I understand your evidence – what you describe as traumatic experiences of growing up in New Zealand, particularly your father, seeing the domestic violence and so forth?*
>
> *APPLICANT: Correct. Yes.*
>
> *DR DONNELLY: Where do you parents live in New Zealand?*
>
> *APPLICANT: In Whakatāne in the Bay of Plenty.*
>
> *DR DONNELLY: I see, sir. All right. The other family that you mentioned, sort of, the mum's sister, your auntie, and cousins, are they in that?*
>
> *APPLICANT: Pretty much there. Yes, pretty much all my - - -*
>
> *DR DONNELLY: In the Bay of Plenty?*
>
> *APPLICANT: Yes, correct.*

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[55] A2, p 2 [7]-[8].

DR DONNELLY: All right?

APPLICANT: Pretty much all my family back there are all – the mains one are pretty much all in Bay of Plenty.

DR DONNELLY: And is that the North or the South Island?

APPLICANT: North.'[56]

128. I am not attracted to the proposition of the Applicant lacking social support upon a return to New Zealand and that this now somehow presents as an impediment to his return and re-settlement there. He has family connections in New Zealand who are known to him and who are likely to offer him at least some measure of support in terms of accommodation and general guidance in the process of him re-establishing himself in that country. The question of social support in New Zealand is not an impediment to his return and re-settlement there.

129. In the SFIC[57] filed on his behalf two additional '*impediments*' are propounded. I am not limited to considering specific impediments by the language of paragraph 9.2(1) of the Direction. The two additional impediments are first that in the event of removal to New Zealand the Applicant may experience uncertain prospects of obtaining employment as a result of his status as a criminal deportee as a result of the criminal history he compiled in Australia. This Tribunal, (differently constituted), made such a finding in *Miller*[58] which involved the removal of an English citizen: '*…it is most unlikely that he would have difficulty maintaining basic living standards in the UK although I do accept that, given his long criminal record, work may be difficult to come by.'*

130. The second additional impediment is propounded on the basis that the Applicant may suffer lifelong emotional hardship as a result of being permanently separated from his family and friends in Australia. This contention urges the Tribunal to have regard to the human consequences of a decision as the instant one which was discussed by the learned Full Court in *Hands*:[59]

> *'By way of preliminary comment, it can be said that cases under s 501 and the question of the consequences of a failure to pass the character test not infrequently raise important questions about the exercise of Executive power. Among the*

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[56] Transcript, p 26, 5-28.

[57] Denoting, '*Statement of Facts, Issues and Contentions*'.

[58] *Miller and Minister for Immigration, Citizenship and Multicultural Affairs* [2024] AATA 175 at [136].

[59] *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 255 at [3].

reasons for this importance are the human consequences removal from Australia can bring about.'

131. I am of the view that these two additional contended impediments do carry a degree of traction. A person does carry their criminal history for the rest of their life. This reality can manifest adversely for that person when that history needs to be disclosed to, for example, a prospective employer. It is plain that the Applicant's circle of family, friends and other ties exists in Australia. He will doubtless experience emotional hardship due to the depravation of him as a physical presence in the lives of his partner, his biological child and the two stepchildren which have now come into his parental orbit. Physical removal from his broader circle of beloved family and friends only augments the prospect of such emotional hardship. I am of the view that these two additionally contended *impediments* do constitute respective difficulties for the Applicant if removed to New Zealand as a result of an adverse outcome in this application. Those two additional contended impediments militate in favour of allocation of a *moderate* level of weight to this Other Consideration (b) in the Applicant's favour.

Findings about impediments

132. My findings about impediments are as follows:

- the Applicant's age and state of physical health are not impediments to his return and resettlement in New Zealand;
- there are no substantial language or cultural barriers impeding the Applicant's return and resettlement in New Zealand;
- the Applicant is not likely to experience an impediment in the form of social isolation and loneliness if returned to New Zealand. Therefore, the lack of social support available to him in that country is not an impediment to his return and resettlement there;
- I accept the traction generated by the two additionally contended impediments:
    - the Applicant may very well experience stigma and difficulty as a result of his status as a criminal deportee as a result of his criminal history in this country; and

- there is a palpable human consequence attributable to the emotional hardship he would very likely experience in New Zealand if forcibly and permanently separated from his circle of family and friends in Australia.

