Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

NQKB and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2021] AATA 4054 (8 October 2021)

Division: GENERAL DIVISION

File Number: **2021/5171**

Re: **NQKB**

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Member Rebecca Bellamy**

Date of Decision: **8 October 2021**

Date of Written Reasons: **4 November 2021**

Place: **Brisbane**

On 8 October 2021, pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal set aside the reviewable decision made by the delegate of the Respondent dated 28 July 2021 and substituted a decision that the cancellation of the Applicant's visa be revoked under section 501CA(4)(b)(ii) of the Migration Act 1958 (Cth).

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

Member Rebecca Bellamy

CATCHWORDS

MIGRATION – Non-revocation of mandatory cancellation of a Class BB Subclass 155 Five Year Resident Return visa – where Applicant does not pass the character test – whether there is another reason to revoke the mandatory cancellation decision – consideration of Ministerial Direction No. 90 – non-refoulement claims where receiving country is Ethiopia – decision under review set aside

LEGISLATION

Administrative Appeals Tribunal Act 1975 (Cth)

Migration Act 1958 (Cth)

CASES

FYBR v Minister for Home Affairs [2019] FCAFC 185

Minister for Home Affairs v Buadromo [2018] FCAFC 151.

Minister for Home Affairs v Omar [2019] FCA 279

STZS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 1140

Uelese v Minister for Immigration and Border Protection [2015] HCA 15

SECONDARY MATERIAL

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December1984, 1465 UNTS 85 (entered into force 26 June 1987).

Convention relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) amended by the *Protocol Relating to the Status of Refugees,* opened for signature 31 July 1967, 606 UNTS 267 (entered into force 4 October 1967).

Direction No 90 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA.

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, GA Res 44/128 (15 December 1989, entered into force 11 July 1991).

REASONS FOR DECISION

Member Rebecca Bellamy

4 November 2021

THE ISSUE BEFORE THE TRIBUNAL

1. The Applicant is a 40 year old citizen of Ethiopia. In June 2012, when he was 31 years old, he moved to Australia. The most recent visa granted to him was a Class BB Subclass 155 Five Year Resident Return visa ("visa").[1]

2. On 30 October 2019, a delegate of the Minister ("the Respondent") mandatorily cancelled the Applicant's visa under s 501(3A) of the *Migration Act 1958* (Cth) ("the Act") on the basis that he did not pass the character test and he was serving a full time custodial sentence.[2] The Applicant made written representations to the Respondent requesting revocation of the cancellation of his visa ("revocation request").[3] On 28 July 2021, the Respondent decided not to revoke the cancellation.[4]

3. The Applicant subsequently lodged an application for review in this Tribunal on 30 July 2021.[5] The Tribunal has jurisdiction to review that decision pursuant to s 500(1)(ba) of the Act.

4. The hearing of this application took place on 5, 7 and 8 October 2021. The Applicant gave evidence via videoconference with the assistance of a Tigrinya interpreter. The Applicant's wife, sister and two other lay witnesses gave evidence by telephone. The Tribunal also heard evidence from Professor James Freeman, psychologist. The Tribunal received the written evidence that is listed in the attached exhibit list, marked "Annexure A".

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1 Exhibit G Section 501 G documents, G27 page 233.
2 Exhibit G Section 501 G documents, G28 pages 250 to 256.
3 Exhibit G Section 501 G documents, G3 pages 10 to 28. G4 page 29.
4 Exhibit G Section 501 G documents, G7 page 41.
5 Exhibit G Section 501 G documents, G2, page 1 to 8.

LEGISLATIVE FRAMEWORK

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

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

6. I am satisfied that the Applicant made the representations required by s 501CA(4)(a) of the Act. Thus, the issue is whether the discretion to revoke the mandatory cancellation of the Applicant's visa may be exercised. If either of paragraphs (i) or (ii) are satisfied, I should revoke the original decision.[6]

Does the Applicant Pass the Character Test?

7. The character test is defined in s 501(6) of the Act. Under s 501(6)(a), a person will not pass the character test if they have "*a substantial criminal record*". This phrase, in turn, is relevantly defined in s 501(7)(c), which provides that a person will have a substantial criminal record if they have "*been sentenced to a term of imprisonment of 12 months or more*".

