Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number: **2023/5668**

Re: **MJVS**

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Senior Member Theodore Tavoularis**

Date: **20 October 2023**

Date of written reasons: **15 November 2023**

Place: **Brisbane**

Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal **sets aside** decision dated 28 July 2023 made by the Respondent's delegate and **substitutes** it with a decision to revoke the mandatory cancellation of the Applicant's Class BB Subclass 155 Five Year Resident Return visa.

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

Senior Member Theodore Tavoularis

Catchwords

MIGRATION- Non-revocation of mandatory cancellation of a Class BB Subclass 155 Five Year Resident Return visa-where the Applicant does not pass the character test- whether there is another reason to revoke the mandatory cancellation decision- consideration of Ministerial Direction 99- where Applicant has an addiction to watching online pornography- where criminal offending involved possession of child abuse material – where the Court of Appeal reduced the head 12 month sentence to nine months on appeal- where Applicant's risk of reoffending found to be low- where Applicant has demonstrated strong evidence of rehabilitation- where the Applicant has no other criminal conviction in Australia or overseas- Tribunal finding that 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

Ali v Minister for Home Affairs (2020) 278 FCR 627
Khalil v Minister for Home Affairs (2019) 271 FCR 326
Plaintiff M174/2016 v Minister for Immigration and Border Protection (2018) 24 ALR 307
PNLB and Minister for Immigration and Border Protection (Migration) [2018] AATA 162
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 November 2023

INTRODUCTION

1. MJVS ('the Applicant') is a 23-year-old male national of China, born on 7 April 2000. His movement history indicates he first arrived here in February 2002. Since then he has travelled to and from Australia on 10 occasions. His movement history indicates the following dates of departure and arrival:[1]

Date of Arrival in Australia	Date of Departure from Australia	Time Spent in Australia
6 February 2002	20 February 2002	14 Days
24 August 2004	19 September 2004	1 month
4 August 2006	27 August 2006	3 weeks
15 May 2008	30 May 2008	2 weeks
4 October 2008	10 April 2009	6 months
5 May 2009	4 October 2009	5 months
26 October 2009	22 June 2010	8 months
5 August 2010	16 April 2012	22 months
6 May 2014	17 January 2015	8 months

[1] R1, p 423-425.

Date of Arrival in Australia	Date of Departure from Australia	Time Spent in Australia
6 February 2015	30 June 2015	5 months
24 July 2015	4 December 2018	3 years and 5 months
16 February 2019	Has not departed	4 years and 8 months
	Total time spent in Australia:	14 years and 6 months (approx.)

2. Following the time of his most recent arrival, he remained in Australia as the holder of a Class BB Subclass 155 Five Year Resident Return ('**Visa**'). His Visa was mandatorily cancelled by a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs ('the Respondent' or 'the Minister') on 10 June 2022 pursuant to s 501(3A) of the *Migration Act 1958* (Cth) ('**Act**'). The mandatory cancellation derived from the Applicant's failure to pass the character test.[2]

3. The Applicant's failure to pass the character test occurred pursuant to the operation of s 501(7)(c) of the Act because he had a '*substantial criminal record'* due to him receiving a term of imprisonment of 12 months or more. Specifically, on 13 May 2022 at the Waverley Local Court, the Applicant was convicted of '*Possess Child Abuse Material - T1* for which he initially received a head custodial term of 12 months with a non-parole period of four months. The Applicant successfully appealed his sentence. On 9 August 2022, the Downing Centre District Court varied both the head sentence and the non-parole period such that the head term became nine months, and the non-parole period became three months.[3]

4. On 29 June 2022, the Applicant made representations to the Respondent's Department for revocation of the decision to mandatorily cancel his Visa.[4] On 28 July 2023 a delegate of

[2] R1, pp 432-438.
[3] Ibid, p 28.
[4] Ibid, pp 57-79.

the Respondent refused to revoke the mandatory cancellation decision ('**Decision Under Review**'). The Applicant was notified of this decision by email on the same day.[5]

5. On 3 August 2023, the Applicant applied to this Tribunal for review of the delegate's decision to not revoke the mandatory cancellation of his Visa. The hearing of this application proceeded before me on 3 and 4 October 2023. Both parties were legally represented.

6. The Applicant appeared by video on both days of the hearing. The Tribunal received both oral and written evidence. In terms of oral evidence (all of which was received by video) the witnesses comprised:

- The Applicant;
- Ms TS (the Applicant's mother);
- Mr BPL (the Applicant's stepfather);
- Ms YL (the Applicant's partner); and
- Ms WW (the Applicant's friend).

7. In terms of written evidence, I did, at the commencement of the hearing, confirm with both parties that the draft exhibit list circulated to them before the hearing comprised a true and correct list of the written material before the Tribunal.[6] A true and correct copy of that list is attached to these Reasons and marked '**Annexure A'**.

ISSUES

8. The issues before this Tribunal are:

- whether the Applicant passes the character test; and if not,
- is there another reason why the mandatory cancellation of his Visa should be revoked by this Tribunal?

[5] R1, p 7-26.
[6] Transcript, day 1, p 2, lines 34-45.

Does the Applicant pass the character test?

9. Section 501(6)(a) of the Act states that a person does not pass the character test if they have a substantial criminal record. Pursuant to s 501(7)(c) of the Act, a person has a substantial criminal record if they have been sentenced to a term of imprisonment of 12 months or more.

10. On 13 May 2022, the Applicant was sentenced to a term of imprisonment of 12 months consequent upon a conviction on a charge of *'Possess child abuse material – T1'.* Therefore, by the cumulative operation of ss 501(6)(a), 501(7)(c) and 501(6)(e)[7]_ of the Act, I find that the Applicant does not pass the character test. Consequently, he cannot rely on s 501CA(4)(b)(i) of the Act for the mandatory cancellation of his Visa to be revoked.

Is there another reason why the mandatory cancellation of the Applicant's Visa should be revoked?

11. For the purposes of determining whether there is another reason to revoke the mandatory cancellation of the Applicant's Visa, the Tribunal is required to consider the framework provided by Ministerial Direction 99 ('**Direction'**) [8]

12. Paragraph 5.2 of the Direction provides the following relevant principles which decision makers must take into account in the process of deciding whether or not to revoke the mandatory cancellation of a person's visa:

> *'(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.*

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[7] The Respondent's delegate correctly observed at paragraph 8 of their Reasons that '*8. [The Applicant] has been advised that although the reduction of his term of imprisonment means he no longer has a 'substantial criminal record' and does not fail the character test under s501(6)(a) with reference to s501(7)(c), he continues to fail the character test under s501(6)(e) on the basis that he was convicted of a 'sexually based offence involving a child'.*

[8] Pursuant to s 499 of the Act. Ministerial Direction No 99- Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA.

*(3) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measureable **[sic]** risk of causing physical harm to the Australian community.*

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

(5) With respect to decisions to refuse, cancel, and revoke 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 measureable **[sic]** risk of causing physical harm to the Australian community.'*

13. Paragraph 6 of the Direction requires a decision-maker to be informed by the above principles and to also take into account the considerations identified in paragraphs 8 and 9 of the Direction.

14. In taking the relevant considerations into account, paragraph 7 of the Direction states:

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

15. The primary considerations that need to be considered are stated in paragraph 8 of the Direction. These are:

- protection of the Australian community from criminal or other serious conduct;
- whether the conduct engaged in constituted family violence;

- the strength, nature and duration of ties to Australia;
- the best interests of minor children in Australia; and
- expectations of the Australian community.

16. The other considerations that need to be considered are stated in paragraph 9 of the Direction. They include but are not limited to:

- legal consequences of the decision;
- extent of impediments if removed;
- impact on victims; and
- impact on Australian business interests.

PRIMARY CONSIDERATION 1: PROTECTION OF THE AUSTRALIAN COMMUNITY FROM CRIMINAL OR OTHER SERIOUS CONDUCT

17. Paragraph 8.1 of the Direction states:

> *(1) When considering protection of the Australian community, decision-makers should keep in mind that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. In this respect, decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.*
>
> *(2) Decision-makers should also give consideration to:*
>
> *a) the nature and seriousness of the non-citizen's conduct to date; and*
>
> *b) the risk to the Australian community, should the non-citizen commit further offences or engage in other serious conduct.*

Summary of the Applicant's offending

18. For all intents and purposes, the Applicant only has one entry in his criminal history. The totality of that history can be summarised thus:

Date	Court	Offence/conviction	Sentence/outcome
May 2022	NSW Local Court	Possess child abuse material-T1	Imprisonment: 12 months, non-parole period (with conditions) 4 months
August 2022	NSW District Court (on appeal)	Possess child abuse material-T1	Imprisonment: 9 moths, non-parole period (with conditions) 3 months.

19. To the best of my understanding of the material, the Applicant does not have any traffic offending history in Australia, and he has no convictions for offending outside of Australia.

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

20. 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.

Paragraphs 8.1.1 considerations

21. **Sub-paragraph 8.1.1(1)(a)**: the chapeau to this sub-paragraph stipulates three specific categories of unlawful conduct that is viewed *very seriously* by the Australian Government and the Australian Community. The Applicant's conviction does not fall within the realm of any of those three categories. Prima facie, one could conclude that the Applicant's unlawful conduct should thus escape an attribution of *very serious.* I will have more to say about this later in the ultimate finding I make about the nature and seriousness of the Applicant's unlawful conduct. In short, his conduct will not be escaping an attribution of being *very serious*.

22. **Sub-paragraph 8.1.1(1)(b)**: the Applicant has not engaged in conduct causing another person to enter into a forced marriage[9] nor can it be safely found that he has committed crimes against vulnerable members of the community or against government officials in the

[9] Sub-paragraph 8.1.1(1)(b)(i) of the Direction.

performance of their duties.[10] The conduct for which he has been convicted does not form the basis for a finding that he does not pass an aspect of the character test that is dependent on my opinion.[11] The Applicant has not committed a crime while in immigration detention, nor is there anything to suggest any escape from immigration detention.[12] This sub-paragraph should be put to one side and rendered neutral for present purposes.

23. **Sub-paragraph 8.1.1(1)(c)**: in applying this particular sub-paragraph, I am precluded from taking into account sentences imposed on this Applicant for:

    (a) any violent offending he may have committed against women or children;[13]

    (b) acts of family violence;[14] and

    (c) any sentence he received relating to conduct whereby he caused a person to enter into (or to become a party to) a forced marriage.[15]

24. None of the Applicant's unlawful conduct falls within any of the three abovementioned categories. But the initial sentenced he received (head term 12 months, non-parole period four months) can be safely found to reflect the nature and seriousness of his conduct. The Applicant is a very young man, yet at his first appearance before lawful authority for sentencing, the learned Magistrate imposed a custodial term. The imposition of a custodial term is the last resort in the hierarchy of sentencing options available to a court. The imposition of custodial time is a sure indicator of the objective seriousness of the offending being punished.[16]

25. The only tempering element working for the Applicant is that less than three months after he was first sentenced in the NSW Local Court, the NSW District Court varied both the head term from 12 to nine months and the non-parole period from four to three months. But this should not diminish the reality (and finding) that as a first time offender and as a quite young

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[10] Sub-paragraph 8.1.1(1)(b)(ii) of the Direction.

[11] Sub-paragraph 8.1.1(b)(iii) of the Direction.

[12] Sub-paragraph 8.1.1(b)(iv) of the Direction.

[13] Paragraph 8.1.1(1)(a)(ii) of the Direction.

[14] Paragraph 8.1.1(1)(a)(iii) of the Direction.

[15] Paragraph 8.1.1(1)(b)(i) of the Direction.

[16] *PNLB and Minister for Immigration and Border Protection* [2018] AATA 162 at [22]; followed in *Lafaele and Minister for Immigration, Citizenship and Multicultural Affairs* [2023] AATA 2827.

offender, both the first instance court and the appeal court saw fit to impose respective custodial terms. It follows that this sub-paragraph 8.1.1(1)(c) strongly militates in favour of a finding that the Applicant's offending has been *very serious.*

26. **Sub-paragraph 8.1.1(1)(d):** the Applicant only has one entry arising from his conviction on one charge of *Possess child abuse material-T1*. There is no prior or subsequent offending against which to base any finding about his offending being either frequent of escalating in seriousness. This sub-paragraph 8.1.1(1)(d) should be put to one side and rendered neutral for present purposes.

27. **Sub-paragraph 8.1.1(1)(e)**: there is a singularity in the Applicant's offending history such that one cannot determine or ascertain any cumulative effect(s) of his '*repeated offending'* as required by this sub-paragraph which I will put to one side and render neutral for present purposes.

28. **Sub-paragraphs 8.1.1(1)(f), (g) and (h):** there is nothing before me to suggest the Applicant has provided false or misleading information to the Respondent's Department.[17] Likewise, he has not re-offended since receipt of any formal warning about the consequences of further offending on his visa status to remain here.[18] As mentioned earlier, the material has nothing to say about the Applicant's commission of any offence of perpetration of unlawful conduct in another country.[19] Each of these sub-paragraphs should be put to one side and rendered neutral for present purposes.

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

29. As I mentioned earlier, the Applicant will not escape the attribution of *very serious* to his unlawful conduct in this country. It is one thing (and legal) for someone to have certain sexual preferences or proclivities and to engage in that type of behaviour with another consenting adult or to purchase and view material depicting that modality of sexual conduct between consenting adults. It is something else entirely for someone to allow their sexual preferences and proclivities to transgress into the realm of relishing and deriving pleasure

[17] Sub-paragraph 8.1.1(1)(f) of the Direction.
[18] Sub-paragraph 8.1.1(1)(g) of the Direction.
[19] Sub-paragraph 8.1.1(1)(h) of the Direction.

from the infliction of violent harm and humiliation upon non-consenting adult victims and/or minor children victims.

