Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number(s): **2023/0381**

Re: **Mehdi Zeydvand**

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Senior Member K Raif**

Date: **29 March 2023**

Place: **Sydney**

Pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal sets aside the Reviewable Decision dated 16 January 2023 to refuse to revoke the mandatory visa cancellation decision, and in substitution, decides that the cancellation of the Applicant's Class BB Subclass 155 Five Year Resident Return visa is revoked.

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

Senior Member K Raif

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CATCHWORDS

MIGRATION *– mandatory cancellation of visa – Migration Act 1958 (Cth), subsection 50CA(4) – Ministerial Direction No. 99 – protection of the Australian community – strength, nature and duration of ties to Australia – expectations of the Australian community – extent of impediments if removed – decision set aside and substituted*

LEGISLATION

Administrative Appeals Tribunal Act 1975 (Cth)

Migration Act 1958 (Cth)

CASES

Afu v Minister for Home Affairs [2018] FCA 1311

FYBR v Minister for Home Affairs [2019] FCAFC 185

Plaintiff M1/2021 v Minister for Home Affairs (2022) 400 ALR 417; [2022] HCA 17

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

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

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

SECONDARY MATERIALS

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

REASONS FOR DECISION

Senior Member K Raif

29 March 2023

BACKGROUND

1. This is an application for review of a decision of the delegate of the Minister for Immigration, Citizenship and Multicultural Affairs ('the Respondent') not to revoke the cancellation of a Class BB Subclass 155 Five Year Resident Return visa ('RRV') held by the Applicant.

2. The Applicant is a national of Iran, born in September 1982. He arrived in Australia in August 2012 on a Skilled visa and in June 2017 he was granted the RRV.

3. In February 2021, the Applicant was convicted of the offences described below and was sentenced to three and a half years of imprisonment. On 19 May 2021, the Applicant's visa was mandatorily cancelled under subsection 501(3A) of the *Migration Act 1958* (Cth) (the Act) because it was determined that the Applicant had a substantial criminal record and did not pass the character test. The Applicant was invited to make and made representations about the revocation of the decision to cancel his visa in June 2021. On 16 January 2023, a decision was made under subsection 501CA(4) not to revoke the mandatory cancellation decision. The Applicant is seeking review of that decision.

4. For the following reasons, the Tribunal has concluded that the decision dated 16 January 2023 not to revoke the cancellation of the Applicant's visa should be set aside. The Tribunal substitutes the decision not to cancel the visa previously held by the Applicant.

RELEVANT LAW

5. Subsection 501(3A) of the Act relevantly states:

The Minister must cancel a visa that has been granted to a person if:

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

6. Subsection 501CA(3) provides that as soon as practicable after making a decision under subsection 501(3A) the Respondent must, among other things, notify the person of the decision, provide particulars of relevant information and invite the person to make representations to the Respondent, '*within the period and in the manner ascertained in accordance with the regulations, about revocation of the original decision*'.

7. Subsection 501CA(4) allows for a revocation of a decision under subsection 501(3A) and relevantly states as follows:

The Minister may revoke the original decision if:

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

8. Subparagraph 501CA(4)(b)(ii) of the Act requires the Tribunal to examine the factors for and against revoking a mandatory cancellation decision. If the Tribunal is satisfied that the cancellation should be revoked following that evaluative exercise, the Tribunal must revoke the original visa cancellation decision.

9. The 'character test' is defined in subsection 501(6) of the Act. Relevantly, paragraph 501(6)(a) provides in part:

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

10. Paragraph 501(7)(c) relevantly provides that a person has a '*substantial criminal record'* if the person has been sentenced to a term of imprisonment of 12 months or more.

11. On 23 January 2023, Direction No. 99 *Visa refusal and Cancellation under s. 501 and revocation of a mandatory cancellation of a visa under s. 501CA* ('Direction 99') was signed, coming into effect on 3 March 2023. Direction 99 is binding on the Tribunal in performing its functions or exercising powers under section 501 of the Act.

12. Direction 99 sets out the principles that provide a framework within which decision-makers should approach their task of deciding whether to exercise the discretion to refuse to grant a visa or revoke mandatory cancellation decisions. The principle set out at paragraph 5.2(2) of Direction 99 states that:

> '*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.*'

13. The primary considerations which are set out in clause 8 of Part 2 of Direction 99 are:

    (1) protection of the Australian community from criminal or other serious conduct;

    (2) whether the conduct engaged in constituted family violence;

    (3) the strength, nature and duration of ties to Australia;

    (4) the best interests of minor children in Australia; and

    (5) expectations of the Australian community.

14. The other considerations, which are not exhaustive, are set out of clause 9 of Direction 99:

    a) Legal consequences of the decision;

    b) extent of impediments if removed;

    c) impact on victims; and

    d) impact on Australian business interests.