8. On 15 October 2019, the Applicant was sentenced to concurrent terms of imprisonment with an effective head sentence of 15 months. Accordingly, there is no doubt that the Applicant has a "*substantial criminal record*" and, therefore, he does not pass the character test. He cannot rely on s 501CA(4)(b)(i) of the Act for the mandatory cancellation of his visa to be revoked.

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[6] *Minister for Home Affairs v Buadromo* [2018] FCAFC 151.

Is There Another Reason Why the Cancellation of the Applicant's Visa Should be Revoked?

9. In considering whether to exercise the discretion in s 501CA(4) of the Act, the Tribunal is bound by s 499(2A) to comply with any directions made under the Act. In this case, *Direction No 90 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ("the Direction") applies.[7]

10. For the purposes of deciding whether or not to revoke the mandatory cancellation of a non-citizen's visa, paragraph 5.2 of the Direction contains several principles that must inform a decision maker's application of Part 2 of the Direction.

11. Those principles may be briefly stated as follows:

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

(2) Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.

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

(4) Australia has a low tolerance of any criminal or other serious conduct by visa Applicants or those holding a limited stay visa, or by other non- citizens who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct by non- citizens who have lived in the Australian community for most of their life, or from a very young age.

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[7] On 1 April 2021, the former applicable direction, *Direction No. 79 – Visa refusal and cancellation under s501 and revocation of a mandatory cancellation of a visa under s501CA*, was revoked and was replaced by Direction 90.

(5) 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 8.4(2) (Expectations of the Australian Community) is so serious that even strong countervailing considerations may be insufficient in some circumstances, even if the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.

12. Paragraph 6 of the Direction provides that:

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

13. Paragraph 8 of the Direction sets out four Primary Considerations that the Tribunal must take into account. They are:

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

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

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

(4) expectations of the Australian community.

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

a) international non-refoulement obligations;

b) extent of impediments if removed;

c) impact on victims; and

d) links to the Australian community, including:

i) strength, nature and duration of ties to Australia; and

ii) impact on Australian business interests

15. Paragraph 7(2) provides that the primary considerations should generally be given greater weight than the other considerations, and paragraph 7(3) provides that one or more primary considerations may outweigh other primary considerations.

BACKGROUND AND OFFENDING

16. The Applicant was born in the Tigray region of, Ethiopia in 1981. His mother was Ethiopian and his father was Eritrean.[8] During the war between Ethiopia and Eritrea, between 1998 and 2000, all of his immediate family fled Ethiopia. His father fought in the war and he never heard from him again.[9] His mother died when he was a child and he and his sister were taken in by their landlady who was a cleaner at the local hospital. He heard from neighbours that he had other siblings besides his sister but he does not know if that is true.[10]

17. At around 13 or 14 years of age, the Applicant left the household of his landlady and supported himself doing odd jobs to survive. He stayed at the homes of friends, on and off, which he said was common practice in Ethiopian culture. A job washing cars led to him doing a mechanics course at the equivalent of TAFE and working as a mechanic for several years.[11]

18. The Applicant moved to Sudan in 2006 with his sister and he worked there.[12] In 2011, he commenced a long-distance relationship with Ms B, an Ethiopian citizen, with whom he had been childhood friends. She had come to Australia as a refugee the year before, then returned to Ethiopia to visit in 2011. She also visited the Applicant in Sudan.[13] The Applicant returned to Ethiopia, to Addis Ababa so he could apply to come to Australia to be with Ms B. Ms B supported him financially while he was in Addis Ababa.[14] He lived there for three to four months. Otherwise he has never lived in Addis Ababa.[15]

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8 Exhibit G1, Section 501 G documents, G22, page,127.
9 Exhibit G1, Section 501 G documents, G22, page 125.
10 Exhibit G1, Section 501 G documents, G22, page 125.
11 Exhibit G1, Section 501 G documents, G22, page 126; transcript, page 29, lines 19 to 22 and lines 19 to 22
12 Exhibit G1, Section 501 G documents, G22, page 126.
13 Exhibit G1, Section 501 G documents, G22, page,127.
14 Transcript, page 25, lines 1 to 21.
15 Transcript, page 26, lines 4 to 25.

19. The Applicant came to Australia in 2012, at the age of 31, with his younger sister. He was her primary carer.[16]

20. While in Australia, the Applicant held steady employment, including as a cleaner, mechanic, welder, car stripper, machine operator and Uber driver.[17]

21. The Applicant and Ms B married and had two daughters, "Child D" born in 2014 and "Child H" born in 2015. Ms B and both children are Australian citizens. Ms B does not have family in Brisbane.