30. The material contains a quite helpful '*facts sheet'* which details that nature and extent of the Applicant's offending. In short compass, on 7 October 2021, police received information that the Applicant was in possession of child abuse material. On 20 October 2021, the police were granted a search warrant which authorised them '*… to search for any devices capable of downloading, uploading and the storage [of] child abuse material.*[20] On 21 October 2021, the police executed the subject search warrant. The police facts sheet discloses that:

> *'During this examination approximately 50 image files and 50 video files were viewed which depicted category 1 child abuse material, a portion of these files viewed depicted adults performing sexual acts upon infants, as well as pre-pubescent teens and infants involved in acts of torture with a sexual connotation'.*[21]

31. This police facts sheet goes on to mention that: '*On Wednesday 29 December 2021, the review and categorisation of the accused's desktop computer was finalised, a total of 15,441 files depicting category 1 child abuse material and 1,130 category 2 child abuse material were located'.*[22] It is important to understand the type of material falling within each of these two categories to understand the nature and extent of the Applicant's offending. The police facts sheet provides helpful guidance about the type of child exploitation material falling within either of these two categories:

> *'**Category one and two child abuse material is described by the Interpol base method. Category one material** is described as depicting a real prepubescent child and the child is involved in a sex act, witnessing a sex act or the material is focused/concentrated on the anal or genital region of the child.*
>
> ***Category two child abuse material** is described as any other child abuse material that is illegal within New South Wales but does not fit within category one. Such material includes a person who appears to be or is implied to be a child and is depicted or described in a way that reasonable persons would regard in all the circumstances offensive who: is a victim of torture, cruelty or physical abuse, or is engaged in or apparently engaged in a sexual pose or sexual activity (alone or in the presence of others), or is in the presence of another person who is engaged in or apparently engaged in a sexual pose or sexual activity, or is exposing the genital area or anal area whether bare or covered by underwear or the breasts of a female person or transgender or intersex person identifying as female, whether or not the breasts are sexually developed.*[23]

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[20] R1, p 394.

[21] Ibid.

[22] Ibid, p 396.

[23] Ibid.

[My emphasis]

32. In terms of the nature of child exploitation material the police seized from the Applicant upon execution of the subject warrant, the facts sheet says the following:

> *'Approximately 90 percent of images and videos located depict children ranging in age from newborn to approximately 10 years old. The material located is at the most extreme end of child abuse material. Hundreds of the videos and images show boys and girls being tied up, with adult males and females performing anal and vaginal intercourse on the children as well as oral sex by and on the children. Some of the aforementioned acts are performed between the children with adult females watching while adult males ejaculate on the children.*
>
> *There were many more heinous indescribable sexual acts, some involving torture, genital mutilation, bestiality and instructional videos for grooming children. Of particular note, multiple copies of the video "[Child D]'s destruction" were located, this video is known by law enforcement worldwide as the most notorious child abuse video ever produced. Police are of the belief there are hundreds, if not thousands of children who have been the victim of horrific sexual abuse to produce the material located on the accused's device."*[24]

33. While the Applicant's possession of this material did not involve him committing actual crimes of a violent nature against children,[25] he was involved in conduct relating to the purchase of material which most certainly resulted in him in viewing horrific crimes being committed against minor children victims. While his possession of this material may not, for present purposes, be found to be a crime committed against vulnerable members of our community,[26] I reject any suggestion that the Applicant was not otherwise involved in the derivation of gratification from viewing these truly monstrous and absolutely awful acts of obscenity against truly innocent and defenceless child victims.

34. I will find that mere possession of this material is at least *serious,* more likely *very serious* conduct. I will delve into the whys and wherefores of how and/or why the Applicant came to be in possession of this material when I assess his level of recidivist risk. But for this component of Primary Consideration 1, I have no doubt that the Applicant's deliberate acquisition of this material for the purpose of satiating his unrestrained sexual preferences and proclivities does constitute *very serious* conduct.

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[24] R1, pp 396-397.

[25] Pursuant to sub-paragraph 8.1.1(1)(a)(i) of the Direction.

[26] Pursuant to sub-paragraph 8.1.1(1)(b)(ii) of the Direction.

35. I therefore find that the nature and seriousness of the Applicant's unlawful conduct has been of a *very serious* nature. Indeed, the Applicant himself said the following of his offending:

> *'I think it is a very serious offence and – the crime that I committed, and I was charged with, and went to prison for is extremely serious and should not be taken lightly… Obviously, the charge itself is already very, very serious, and very major… overall, it is a very serios offense and serious charge'.* [27]

36. His representative submitted '*…there is no question that the offending… is very serious, it is it distasteful, it is disgraceful, it is unacceptable, no question'*.[28] I agree.

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

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

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

> *(a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and*
>
> *(b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:*
>
> *(i) information and evidence on the risk of the non-citizen re-offending; and*
>
> *(ii) evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since the most recent offence …..; and*
>
> *(c) where consideration is being given to whether to refuse to grant a visa to the non-citizen – whether the risk of harm may be affected by the duration and purpose of the non-citizen's intended stay, the type of visa being applied for, and whether there are strong or compassionate reasons for granting a short stay visa.*

[27] Transcript, day 1, lines 30 – 36.

[28] Transcript, day 2, p. 4, lines 2 – 3.

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

39. This part of the Direction requires a decision maker to assess the nature of harm that would be occasioned to an individual(s) or the Australian community were the Applicant to re-commit the offence for which he was convicted. This Applicant's offending did not involve '*hands-on'* conduct upon any victim. We do not know with any certainty about whether the minor child victims depicted in the child exploitation material found in possession of the Applicant were members of the Australian community or whether those victims were from countries abroad. Therefore, any assessment of the nature of the harm that would result from the Applicant re-committing the type of offending for which he was charged, sentenced and jailed must be approached with some measure of caution.

40. The Applicant's Statement of Facts, Issues and Contentions ('SFIC') is not very helpful. It unhelpfully, and, I think, incorrectly says:

> *'30. Having regard to the nature of the applicant's offending conduct in the past, as outlined above, any future offending of a similar nature would have the potential to cause physical and/or psychological injury to members of the Australian community.'*[29]

41. During closing submissions, I sought to understand the immediately preceding written submission put on behalf of the Applicant. The following transpired between me and the Applicant's representative:

> *'SENIOR MEMBER: All right. Could I just ask you, in terms of – could I ask you to focus on the question of risk of harm to the community. This type of offending, which is one person, on one computer, sitting on one room, at one time, viewing images, appalling and unlawful images, I understand all that. But in terms of harm to the community, which strata or part of the community would he be harming if he reoffended? It can only be the class of child victims that are the subject of those appalling video depictions, aren't they? Aren't they the only element of the community that he could harm, because by subscribing to these services, if he were to do so in future, he would be, as he said himself, creating a demand for the production of further such material. Isn't that the only strata of the community that he could harm, were he to reoffend?*
>
> *DR DONNELLY: I think directly, that is the main apparatus of victim, so to speak, of his reoffending. Of course, there's the indirect, so police resources and so forth investigating and prosecuting, probably in those accepted propositional ones. So yes, Senior Member. But something I said in my submissions, not to be technical or try to be creative, but one of the difficulties here, of course, is, one doesn't just – of*

[29] A2, p 8, [30].

course, this doesn't offset the serious of the nature, I won't even go near that because it's extremely serious offending. All I will say is, if one characterised the victims, we don't know if the victims are in Australia, if they're in Yugoslavia, if they're in the Balkans, we don't know where they are. We don't know if the victims are in Queensland, Sydney and so forth. And so yes, he could potentially create a market, there's no question about that, but is it a market in Australia, is it a market overseas? It depends where the victims are. The difficulty here is that we're hypothesising that the victims will be in Australia. And now the difficulty is there's no clear evidence on that question at all. And we know, for example, there could be the sex trade in Southeast Asia, Eastern Europe, we just don't know where the children – where these disgraceful photos and videos come from, or where the criminals who have created this, where they come from. But of course, I have to accept that there is a potential, there's no doubt that there is a potential that he could create a market even in Australia.'[30]

42. In the SFIC filed on behalf of the Respondent, there is reference to the abovementioned police facts sheet which described the heinous acts to which the minor child victims were subjected which is then followed by these submissions:

> '*In view of these factors, the respondent submits that the applicant's conduct should be viewed as very serious, and if such conduct were to be repeated, the harm to the individual or the Australian community will be significant'.* [31]

43. During closing submissions, the Respondent's representative seemed to be making submissions that converged with those made on behalf of the Applicant:

> *'The first harm, and the most obvious, is the harm to the children who this happens to around the world. Now, those children could be in Australia – my friend raised a point that we don't know whether the children involved in this material were Australian, that's not a great defence. I don't think my learned friend was putting it in that way, we don't, but that's not really the question here. The question is in terms of protection, is whether it's possible that children in the future, you know, could be Australian, and that by further access, and not just access of possession but paying for this kind of content, this kind of (indistinct), could put Australian children at risk of this, sort of, activity.*
>
> *Now, I mean, I suppose the first thing to say is if we protect – at a more macro level – if we protect children anywhere, we're probably protecting children everywhere. That is it's a global scourge. It doesn't just happen in one country, it happens all over the place. And any actions that many governments take to protect children in any of those countries, can only contribute to the lessening of the scourge, wherever it occurs, helping all children everywhere. So I don't think my friend was trying to argue that, you know, Australian children aren't at risk from this, but that's a thing that we don't know in this particular case…'*[32]

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[30] Transcript, day 2, p 6, lines 1 – 38.

[31] R2, p 6, [23].

[32] Transcript, day 2, p 22, lines 32-47; p 23, lines 1-4.

44. I agree with, and will follow, the convergent path that the parties' oral submissions ultimately took. We can only hypothesize that any future minor child victims of re-committed conduct by the Applicant will be in Australia. From a future harm perspective, the only and genuinely safe finding on the instant facts is that if the Applicant were to re-engage in the sourcing and acquisition of this type of appalling child exploitation material, there is little to argue with the proposition that he would, at the very least, be creating a market for this type of material in Australia. Any re-committed unlawful conduct by this Applicant leading to such an outcome can be safely found to have the potential of a very significant level of harm to '*the Australian community'* due to the contribution the Applicant would be making to the level of demand for this dreadful material in this country. I so find.

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

45. There is a range of both lay and expert evidence before the Tribunal referrable to the Applicant's recidivist risk. I will address each element of the evidence in turn.

The Applicant's evidence

46. The Applicant has prepared two **written statements**. The first of those is dated 12 May 2022.[33] In this statement the Applicant is quite forthright in saying '*I have always been a person who has been interested in abnormal kinks and fetish pornography like BDSM*[34]*…*'[35] In this statement he speaks of not being able to source and upload this kind of material via the more commonly accessed websites like Pornhub. This caused the Applicant to visit online forums to source and acquire pornographic material depicting his own proclivities for sexual gratification.

47. He says he located a package containing this type of material and that '*I bought the package of a website I found through Google….I can't remember how much it cost me, but it was under $100.*'[36] He explains the circumstances via which he came to be in possession of the unlawful child abuse material in these terms:

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[33] R1, pp 400-405.

[34] BDSM is a variety of often erotic practices or roleplaying involving bondage, discipline, dominance and submission, sadomasochism, and other related interpersonal dynamics.(From Wikipedia).

[35] Ibid, [3].

[36] Ibid, [4].

> *'I had previously seen that the website had some dodgy material including child abuse material. Given what I had previously seen and method of the transaction, I should have known that the package I downloaded might also have had some child abuse material. At the time, I just ignored this. I later realised there was definitely child abuse material in the package.'*[37]

48. The Applicant says that this entire process involving him being found in possession of child exploitation material and the resulting difficulties with his visa status:

> '*…..caused me immense stress to me in my everyday life. I was forced by the stress to give up on one of the most important parts of life which was my university life. When this happened, I was in my third year of university doing Bachelor of Mechatronics Engineering and Advanced Mathematics, which is a seven-year double honours degree.'*[38]

49. He confirms that his offending adversely affected his extra-curricular university life and that it *'…also had an effect on other parts of my mental health where my heart would start racing every time I hear a doorknock*.'[39] He speaks about having difficulty sleeping and of feeling '*depressed and guilty for the damage and harm I caused to the victims of abuse like those in the material on my computer.*'[40] He refers to being '*…regretful and angry at myself for having unknowingly caused so much harm to others and contributed an abusive industry I didn't understand.*'[41]

50. In this first statement, the Applicant also described his efforts at rehabilitation from a predisposition towards this kind of extreme pornographic material. He initially consulted his university's mental health clinic and sought assistance. He says '*A university psychologist directed me to a website where I found Rosalind Bolitho.*'[42] He says Ms Bolitho '…*gave me an understanding of the of the unhelpful thought processes I had and the extreme nature of how I tried to relieve myself of stress by engaging with pornographic content.*'[43] Ms Bolitho then referred the Applicant to the forensic psychiatrist, Dr Jeremy O'Dea, who apparently specialises in treating those with addictions to pornography.

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[37] R1, pp 400-401, [6].
[38] Ibid, p 402, [14].
[39] Ibid, [16].
[40] Ibid, [18].
[41] Ibid.
[42] Ibid, [19].
[43] Ibid, pp 402-403 [19].

51. In addition, the Applicant says he was referred to the Positive Lifestyle program by his solicitor. He says this program provided with him information and strategies on positively managing his feelings that pre-disposed him to accessing and consuming this type of pornographic material. The representative of the Positive Lifestyle program then referred the Applicant to Mr Neil Ballardie who is a psychologist specialising in the treatment of those with pornographic addictions. In terms of outcomes resulting from rehabilitative treatment the Applicant says:

> *'Jeremy O'Dea and Neil Ballardie have both been immensely helpful. They helped me not just recognise my problems but also trying to change the way I think. Neil for example helped me recognise how my trauma experienced when my parents divorced and me being bullied because of my lack of ability to speak English has contributed to me looking for a protector from stress, loneliness and sadness which is why my brain defaults to pornography so often. Also teaching me strategies and ways to not think like that and overpower that part of my brain. I want to continue with the treatment I have been getting to eventually no longer need pornography in my life.'*[44]

52. The Applicant concludes this first statement by giving his own thoughts about the impact the matter has had on him. He describes the episode as an offence that '…i*s a massive black spot in my life that I will have to deal with, a major memory that I will be embarrassed and ashamed for the rest of my life.*'[45] He acknowledges that he consumed a product deliberately oriented towards the abuse of innocent others and how this will have resulted in a gross infringement of the rights of those victims and how those victims were so significantly traumatised. He says '*I know that I caused people to suffer*'.[46]

53. In terms of the extent of any rehabilitative benefit, the Applicant says:

> *'With my sessions with Neil Ballardie and Dr O'Dea I have realised that a lot of my bad behaviour and harmful ways of thinking has its roots in my childhood and my upbringing. This unexpectedly led me to understand the amount of harm my actions had on others. I am lucky that I am blessed with professionals from the police to the psychiatrist who was able to help me and overcome that trauma I have experienced as a child but to those victims they might not have the resources I was able to access to fix my trauma.'*[47]

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[44] R1, p 403 [21].

[45] Ibid, [22].

[46] Ibid.

[47] Ibid, pp 402-403 [24].