15. Decision-makers should 'generally' give greater weight to primary considerations than other considerations. As noted by Colvin J in *Suleiman v Minister for Immigration and Border Protection*:[1]

> '*Direction 65 [now Direction 99] makes clear that an evaluation is required in each case as to the weight to be given to the 'other considerations' (including non-refoulement obligations). It requires both primary and other considerations to be given 'appropriate weight'. Direction 65 does provide that, generally, primary considerations should be given greater weight. They are primary in the sense that absent some factor that takes the case out of that which pertains 'generally' they are to be given greater weight. However, Direction 65 does not require that the other considerations be treated as secondary in all cases. Nor does it provide that primary*

[1] [2018] FCA 594.

considerations are 'normally' given greater weight. Rather, Direction 65 concerns the appropriate weight to be given to both 'primary' and 'other considerations'. In effect, it requires an inquiry as to whether one or more of the other considerations should be treated as being a primary consideration or the consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply'"[2]

16. In this case, it is not in dispute that the Applicant has made representations about the revocation of the cancellation of his visa. The requirements of paragraph 501CA(4)(a) are met. The issues before the Tribunal are:

    (a) does the Applicant pass the character test, as defined by section 501 and, if not;

    (b) is there another reason why the original decision should be revoked.

DOES THE APPLICANT PASS THE CHARACTER TEST?

17. The character test is defined in subsection 501(6) of the Act. Relevantly, paragraph 501(6)(a) states that a person does not pass the character test if the person has a substantial criminal record, as defined in subsection 501(7). Paragraph 501(7)(c) provides that a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more.

18. Information before the Tribunal indicates that in February 2021, the Applicant was convicted of the following offences:

- Dishonestly obtain financial advantage by deception (3 years, 6 months' imprisonment)
- Dealing with property reasonably suspected of being proceeds of crime <$100,00 (12 months imprisonment)
- Produce false / misleading document to specified person / entity (convicted without penalty)

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[2] Ibid, [23].

19. The Tribunal finds that the Applicant has been sentenced to a term of imprisonment of 12 months or more. The Tribunal finds that the Applicant has a substantial criminal record as defined in paragraph 501(7)(c) of the Act. As the Applicant has a substantial criminal record, he does not pass the character test (and the Applicant concedes that he does not pass the character test). The requirements of subparagraph 501CA(4)(b)(i) are not met.

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

20. The Applicant submits, essentially, that he has rehabilitated and there is a very low risk of reoffending and that he has undertaken a significant amount of rehabilitation. The Applicant refers to the significant impediment if he is removed, his links to Australia, the interests of minor children and the possibility of indefinite detention if his visa remains cancelled and claims that these considerations outweigh others.

21. The Respondent submits that the Applicant does not pass the character test and that considerations that favour the non-revocation outweigh other considerations.

22. The Tribunal's considerations are set out below with regard to Direction 99.

Primary considerations

Protection of the Australian Community

23. Sub-clause 8.1 of Direction 99 provides in part as follows:

Protection of the Australian community

> (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….*
>
> (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.*

24. The Direction provides that violent and/or sexual crimes; crimes of a violent nature against women or children (regardless of the sentence imposed); or acts of family violence (regardless of whether there is a conviction for an offence or a sentence imposed) are viewed very seriously by the Australian Government and the Australian community. In this case, the offending did not involve any violence as the offending involved financial crime.

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

26. In considering the nature of the offending, the Tribunal has had regard to the sentencing remarks of Hanley J in the District Court. These indicate that:

(a) between 2015 and 2018, the Applicant assisted and advised various applicants on how to obtain personal loans and credit cards by misrepresenting and inflating their financial position. Specifically, the Applicant helped establish false credit profiles for clients to give them the appearance of being employed and in receipt of income. Once the credit card or personal loan was exhausted, they would not be paid in full and many of the Applicant's clients left Australia.

(b) In August 2018, the Applicant used the identity of another person to deposit $10,000 into a bank account.

(c) In 2016, the Applicant contacted a director of a remittance business, giving a false name and he remitted approximately $80,000 to Iran using the false identity.

(d) The Applicant had successfully applied for a total of 32 credit cards and 7 personal loans with the total card limits fraudulently obtained totalling $603,000 (of which $566,410 has not been recovered). If a loan or credit card application was successful, the funds would be withdrawn within the first month either in cash or paid to one of three businesses. The Applicant was a sole director of one of the businesses.

(e) In November 2018, during the course of a search warrant, police seized 14 drivers licenses issued under 12 different names, two photo cards, over $17,500 in cash and a volume of documents and records in different identities. The police seized several mobile phones, laptops containing details of 130 customers in the process of applying for fraudulent bank loans and identity documents such as passports, citizenship certificates and licenses. It is noted that details of 17 business were

identified, registered to identities of persons who had left Australia but were controlled by the Applicant.

(f) Interception of the Applicant's phone calls (noting that his phone was registered in another name) revealed multiple conversations regarding defrauding of the financial institutions.

27. His Honour notes that the offending involved sophisticated, highly planned fraudulent conduct which required significant management, detailed knowledge of workings of financial institutions which were defrauded. His Honour rejected the suggestion that the offences were committed as a result of the Applicants' purported drug use or gambling addiction (noting lack of evidence for these propositions and implausibility that such a fraudulent sophisticated business could be run whilst suffering from such addition). His Honour found that the Applicant's motivation was substantially for personal financial gain.