22. The Applicant developed back pain in about June 2015 and he was diagnosed with a disc problem. He first used cannabis in 2015 as a form of pain management and to help him sleep.[18]

23. The marriage broke down in 2015 but the Applicant and Ms B continued to live under the same roof so the Applicant could continue to fully participate in their daughter's lives, however it strained their relationship.[19]

24. In 2017, the Applicant and Ms B bought a family home.[20] They both contributed their employment income to paying the mortgage.

25. According to police records,[21] on 26 August 2018 the police attended the Applicant's home in response to a call about domestic violence. Ms B was visibly upset and crying at the front door. She said she and the Applicant were arguing about the Applicant taking drugs and addiction. He had then slapped her twice with his open hand on her face. She told the police that she was scared when he appeared to be on drugs. The police did not see any marks on Ms B's face. The Applicant told the police that she was questioning him about drugs and continually nagging him, but he denied having taken any drugs. He said that when he was sitting in the lounge room with one of his children on his lap, Ms B tried

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16 Exhibit G1, Section 501 G documents, G22, page 125.
17 Exhibit A5, Applicant's supplementary statement.
18 Transcript, page 58, lines 32 to 37.
19 Exhibit G1, Section 501 G documents, G22, page, 128.
20 Exhibit G1, Section 501 G documents, G22, page 127.
21 Exhibit R2, Respondent's Tender Bundle, R1, page 8.

to grab the child from him. He got frustrated and pushed her in the shoulder then slapped her in the face. It was noted that there were no previous incidents reported to the police however his wife informed them that in the past she had been the subject of similar physical violence.

26. A Police Protection Notice was issued that day,[22] and a Protection Order was issued on 24 September 2018. The order did not prohibit contact between the Applicant and Ms B and their children. The Applicant was present in court when the order was made.[23]

27. The Applicant was not prosecuted for this conduct so there is no finding by a court with respect to exactly what occurred. In the hearing both the Applicant and Ms B gave versions that differed in some respects from the police record. The Applicant admitted he was under the influence of cannabis[24] (whereas he had denied that to the police) and he had also consumed one or two beers.[25] Ms B said the argument was not about drugs (contrary to what she told the police) but because the Applicant came home late.[26] She said she did not think he was on drugs at that time or had been before. She had heard some rumours that the Applicant was using drugs, but she did not believe them. She denied having told the police that he was using drugs or having mentioned drugs.[27]

28. The Applicant admitted to having slapped Ms B twice on her face. She said he slapped her once.[28] They both denied that the Applicant had been violent toward Ms B before that incident,[29] and the Applicant said he thought possibly Ms B told the police he had because she was upset and angry with him at the time.[30] Both said the children were not in the room at the time but were in the house (contrary to the Applicant telling the police that one child was on his lap). Ms B said she and the Applicant were in the loungeroom and the children were in the playroom.[31] The Applicant conceded that the incident affected the

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22 Exhibit R2, Respondent's Tender Bundle, R1, pages 9 to 14.
23 Exhibit R2, Respondent's Tender Bundle, R1, page 5.
24 Transcript, page 41, line 9 to page 42, line 35.
25 Transcript, page 84, line 45 to page 85, line 11.
26 Transcript, page 96, lines 34 to 36.
27 Transcript, page 104, lines 12 to 21.
28 Transcript, page 96, lines 1 to 7.
29 Transcript, page 96, lines 9 to 13.
30 Transcript, page 46, lines 3 to 23.
31 Transcript, page 96, lines 14 to 18.

children because they saw their mother upset and angry afterwards.[32] He said he hugged them and held them so they would not be upset or frightened.[33]

29. The Applicant's wife required an interpreter in the hearing, and I have some doubt about the accuracy of the translation. Her evidence was difficult. There is no record of the police using an interpreter when they attended her home after the assault, and the Police Protection Notice that was subsequently issued indicates that the officer who filled it in did not think Ms B required an interpreter[34] which strongly suggests Ms B communicated directly with the police. This could account for some of the discrepancies between the version she apparently gave the police and the version she gave the Tribunal. The Applicant also required an interpreter in the hearing and the language barrier could account for some of the differences between what he reportedly told the police and what he said in the hearing. What is consistent between all versions is that the Applicant hit Ms B in the face following an argument while their children were in the house. Given the Applicant's admission that he was using drugs at that time, I think Ms B did in fact mention conflict about suspected drug use to the police.