133. Given my findings about each of the three sub-paragraphs to this paragraph 9.2 of the Direction plus the two additionally contended impediments, I am of the view that this Other Consideration (b) confers, a *moderate* level of weight in favour of this Tribunal exercising the power to revoke the mandatory cancellation of the Applicant's Visa.

Findings: Other Considerations

134. The allocation of weight to 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 ***moderate weight*** in favour of revocation;

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

(d) impact on Australian business interests: is of ***neutral weight*.**

CONCLUSION

135. Under section 501CA(4)(b) of the Act, there are two alternate conditions precedent to the exercise of the power to revoke the mandatory cancellation of the Applicant's Visa: either the Applicant must be found to pass the character test; and if not, I must be satisfied there is another reason, pursuant to the Direction, to revoke the cancellation decision. As noted (and found) previously in these Reasons, the Applicant does not pass the character test.

136. In considering whether there is another reason to exercise the power afforded by section 501CA(4)(b)(ii) of the Act to revoke the mandatory cancellation of the Applicant's Visa, I have had regard to the considerations referred to in the Direction. I find as follows:

- Primary Consideration 1: carries a ***strong, but not determinative***, level of weight in favour of affirming the Decision Under Review;
- Primary Consideration 2: is of ***neutral weight***;

- Primary Consideration 3: is of a ***heavy weight*** in favour of setting aside the Decision Under Review;
- Primary Consideration 4: is of ***heavy weight*** in favour of setting aside the Decision Under Review;
- Primary Consideration 5: carries a ***strong weight*** in favour of affirming the Decision Under Review.

137. I have outlined the weight attributable to each of the Other Considerations. I am of the view (and I find) that the combined respective weights I have allocated to Primary Considerations 3 and 4 plus Other Consideration (b) outweigh the combined respective weights I have allocated to Primary Considerations 1 and 5.

138. A holistic application of the considerations in the Direction therefore militates in favour of this Tribunal finding there is another reason to revoke the mandatory cancellation of the Applicant's Visa.

DECISION

139. Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), this Tribunal **sets aside** the decision made on 1 July 2022 by a delegate of the Respondent and **substitutes** it with a decision to revoke the mandatory cancellation of the Applicant's Class TY Subclass 444 Special Category (Temporary) visa.

I certify that the preceding 139 (one hundred and thirty-nine) paragraphs are a true copy of the reasons for the decision herein of Senior Member Theodore Tavoularis

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

Associate

Dated: 15 July 2024

Dates of hearing:	**9 and 16 May 2024**
Counsel for the Applicant:	**Dr Jason Donnelly (Latham Chambers)**
Solicitor for the Applicant	**Mr Ziya Zarifi (Principal Solicitor)**
	Zarifi Lawyers
Solicitor for the Respondent:	**Ms Gabrielle Gutmann (Associate)**
	Minter Ellison Lawyers

ANNEXURE A

EXHIBIT	DESCRIPTION OF EVIDENCE	DATE OF DOCUMENT	DATE RECEIVED
RESPONDENT SUBMISSIONS			
R1	Remittal Bundle	Various	12 February 2024
R2	Respondent's Statement of Facts, Issues and Contentions	1 May 2024	1 May 2024
APPLICANT SUBMISSIONS			
A1	Applicant's Statement of Facts, Issues and Contentions	27 March 2024	27 March 2024
A2	Applicant's Bundle	Various	27 March 2024
A3	Report by Dr Kwok	22 April 2024	3 May 2024
A4	Evidence of rehabilitation	Various	3 May 2024
A5	Statement from Ms Avon Tepu	18 February 2024	16 May 2024

ANNEXURE B

Administrative Appeals Tribunal

ADMINISTRATIVE APPEALS TRIBUNAL	**)**	
	)	No: **2022/5556**
GENERAL DIVISION	**)**	

Re: **Cornelius Lucas**

Applicant

And: **Minister for Immigration, Citizenship and Multicultural Affairs**

Respondent

DECISION

TRIBUNAL: Senior Member Theodore Tavoularis

DATE: 20 June 2024

PLACE: Brisbane

DECISION: Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), this Tribunal **sets aside** the decision made on 1 July 2022 by a delegate of the Respondent and **substitutes** it with a decision to revoke the mandatory cancellation of the Applicant's Class TY Subclass 444 Special Category (Temporary) visa.

The Tribunal will give written reasons for this decision within a reasonable time of the decision.

…….....[SGD].....

Senior Member Theodore Tavoularis