54. The Applicant's second written statement also appears in the material. It is dated 26 August 2023.[48] In this statement the Applicant expresses '*…deep remorse for the grave offence of possessing child abuse material….I understand the severity of my actions and the harm they have caused the victims and society as a whole.*'[49] He takes '*…full responsibility for my behaviour and the consequences it has brought on myself and others.*'[50] He is '*…acutely aware of the distress this type of material can cause to vulnerable individuals and I deeply regret ever engaging in such behaviour.*'[51] He refers to his remorse being genuine and being dedicated to making amends for what he has done. He says he understands the gravity of his offending and requests an opportunity to further engage in a rehabilitative process if returned to the Australian community.

55. In this second statement the Applicant refers to his rehabilitative efforts and summarises them thus:

> *'22. Under the guidance of Forensic Psychiatrist Dr. Jeremy O'Dea and Psychologist Mr. Neil Ballardie, I have actively engaged in an ongoing psychiatric treatment program. Dr. O'Dea believes that my dedicated participation in this program is pivotal in effectively managing and minimising the risk of any future reoffending.*
> *23.Mr. Ballardie, too, has been instrumental in my rehabilitation. His insights into the root causes of my pornography addiction have helped me understand and manage my behaviours. Through a structured mental health treatment plan, I have been taking steps towards a healthier mindset and behaviour.*
> *24. Registered Psychologist Rosalind Bolitho has noted my growing awareness of the detrimental effects of pornography on abuse victims. Her belief that I will no longer engage in such activities reflects the progress I have made in developing empathy and understanding for those who have suffered.*
> *25. I have actively embraced a range of initiatives to aid in my rehabilitation. My participation in the SMART Recovery program has been instrumental in reshaping my mindset. Furthermore, I have completed courses on Child Abuse Recognition, Investigation, and Protection, as well as Understanding Addictions and Stress Management. These endeavours underline my commitment to growth and change.'*[52]

56. The Applicant acknowledges the '..*support and perspective of my partner [Ms YL]. We have maintained open and honest communication about our sexual preferences, with none involving underage desires.*'[53] He otherwise acknowledges the gravity of his unlawful

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[48] A1.
[49] Ibid [5].
[50] A1 [5].
[51] Ibid [6].
[52] Ibid, p 5 [22] – [25].
[53] Ibid [26].

conduct and, in terms of his rehabilitation, he says '*The journey towards rehabilitation has been challenging, yet it has also been transformative*.'[54] He also speaks of deeply regretting the unlawful conduct resulting in the cancellation of his Visa and says that '*Since that time, I have dedicated myself to rehabilitation and self-improvement….with the guidance of professionals, I have taken significant steps towards personal growth, development and positive change.*'[55]

57. The Applicant also provided **oral evidence** to the instant hearing by way of evidence-in-chief and by being cross-examined. During his evidence-in-chief the Applicant was taken to his second abovementioned written statement and confirmed the contents of that document as being true and correct.[56] He acknowledged that he first came into possession of the child abuse material sometime in 2021. He confirmed that he did not intend to download such material but inadvertently did so because it was part of the larger package of this type of material he had purchased. Importantly, he was asked why he did not remove this child exploitation material when he first came across it given his evidence that he did not intend to purchase and view such material when buying the larger package of extreme pornographic material. He responded with this:

> *'DR DONNELLY: All right. So you say this happened sometime in 2021. But you said that although you didn't intend to download child porn, that it was a part of the big package, I think you said, of pornography. Why didn't you remove it when you came across it?*
>
> *APPLICANT: ---So there was a few things that caused me to not remove it. Obviously, in hindsight, I should have regardless. However, at the time, I was in the middle of my university term, I was doing a few assignments, and I didn't want to wipe my computer because of that. Also, I so – I thought at first, I tried to just delete it, by going onto Windows and just pressing delete, however, it did not get rid of the folder. And that's when I realised, I actually needed to wipe my hard drive completely. And because of the aforementioned – my university term, I did not want [sic] to wipe my hard drive, and therefore, that's why I didn't. However, I did also look into ways of wiping my hard drive, and I did plan to basically wipe everything from my hard drive, everything – I was going to wipe everything the second my term was up. However, the police came before my term ended.'*[57]

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[54] A1, p 6 [27].

[55] Ibid, p 7 [36].

[56] Transcript, Day 1, p 4, lines 10-14.

[57] Ibid, p 5, lines 10-25.

58. While denying he had any predilection towards child pornography as a means of sexual gratification, he nevertheless confirmed that he did look at this type of material for what he described as '*shock value*':

> *'DR DONNELLY: There is a reference somewhere in the documents….. to you having looked at some child pornography….. for shock value?*
>
> *APPLICANT: -?---Yes, I said that to the detective in the interview, yes. And yes, I did open up some for shock value. But, yes, I did open up some, but I'm not interested in a sexual way, and I was going to delete it……. I basically said that I wasn't interested in a sexual way, and I was in the process of trying to delete it. And in the process of trying to delete it, I was trying to, basically, delete the child abuse material, as much as I can, and save the BDSM pornography that I liked. Eventually, after opening a few for shock value, I realised there was actually quite a few child abuse material, and that's when I decided I'm going to wipe my hard drive. And instead of going through and delete it, I was like – I was ready to delete all my pornography, because I was like, you know what, this is too much, I don't want to get in trouble, I don't even like it, this is just not worth it.'*[58]

59. The Applicant described the nature and extent of his rehabilitation. With particular reference to the forensic psychiatrist, Dr Jeremy O'Dea he said the following:

> '*And then she referred me to Dr Jeremy O'Dea, who I think is a specialist in sex addiction and porn addiction in Sydney. And I saw him till I was sent to prison. And he was actually, he – even more helpful than Rosalind [Bolitho]. He pointed out to me, like, the way that my brain's thought process was. Basically, he kind of asked me a bunch of questions and asked – told me to respond, like as – like just without thinking. And then after he wrote it down and explained to me the patterns of my thinking led to the wrong end, and that kind of contributed to my leaning in towards pornography. And he kind of convinced me to start abstaining from pornography. And during that time, I started – instead of watching pornography, I would – instead video call or talk to my girlfriend, and work on things with her in person, or on video instead of watching pornography. And I think I made pretty good progress on that.*'[59]

60. The Applicant was also cross-examined. He said that he first accessed pornography on a trip to China when he was aged 13 or 14 years and that he had not ever accessed pornography in Australia prior to that age. He spoke of accessing images of '*…a person in a bikini…*'[60] And because he was feeling stressed and sad about the end of the marital relationship between his biological parents, looking at these images caused him to '*discover[ed] masturbation and I realised that made me feel better.'*[61] He then described his

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[58] Transcript, Day 1, p 7, lines 29-34; p 8, lines 1-5.

[59] Ibid, Day 1, p 9, lines 6-18.

[60] Ibid, p 32, line 6.

[61] Ibid, p 31, line 47.

eventual engagement with more extreme forms of pornography, particularly of the BDSM genre which he described in these terms:

> *'MR ETUEATI: Do you know what BDSM actually stands for?*
>
> *APPLICANT: ---I'm thinking masochism – I don't know the full name, sorry.*
>
> *MR ETUEATI: Are you sure? Do you want a moment to think about that?*
>
> *APPLICANT: ---Bondage, something sort of masochism, I think.*
>
> *MR ETUEATI: Do you know what bondage is?*
>
> *APPLICANT: ---Yes, using – using – using ropes to tie people up and then in positions and – yes.*
>
> *MR ETUEATI: And then sadism and I think you mentioned masochism; is that your understanding?*
>
> *APPLICANT: ---Yes. Sadism and masochism is – depends. Sadism is hurting someone for pleasure and masochism is receiving pain for pleasure.*
>
> *MR ETUEATI: Yes. So that's what interests you, pornography about people receiving pain for pleasure and being hurt for pleasure?*
>
> *APPLICANT: ---Not – I enjoy bondage, that's and the – BDSM is an umbrella term.*
>
> *I enjoy mostly degradation and fetish – like foot fetish.*
>
> *MR ETUEATI: So when you say degradation - - -?*
>
> *APPLICANT: ---I - - -*
>
> *MR ETUEATI: When you say graduation - - -?*
>
> *APPLICANT: ---Degradation as in – to explain this, I like looking at – like, for example, my girlfriend, she – and I like her verbally abusing me sometimes.*
>
> *MR ETUEATI: So you enjoy pornography where people are degraded?*
>
> *APPLICANT: ---I guess verbal degradation, yes.*
>
> *MR ETUEATI: Well where does bondage come into that? That's not verbal degradation, is it?*
>
> *APPLICANT: ---Bondage is temporarily stopping someone's movement, right. It's – like, for example, I like it when their hands are tied and they are playful with it, right. So sometimes when I – when my girlfriend and I have sex I like to be tied up.'*[62]

61. The Applicant went on to describe how he came into possession of the child exploitation material. In particular, he confirmed that the more mainstream pornography-accessing outlets did not carry the type of BDSM material, primarily containing Japanese or Asian participants and that, as result, he accessed the subject material through alternate means. He was careful to point out that in seeking this more extreme type of BDSM material, he

[62] Transcript, Day 1, p 32, lines 27-46; p 33, lines 1-12.

was not doing so for the purposes of viewing material containing violence. He pointed out that his primary predilictional motivation was strictly oriented towards the depiction of female subjects degrading male subject:

> *'APPLICANT: -?---I was definitely chasing for degradation, but I wasn't chasing violence.*
>
> *MR ETUEATI: Well, you tell me what's the difference?*
>
> *APPLICANT: ---Okay. So a form of degradation I like is when a girl pees on guy. Sorry for the imagery. But that is degradation. I don't think you can cover that in violence.*
>
> *MR ETUEATI: Is it more extreme than what you get on Pornhub?*
>
> *APPLICANT: ---Pornhub – well on Pornhub there's videos of women peeing on men. What I downloaded, there are videos of women taking a shit on a man. And I like when a woman poops on a man. I enjoy that. And I think that is more extreme, I agree, than Pornhub because Pornhub only has peeing. But I wouldn't say that's more violent.*
>
> *MR ETUEATI: All right. So – and that's one example of the kind of thing that you enjoy, the urination and defecation on men by women. Do you enjoy is also the other way around?*
>
> *APPLICANT---No.'*[63]

62. It was suggested to the Applicant that his involvement in the non-mainstream websites promoting BDSM material must have surely put him on notice that material generated by those non-mainstream websites would most likely have carried degrading and sadistic pornography in relation to children. He spoke of a '*BDSM community*' that shunned anyone's stated preference for child abuse material:

> *'MR ETUEATI: Well, you tell me. As part of this BDSM community that you're a part of, or that you were a part of at least, is part of that community the degradation and sadistic views in relation – pornography in relation to children?*
>
> *APPLICANT: ---If there was – in the group they are generally very against it. They are against child abuse material. So even if there are sometimes people advertising it but they get removed or they will get kicked out basically right away. And that's why I guess I never even thought that I would run into it. But the person that I guess was selling it, as part of a pack of I wasn't aware that it was on it. Eventually I did find out.'*[64]

63. The Applicant was then taken to the fact that the material he purchased (containing the child abuse material) was encrypted in a certain way. He was not able to adequately explain why

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[63] Transcript, Day 1, p 35. lines 1-18.

[64] Ibid, Day 1, p 36, lines 38-46.

the level of encryption in relation to the subject material did not put him on notice that it might contain material depicting the abuse of children. The central thesis of the Applicant's evidence around how he came to be in the possession of the child exploitation material seems to be that he simply stumbled upon it while in the course of accessing the extreme form of BDSM material:

> *'MR ETUEATI: No. So you saw that it was all – that it was encrypted in a certain way. When did you find out it was – there was that extra degree of security?*
>
> *APPLICANT: ---After I'd downloaded it already. Because before you download it you don't know what it's like. I knew it was a package and I downloaded the package. I opened it and then it was – there was a lot of encryption on it. I was like, 'why is there so much encryption'. But then on one of the files it had instructions on how to decrypt it. So I decrypted and then it looked fine. I opened up a video. It was adult BDSM. So I was like, okay I guess this person's just extra careful. I didn't think too much of it. But then eventually I after I saw a few more I eventually found the child abuse materials. And that's what I wanted to delete.'*[65]

64. And further, the Applicant's evidence seemed similarly vacuous about the extent to which he had an inkling that the BDSM material that he purchased from the non-mainstream website contained child abuse material. His evidence boils down to this non-mainstream website apparently shunning anyone within its community of participants talking about or making reference to child pornography. For that reason, we are now to believe that because such attitudes were shunned within that community, it must have been the case that the Applicant did not reasonably expect to find child exploitation material in the download of material of extreme Asian BDSM material he purchased:

> *'MR ETUEATI: So your evidence now is that at the time that you downloaded the package you had no idea that the pornography that you were downloading might have child abuse material on it despite it being advertised on the website?*
>
> *APPLICANT: ---I'm not saying I had no idea. I'm saying the website did have it previously, however, the post I saw did not have that description. I think on Facebook there sometimes there are posts that try and sell illegal content like drugs. But I know that those normally get taken down. Right? That doesn't mean when I buy something off Facebook I didn't automatically think that it had drugs.'*[66]

65. Of course, the Applicant's evidence could have been given a greater measure of credibility if the Applicant did put on evidence of an example wherein this alternate / non-mainstream

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[65] Transcript, Day 1, p 37, lines 20-30.

[66] Ibid, p 38, lines 43-47; p 39, lines 1-4.

website shunned a suggestion by one of its communities that it should carry child exploitation material. There is no such evidence before the Tribunal.

66. The Applicant's position eventually evolved from one of accidentally stumbling onto the child exploitation material as a result of downloading the BDSM content into one of gradually accepting that he had been aware that the material he purchased would contain child abuse material:

> *'MR ETUEATI: So I'm just trying to – I wonder what your evidence is. Is the evidence that you were aware of the possibility when you purchased that package that it would contain child abuse material or not?*
>
> *APPLICANT: ---Yes, I was aware.'*[67]

67. The Applicant's evidence then evolved into him suggesting that while he did not derive sexual gratification from viewing child exploitation material, he nevertheless sought to satiate his curiosity about this type of material by deriving some kind of '*shock value'*:

> *'MR ETUEATI: Well, the evidence that you've given to – not just as my friend has mentioned the police – but also to the psychologist was that you watched these movies for shock value. That's correct, isn't it?*
>
> *APPLICANT: ---I did. I agree. Yes, I did.*
>
> *MR ETUEATI: So you deny that it was for your own sexual gratification, don't you?*
>
> *APPLICANT---Yes.*
>
> *MR ETUEATI: But it was something that you liked doing, watching these movies for shock value?*
>
> *APPLICANT: ---Yes.*
>
> *MR ETUEATI: Do you like horror movies or gory movies?*
>
> *APPLICANT:---Yes.*
>
> *MR ETUEATI: And so you enjoyed watching these kids getting tortured because it, I don't know, you like that. That was something that you enjoy watching?*
>
> *APPLICANT:---I did not see any kids getting tortured.*
>
> *MR ETUEATI: What did you see? Why don't you tell me what you did see, Mr [the Applicant]?*
>
> *APPLICANT: ---It was abuse and it was – but it wasn't violent torture. It was sexual torture, yes. But it wasn't violent torture.'*[68]

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[67] Transcript, Day 1, p 39, lines 25-28.