30. The Applicant said he was under a lot of stress at that time of that incident because his back pain had reduced the income that he was earning and he and Ms B were not getting along.[35] I accept that.

31. Ms B said that after this incident she made the Applicant leave their home[36] whereas the Applicant's evidence was that he left in January 2019. The Applicant's sister said the Applicant did not have a good understanding with Ms B, which appeared to mean they were not getting along, and he left the family home twice and returned twice.[37] Her evidence was also difficult because of the language barrier. Her evidence suggests that the Applicant had left the family home and returned. I am satisfied that the Applicant did not leave the family home permanently until January 2019.

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[32] Transcript, page 72, lines 28 to 46.
[33] Transcript, page 73, lines 10 to 13.
[34] Exhibit R2, Respondent's Tender Bundle, R2, page 10.
[35] Transcript, page 46, lines 29 to 41.
[36] Transcript, page 100, lines 1 to 12.
[37] Transcript, page 108, lines 37 to 46

32. After the Applicant left the family home, he maintained his employment until March 2019, and he continued to give money to Ms B to pay the mortgage. However, that did not leave enough money for rent, so he lived in his car and he sometimes stayed with friends but they were friends "*from the street*".[38] He described parking his car under a security camera outside a pharmacy near a hospital so he would be safe when he slept, and moving his car from one place to another.[39]

33. The Applicant's new friends introduced him to methamphetamine.[40] Smoking it made him feel happy and it relieved his back pain. He became addicted straight away,[41] and was smoking it every day. He continued until he was remanded in custody in April 2019, then resumed after he was released on bail shortly after, only stopping when he was incarcerated in July 2019.[42]

34. The Applicant was also using cannabis daily when he was using methamphetamine.[43] The Applicant considers that his cannabis use became a problem when he was using it and methamphetamine together.[44]

35. The Applicant stopped working in March 2019.[45] He did not think he could work because he was emotional, homeless and on drugs,[46] and he wanted to get some help from Centrelink and some medical help for his back problem.[47] He was able to continue to access drugs because he and his new friends would share.[48]

36. On 18 April 2019, the Applicant's vehicle was intercepted by the police.[49] They saw that the rear passenger had a small item on his lap which he quickly brushed away. The police then searched the vehicle and found various drug utensils and a bag of cannabis under

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38 Transcript, page 22, line 9 to page 23, line 13; page 35, lines 40 to 46.
39 Transcript, page 66, lines 21 to 25.
40 Transcript, page 85, lines 40 to 42.
41 Transcript, page 56, lines 1 to 29.
42 Transcript, page 57, lines 1 to 28.
43 Transcript, page 58, lines 25 to 28; page 59, lines 20 to 24.
44 Transcript, page 59, lines 1 to 4.
45 Transcript, page 35, lines 40 to 46.
46 Transcript, page 37, lines 31 to 34.
47 Transcript, page 38, lines 28 to 38.
48 Transcript, page 59, lines 31 to 46.
49 Exhibit R2, Respondent's Tender Bundle, R1, page 19.

the driver's seat, two pink tablets (Oxazepam) in a drawer under the steering wheel, and a quantity of methamphetamine hidden in both a magnetic case and a sunglasses case located near the engine. The Applicant was charged in relation to possession of the cannabis, tablets and methamphetamine. He was held on remand until 24 April 2019 when he was granted bail.

37. Less than a week later on 30 April 2019 he attended police headquarters under the influence of drugs, and he told the police he had driven there. He was tested and found to have amphetamine and methamphetamine in his system. He failed to appear in accordance with his bail undertaking on 13 May 2019 and he breached his bail between 19 and 25 May 2019 by failing to report.[50] (He also failed to appear in court on 1 July 2019 in relation to the drug-driving charge).