28. His Honour found that the offending was at least at the mid-range of objective seriousness, if not higher. His Honour noted the amount of money involved being not as substantial as in many offences but noted the degree of sophistication of the methods used, which undermine the entire banking systems and its safeguards. In his evidence to the Tribunal, the Applicant concedes that the offending was serious, noting that crimes relating to fraud and theft cause significant financial disadvantage and / or loss to individuals and businesses who are victims of such crimes. The Applicant concedes that the offending occurred over several years and involved substantial sums of money. The Applicant also concedes that the frequent and repeated offending would have had a cumulative effect upon the community, is serious. The Applicant also agrees that any future offending of a similar nature would have the potential to cause financial harm to members of the Australian community.

29. The Respondent submits that the weight given to the Applicant's previously good character should be limited, in the context of the significant period during which his offending occurred. The Respondent notes that the Applicant was convicted of offences including 40 incidents involving false information, 6 personal loans, 32 credit cards and a further 30 attempts. The Respondent submits that the lengthy and highly organised scheme of offending operated by the Applicant demonstrates his willingness to commit repeat offences which had caused significant financial harm to the Australian community and cannot be considered out of character. The Respondent notes that the seriousness of offending is reflected in the sentencing received.

30. The Tribunal has formed the view that the offending was serious, given its repeated nature over a significant period of time, the extent of the fraud, and the losses it caused to financial institutions.

31. The Tribunal has considered the risk to the community, should the Applicant reoffend. Paragraph 8.1.2(1) provides that in considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some of the conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.

32. Paragraph 8.1.2(2) provides that in assessing the risk that may be posted by the non-citizen to the Australian community, decision-makers must have regard to, cumulatively:

    (a) the nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct;

    (b) the likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:

        (i) information and evidence on the risk of the non-citizen re-offending; and

        (ii) evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence; and

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

33. Assessing the nature of the harm to individuals or the Australian community that may occur if the Applicant were to engage in further criminal or other serious conduct, is informed by the nature of his offending to date, including any escalation in his offending. This assessment also notes that the Direction provides that the Australian community's tolerance for harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, is so serious that any risk that it may be repeated may be unacceptable. (Paragraph 8.1.2(1))

34. The Applicant states that he was suffering from financial difficulties and depression, that he had turned to short term drug use, alcohol consumption and gambling to cope, and that these factors contributed to his past conduct. He has been diagnosed with Post Traumatic Stress Disorder ('PTSD') and is taking medication for depression, anxiety and insomnia. The Applicant submits that his offending coincided with the failure of his business in 2018, his increased use of drugs and his gambling habit. The Applicant notes that the sentencing judge did not accept that he had substance use disorder and gambling disorder, noting the report from Mr Borenstein (Clinical Psychologist), and found that his motivation was greed and financial remuneration. The Applicant notes that in a subsequent report prepared in May 2022, Ms Rose (Psychologist) diagnosed him with PTSD, depression and anxiety but did not suggest that he had these symptoms at the time of his offending.

35. The Applicant provided to the Tribunal an updated psychological report prepared by Ms Rose in March 2023. That report expressed Ms Rose's strong belief that the Applicant has every likelihood of being a law-abiding member of the Australian community, noting that he had acknowledged his offences and expressed remorse, has 'borne the consequences' of his offending, has been of good conduct while in prison qualifying for parole, and other factors such as his education and job opportunities, his family circumstances, the fact that he has stopped gambling, his plans to live with his family and contribute to the church and the community. Ms Rose expressed the view that his risk of reoffending is very low. Ms Rose also expressed the view that the risk to the community is extremely low.

36. In oral evidence, the Applicant also referred to drug and alcohol use in the past which, he claims, had contributed to his conduct. The Applicant states that being in prison was a '*wake-up call*' for him. He outlined the various rehabilitation programs and counselling sessions he had completed prior to and during his detention. The Applicant claims that he has '*too much to lose'* to reoffend again.

37. The Respondent states that the claimed mitigating factors – such as PTSD and gambling, depression, substance use and financial difficulties - had been rejected by the sentencing judge. Hanley J had indicated his difficulty in accepting that *'such a fraudulent, sophisticated 'business' could be run while suffering from such addiction, particularly that of drugs*'. Hanley J went on to state that '*[the addictions] did not form a basis for his primary motivation or mitigate his moral culpability or act as mitigating factor*'.

38. The Applicant concedes that the offending was '*sophisticated and complex*', occurred over an extended period of time, involved multiple individuals and entities and resulted in fraudulently obtaining over $600,000. The Applicant acknowledges that despite the stated stress, mental health symptoms and other addictions, he was able to organise and direct other participants in his offending.

39. With respect to his rehabilitation, the Applicant submits that he has made serious mistakes and he feels regret and ashamed. He states that he has made positive healthy changes and will not reoffend. The Applicant submits that he appreciates his criminality and its adverse impact on the Australian community. He refers to himself as being a '*model prisoner*' while in detention. He presented evidence of his participation in several programs and letters of support from the program organisers and others. Notes from the prison authorities indicate that the Applicant had been respectful towards staff, hard-working and displayed a positive attitude.

40. In oral evidence, the Applicant outlined his plans for ongoing counselling if he remains in the Australian community. He states that he intends to obtain a Mental Health care plan and to continue his counselling sessions with Ms Rose. The Applicant spoke about his plans to work for his wife's business and the offers of employment he had received in construction.