[68] Ibid, p 41, lines 19-36.

68. There followed some questions about why the Applicant did not delete the child exploitation material he says he advertently discovered while randomly going through the package of BDSM material he purchased from the non-mainstream website.

> *'MR ETUEATI: All right. So after you discovered the child abuse material, a couple of days, a week afterwards, you decided to hold onto it all – or hold onto it for at least three weeks until you were arrested?*
>
> *APPLICANT: ---I was trying to delete it, but I couldn't delete it and then I tried to find – and I was, like, I'll just wipe my computer with the subjects. Because I wasn't too bothered from – there's so many.*
>
> *MR ETUEATI: Well, let's examine that. How hard you actually tried?*
>
> *APPLICANT: ---Okay.*
>
> *MR ETUEATI: How did you find – how did you try to delete it? How did you know which bits were the child pornography?*
>
> *APPLICANT: ---So, I told you there was a folder that had a bit more - - -*
>
> *MR ETUEATI: When you say a bit more, that suggests that there was child pornography all through the package. What, there just happened to be more in one particular folder, is that correct?*
>
> *APPLICANT: ---No.*
>
> *MR ETUEATI: Well, you tell – when you say a bit more, what do you mean?*
>
> *APPLICANT: ---I said – as in, so this folder that I ran into had a bit more, like, content. Images and videos. The other one may have two or three videos. The first one had a bit more. So I opened it and then – and then there was – and then the first thing I click on was child abuse. So I know – I click on the one child abuse video, that's the first one I watched. And then also – and then also – I was, like, you know what, I'm – and I saw, like, I think about a minute of it, and it was, like, I'm moving on. So then I saw child abuse pictures, all of the child abuse pictures, and then also I'm, you know what, I'm done with this, I'm moving on.'*[69]

69. The Applicant said he was not able to delete the child exploitation material from the hard drive of his computer because, according to him, it would have interfered with his capacity to prepare for and do his university examinations. Further, he says that during this phase of doing his examinations when not able to delete the material from his computer, the police showed up and executed search warrants the end result of which saw him charged with the offences for which he was eventually sentenced:

> *'MR ETUEATI: Hold on. So when you said you were trying to delete the material, you weren't really trying at all? You knew that you had – you very, very likely had a whole bunch of child pornography on your computer, and you did nothing to get rid of it?*

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[69] Transcript, Day 1, p 46, lines 1-26.

APPLICANT: ---The folder I found had clicked delete and I tried to delete it. That's what I meant when I said I tried to delete it. Yes, I suspected there was more stuff on my computer, so I was not – so at first, I couldn't help (indistinct) porn that I had, that were legal. However, eventually I was, like, okay, I'll just wipe my hard drive. But because I was during another term when I had exams going on, I was – I decided not to wipe it until after my exams. And the police came and arrested me before my exams were over.

MR ETUEATI: So I suppose your evidence is going to be that if the police hadn't come you would have gotten rid of all this child pornography that you hadn't gotten rid of up until that point?

APPLICANT:---I know it's stupid. I should have deleted it right away. But I was stupid then and I made a mistake. I was complacent, and in hindsight, I should delete – I should burn my hard drive on the spot when I found it. It was my fault, and I should have deleted it.'[70]

70. The questions in cross-examination then moved to the Applicant's rehabilitation and, in particular, the diagnosis made by the forensic psychiatrist, Dr Jeremy O'Dea, together with the advice the Applicant had received from the psychologist Mr Neil Ballardie. The Applicant told the hearing that '*…both of them convinced me that I was using internet pornography to an unhealthy degree.*'[71] The Applicant went onto explain how Dr O'Dea had convinced him that constant access to BDSM pornography was '*unhealthy for the mind'*:

> *'Jeremy one day explained to me that BDSM is, while practiced in person, is okay. When you look at it on – and as a form – in essence, internet pornography, Jeremy O'Dea explained to me that it – when you – you get numb to – to the violent nature and the abusive nature of that pornography and it's unhealthy for the mind. And it's unhealthy for your views on what that – whether they're just general health is not definable to worse than – and a lot. Therefore, I decided, you know what, if they're unhealthy and they're not good for me, I just won't watch them at all. That was a personal decision on my part, and I want to quit all BDSM pornography.'*[72]

71. The Applicant went onto explain that Dr O'Dea and Mr Ballardie had told him that *'…re-consuming some pornography or having sexting with your girlfriend or having sex with your partner they are all healthy. However, BDSM pornography is not.*'[73] The Applicant told the hearing that he still uses pornography and that he goes onto the mainstream Pornhub site '*about once a month*'.[74] Since going into detention, the Applicant said that in terms of his use of pornography, '*All I can say is I have been trying to cut down. It was once a week then*

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[70] Transcript, Day 1, p 46, lines 34-47; p 47, lines 1-3.

[71] Ibid, p 47, lines 26-27.

[72] Ibid, p 47, lines 33-42.

[73] Ibid, lines 43-46.

[74] Ibid, p 48, line 5.

it was once every fortnight and now it's generally once a month or even less than that.'[75] He said that he accessed this mainstream-pornography for '*Five minutes at a time.'*[76] In terms of current levels of usage across a given day, the Applicant conceded he continues to access and use pornography '*…for about four to twenty minutes an hour a day.*'[77]

72. The Applicant was asked whether he considers himself at risk of harming other people and he responded in these terms:

> *'MR ETUEATI: You realise that you're at risk of harming other people?*
>
> *APPLICANT: ---I don't believe I am a risk, but I do understand why some people might think I am a risk. I know myself, that I know that I won't hurt anyone. I've never hurt any – I've never hurt anyone willingly, and I never will. But because of my offence, I understand why it can be argued that I am a harm to society. However, I am trying my best in engaging with rehabilitation, with courses, seeing a psychiatrist, talking about my problems openly, to try and mitigate those risks as much as I possibly can.'*[78]

73. The Applicant agreed that his conduct involving the position of child exploitation material had the capacity to cause other people to actually harm children in a physical sense:

> *'MR ETUEATI: And do you also understand that possessing that type of material can lead to people actually themselves harming children?*
>
> *APPLICANT: ---I do understand that. I do. And that's why I'm happy that, when I'm released, I will be in the child protection register and that I will be engaging with these courses and I have options to engage with these courses which I will take, and because Dr O'Dea also says that despite engaging with the cognitive behavioural therapy and actually engaging with the course is the best way to prevent any type of progression into that field.*
>
> *……*
>
> *MR ETUEATI: You understand then, by possessing that material, it not only contributes to the market, but it provides potentially access to people in Australia, to child exploitation material, which could have the effects that we've just been talking about?*
>
> *APPLICANT: ---I understand that. Yes. I understand that I was – I've not met the expectation of the community, but I understand that I've made a mistake that has definitely breached that trust for Australian community members.'*[79]

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[75] Transcript, Day 1, lines 37-39.

[76] Ibid, p 49, line 12.

[77] Ibid, lines 31-32.

[78] Ibid, p 60, lines 4-11.

[79] Ibid, p 63, lines 6-26.

Evidence of Dr Jeremy O'Dea, Forensic Psychiatrist

74. Dr O'Dea's report appears in the material. It is dated 12 May 2022 and was obviously prepared in anticipation of the Applicant's appearance for sentencing at the Local Court in New South Wales in May 2022. In the introductory portion of his report Dr O'Dea points out that he provides his report '*….in my capacity as [the Applicant]' **current treating psychiatrist** and with his knowledge and consent.*'[80] [Emphasis in original]

75. Dr O'Dea noted the Applicant's demographic details and provided commentary around the Applicant's (1) family history; (2) developmental and employment history; (3) alcohol and other drug history; (4) psychiatric and general medical history; and (5) forensic history.

76. **Dr O'Dea also made a detailed summary of the Applicant's '*index sex offences'* and reached the following diagnosis** which I will summarise:

- the Applicant is not suffering from any major psychiatric illness;[81]
- the Applicant has developed a compulsive internet pornography use from his early teenage years '*with a specific and significant focus on BDSM pornography, with a more recent history of additional access to paedophilic pornography*';[82]
- the Applicant's predisposition towards BDSM pornography '*…may not strictly meet the psychiatric diagnostic criteria for a Paraphilic Disorder*';[83]
- while the Applicant maintains an engagement in active and ongoing heterosexual relationships, his compulsory internet pornography access and resulting masturbatory practices, '*have repeatedly formed a strong if not central component of his overall sexuality to date*';[84]
- if the Applicant continues this compulsive internet pornography access and masturbatory practices with a continued focus on BDSM pornography, '*it may increasingly dominate his sexual urges, fantasies and / or behaviours at the*

[80] R1, p 81 [7].
[81] Ibid, p 86 [39].
[82] Ibid [40].
[83] Ibid [41].
[84] Ibid [42].

expense of other more normative sexual urges, fantasies and / or behaviours, and thereby reach the threshold of Paraphilic Disorder';[85]

- while the Applicant '*…has not reported awareness of a specific or significant sexual attraction to pre-pubertal of [sic] pubertal children, and has described his access to child abuse material as incidental to his focus on adult BDSM pornography,…..his conduct in relation to the index sex offences in viewing the child abuse material would point at least a vulnerability to repeatedly viewing child abuse material, with at least the potential that this form of pornography would become of increasing sexual interest to him if he were to engage in such behaviour* ';[86]

- Dr O'Dea noted that :

  '*As is becoming increasingly recognised in clinical settings, the access to, and focus on, internet pornography by males through their formative psychosexual years, can and does have significant, and often negative, impact on their developing sexuality. In addition to the significant risk of this activity readily leading to excessive and compulsive Internet pornography access for long periods of time with prolonged periods of masturbation, subsequently extending to more arousing and at least taboo pornography; it can and does lead to accessing extreme and/or illegal pornography, in particular Internet child pornography, and can and does lead to significant problems in their heterosexual relationships.*'[87]

77. **Dr O'Dea then summarised the psychiatric treatment program he had administered** to the Applicant up to the date of his report (May 2022) via the Cognitive Behavioural Psychotherapeutic (CBT) model. Dr O'Dea has sought to assist the Applicant '*…to gain a better understanding of his overall sexuality in general, and his internet pornography use, in particular the BDSM and paedophilic components of this pornography use, aimed at assisting him from accessing child abuse material, and aimed at him reducing and preferably abstaining from all internet pornography use , and to focus on real life consensual adult sexual relationships.*'[88]

78. Dr O'Dea noted the Applicant had been '*actively engaged in our treatment program*'.[89] Dr O'Dea reports that the Applicant had told him of his reduced internet pornography access

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[85] R1 [43].
[86] Ibid, p 87 [44].
[87] Ibid, p 87 [45].
[88] Ibid [46].
[89] Ibid [47].

and frequency of masturbation '*…but has found it difficult to remain abstinent from pornography use when under stress.*'[90] Dr O'Dea noted that the Applicant '*..has remained committed to the goal of long term abstinence from internet pornography access*'.[91]

79. Dr O'Dea then outlined the ***'proposed ongoing psychiatric treatment program'*** for the Applicant. An initial point to note is that at the beginning of his report Dr O'Dea said:

> *'Notwithstanding the outcome of the Court proceedings, I plan to continue our formal and comprehensive community psychiatric treatment and risk management program for [the Applicant]'s psychiatric condition, with our next appointment scheduled for Thursday 26 May 2022 at 3pm.'*[92]

80. Dr O'Dea proposed continuing the Applicant on the CBT model for *'….a total of approximately 8 to 12 sessions…..with a review after that, with a view to ongoing sessions on a monthly then 3 monthly basis indefinitely, dependent on progress*.'[93] Dr O'Dea thought psychiatric medications '*would not be indicated at present, they would be considered as part of the overall treatment program dependent on progress.*'[94]

81. In terms of a **concluded opinion**, Dr O'Dea said the following:

> *'Whilst the risk of individuals such as [the Applicant] accessing Internet child abuse material in the future, or of progressing to real life physical sexual contact with children, is difficult to determine with accuracy; successful engagement in the above community treatment program is likely to prove the most effective intervention in managing and minimising this risk in the community in the long term.'*[95]

82. Dr O'Dea's written evidence was not the subject of further ventilation in oral evidence at the instant hearing nor were his views and opinions the subject of cross-examination at the instant hearing.

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[90] R1 [47].
[91] Ibid.
[92] Ibid, p 81 [6].
[93] Ibid, p 87 [48].
[94] Ibid [50].
[95] Ibid [51].

Evidence of Mr Neil Ballardie, Consultant Psychologist

83. As was the case with Dr O'Dea, the report of Mr Ballardie (dated 8 May 2022)[96] was most likely commissioned in anticipation of the Applicant's sentencing for index sex offending in May 2022. At the time of his report Mr Ballardie had been treating the Applicant for about a month and had seen him three times. He thought the Applicant '*…has a good level of insight.*'[97] Mr Ballardie opined that the Applicant '*has gained insight into the aetiology of his pornography addiction and how to manage it. He was able to empathise with the victims of his offending..*'[98]

84. Mr Ballardie noted that the Applicant had completed five sessions of the Positive Lifestyle Program with NSW Chaplaincy. Mr Ballardie believes the Applicant's '*…symptoms would improve and he would gain further insights with further sessions.*'[99] He expressed an intention to continue seeing the Applicant ongoing treatment. In terms of a treatment plan for the Applicant, Mr Ballardie proposed the following:

> *'Proposed mental health treatment plan for [the Applicant]*
>
> *1. [the Applicant] has obtained a Mental Health Care Plan from his general practitioner that provides subsidy for up to 20 sessions per annum with a psychologist through the Medicare Better Access Scheme.*
>
> *1. [sic]. It is recommended that following sentencing he attends counselling sessions at least once per fortnightly for period of a least five months (10 sessions) and as clinically indicated thereafter.*
>
> *2. He needs to follow the treatment plan proposed by his treating psychiatrist Dr Jeremy O'Dea.*
>
> *3. Following further assessment, he needs to attend any referral to other mental health professionals or services as directed by his treating psychologist, psychiatrist or general practitioner.*
>
> *4. As his treating psychologist, I agree to coordinate this mental health treatment plan for [the Applicant] and will report to his general practitioner, psychiatrist and any other health professionals he may be referred to.*
>
> *5. I confirm that I would supervise and continue to treat [the Applicant], and if a court order were made for him to comply with this treatment plan, I would report any breach of that order to Community Corrections if they were to supervise him.'*[100]

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[96] R1, pp 89-90.