38. When he was ultimately dealt with for drug possession in October 2019, the learned Judge made the following findings about the facts of the offences and the Applicant's circumstances at the time:

- the Applicant was the driver of a vehicle in which there were two other occupants;
- no drugs were found on the Applicant;
- one of the other occupants had some drug paraphernalia;
- the Applicant had actual knowledge of the Oxazepam and the cannabis, he owned them, and they were for his personal use;
- the total amount of methylamphetamine found was 51.872 grams;
- the Applicant was not charged on the basis that he was a dealer or that the methamphetamine belonged to him. Rather, he was in deemed possession of it because he was in control of the car in which it was found;
- the Applicant knew the methamphetamine was there but not the quantity;
- the Applicant was living in impoverished circumstances at the time;
- he was prevailed upon to allow his car to be used to conceal the magnetic box and the sunglasses case and was probably given a relatively small reward in food or money in return;

[50] Exhibit R2, Respondent's Tender Bundle, R1 page 24.

- the Applicant was working at the time but practically all of his income went to supporting his estranged wife and two children and to pay the mortgage on the family home; and
- the Applicant was homeless, and living in very difficult circumstances.[51]

39. I note that the court found the Applicant was employed at the time of the offence whereas he gave evidence that he had stopped working in March 2019. I think the difference is immaterial for present purposes because, as the court found, he was living in impoverished circumstances even when he was working, and this is what His Honour thought largely led to him allowing his car to be used to conceal methamphetamine.

40. In the hearing, the Applicant said he did not know about the Oxazepam until he was in custody. He said other people had been driving that car, not just him.[52] He said that he confessed to the cannabis and tablets being his because they were both found in the vehicle.[53] However, in the absence of very strong evidence to justify departing from the court's finding, I am not prepared to do that.

41. In the early hours of 7 July 2019, the Applicant engaged in his most serious offending. He was driving under the influence of drugs at night, without his headlights on, following a vehicle in the belief that it has come from Ms B's residence. When the vehicle stopped at an intersection, he drove onto the wrong side of the road. The driver of the vehicle said "*What do you want?*" and the Applicant said "*Were you at number 27? Did you just come from number 27?*" The driver heard the Applicant say something about a wife and asked "*What wife?*" then drove away on his way to work.

42. A short time later as the victim was driving along the Ipswich Motorway, the Applicant quickly drove up behind him, still without headlights. The Applicant drove up past the victim on the right side, then quickly crossed back so he was driving directly in front of the victim's truck, then he braked suddenly. The victim braked hard, decelerating rapidly from 100kmph to 30kmph. The braking made the victim unable to manoeuvre his truck and it

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[51] Exhibit R2, Respondent's Tender Bundle, R2, pages 47 and 48.
[52] Transcript, page 51, lines 23 to 26.
[53] Transcript, page 51, lines 42 to 45.

collided with the rear of the Applicant's vehicle. The Applicant drove slowly alongside the victim's truck then sped up and drove at the side of the victim's truck, hitting the fuel tank.

43. The victim stopped his truck near an off-ramp and the Applicant stopped too. The Applicant approached the victim, holding a bamboo stick. The victim began to drive away, fearing for his safety. The victim flashed another vehicle for help and asked the driver to call the police. The Applicant approached both of them, still holding the stick. They each got back into their respective vehicles. The Applicant sprayed WD-40 into a lighter to create a propellant flame, and then threw the can into the victim's car while trying to keep it lit. As no force was applied to the nozzle after the Applicant let go of the can, the flame went out. The Applicant continued to act aggressively to the victim and witness until the police arrived. The victim feared for his life.

44. When the police arrived, they found the Applicant walking along the motorway, agitated and he gave slow responses to basic questions. He was unable to stand on his feet. He told them he had smoked methamphetamine mixed with "*cat*" and marijuana at a friend's house around an hour before the incident. He also told the police that his licence had been suspended.[54]

45. In the hearing the Applicant said he had consumed methamphetamine and alcohol.[55] He did not provide a convincing reason for having a bamboo stick in his car, claiming that he found it on the ground and moved it into his car without explaining why. He denied picking it up so he could use it as a weapon.[56] Further, the Applicant admitted that he when he used the WD-40 and the cigarette lighter that he was trying to set the victim on fire.[57]

46. On 15 October 2019, the Applicant was convicted and sentenced as follows:

- *going armed so as to cause fear* - six months imprisonment, concurrent;
- *going armed so as to cause fear* - three months' imprisonment, concurrent;

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[54] Exhibit G1, Section 501 G documents, G9, pages 67 to 69; G22, pages 129 to 130; Exhibit R2, Respondent's Tender Bundle, R1, page 32.
[55] Transcript, page 48, lines 33 to 36.
[56] Transcript, page 48, line 42 page 50, line 6.
[57] Transcript, page 50, lines 10 to 15.