41. The Respondent notes that the Applicant's claim of remorse was not found to be genuine by Hanley J, who formed the view that '*in his statement [the Applicant] does not truly reflect any real remorse or acceptance of responsibility*'. In the sentencing remarks, the judge noted that the Applicant's expression of remorse contradicted the comments made in the Sentence Assessment Report where it is recorded that the Applicant denied portions of agreed facts, minimised his role in the offences and apportioned blame to others.

42. The Applicant submits that he has been offered employment and he has provided a number of supporting statements and character references from members of the community (including from his pastor and members of the Salvation Army), who have expressed their belief that the Applicant is of good character and provided an undertaking to assist him not to reoffend. Additional statements have been provided to the Tribunal. The Applicant claims he remains in contact with a chaplain of the Salvation Army (and relevant statements have been provided in support of that claim). The Applicant refers to multiple programs and

therapies he had completed, and provided evidence from the Department of Corrective Services confirming his attending and participation in various programs..

43. The Tribunal has had regard to the several reports prepared by Mr Borenstein and Ms Rose. In his report, Mr Borenstein refers to the Applicant regularly consuming drugs and having a gambling disorder, resulting in significant financial hardship. Mr Borenstein states that the Applicant agreed to engage in offending behaviour to fund his escalating drug addiction and gambling disorder. (The Tribunal notes these claims were not accepted by the sentencing judge). Mr Borenstein has expressed the view that the Applicant '*impressed as highly motivated to ensure he maintains his positive rehabilitation path… the likelihood of [the Applicant] relapsing is extremely low and, in turn, the likelihood of [the Applicant] reoffending is also extremely low*'.

44. In another report, Mr Borenstein refers to the Applicant's relationship with his daughter and the effect that his arrest and the possibility of his removal from Australia have had on her. Mr Borenstein states that the Applicant's daughter suffers from adjustment disorder with mixed anxiety and depressed mood.

45. Ms Rose prepared several reports in relation to the Applicant. She also refers to the Applicant self-reporting depression and gambling, drug and alcohol abuse. (There are, before the Tribunal, reports issued by the Applicant's GP indicating he receives treatment for depression and other conditions). Ms Rose has expressed the view that given the Applicant's participating in all the recovery programs, his insight into his offending and consequences, his remorse and life changes, and understanding of the impact of his offences on his daughter, the probability of him reoffending is minimal.

46. The Applicant submits that his rehabilitation was tested in the community for 22 months while his criminal proceedings were ongoing, and he remained in the community on bail and did not commit further offences. The Applicant submits that he will be undertaking ongoing psychology, counselling sessions and mental health treatment with Odyssey House Community Services and will obtain a mental health treatment plan from a GP. The Tribunal accepts that the Applicant had participated in various courses and acknowledges his stated intention to continue with ongoing counselling. However, the Tribunal considers it significant that the sentencing judge rejected the Applicant's argument that his offending was the result of addictions or other issues, finding instead that the Applicant was motivated

by personal gain. In these circumstances, the Tribunal is of the view that the various courses and programs which the Applicant had completed, and other programs he intends to engage in, would be of limited value in preventing the repeat of the same conduct. These programs are unlikely to have addressed the cause of the past conduct, being desire for personal gain.

47. The Applicant submits that he has safe and stable accommodation with his wife and daughter, has been offered stable employment in his wife's business and will have work opportunities in the construction industry, having completed a relevant Diploma. The Tribunal accepts that evidence, although the Tribunal is also mindful that in the past the Applicant had also had stable accommodation, close family relationships and other stabilising factors that did not prevent him from engaging in criminal conduct.

48. The Tribunal gives significant weight to the evidence of Mr Borenstein and Ms Rose who have assessed the risk of the Applicant's reoffending as low. The Tribunal gives cautious weight to the fact that the Applicant has completed extensive rehabilitation programs and his stated intention to continue with counselling. Having regard to the fact that the Applicant's offending was serious but also that the risk of his reoffending as low, the Tribunal has formed the view that the protection of the Australian community weighs moderately against the revocation.

Whether the conduct engaged in constituted family violence

49. Paragraph 8.2 of the Direction provides:

> (d) The Government has serious concerns about conferring on non-citizens who engage in family violence the privilege of entering or remaining in Australia. The Government's concerns in this regard are proportionate to the seriousness of the family violence engaged in by the non-citizen

50. There is no evidence that the Applicant engaged in family violence. This consideration is neutral.

The best interests of minor children in Australia

51. Paragraph 8.4(1) of the Direction requires a decision-maker to make a determination about whether cancellation or refusal under section 501, or non-revocation under section 501CA is in the best interests of a child affected by the decision.

52. Paragraphs 8.4(2) and 8.4(3) respectively contain further considerations. The former provides that for their interests to be considered, the relevant child (or children) must be under 18 years of age at the time when a decision about whether or not to refuse or cancel the visa or not to revoke the mandatory cancellation decision is being made. The latter provides that if there are two or more relevant children, the best interests of each child should be given individual consideration to the extent that their interests may differ.