[97] Ibid p 89.

[98] Ibid, p 89.

[99] Ibid, p 90.

[100] Ibid.

85. Mr Ballardie's written evidence was not the subject of further ventilation in oral evidence at the instant hearing nor were his views and opinions the subject of cross-examination at the instant hearing.

Evidence of Ms Rosalind Bolitho, Registered Psychologist

86. Ms Bolitho is in private practise and her undated report appears to have been witnessed by a Justice of a Peace on 29 June 2022.[101] At the time of her report, she had seen the Applicant on five occasions. She notes the Applicant saw another psychologist at the clinic where she practises when she was not available. She confirms that the Applicant told her of his involvement in downloading and watching pornography since the age of 13 years. He told her that pornography use was very common in China and that he did not understand why it was not as common in Australia. She made a note of the Applicant's then – applicable bail conditions which (1) prohibited him from being in the company (or otherwise talking to) anyone under the age of 18 years; (2) reporting to police once a day; (3) the police having power to audit the Applicant's devices up to three times per week; and (4) the Applicant being required to surrender his passport.[102]

87. Ms Bolitho noted the Applicant was then suffering from '….*uncontrollable shakes, sleep disturbances and suicidal thoughts although he states he had no intention of following through on this.*'[103] Ms Bolitho made the recommendation for the Applicant to seek an appointment with Dr Jeremy O'Dea. She also noted the Applicant's '*…growing awareness of the effects of porn on those that have suffered the abuse from it.*'[104] Ms Bolitho believes the Applicant will no longer engage in the activity constituting his index sex offending.[105]

88. Ms Bolitho's written evidence was not the subject of further ventilation in oral evidence at the instant hearing nor were her views and opinions the subject of cross-examination at the instant hearing.

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[101] R1, pp 91-92.
[102] Ibid, p 91.
[103] Ibid.
[104] Ibid.
[105] Ibid, p 92.

Report from NSW Court Chaplains Association

89. Mr Daniel Stuart is a Court Chaplain and the Facilitator of the Positive Lifestyle Program ('PLP') run by the NSW Court Chaplains Association. His report is dated 9 May 2022 and appears in the material. [106] Mr Stuart notes the Applicant came to participate in the PLP via a referral from his solicitor. Mr Stuart provided his report in the knowledge of the Applicant's index sex offending. The PLP is a program that runs over eight weeks of one hourly session per week. It is designed to facilitate (1) self-examination; (2) participants being truthful with themselves; (3) participants being able to examine their own behaviours; (4) participants being able to understand the effect of their behaviours on themselves and others; and (5) participants understanding the consequences of their behaviours.[107]

90. There are eight components of the PLP. They comprise (1) self-awareness; (2) anger; (3) depression and loneliness; (4) stress; (5) grief and loss; (6) assertiveness; (7) self-esteem; and (8) future directions. Mr Stuart notes the Applicant was a very active participant in the PLP and that he was accepting of a need '*…to make changes to both his thought processes and lifestyle choices.*'[108] Mr Stuart noted the Applicant '*…expressed remorse and regret for his actions and is very ashamed of his behaviour.*'[109] Mr Stuart referred the Applicant to the consultant psychologist, Mr Ballardie. Mr Stuart observed that the Applicant found his participation in the PLP '*..has been very beneficial.*'[110]

91. Mr Stuart's written evidence was not the subject of further ventilation in oral evidence at the instant hearing nor were his views and opinions the subject of cross-examination at the instant hearing.

Sentencing Assessment Report

92. Ms Marama Nuttall is a Community Corrections Officer with the NSW Department of Justice. She prepared a pre-sentencing report is dated 11 May 2022[111] and it was referred to and

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[106] R1, pp 93-94.
[107] Ibid, p 93.
[108] Ibid.
[109] Ibid.
[110] Ibid, p 94.
[111] R3, pp 30-33.

relied upon at the Applicant's sentencing hearing in May 2022.[112] Ms Nuttall appears have to been fulsomely briefed for the purposes of preparing her report.[113]

93. In terms of the Applicant's level of responsivity Ms Nuttall made the following findings:

> *'Insight into impact of offending*
>
> *[The Applicant] has shown insight into the impact his offending behaviour has had on the victims of child abuse/child pornography.*
>
> *Willingness and ability to undertake intervention*
>
> *[The Applicant] has shown a willingness to undertake intervention and is currently engaged in treatment to address his offending behaviour.*
>
> *Willingness and ability to undertake community service work*
>
> *[The Applicant] is willing to undertake community service work and has been deemed suitable. Response to supervision*
>
> *[The Applicant] has not been supervised by Community Corrections however his response during this assessment period is considered satisfactory.'*[114]

94. Ms Nuttall conducted a risk assessment on the Applicant via the Level of Service Inventory-Revised ('LSI-R') methodology, and she arrived at an assessment of the Applicant representing a low risk of reoffending.[115]

95. Ms Nuttall's written evidence was not the subject of further ventilation in oral evidence at the instant hearing nor were her views and opinions the subject of cross-examination at the instant hearing.

Sentencing remarks made in May 2022[116]

96. As mentioned earlier, the Applicant appeared at a Local Court in NSW for sentencing in May 2022. The Applicant seemed to form a favourable impact on the learned judicial sentencing officer. For example, in terms of the nature and extent of his remorse, the following exchange transpired between the court and the Applicant's representative:

> *'MALANEY: Yes. Yes. I wouldn't suggest otherwise in relation to that. It's the content of the material and the volume of the material that really made this matter so serious,*

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[112] R1, p 29, lines 16-19.

[113] R3, p 30, see heading '*Sources of information'.*

[114] Ibid p 31.

[115] Ibid.

[116] R1, pp 29-45. Per Her Honour Magistrate Milledge.

and my submission is just that the general circumstances by which he came to obtain it, what he was doing with it, bring that down a little bit, but I accept, not particularly far. The second issue is his attitude towards the offending.

HER HONOUR: Yes. You don't have to work too hard to convince me that he's very remorseful for the position that he's in.'[117]

97. In terms of the extent of the Applicant's rehabilitation the following exchange transpired between the Applicant's representative and the sentencing court:

> *'Fourth, turning toward his rehabilitation, prior to his offending, he clearly had longstanding issues with overuse and abuse of pornography since the age of. I certainly don't suggest that he had a deprived childhood, or anything of that sort, that led to that. But he did have an issue with the--*
>
> *HER HONOUR: Yes, he does with that. There's no doubt about that. He can't go blaming his childhood, like the psychologist seems to think.*
>
> *MALANEY: Yes. Yes, and I understand that's something that's come from the psychologist. They've been discussing that in-depth, but he understands that his actions are, of course, his own, and he made a poor choice, and that cannot be blamed on anyone, other than himself, and that's, of course, reflected in the plea. He knows that. Prior to being charged, he had never seen a psychologist or a psychiatrist, or engaged in any other form of structured intervention. Since the offending, he's clearly taken a number of significant steps, and he's followed through on every recommendation from every treatment provider. It started with Ms Rosalind Bolitho, who he found through a website. She referred him on to Dr Jeremy O'Dea, and he took that up. At the same time, he engaged with a Positive Lifestyle Program, which he obviously came to know through the courts, and the Positive Lifestyle Program referred him to Neil Ballardie, which he took up as well, and that's why he's seen such a number of specialists in such a short time. It was simply that he was acting on every referral that he was given.*
>
> *HER HONOUR: Yes. Yes, that is impressive, there's no doubt about that.'*[118]

98. Later in the sentencing remarks, the learned judicial sentencing officer said *'…I do take into account all of the things that [your representative] has said to me, that tell me that you are very remorseful for what you have done, and I absolutely accept that, [Applicant]. I absolutely accept it.'*[119]

99. In terms of the Applicant's insight into his offending, the learned judicial sentencing officer said the following:

> *'So, while I condemn what you did, and it is just frightful, I commend you for the approach that you have taken, putting aside what you were worried about was*

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[117] R1, p 33, lines 18-26.

[118] Ibid, p 34, lines 15-39.

[119] Ibid, p 42, lines 4-6.

going to happen with these fellows over here, with the police, the fact of the matter is that you do realise that you had that addiction, and you do realise that, putting aside the child abuse side of it, even your addiction with pornography with adults is just not healthy, and what is the sadness here, apart from the victims, that is the reference to your mother, what she must be thinking of now, these little kids have got families, but obviously, families who do not care about them, because they sell them so that they can involve themselves in this kind of product. The fact of the matter is, you have really - you can rebuild your life, there is no doubt about that, but you have thrown away everything that they have invested in you. Do you understand what I am saying to you?'[120]

100. The learned judicial sentencing officer did (at first instance) impose the following sentence:

> *'So, my sentence today - and I am going to find special circumstances, Ms Malaney, for those reasons that I said, his age, his first time in custody, no previous matters recorded against him, the fact that he has embraced rehabilitation, and the fact that it is less likely that he is going to be a recidivist, so I am being generous in the split, but I SENTENCE YOU, MR [the Applicant], TO 12 MONTHS' IMPRISONMENT, BUT FOUR MONTHS IN AND EIGHT MONTHS OUT. Do you understand that?'*[121]

101. Two further things should be noted about the regime of sentencing imposed upon this Applicant: (1) he successfully appealed his sentence to a District Court in NSW which, three months after his sentencing at first instance, reduced his head sentence from 12 months to nine months and his non-parole period from four months to three months;[122] and (2) both sentencing regimes imposed on the Applicant (i.e. in the Local Court and then in the District Court) contained the following language '…*THE NON-PAROLE PERIOD IS LESS THAN THREE-QUARTERS THAN THE SENTENCE BECAUSE THE COURT FOUND THESE SPECIAL CIRCUMSTANCES: AGE, REMORSE, ENGAGE IMMEDIATELY AFTER ARREST WITH REHABILITATION SERVICES, CONFIDENT THAT THERE WILL BE NO FUTURE OFFENDING.*'[123]

Findings about recidivist risk

102. Having regard to the evidence I have reviewed above, I have arrived at the following findings about the Applicant's recidivist risk of re-committing his index sexual offending:

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[120] R1, lines 16-28.

[121] Ibid, p 43, lines 12-18.

[122] Ibid, p 28.

[123] Ibid.

- **management of sexual curiosity**: the Applicant is entitled to satiate his sexual curiosity in any way he sees fit *provided* he does not breach the law. He is obviously a highly intelligent person possessed of a curious mind which, in terms of his sexual preferences, has led him to non-conventional or mainstream sexual practices. Those preferences are a matter for him. Where those preferences do, or have the potential to, be harmful to the interests of others, especially vulnerable '*others*', then those preferences become a matter for those enforcing the law governing the community back into which the Applicant seeks re-admission. I am satisfied the Applicant has well and truly understood that his conduct cannot be glibly described as '*a bit of naughty gone wrong*' but as something that has very seriously breached the law of this country and that has otherwise had a dreadful impact on the victims comprising the subject matter of the offending material;

- **how he came across this material:** I receive with caution and with misgivings the Applicant's explanations for how he came to be in possession of the child exploitation material. There is little credibility to his story about wanting to purchase material depicting adult-performed BDSM conduct and yet, out of the blue and completely unexpected, he found child abuse material. That evidence should be put to one side for several reasons:

    - the Applicant purchased the material via a site requiring encrypted access and it beggars belief that the Applicant did not reasonably expect child exploitation material would be included in the totality of the material he purchased;

    - the Applicant referred to some type of on-line community chat forums discussing this type of encrypted material where discussion of items of paedophilic interest was ventilated yet he vacuously sought to suggest that those individuals were removed from the chat and that only none-paedophilic participants were allowed to remain in it; and

    - he eventually accepted that the child exploitation material was of interest to him if for no other reason than for '*shock value*'; but that

    - he was not inclined to delete this material from the hard drive of his computer because that would have risked him wiping important material he needed to access for his current or pending university examinations, but he would apparently do so after the examinations were over.

- **is the Applicant remorseful?** the evidence contains an unanimity of opinion that the Applicant is indeed remorseful. The learned judicial sentencing officer at first instance absolutely accepted that the Applicant was really remorseful. Dr O'Dea (forensic psychiatrist) recorded that the Applicant exhibited '*good insight into his predicament*'[124] and that he otherwise expressed his shame and remorse for his index sex offences. Mr Ballardie (psychologist) thought the Applicant had gained insight into the aetiology of his pornography addiction as well as how to manage it. Ms Bolitho (psychologist) noted the Applicant's growing awareness of the effects of child abuse material on the victims it depicted. The Court Chaplain, Mr Stuart, noted the Applicant expressed remorse and regret for his actions and was very ashamed of his behaviour. Ms Nuttall (Community Corrections Officer) thought the Applicant had shown insight into the impact his offending behaviour has had on the victims depicted in the offending material;

- **rehabilitation:** it is clear that the Applicant has engaged in the rehabilitative process. The learned judicial sentencing officer at first instance thought the extent of the Applicant's engagement in the rehabilitative process had been '*…impressive, there is no doubt about that.*'[125] Dr O'Dea confirmed that the Applicant '*…..has been actively engaged in our treatment program*'.[126] Mr Ballardie found that the Applicant '*…was engaged during assessment and treatment….He followed through on his set homework, and gave feedback that he spent time identifying though patterns which can lead to unhelpful behaviours*'.[127] Mr Stuart (Court Chaplain) confirmed the Applicant's eight week participation in the PLP and described the Applicant as *'a very active participant….respectful and punctual and open and honest in his sharing.'*[128] Ms Nuttall was clear that the Applicant '*…has shown a willingness to undertake intervention and is currently engaged in treatment to address his offending behaviour.*'[129]

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[124] R1, p 86 [38].
[125] Ibid, p 34, line 39.
[126] Ibid, p 87 [47].
[127] Ibid, p 89.
[128] Ibid, p 93.
[129] R3, p 31.

- **the requirement for further rehabilitation:** the most authoritative clinical opinion before the Tribunal is that of Dr O'Dea who spoke of continuing '…*the current*[130] *treatment program for a total of 8 to 12 sessions utilising a CBT model, with a review after that, with a view to ongoing sessions on a monthly then 3 monthly basis indefinitely, dependent upon progress*.'[131] It is therefore clear that the Applicant's recidivist risk is, to no small extent, dependent upon his ongoing engagement with rehabilitative therapy. His evidence to so engage must be accepted for a couple of reasons: (1) his past willingness to engage in rehabilitation as observed by numerous clinicians; and (2) the extent of his intellectual capacity to understand the nature of his addiction to pornography and how therapy can assist him to overcome it. This will, I think ultimately, cause the Applicant to delineate between satiating his sexual curiosity and proclivities without a predominant focus on BDSM pornography such as to possibly cause him to reach the threshold of a paraphilic disorder;

- **the risk of real life physical sexual contact with children:** during closing submissions one of the discussion points between the Tribunal and the representatives involved the extent to which the Applicant's continued focus on BDSM pornography with a child-based element could result in real-life physical sexual contact between the Applicant and the children. Dr O'Dea was relatively coy on this question and suggested it was something '*…difficult to determine with accuracy.*'[132] Dr O'Dea also thought that the Applicant's successful engagement in the abovementioned community treatment program '….*is likely to prove the most effective intervention in managing and minimising this risk in the community in the long term.*'[133] I once again refer to the Applicant's intellectual capacity and consider that it represents a protective factor against him becoming involved in the commission of physical offending against child victims. Put simply, this Applicant has the intellectual and cognitive capacity to well and truly grasp the existential position into which his index sex offending has placed his visa status. He is well-able to understand how commission of any future physical offending against

[130] That is, '*current*' as at the date of Dr O'Dea's report which is 12 May 2022.
[131] R1, p 87 [48].
[132] Ibid, p 88 [51].
[133] Ibid, p 88 [51].

children will even more significantly affect that status and how he must bring his predisposition to BDSM pornography under control in order to minimise that risk.

Assessment of recidivist risk

103. I will not cavil with Ms Nuttall's assessment that the Applicant represents a low risk of re-committing of his index sexual offences. This finding should be tempered by the conditionality expressed in Dr O'Dea's report to the effect that the Applicant's engagement with rehabilitation will be the most effective means by which his recidivist risk can be managed in the community in the long term.

Sub-paragraph 8.1.2(2)(c)

104. 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 of Primary Consideration 1:

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

(a) I have found that the nature and seriousness of the totality of the Applicant's conduct to date has been *very serious;*

(b) I have found that were this Applicant to re-commit his index sex offending, by acquiring child exploitation material, he would be creating a market for this type of material in Australia. Any unlawful conduct by the Applicant leading to such an outcome has the potential of occasioning very significant harm to the Australian community due to the contribution the Applicant would be making to the level of demand for child exploitation material in this country.

(c) the totality of the evidence points to a finding that this Applicant's level of recidivist risk can now be found to be '*low'*.

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

PRIMARY CONSIDERATION 2: WHETHER THE APPLICANT'S CONDUCT ENGAGED IN CONSTITUTED FAMILY VIOLENCE

107. In their respective written submissions,[134] the parties are *ad idem* that this Primary Consideration is not relevant to the instant determination and that it should carry neutral weight. Their respective positions did not change during oral argument.[135] I agree with the respective positions of the parties in relation to this Primary Consideration 2 and will allocate neutral weight to it.

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

108. 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.*

109. 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.

110. 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*

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[134] A2, p 13 [64]; R2, p 9 [39].

[135] Transcript, Day 1, p 21, lines 16-21; p 38, lines 36-39.

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.

111. During the hearing, both parties agreed the Applicant has immediate family members in Australia. They comprise:

- his mother (Ms TS);
- his stepfather (Mr PBL);
- and his partner (Ms YL).

112. **The Applicant's mother** (Ms TS) is aged 53 and is a permanent resident of Australia. She is, with respect, an exemplar of a person migrating to Australia and making a success of herself in this country. She is estranged from her first husband (and biological father of the Applicant) in China who does not appear to have taken any genuine measure of interest in the welfare of either herself or the Applicant in Australia. When she was in China, the Applicant's mother worked in the field of information technology. Her IT experience in China was not recognised in Australia such that she could find work in that field here. She nevertheless re-skilled and became a registered nurse in Sydney. She holds down full-time employment as a registered nurse in the aged care sector in Sydney. Until she met her current partner, there is little to cavil with a finding that she very impressively provided for herself and the Applicant as well as seeing the Applicant through his school years and now his university years.

113. The Applicant's mother provided both oral and written material to the instant hearing. It suffices to say that she will experience a significant level of devastation in the event of the Applicant's removal to China. As her only child, it is not a stretch of the evidence to suggest (and find) that the Applicant represents virtually the totality of her life's work. This is made clear in her written statement:

'11. If [the Applicant] had to return to China, it would cause very big trouble for our family. I would be absolutely shattered and devastated beyond words. It would be

like losing my only son. I would be heartbroken for life. I would be very concerned for [the Applicant]'s prospects and ability to reside in China.'[136]

114. This tone of her evidence was repeated in her oral evidence before the Tribunal:

> *'DR DONNELLY: And this probably will sound like a silly question, but if your son had to go back to China, how would you feel about this?*
>
> *MS TS: ---I can't – I can't – I can't – I can't. I can't imagine. You know, my son, he very, very young and the (indistinct words) come here and the immigration, I want to be with my son. Good, better, more better than China environment. So I immigration to Australia with my son. And – but he – he grow in the Australia, and he still cannot – we always were speaking English at home. He – he cannot the reading and writing Chinese, and (indistinct words), if he return to China, it's very – it's very be terrible. Terrible for our family.'*[137]

115. **The Applicant's stepfather** (Mr PBL) is aged 62 years and is an Australian citizen. He has been in a long-term relationship with the Applicant's mother. He has known the Applicant for more than 10 years. In his written statement he said the Applicant '*is extremely close to his mother*'.[138] He also says that:

> *'9. In circumstances where [the Applicant] was deported to China, I would be very sad and depressed. I consider [the Applicant] like my own son. As discussed earlier in my evidence, we are very close and have a strong relationship. The deportation of [the Applicant] would be like losing a member of the family.'*[139]

116. Mr PBL confirms that the Applicant's mother '*…would be extremely distressed and heartbroken if her son was deported.*'[140] Like the Applicant's mother, Mr PBL also works as a registered nurse and confirms that were they to return to China with the Applicant, '*Our expertise and experience would not be recognised in China*.'[141]

117. While perhaps too modest to say so, one should have regard to the extent to which Mr PBL has fathered the Applicant. During his own evidence, the Applicant said this of the role Mr PBL has played in his life:

> *'DR DONNELLY: How would you describe your relationship with mum and dad?*
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> *APPLICANT: ---My relationship with mum and dad are very tight. Obviously, I grew up with both of them. Dad didn't really come into my life until I was in about – I was*

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[136] A4, p2, [11].

[137] Transcript, Day 1, p 81, lines 29-37

[138] A3, p1, [7].

[139] Ibid, [9].

[140] Ibid, p 2, [10].

[141] Ibid.

13. However, he's been in my life ever since and he's a very, very good fatherly figure and very close – I hold him very close to my heart. In uni, I – because my parents live far away from the university, I did move out to be closer to the university. However, every week I would drive or he'd take – I would drive for an hour and take the bus for nearly two hours to go see them every week at least once.'[142]

118. **The Applicant's current partner** (Ms YL) provided both oral and written evidence[143] to the instant hearing. She is a citizen of China who is in Australia on a student visa studying for a Master of Architecture at the University of Sydney. She is nearing the completion of her studies that says she has '…*plans to permanently settle in Australia, especially given my qualifications.*'[144] She has been in a relationship with the Applicant for about three years. She says:

'9. I have been in a relationship with [the Applicant] for about three years. We have a very close, loving, and ongoing relationship. I love [the Applicant] deeply. I communicate with [the Applicant] daily by telephone, text messages and video calls. We have done our best to maintain a relationship, despite the difficult circumstances with [the Applicant] in prolonged immigration detention.

10. We do not have any children together. We are not married. However, my mother is coming from China in December this year. It is the mutual intention of [the Applicant] and me to eventually get married. Before this can happen, we need to communicate our thoughts and seek formal permission from our parents.

11. Our relationship is serious and one of sincere commitment. Notwithstanding [the Applicant]'s difficulties, I have stood by him. I have otherwise visited [the Applicant] in immigration detention on several occasions. [The Applicant] looks depleted and very sad by his current circumstances.'[145]

119. She speaks of being heartbroken in the event of the Applicant's removal to China and that such an outcome could lead to the end of their long-term relationship. She does not have any intention of relocating to China in the event of the Applicant's removal. This is so for several reasons: (1) her Australian qualifications in architecture would not be recognised in China; (2) she has established ties in Australia; and (3) she wishes to pursue her career in Australia.[146]

120. I am mindful that for the interests of Ms YL to be taken into account for present purposes, she must be an Australian citizen, an Australian permanent resident or a person who has a

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[142] Transcript, Day 1, p 13, lines 1-9.

[143] A6.

[144] Ibid, p 1, [7].

[145] Ibid, pp 1-2 [9] – [11].

[146] Ibid, p 2, [15] – [16].

right to remain in Australia indefinitely. Ms YL does not fall into any of these categories and I must allocate neutral weight to the strength, nature and duration of the Applicant's ties to her.

121. The position is different in relation to the Applicant's mother and stepfather. Both of them fall into at least one of the qualifying categories contained in paragraph 8.3(1) of the Direction. Accordingly, I am of the view that his ties with his mother and stepfather respectively are very strong and that those ties militate in favour of 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

122. 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 his biological and/or stepchildren are Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely. It is common ground that the Applicant does not have any biological and/or stepchildren in Australia. This paragraph 8.3(2) can be put to one side and rendered neutral for present purposes.

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

123. 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. This paragraph of the Direction does not specifically formulate a methodology as to how weight is to be allocated to these two categories of ties.

124. In terms of other family members, the Applicant's Personal Circumstances Form ('PCF')[147] responds to the requirement to '***List other close family members including in-laws,***

[147] R1, pp 65-79.

cousins, grandparents, uncles/aunts.' In response to this requirement, the Applicant makes reference to a cousin and an uncle in Australia. The PCF records the nationality of this cousin and uncle as '*Australia*'. However, there is no commentary or narrative in the PCF or elsewhere in the material about the extent of his ties to those people.

125. Further in the PCF, in response to the requirement to '***State how many other relatives you have in Australia or overseas***' the Applicant records '*2*' uncles/aunts and '*2*' cousins. Again, there is no commentary or narrative in the PCF or elsewhere in the material about the extent of his ties to those people.

126. The material contains several statements/references from people who may qualify as social links of the Applicant in Australia. They comprise:

- **Ms JC**: her statement made in April 2022 appears in the material.[148] She is a full-time engineering / computer science student at the University of NSW. She has known the Applicant and has been close friends with him since September 2020. She regards the Applicant as a conscientious student who '*strives to achieve academically and be involved in university projects.*'[149] Outside of their student environment she regards the Applicant as '*…an outgoing person and is unafraid to speak his mind. He speaks honestly and openly about his relationship and sexuality and he is very well aware of his libido and sexual desires.*'[150] She concludes her statement by saying '*…it is evident that he does not want people to view the charges as a reflection of the person he is.*';[151]
- **Mr NS** is a university colleague of the Applicant and has known him for three years. His written statement is dated 25 February 2022 and appears in the material.[152] He regards the Applicant as a '*kind, considerate and genuinely helpful individual.*'[153] He concludes his statement by saying: '*I am confident…that [the*

[148] R1, p 111.
[149] Ibid, p 111.
[150] Ibid.
[151] Ibid.
[152] Ibid, p 112.
[153] Ibid.

Applicant] is caring, mature and responsible enough to follow through on getting help and learning from his mistakes to be a better person';[154]

- **Ms SB** is a law student in NSW. Her statement is dated 6 April 2022 and appears in the material.[155] At the time of her statement she had known the Applicant for four and a half years. They were involved in a romantic relationship for three months while they were both in high school. She is aware of the Applicant's criminal offending but thinks '*…he has always been an intelligent and capable person…He has been someone who could persevere through hardship and come out stronger on the other side.*'[156] She speaks of the Applicant being supportive towards her '…*not only as a former partner, but as a friend*';[157]

- **Ms WW** is currently 22 years of age. Her written statement appears in the material[158] and she also gave oral evidence to the instant hearing. She is studying for a Bachelor of Engineering degree at the University of New South Wales. She has known the Applicant for about five years and says they have maintained '*a close friendship*'.[159] She has visited the Applicant '*…about four to five times in immigration detention.*'[160] She is aware of the Applicant's offending but regards him as '*… a good member of the Australian community. He is a very intelligent young man who is respectful and nice. I have always enjoyed being his friend.*'[161] She speaks of the Applicant's possible removal to China in these terms: '*If [the Applicant] was deported from Australia I would be heartbroken and very sad. [The Applicant] is my dear friend*';[162]

- **Ms CC** is an Australian citizen who works for a major Australian bank. She did not give oral evidence at the instant hearing but her written statement dated 29 June 2023 appears in the material.[163] She and the Applicant have been friends for about nine years and she is aware of his criminal offending. She says '*He has opened to*

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[154] R1, p 112.
[155] Ibid, p 113.
[156] Ibid.
[157] Ibid.
[158] A5.
[159] Ibid, p 1, [6].
[160] Ibid p 2, [10].
[161] Ibid, p 1, [8].
[162] Ibid, [9].
[163] R1, p 421.

me but never before, and I have acted as his emotional support.'[164] Given the length of time she has known him, Ms CC says she can '*…attest to his character and integrity independent of this one criminal offence.*'[165] She regards the Applicant as a positive contributor to Australian society. She also regards him '*as a loyal and supportive friend*'[166] who has helped her through her own personal difficulties. She notes the Applicant '…*has integrated into the Australian culture and has established strong ties with the community, such as myself, who would miss him greatly if he had to leave.'*[167]

127. With the exception of Ms JC, it would appear the remainder of the above dot-pointed deponents fall into any one of the qualifying categories contained in paragraph 8.3(3) of the Direction requiring them to be Australian citizens, Australian permanent residents and / or people who have a right to remain in Australia indefinitely.