53. The Applicant's daughter was born on 22 March 2005. She is 18 at the time of this Tribunal's decision and is no longer a minor child. The Applicant provided to the Tribunal a submission regarding his relationship with his daughter, and the daughter provided a statement to the Respondent and an updated statement to the Tribunal in support of the revocation. The Tribunal is unable to consider the daughter's interests under this consideration but has considered these below.

54. The Applicant refers to his niece and nephew, stating he has a close and loving relationship with them and is their only uncle. In oral evidence, the Applicant described his relationship with his niece and nephew, stating that he helps with sport and music and intends to continue in that role. The Applicant notes that his sister would not be able to support his daughter due to her own commitments (a statement from the Applicant's sister has been provided).

55. The Applicant refers to a close '*uncle-like*' relationship with the two children of his friend, Melody and Elissa, and has provided these children with emotional and practical support. The Applicant states that the biological father of these children wants the Applicant to continue to play the uncle figure in the future.

56. The Respondent submits that these relationships are not of a primary carer and the removal [of the Applicant] will not impact the care provided to these children. The Respondent also

submits that due to his incarceration, it is likely that the Applicant has had limited interaction with the children in the past few years and their care has not been impacted.

57. The Tribunal is prepared to accept that the Applicant may have a close relationship with his niece and nephew and that he also has a relationship with the children of his friend. However, the Tribunal is mindful that these children are in the care of their respective parents and while the Applicant does play some role in his interactions with the children, parental care will continue irrespective of the Applicant's involvement (or lack of it). There is little probative evidence before the Tribunal from health professionals to indicate that the best interests of these children will be affected by the cancellation of the Applicant's visa. Thus, while the Tribunal is prepared to accept the cancellation of the visa may have some effect on these children, the Tribunal is not satisfied on the evidence before it that the effect is of such magnitude as to affect the best interests of the Applicant's children. The Tribunal finds this consideration to be neutral.

The strength, nature and duration of ties to Australia

58. Paragraph 8.3 of the Direction provides:

> *(1) Decision-makers must consider any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.*
>
> *(2) In considering a non-citizen's ties to Australia, decision-makers should give more weight to a non-citizen's ties to his or her child and/or children who are Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely.*
>
> *(3) The strength, duration and nature of any family or social links generally with Australian citizens, Australian permanent residents and/or people who have a right to remain in Australia indefinitely.*

59. The Applicant states that he has one Australian citizen daughter. He arrived with his daughter in Australia when she was seven years old and has been her sole parent since his divorce in 2010. The Applicant states that his daughter was fully dependent on her father and has suffered from stress, anxiety and depression since his arrest. The Applicant notes that his daughter is presently in Year 12, and that it is crucial time for her. The Tribunal has

had regard to the statement from the Applicant's daughter and accepts the effect that her father's circumstances have had on her well-being.

60. The Applicant's daughter provided a statement to the Tribunal in which she outlines the detrimental effect that the cancellation of her father's visa would have on her. Mr Borenstein in his report states that the mental health of the Applicant's daughter is dependent on her father's well-being and that his ongoing detention could cause the daughter to have a major depressive episode. This is consistent with the information in Ms Rose's report, which states that the Applicant's incarceration had impacted her mental health and well-being. The Tribunal accepts that the Applicant has a close relationship with his daughter and that the presence of his Australian citizen daughter in Australia forms a significant link that the Applicant maintains in Australia.

61. The Applicant states that he has been living in Australia since August 2012, for 11 years. The Tribunal accepts that this is not an insignificant period. In oral evidence, the Applicant referred to many of the voluntary activities he had engaged in prior to his detention. The Applicant refers to his family ties, including his wife and daughter, his sister and her family. There are before the Tribunal statements from the Applicant's family members (including his partner and sister) and from members of the community. The Applicant states that he has known his partner for seven years and they married in May 2022. His partner supports the Applicant remaining in Australia and states they are committed to each other as life partners. The Tribunal accepts that evidence.

62. The Applicant refers to the presence of his sister, her husband and two children in Australia. He states that he is very close to his sister and her family. In oral evidence, the Applicant describes his interactions with his sister's children and states that he has played a significant '*uncle role*' for the children and they have continued to have regular contact during his detention. The Applicant states that if his visa remains cancelled, his family in Australia could experience significant emotional, practical and financial hardship.

63. The Applicant refers to social and community ties to Australia. He refers to his participation in the Wrestling championship and states that he wants to compete in international competitions representing Australia. The Applicant refers to his voluntary activities, mentoring, his religious activities and participations. The Applicant provided a number of photographs depicting his social activities and several letters of support from third parties,

who refer to him as a good person and an asset to the community. The Applicant also refers to his continuous employment in Australia between 2012 and 2021. The Applicant provided to the Tribunal evidence of his past study in Australia.

64. The Tribunal accepts that the Applicant has extensive social, family, community, employment and other ties in Australia. This consideration weighs heavily in favour of revocation.

Expectation of the Australian Community

65. Sub-clause 8.5 of Direction 99 provides that the Australian community expects non-citizens to obey Australian laws while in Australia. Paragraph 8.5(1) of the Direction sets out the government's view in relation to community expectations:

> '*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*.'

66. Paragraph 8.5(3) of the Direction provides that the above expectations of the Australian community apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.

67. Paragraph 8.5(4) of the Direction provides guidance on how the expectations of the Australian community are to be determined. This paragraph states:

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

68. Paragraph 8.5(4) is consistent with the decision of the Full Court of the Federal Court in *FYBR v Minister for Home Affairs* [2019] FCAFC 185 ('*FYBR*') which affirmed the approach established in previous authorities that it is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an Applicant's circumstances or

evidence about those expectations. The Tribunal is to be guided by the Government's views as to the expectations of the Australian community, which are to be found in the Direction.[3]

69. Paragraph 8.5 contains a statement of the Government's views as to the expectations of the Australian community, which operates to ascribe to the whole of the Australian community an expectation aligning with that of the executive government which the decision maker must have regard to.

70. The Tribunal has formed the view that, given the seriousness and repeated nature of the Applicant's conduct, the community expectations would weigh heavily against the revocation.

Other considerations

Legal consequences of the decision

Non-refoulement obligations

71. The Applicant submits that his wife is of Bahai faith and would be persecuted in Iran. The Tribunal acknowledges that evidence but must consider the consequences in relation to the Applicant and not his partner, who holds an Australian visa and would not be required to leave Australia if the Applicant's visa remains cancelled. The same can be said about the Applicant's daughter (as the Applicant refers to her faith).

72. The Applicant refers to the situation of women in Iran, stating that his daughter would have no freedoms. Again, the Tribunal notes that the Applicant's daughter is an Australian citizen and would not be required to leave Australia.

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

73. The Applicant states that he suffers from PTSD as he grew up during the Iran/Iraq war. The Tribunal acknowledges that evidence but must consider the future consequences of the decision in relation to the Applicant's visa, not past events.

74. The Applicant states that he is a practising Christian and holds a fear of persecution due to his religion and involvement within his church. The Applicant also states that he fears a grave risk of harm from the Iranian authorities due to his association with another person who has been targeted by the regime in Iran. The Applicant refers to his protest against the Iranian regime. The Applicant also told the Tribunal that he had been involved in peaceful protest against the Iranian regime and had published that on social media, which is monitored in Iran. He claims he is fearful he would be harmed in Iran as a result of these activities. The Applicant provided in his submissions to the Respondent a number of articles and media reports. In his evidence to the Tribunal, the Applicant provided country reports and other information concerning the situation in Iran. He refers to the *'do not travel'* advice provided by the Australian government in relation to Iran.

75. If the Applicant's visa is cancelled, he would become an unlawful non-citizen and would be subject to detention and removal from Australia under section 198 of the Act. The Applicant indicates that he may apply for a protection visa if his visa is cancelled, but he may not be granted the visa, even if he is found to be owed protection and, in these circumstances, he could not be removed to Iran. The Applicant submits that his removal to Iran would be in breach of Australia's *non-refoulement* obligations and there is currently no known prospect of removing the Applicant to any other country.

76. It is not for this Tribunal to determine the Applicant's motivations for his conversion to Christianity (noting that the baptism took place around the time the Applicant was charged with the offences) or of the Applicant's claimed political protest. The Tribunal acknowledges that the Applicant's evidence is capable of suggesting that the *non-refoulement* obligations may arise in this case. However, there is nothing before the Tribunal to indicate that the Applicant is presently the subject of a protection finding, and it is open to the Applicant to apply for a protection visa.

77. In considering Australia's non-refoulement obligations, the Tribunal is guided by the principles enunciated by the High Court in *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 400 ALR 417; [2022] HCA 17. The court stated at [29]–[30]:

‘*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 decision-maker 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.*

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.’

78. This is consistent with Paragraph 9.1.2(2) of the Direction which relevantly states that:

> ‘*where it is open to the non-citizen to apply for a protection visa, it is not necessary at the section 501/section 501CA stage to consider non-refoulement issues in the same level of detail as those types of issues are considered in a protection visa application. The process for determining protection visa applications is specifically designed for consideration of non-refoulement obligations as given effect by the Act and where it is open to the person to make such an application a decision-maker, in making a decision under section 501/section 501CA, is not required to determine whether non-refoulement obligations are engaged in respect of the person. Having considered the person's representations, the decision-maker may choose to proceed on the basis that if and when the person applies for a protection visa, any protection claims they have will be assessed, as required by section 36A of the Act, before consideration is given to any character or security concerns associated with them.*’

79. In the present case, there is nothing preventing the Applicant from making an application for a protection visa in the future where his claims would be assessed. His evidence to the Tribunal is that he intends to make such an application.

80. In his submission to the Tribunal, the Applicant states that the assessment of the *non-refoulement* obligations should not be deferred, as doing so will result in significant or indefinite detention for the Applicant noting also the delay that will result if the Applicant is to apply for a protection visa. The Tribunal accepts that hardship would be caused due to prolonged detention if the visa remains cancelled and if the Applicant is to make an application for another visa. That is addressed more in other considerations but is a separate issue from the consideration of Australia's *non-refoulement* obligations.