128. The position is different in relation to the Applicant's mother and stepfather. Both of them fall into at least one of the qualifying categories contained in paragraph 8.3(1) of the Direction. Accordingly, I am of the view that his ties with his mother and stepfather respectively are very strong and that those ties militate in favour of allocation of a heavy level of weight in favour of the Applicant pursuant to this Primary Consideration 3.

129. Each of Ms CC, Mr NS, Ms SB and Ms WW can be safely found to fall into at least one of the qualifying categories found in paragraph 8.3(3) of the Direction. Accordingly, I am of the view that the Applicant's social links with these four 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.

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[164] R1, p 421.
[165] Ibid.
[166] Ibid.
[167] Ibid.

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

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

(a) whether the Applicant has been ordinarily resident here during his formative years.[168] The Applicant was born in April 2000. He came to and settled in Australia (on a final basis with his mother) in 2008. He was therefore eight upon his arrival. It is therefore safe to find that he has been ordinarily resident in Australia during his *formative years.* This component of paragraph 8.3(4) does facilitate the allocation of weight to his ties to Australia because he spent his formative years here – that is, from age eight onwards;

(b) whether the Applicant has positively contributed to the Australian community during his time here.[169] The Applicant has spent over two thirds of his life in Australia. At 23 years of age and still in the tertiary education phase of his life, he has not yet had an opportunity to engage in remunerative employment in this country although he has received a small measure of income for some teaching work he has done at his tertiary institution.[170] He has a strong history of participation in the cultural and extra-curricular life of the tertiary institution he attends. To this extent, it could be found that the Applicant has been a productive member of the Australian community but perhaps not to the same extent as would be the case if he were working in full-time employment for a prolonged period. There is no doubt that his level of qualifications (upon completion of his studies) will position him for employment through which he will be able to make a positive contribution to Australia. I am therefore satisfied that the extent of his contributions to the cultural and extra-curricular life of the tertiary institution he attends is such that this specific sub-paragraph 8.3(4)(a)(ii) of the Direction does speak favourably to the strength, nature and duration of his ties to this country. According to the evidence, the Applicant has also made contributions to this nation's community and cultural life. During evidence-

[168] Paragraph 8.3(4)(a)(i) of the Direction.
[169] Paragraph 8.3(4)(a)(ii) of the Direction.
[170] Transcript, Day 1, p 13, lines 41-47.

in-chief, he spoke of providing pro-bono assistance to fellow school students and then fellow university students with tutoring-type assistance and support.[171] I find that these community and cultural contributions mean that the Applicant has positively contributed to the Australian community such that this specific sub-paragraph 8.3(4)(a)(ii) of the Direction can be applied as a means of speaking favourably to the strength, nature and duration of his ties to this country.

(c) 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?[172] With reference to the first question, I have already found that the Applicant has spent his formative years here. With reference to the second question, he arrived here as an eight year old in 2008 and committed his first and only offence in Australia in 2021 when he was aged 21 years and was sentenced for it in May 2022. Thirteen years post-settlement in Australia is not '*soon after arriving in Australia*.' Taking into account (1) that the Applicant did spend his formative years here and (2) he did not begin offending soon after arriving here, this paragraph 8.3(4)(a)(iii) of the Direction does not impugn the strength, nature and duration of the Applicant's ties to Australia.

131. I am therefore of the view (and I find) that as a result of my analysis of the evidence around sub-paragraphs 8.3(4)(a)(i)-(iii) of the Direction, the Applicant's ties to the Australian community must be found to be very strong especially in circumstances where he has spent his formative years here. This finding is augmented by the reality that (1) he has made contributions to the Australian community via his active involvement in the cultural and community life the tertiary institution he attends; and (2) that he otherwise has no other criminal history in this country aside from that which came before an NSW Local Court for sentencing in May 2022.

Conclusion: Primary Consideration 3

132. I have referred to the four relevant sub-paragraph components of this Primary Consideration 3. I am of the view – after having analysed the evidence relevant to

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[171] Transcript, Day 1, p 14, lines 5-37.
[172] Paragraph 8.3(4)(iii) of the Direction.

each of those components – that the totality of the evidence points to a finding that this Primary Consideration 3 is of *heavy* weight in favour of this Tribunal setting aside the Decision Under Review.

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

133. In their respective written submissions,[173] the parties are *ad idem* that this Primary Consideration is not relevant to the instant determination and that it should carry neutral weight. Their respective positions did not change during oral argument.[174] I agree with the respective positions of the parties in relation to this Primary Consideration 4 and will allocate neutral weight to it.

PRIMARY CONSIDERATION 5: EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

134. 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.[175] 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.'*[176]

135. Paragraph 8.5 of the Direction states:

> *(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.*

136. This Applicant has breached the Australian community's expectations by commission of his index sexual offending in this country for which he was sentenced in May 2022. Therefore,

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[173] A2, p 19 [100]; R2, p 10 [44].

[174] Transcript p 21, lines 16-21; Transcript p 38, lines 36-39.

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

[176] 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.

the Australian community, *'as a norm',* expects the Australian Government not to allow him to remain in Australia.

137. 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:[177]

> *(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.*

138. The Applicant has a single conviction for '*Possess child abuse material*'. I am hard-pressed to arrive at a finding that this type of offending falls within the auspices of any of the abovementioned paragraphs (a)-(f) of paragraph 8.5(2) of the Direction. True it is that the child exploitation material found in the possession of the Applicant involved child victims. But possession of this material does not constitute the '*commission of serious crimes against….children….'* pursuant to paragraph 8.5(2)(c) of the Direction. The producers of this child exploitation material have committed serious crimes against children. The Applicant has breached the criminal law of NSW, specifically, s 91(h)(2) of the *Crimes Act 1900* (NSW).

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

139. 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;[178]

(c) Australia *will generally* afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life or from a very young age;[179]

(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;[180]

(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;[181] and

(f) if a non-citizen's unlawful conduct is inherently of the type captured by any of the categories stipulated in paragraph 8.5(2)(a)-(f)(inclusive) of the Direction, then even strong countervailing considerations may not assist a non-citizen even where the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.[182]

140. In relation to sub-paragraph (a) of the immediately preceding paragraph [139], the term '*limited stay visa*' is not defined in the Act. The Applicant in this case held a Class BB

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[178] Paragraph 5.2(4) of the Direction.
[179] Paragraph 5.2(5) of the Direction.
[180] Paragraph 5.2(5) of the Direction.
[181] Paragraph 5.2(6) of the Direction.
[182] Paragraph 5.2(6) of the Direction.

Subclass 155 Five Year Resident Return visa until it was mandatorily cancelled on 10 June 2022.[183] This Visa permits a person to '*travel*' to and '*enter'* Australia within a specified period of time once it is granted.[184] It does not specify a period for which the visa holder can remain in Australia once it is granted. 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.[185] Therefore this sub-paragraph (a) is not applicable to the Applicant.

141. In relation to sub-paragraph (b) of the abovementioned paragraph [139], the Applicant has resided in Australia on a permanent basis since mid-2008 when he was about eight years old. He is currently aged 23 years. He is currently engaged in tertiary study but seems actively involved in the community and extra-curricular life of his tertiary institution. Whatever participation in, and contribution (however modest) 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 necessarily lowered by this part of the principles in 5.2(4) of the Direction.

142. In relation to sub-paragraph (c) of the abovementioned paragraph [139], I repeat that the Applicant resided in Australia from the age of eight. He is currently 23 years of age. He has resided in Australia on a permanent basis since mid-2008. He has spent just over two thirds of his life in this country. This means that the Australian community has a higher than usual tolerance of criminal, or other serious conduct by this Applicant.

143. In relation to sub-paragraph (d) of the preceding paragraph [139], I am of the view that the length of time the Applicant has spent here facilitates a raising of the community's level of tolerance for his offending. This finding can be augmented as a result of him having spent his formative years in this country because he arrived here as an eight year old.

144. In relation to sub-paragraph (e) of the abovementioned paragraph [139], 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 '*very serious'* offending for which he was sentenced in

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[183] R1, pp 430-438.
[184] Regulation 155.511 of the *Migration Regulations 1994* (Cth).
[185] *Walker v Minister of Home Affairs* [2020] FCA 909 at [29].

May 2022 and (on the other hand), whatever countervailing considerations may work in his favour, is a principle referable to the community's expectations for present purposes. This is because I am of the view that the Applicant's '*very serious'* offending for which he was sentenced in May 2022 and the resulting harm from that conduct has been of a sufficient magnitude to possibly dispel any applicable countervailing considerations.

145. In relation to sub-paragraph (f) of the abovementioned paragraph [139], I have found that while the Applicant's offending does not readily fall within the auspices of sub-paragraphs (a)-(f) of paragraph 8.5(2) of the Direction, the Applicant's very serious offending that came before Magistrate Milledge for sentencing in May 2022 is of such a magnitude of seriousness that regardless of whether it falls into any of the componentry of paragraph 8.5(2) of the Direction, the Australian community would expect that the Australian Government can and should cancel this Applicant's Visa.

146. Given that finding, even strong countervailing considerations in his favour may not assist the Applicant. This is the case even in circumstances where, as I have found, he represents a low risk of reoffending in the realm of his index sexual offending. Therefore, my finding must be that the nature of his offending effectively precludes any countervailing considerations working in his favour even where he represents a low recidivist risk.

Conclusion of Primary Consideration 5: Expectations of the Australian community

147. I am mindful of the extent of his life the Applicant has spent in this country. I am also mindful of the determined efforts of his mother to – virtually on her own - establish a life for herself and the Applicant in this country. The Applicant is a high-achieving student who is well on his way to taking degree qualifications that may one day facilitate his making a significant contribution to this country. I accept this Primary Consideration must weight against him. I find that Primary Consideration 5 confers *a certain, but not determinative* level of weight in favour of this Tribunal affirming the Decision Under Review.

OTHER CONSIDERATIONS

Other Consideration (a): Legal consequences of the decision

148. I am mindful of the Tribunal's obligation to be alert to a claim by an applicant about any non-refoulement obligations they may claim are owed to them.[186] Prevailing High Court authority tempers that obligation on the basis of such an Applicant's capacity to apply for a Protection visa.

Plaintiff M1/2021

149. On 11 May 2022, the High Court of Australia – in its decision of *M1/2021 v Minister for Home Affairs*[187] ('*Plaintiff M1'*) turned its mind to the question of whether a decision-maker can, '*defer*' consideration of Australia's non-refoulement obligations to a future date or event, such as if the Applicant were to apply for a Protection visa. Prevailing authority militated against any such deferral by a decision-maker even in circumstances where an Applicant were able to seek a Protection visa.[188]

150. The approach formulated by the High Court in *Plaintiff M1* was expressed thus:

> *'Decision-makers' approach to non-refoulement*
>
> *[28] Where the representations do **not** include, or the circumstances do **not** suggest, a non-refoulement claim, there is nothing in the text of s 501CA, or its subject matter, scope and purpose, that requires the Minister to take account of any non-refoulement obligations when deciding whether to revoke the cancellation of any visa that is not a protection visa**.***
>
> *[29] Where the representations **do** include, or the circumstances do suggest, a non-refoulement claim by reference to **unenacted international non-refoulement obligations,** that claim may be considered by the decisionmaker under s 501CA(4). But those obligations cannot be, and are not, mandatory relevant considerations under s 501CA(4) attracting judicial review for jurisdictional error – they are not part of Australia's domestic law.*
>
> *[30] Where the representations **do** include, or the circumstances **do** suggest, a claim of non-refoulement **under domestic law**, again the claim may be considered by the decision-maker under s 501CA(4), but one available outcome for the decision-maker is to defer assessment of whether the former visa holder is owed those non-refoulement obligations on the basis that it is open to the former visa holder to apply for a protection visa.'*

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[186] See Direction, paragraphs 9.1(1) and (2).

[187] (2022) 400 ALR 417. Date of judgment: 11 May 2022.

[188] *Ali v Minister for Home Affairs* (2020) 278 FCR 627.

[Emphasis in original]

151. In *Plaintiff M1*, the plurality clarified that consideration of non-refoulement obligations can be deferred where a non-refoulement claim is made or arises on the facts and the person is able to make a valid application for a Protection visa. The decision settles the previously unsettled state of the law on this issue. It confirms that it is permissible for a merits-based decision-maker applying s 501CA(4) of the Act to determine whether the relevant discretion can be exercised to have regard to the fact that a person may make a Protection visa application.

152. I interpret the plurality in *Plaintiff M1* to nevertheless *require* a merits-based decision-maker's reasons to demonstrate that non-refoulement claims have been read, identified, understood and evaluated, but *does not require* that decision-maker to undertake a Protection assessment before considering removal of a non-citizen from Australia. Thus, it may be necessary to take account of alleged or claimed facts underpinning such claims:

- where those alleged facts/claims are relied upon for establishing '*another reason*' why the cancellation decision under s 501CA should be revoked; or
- where they are relied upon as any other matter relevant to the exercise of the discretion to cancel visas pursuant to s 501.

153. It seems clear from the Applicant's evidence that if he is unsuccessful in the instant application, he will ventilate his protection claims at a different forum of the purpose of securing a Protection visa:

> *'MR ETUEATI: do you fear going back to China?*
>
> *APPLICANT: ---I don't – I fear going back permanently, yes.*
>
> *MR ETUEATI: Why?*
>
> *APPLICANT: ---As I've outlined in my statement, my Christian faith, differences in belief, ideology, freedoms of – freedom that's not guaranteed in China, authoritarian government, cognitive state, my lack of friends, Chinese language, education, I've already outlined all of that.*
>
> *MR ETUEATI: All right.* ***Are you aware of the concept of refugees?***
>
> *APPLICANT:* ***---I do.***
>
> *MR ETUEATI : Yes. Do you consider that you are a refugee?* ***Or do you seek the protection of Australia, vis-à-vis China?***

> *APPLICANT:* ***---I think I would seek the protection of Australia because I have a genuine fear.***
>
> *MR ETUEATI :So why haven't you?*
>
> *APPLICANT: ---Because I haven't – because right now I'm trying to fight for my visa.*
>
> *MR ETUEATI: Well, you don't have a visa, and you realise that if you lose this, these proceedings, then you'll be going back to China. Well absent – unless there's a finding that you're owed protection obligations, that you'll be going back to China?*
>
> *APPLICANT: ---I – if I – if in the – in the situation that I lose this, can't I still apply for a protection visa and seek refugee protection claims?*
>
> *MR ETUEATI: Well, I'm not here to advise you. I'm asking why, if you believe you're a refugee, you haven't applied for a refugee visa?*
>
> *APPLICANT: ---Because I am trying to do one thing at a time to get my visa back through revocation.*
>
> *MR ETUEATI: So if you aren't successful here, will you apply for a refugee visa?*
>
> *APPLICANT: ---If I already have a permanency residency visa, I don't need a refugee visa.*
>
> *……*
>
> *MR ETUEATI****: When I say if you're unsuccessful here, I mean if you don't end up getting your visa back?***
>
> *APPLICANT: ---Yes, yes, yes, yes. If I – sorry, I misunderstood the question, I'm sorry. Yes, if I – if I do* ***– if I'm unsuccessful in revocation, I will definitely try to get a refugee visa. I don't know what it's called but, yes. I'll see [sic] protection claims, yes****.'*[189]
>
> [My emphasis]

154. As will be noted from his above-quoted oral evidence, were the Applicant unsuccessful in the instant proceeding, he will be applying for a Protection visa. Given this unequivocal position articulated by the Applicant, I will defer assessment of whether he is owed any non-refoulement obligations to the decision-maker actually involved with making that assessment.

155. The further point is this: the outcome of the instant application is already known. The Applicant has succeeded and his visa status has been restored to him. As mentioned earlier, this hearing proceeded before me on 3 and 4 October 2023. The Tribunal had a statutory obligation to make a decision in this matter pursuant to the 84 day timeframe referred to in s 500(6L)(c) of the Act. On 20 October 2023, I published a short-form decision

[189] Transcript, Day 1, p 69, lines 11-47.

pursuant to the authority of *Khalil v Minister for Home Affairs* (2019) 271 FCR 326, in order to ensure the Tribunal met its statutory obligation. That short-form decision restored the Applicant's Visa status to him. A true and correct copy of that short-form decision is attached to these Reasons and marked '**Annexure B**'.

156. Accordingly, I will (and can only) allocate neutral weight to this Other Consideration (a).

Other Consideration (b): Extent of impediments if removed

157. This other consideration requires a decision-maker to consider the impediments a non-citizen is likely to face in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), if they are removed from Australia to their home country. In doing so, a decision-maker is required to take into account:

- the non-citizen's age and health;
- whether there are substantial language or cultural barriers; and
- any social, medical and/or economic support available to them in that country.

158. **Paragraph 9.2(1)(a)**: the Applicant is a 23-year-old man. He seems in robust physical health. Dr O'Dea found that the Applicant is not suffering from any major psychiatric illness but that he does have a compulsion towards internet pornography use with a BDSM component but that these symptoms do not meet the psychiatric diagnosis criteria for a paraphilic disorder.[190] As also confirmed by Dr O'Dea the Applicant does not take any medication on an ongoing or a regular basis. This component of Other Consideration (b) should be put to one side and rendered neutral for present purposes.

159. **Paragraph 9.2(1)(b)**: the Applicant's primary position is that he only has a rudimentary capacity to read and write in Mandarin Chinese. It is said on his behalf that these skills are '*….at a primary level.*'[191] This evidence must be received with a degree of caution for a couple of reasons: (1) it is very difficult to accept that he has not maintained at least some measure of Mandarin Chinese discourse with his mother and / or stepfather since the

[190] R1, p 86 [41].
[191] A2, p 25, [29].

Applicant and his mother arrived here (on a final basis) in 2008; and (2) the movement records confirm that since mid-2008 the Applicant has returned to China on at least nine occasions from 4 December 2008 until 16 February 2019.

160. Those repeated returns have surely resulted in a significant period of cumulative time that he has spent in China. It is, with respect, vacuous for the Applicant to suggest he will experience some type of language impediment upon return to China given: (1) the number of occasions he returned to China between 2008 and 2019; (2) the fact that he spent time with his biological father and grandparents on at least some of those trips; and (3) the cumulative amount of time he has spent in China since 2008. As well, the evidence before the Tribunal indicates that '…*the applicant's partner who says, yes, she does text him in Mandarin but his responses are in basic- and is also mixed with English.*'[192] In her own evidence, the Applicant's partner, Ms YL, said the following:

> *'MR ETUEATI: What's your mother tongue?*
>
> *MS YL: ---Mandarin.*
>
> *MR ETUEATI: All right, and when you speak with the applicant, how do you mostly communicate? In English or in Mandarin?*
>
> *MS YL: ---I think we speak, like, a hybrid language, so some English and some Mandarin. Just combine together.*
>
> *MR ETUEATI: And you went to school in China, didn't you?*
>
> *MS YL: ---Yes.*
>
> *MR ETUEATI: And so you read and write in Chinese?*
>
> *MS YL: ---Not really, because there's just so many people, overcrowded, and I think Australia has a better environment.*
>
> *MR ETUEATI: So my question was whether you read and write in Chinese?*
>
> *MS YL: ---Sorry, yes I do.*
>
> *MR ETUEATI: All right. And do you ever write in Chinese to the applicant?*
>
> *MS YL: ---I don't really – I think, we mostly just text each other, and I think he is not really good at writing Mandarin.*
>
> *MR ETUEATI: Well, when you text, do you ever text in Mandarin, or is it just in English?---I think both, but, like - - -*
>
> *MR ETUEATI:* ***So you text him in Mandarin, and he responds in Mandarin?***
>
> *MS YL: ---**Yes, sometimes, but, I think, just very basic Mandarin, like, just daily chatting.***

[192] Transcript, Day 2, p 17, lines 4-6.

MR ETUEATI: ***All right. So to be clear, he speaks Mandarin, and he reads and write Chinese?***

MS YL: ***---Yes, but just very basic level.*** *Just when (indistinct words) and he will just switch to English words.'*[193]

[My emphasis]

161. This component of Other Consideration (b) attracts, at best, only a moderate level of weight in favour of the Applicant and only on the basis that his Mandarin Chinese written and spoken skills may not immediately be at a level higher than primary school level.

162. **Paragraph 9.2(1)(c):** the Applicant's biological father has re-partnered and established a new family in China. The Applicant conceded that on his numerous return visits to China he has had at least some measure of contact with his biological father. This evidence displaces the contention that '*The applicant does not have a relationship with his father.*'[194] That said, it does not necessarily follow that the Applicant will have a safe haven in terms of safe and secure accommodation with his father if returned to China.

163. The Applicant's further contention is that his criminal record, if it became known in China, would give rise to impediments towards him securing employment and, possibly, accommodation. It is further contended that his criminal record in Australia would expose him to social stigma and discrimination in China. While those contentions cannot be definitively proven, they do at least represent matters of potential difficulty for the Applicant.

164. At a more generic level, I think the Respondent's contention is correct: '*The respondent also accepts that the applicant may face financial hardship upon return at first, given the claimed lack of social, familial and economic support in China.*'[195] During closing submissions, it occurred to me to enquire whether the Applicant would be able to complete his Australian university studies in China on a distance basis via an online environment:

'SENIOR MEMBER: Just on that area, if I could just ask you this? This occurred to me during the evidence. Your client is about, I think, it's three fifths of the way through his university studies. I think he's got a couple of years left to go. And I'm no distance or other education expert, but would it be possible for him, if removed from Australia, to complete his University of New South Wales studies on a distant basis from China, acquire those qualifications, those degree qualifications, high level

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[193] Transcript, Day 1, p 76, lines 15-41.

[194] A2, p 27 [134].

[195] R2, [58].

degree qualifications, and then utilise those qualifications to work as a Chinese National, but with a foreign corporation in China, which would surely have a demand for his sort of qualifications. And surely there are a multitude of foreign corporations working in China, most of whose employees speak and work in English, and whose employees most probably have qualifications from universities outside of China. Is that a possibility, that is him completing - - -

DR DONNELLY: That's a very good question, Senior Member.

SENIOR MEMBER: Yes. I should have asked your client, and I'm sorry I didn't.

DR DONNELLY: And I know the answer.

SENIOR MEMBER: All right.

DR DONNELLY: I know the answer. I only know the answer because I'm the head of the immigration program at the university myself, so I actually know the answer to this question. And the answer is, no. If you're an international student, and as I understand it, you can't do more than 25 per cent of the program online, you actually have to physical be on the ground at the university. And perhaps more importantly, there is no evidence here that his program is even 100 per cent online. Most of these programs are a face- to-face on the ground, and that even when you have international students, the government only allows 25 per cent of it to be online. There was a – there was a period during the covid where they gave that indulgence, but it's back to you've got to be on university grounds to do that. But I do know the answer to it, only because I have to deal with it all the time with students who are overseas.'[196]

165. If the Applicant cannot complete his Australian studies in China it will make it more difficult for him to find employment there. What then comes into play is the Applicant's capacity to sustain himself by way of government support / benefits at least in the interim. In terms of receiving such government support, the following is contended on behalf of the Applicant:

> *'137. The applicant would not be entitled to unemployment benefits in China due to the pension framework and pension insurance schemes that require individuals to have a record of prior employment and make contributions while employed.'*[197]

166. It can be accepted that the Applicant will face a social impediment upon a return to China to the extent that he will most likely not be able to reside with his biological father while his prospects of being accommodated at the home of his grandparents are, at best, short-term given their age and level of infirmity. In terms of medical support, the Applicant will have such publicly available medical support as is generally available to other citizens of that country. It is likely he will suffer an economic impediment due to (1) the non-completion of his studies in Australia that would otherwise have allowed him to secure good employment

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[196] Transcript, Day 2, p 18, lines 43-47; p 19, lines 1-31.

[197] A2, p 27, [137].

in China if compelled to return there; and (2) the difficulties he will apparently experience in sourcing government-funded support benefits to assist him in the short-to-medium term while he establishes himself in that country. For these reasons, a strong level of favourable weight for the Applicant resides in this paragraph 9.2(1)(c) of the Direction.

Findings about impediments

167. I have found that (1) no weight is allocable in favour of the Applicant pursuant to paragraph 9.2(1)(a); (2) that a moderate amount of weight is allocable to him pursuant to paragraph 9.2(1)(b); and (3) that that a strong amount of weight is allocable to him pursuant to paragraph 9.2(1)(c). I am therefore of the view that the totality of weight I have allocated to two of the three components of paragraph 9.2(1) leads to the conferral of a *strong* level of weight in favour of this Tribunal exercising the power to revoke the mandatory cancellation of the Applicant's Visa.

Conclusion of Other Consideration (b): Extent of impediments if removed

168. I am of the view that the state of the evidence only referrable to sub-paragraphs 9.2(1)(b) and (c) of the Direction, confers a *strong* level of weight being allocable towards a finding that this Tribunal should set aside the Decision Under Review.

Other Consideration (c): Impact on victims

169. The parties are *ad idem* that this Other Consideration is not relevant to the instant determination and that it should carry neutral weight. I agree.[198]

Other Consideration (d): Impact Australian business interests

170. The parties are *ad idem* that this Other Consideration is not relevant to the instant determination and that it should carry neutral weight. I agree.[199]

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[198] A2, p 28 [143]; R2, p 13 [60]; Transcript p 44, lines 36-46. p 52 lines 7-10.
[199] Ibid.

Findings: Other Considerations

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

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

(b) extent of impediments if removed: is of ***strong*** **weight** in setting aside the Decision Under Review;

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

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

172. Under s 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. As noted previously in these Reasons, the Applicant does not pass the character test.

173. In considering whether there is another reason to exercise the power afforded by s 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 *certain, 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* level of weight in favour of **setting aside** the Decision Under Review;
- Primary Consideration 4: is of ***neutral weight***; and
- Primary Consideration 5: carries a *certain, but not determinative* level of weight in favour of **affirming** the Decision Under Review.

174. I have outlined the weight attributable to each of the Other Considerations. I am of the view (and I find) that the combined weights I have allocated to Primary Consideration 3 and Other

Consideration (b) are sufficient to outweigh the combined weights I have allocated to Primary Considerations 1 and 5.

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

DECISION

176. Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal **sets aside** the decision dated 22 June 2023 made by a delegate of the Respondent and **substitutes** it with a decision that the mandatory cancellation of the Applicant's Class BB Subclass 155 Five Year Resident Return visa should be revoked.

I certify that the preceding 176 (one hundred and seventy - six) paragraphs are a true copy of the reasons for the decision herein of Senior Member Theodore Tavoularis

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

Associate

Dated: 15 November 2023

Date(s) of hearing:	**3 and 4 October 2023**
Counsel for the Applicant:	**Dr Jason Donnelly (Direct brief)**
	Latham Chambers
Solicitor for the Respondent:	**Mr Tigiilagi Etueati (Senior Lawyer)**
	Australian Government Solicitor

ANNEXURE A

EXHIBIT	DESCRIPTION OF EVIDENCE	DATE OF DOCUMENT	DATE RECEIVED
RESPONDENT SUBMISSIONS			
R1	Section 501G documents	Various	16 August 2023
R2	Respondent's Statement of Facts, Issues and Contentions	19 September 2023	19 September 2023
R3	Respondent's Tender Bundle	Various	19 September 2023
APPLICANT SUBMISSIONS			
A1	Applicant's signed statement + IHMS records	26 August 2023	31 August 2023
A2	Applicant's Statement of Facts, Issues and Contentions	27 August 2023	31 August 2023
A3	Statement from Mr BPL	23 August 2023	31 August 2023
A4	Statement from Ms TS	23 August 2023	31 August 2023
A5	Statement from Ms WW	23 August 2023	31 August 2023
A6	Statement from Ms YL	23 August 2023	31 August 2023

EXHIBIT	DESCRIPTION OF EVIDENCE	DATE OF DOCUMENT	DATE RECEIVED
A7	Applicant's reply to Respondent's SFIC	24 September 2023	25 September 2023
A8	Applicant's list of authorities	Various	25 September 2023

ANNEXURE B – SHORT FORM DECISION

Administrative Appeals Tribunal

ADMINISTRATIVE APPEALS TRIBUNAL	**)**	
	)	No: **2023/5668**
GENERAL DIVISION	**)**	

Re: **MJVS**

Applicant

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

Respondent

DECISION

TRIBUNAL: Senior Member Theodore Tavoularis

DATE: 20 October 2023

PLACE: Brisbane

DECISION: Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal **sets aside** decision dated 28 July 2023 made by the Respondent's delegate and **substitutes** it with a decision to revoke the mandatory cancellation of the Applicant's Class BB Subclass 155 Five Year Resident Return visa.

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

…….....[SGD].....

Senior Member Theodore Tavoularis