81. The Tribunal is of the view that the Applicant's claims do not raise any issues that would not be assessed under the protection visa process. As such, the Tribunal has decided to defer the assessment of whether the *non-refoulement* obligations arise in this case to be completed should the Applicant make an application for a protection visa in the future.

Ongoing detention

82. The Applicant states that he cannot return to Iran as he has a fear for his safety and he has repeatedly stated that he would be unwilling to return to Iran. DFAT Country report on Iran, published in 2020, states the following at 5.27 with respect to involuntary returnees.

> '*Iran has a global and longstanding policy of not accepting involuntary returns. Historically, Iran has refused to issue temporary travel documents (laissez-passers) to facilitate the involuntary return of its citizens from abroad. In March 2018, Iran and Australia signed a Memorandum of Understanding on Consular Matters. This includes an agreement by Iran to facilitate the return of Iranians who arrived after March 2018 and who have exhausted all legal and administrative avenues to regularise their immigration status in Australia. A laissez-passer can be obtained from an Iranian diplomatic mission on proof of identity and nationality.*'

83. As the Applicant arrived in Australia prior to 2018, the Memorandum of Understanding on Consular Matters does not apply to him. Thus, if the Applicant does not wish to return to Iran voluntarily (as he has indicated), it appears that he would not be accepted in Iran and that is likely to lead to prolonged or, possibly, indefinite detention.

84. The Respondent submits that the Applicant could end such detention by voluntarily returning to Iran however given the Applicant's expressed fear of returning, the Tribunal does not consider this to be a reasonable expectation.

85. Thus, irrespective of the Applicant's application for the protection visa and the outcome of such an application, and whether or not there may be protection findings in relation to the Applicant in the future, the Tribunal finds that if the Applicant's visa is not reinstated, there is a real prospect of him remaining in detention indefinitely or for a lengthy period.

86. In oral evidence the Applicant spoke about the detrimental effect detention has had on him. There are reports before the Tribunal on the effect being in detention has had on the Applicant's mental health and the Tribunal accepts that evidence. That is, the Tribunal

accepts that prolonged detention is likely to adversely affect the Applicant's health and well-being. This consideration weighs heavily in favour of the revocation.

Extent of impediments if removed

87. Paragraph 9.2 of the Direction directs a decision-maker to take into account the extent of any impediments that the non-citizen may face if removed from Australia to their home country, in establishing themselves and maintaining basic living standards (in the context of what is generally available to other citizens of that country), taking into account:

    (a) the non-citizen's age and health;

    (b) whether there are any substantial language or cultural barriers; and

    (c) any social, medical and/or economic support available to that non-citizen in that country.

88. The Applicant is 40 years of age. There would be no substantial language or cultural barriers if the Applicant was to live in Iran.

89. The Applicant claims he has been diagnosed with PTSD and has been prescribed medication for depression, anxiety and insomnia and he has also been diagnosed with fatty liver disease. He provided to the Tribunal his treatment care plan and records of medical consultations while in detention. Ms Rose, in her most recent report, states that the Applicant presents with symptoms of PTSD and achieved '*extremely severe'* scores for anxiety, stress and depression. Ms Rose also refers to adjustment disorder and states that prolonged detention would have ongoing effects on the Applicant's mental health. In oral evidence the Applicant, spoke about the stigma of mental health issues in Iran, claiming that he would experience substantial hardship if he was to return to Iran.

90. The Applicant states that he would not be entitled to unemployment benefits (which is only granted after six months of employment and the Applicant has not worked in Iran) and he would not be entitled to social welfare services from the state. The Applicant states that there is no 'fully-fledged' public health care system in Iran and that mental healthcare spending is minimal. The Applicant refers to the stigma surrounding psychological disorders.

91. The Applicant refers to his concerns for his daughter, if they are return to Iran, noting also that his daughter has had limited or no contact with her biological mother. There are statements before the Tribunal about the hardship that the Applicant's departure from Australia would have on his daughter and the Tribunal has had regard to the daughter's statements. As noted above, the cancellation of the Applicant's visa would not lead to the cancellation of the visa held by his daughter and there is nothing to suggest that the Applicant's daughter would be required to leave Australia. However, the Tribunal acknowledges that the Applicant has been a primary caregiver to his daughter and that if the cancellation of his visa was to result in him having to leave Australia (which is not necessarily the case, at least in the immediate future) and if his daughter is to remain in Australia, the separation of the two could cause significant hardship both to the Applicant and his daughter.

92. The Applicant refers to having a close relationship with his wife, stating that she supports him emotionally, spiritually and financially. The Applicant's wife provided statements to the Respondent and the Tribunal, as well as oral evidence to the Tribunal, outlining their relationship and the impact on her if the Applicant was forced to leave Australia. The Tribunal is prepared to accept that evidence. In her oral evidence to the Tribunal, the Applicant's wife also spoke about their close relationship and the emotional support they provide to each other. She spoke about the detrimental effect that the cancellation decision may have on her. The Tribunal is prepared to accept that the decision to cancel the Applicant's visa (which may result in his ongoing detention) may have a detrimental effect not only on the Applicant but also on his wife and daughter.

93. The Applicant refers to his parents' ill-health and states that his siblings had fled Iran. He states that he would not be able to seek any support from his parents. The Applicant claims that he would experience practical, financial and emotional hardship if he is to return to Iran.

94. The Applicant also states that if this application is not successful, he will seek a protection visa, which may lead to his prolonged detention. In his declaration to the Tribunal, the Applicant refers to the hardship he has experienced while in detention.

95. Generally, the Tribunal accepts that there is likely to be considerable detriment to the Applicant and others if the Applicant is removed from Australia. The Tribunal finds that this consideration weighs strongly in favour of the revocation.

Impact on victims

96. Paragraph 9.3 of the Direction directs a decision-maker to take into account the impact of the section 501 or 501CA decision on members of the Australian community, including victims of the non-citizen’s criminal behaviour, and the family members of the victim or victims, where information in this regard is available and the non-citizen being considered for visa refusal or cancellation, or who has sought revocation of the mandatory cancellation of their visa, has been afforded procedural fairness.

97. There is no evidence before the Tribunal concerning any impact on victims. This consideration is neutral.

Impact on Australian business interests

98. Paragraph 9.4 of the Direction directs a decision-maker to take into account the following:

> ‘*Decision-makers must consider any impact on Australian business interests if the non-citizen is not allowed to enter or remain in Australia, noting that an employment link would generally only be given weight where the decision under section 501 or 501CA would significantly compromise the delivery of a major project, or delivery of an important service in Australia.*’

99. The evidence before the Tribunal is that the Applicant’s wife hopes the Applicant can work in her business and support her business interests. It is stated that the Applicant has other job offers. While the Tribunal accepts that the cancellation of the Applicant’s visa would prevent him from being able to work with his partner or with others, there is insufficient evidence to satisfy the Tribunal that the business interest would be adversely affected if the Applicant is not able to take on this role.

CONCLUSION

100. The Tribunal has found that the Applicant has a substantial criminal record and that he does not pass the character test. The Tribunal has considered if there is another reason why the decision to cancel his visa should be revoked.

101. The Tribunal has formed the view that the Applicant has committed a serious offence, involving a significant degree of fraud and extensive losses to various financial institutions. The Applicant does not dispute that his offending was serious. The nature of his past offending is such that the Applicant's conduct is against the expectations of the Australian community. The Tribunal has formed the view that the protection of the Australian community and the expectations of the Australian community weigh against the revocation.

102. For the reasons set out above, the Tribunal has formed the view that the best interests of Australian children would not be adversely affected by the cancellation of the visa.

103. The Tribunal places significant weight on the legal consequences of the decision to cancel the Applicant's visa. The Tribunal has formed the view that there is a real prospect of the Applicant being detained for a lengthy or even indefinite period. It is not sufficient to state that the Applicant could end his detention by returning to Iran. The Applicant has expressly stated that he does not wish to, for a number of reasons, and the Tribunal must proceed on the basis that he would not voluntarily return to Iran. There is evidence before the Tribunal that ongoing detention may have adverse effect on the Applicant's own mental and general health, and the health of his wife and daughter. In the Tribunal's view, these considerations weight heavily in favour of the revocation.

104. There are other factors that weigh in favour of the revocation. Most significantly, the extent of the Applicant's ties to Australia. It is not in dispute that the Applicant's Australian citizen daughter lives in Australia and the evidence is that the Applicant has been the sole caregiver to his daughter for a number of years. The Tribunal accepts that if the Applicant's visa remains cancelled, resulting in the Applicant having to either leave Australia or to remain in detention, this may have a detrimental effect on the Applicant's daughter. It is also not in dispute that the Applicant has a close relationship with his partner, his sister and her family and others. The Tribunal has formed the view that the extent of the Applicant's ties to Australia weighs strongly in favour of the revocation.

105. Similarly, the Tribunal has formed the view that the extent of impediment if removed also weighs in favour of the revocation, noting in particular the evidence about the Applicant's subjective fear of harm, as well as the detrimental effect that the Applicant's removal or ongoing detention would have on the Applicant and others in Australia. The other considerations are neutral.

106. Having carefully considered all the circumstances, the Tribunal has decided to give greater weight to the primary considerations of the strength of the Applicant's ties to Australia and the other consideration of extent of impediment if removed, noting in particular the detrimental effect that the cancellation would have on the Applicant, his daughter, his wife and others. The Tribunal also places greater weight on the consequences of the decision to cancel the visa, noting that it may lead to the Applicant remaining in detention for a lengthy period or indefinitely. In the Tribunal's view, these considerations outweigh other considerations that favour the cancellation.

107. The Tribunal has decided that the decision under review should be set aside.

DECISION

108. The Tribunal sets aside the decision not to revoke the cancellation of the Applicant's Class BB Subclass 155 Five Year Resident Return visa and in substitution, decides that the cancellation of the visa is revoked.

I certify that the preceding 108 (one hundred and eight) paragraphs are a true copy of the reasons for the decision herein of Senior Member K Raif

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

Associate

Dated: 29 March 2023

Date(s) of hearing:	**21 March 2023**
Solicitors for the Applicant:	**Dr J. Donnelly, Latham Chambers**
Solicitors for the Respondent:	**S. Hardie, HWL Ebsworth Lawyers**