- *dangerous operation of a vehicle and adversely affected by an intoxicating substance* - 15 months imprisonment, concurrent;
- *wilful damage* - two months imprisonment, concurrent;[58]
- *drug driving* (on 30 April 2019) - 14 days imprisonment (concurrent);[59]
- *failure to appear in accordance with undertaking* (on 13 May 2019) - convicted and not further punished; and
- *drive under the influence of alcohol or other substance* - one month imprisonment.

47. The learned sentencing Judge accepted that the combination of drugs and the Applicant's upset about his separation from his wife caused paranoia about the victim being somehow involved or doing wrong to his wife. His Honour described the Applicant's conduct as "*obviously, completely unacceptable in any context*", and observed that the Applicant's actions were unpredictable and the risk of serious injury was very real, both from the Applicant's driving and the aspect of going armed in public in those circumstances. His Honour further noted that the victim's fear for his life seemed entirely justifiable.[60]

48. The Applicant was transferred to immigration detention in December 2019. In December 2020 he was dealt with for the earlier drug offences and returned to prison. After having pleaded not guilty, he was convicted and sentenced as follows:

- *possessing dangerous drugs or schedule 1 drug quantity of or exceeding schedule 3 but less than schedule 4* - 12 months' imprisonment, suspended after serving four months;
- *possessing dangerous drugs specified in schedule 1 or 2 (two offences)* - conviction recorded, not further punished; and
- *possess utensils or pipes etc that had been used* - conviction recorded, not further punished.[61]

49. The Applicant went back to prison and in March 2021, he returned to immigration detention.[62]

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[58] Exhibit G1, Section 501 G documents, G8, page 64.
[59] Exhibit R2, Respondent's Tender Bundle, R3, page 55.
[60] Exhibit G1, Section 501 G documents, G9, pages 67 to 69.
[61] Exhibit G1, Section 501 G documents, G2, pages 63 and 64.

50. The Applicant has committed a number of traffic infringements.[63] Since February 2014, he has incurred the following infringements in addition to the drug-driving (x2), dangerous operation of a motor vehicle, and unlicensed driving offences that I have already referred to:

- failed to stop at red light;
- *learner drive vehicle under direction person not hold O type*, and *learner failed to display L plates at front and rear of motor vehicle*;
- speeding by less than 13 km/h (x 8);
- speeding by at least 13 km/h but less than 20 km/h (x 6); and
- unlicensed driving.

51. The Applicant did not have an explanation for why he committed all the traffic offences, saying he made mistakes and that sometimes he was speeding to go from one job to another.[64] In relation to the offences after he stopped working he said he may have been speeding without any reason, and he speculated that some fines could have been incurred by friends using his car.[65] Whether or not it was the Applicant driving on those occasions, he did not deny that it was him driving on the other occasions, demonstrating a tendency to speed by up to 20kmph. I am satisfied that he incurred all of the infringements on his traffic record.

52. There is no evidence of any breaches in prison or immigration detention. I accept that the Applicant has been of good behaviour in custody.

PRIMARY CONSIDERATION 1 – PROTECTION OF THE AUSTRALIAN COMMUNITY

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62 Exhibit A3, Psychological Report of Professor James Freeman.
63 Exhibit R2, Respondent's Tender Bundle, R3, pages 54 to 57.
64 Transcript, page 54, lines 5 to 28.
65 Transcript, page 54, line 28 to page 55, line 23.

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

54. In determining the weight applicable to Primary Consideration 1, paragraph 8.1(2) of the Direction requires decision-makers to give consideration to:

a) The nature and seriousness of the non-citizen's conduct to date; and

b) The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.

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

55. 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) …:

(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) …;

(g) …

56. The Applicant committed an act of family violence on his wife. It is very serious by its nature. However, it is at the lower end of the scale of seriousness of such offending.

57. The Applicant drove while under the influence of methamphetamine and harassed another vehicle on a motorway, which must have been distracting for the victim and thereby put him at increased risk of an accident. The Applicant then deliberately swerved in front of that vehicle and braked, causing a collision. He then rammed his car into the victim's vehicle. By that stage the victim had very good reason to be terrified, and he sought the help of another motorist to call the police. The Applicant came at the victim and witness brandishing a bamboo stick. The victim feared for his life. The Applicant then propelled a flame at the victim's truck.

58. This is very serious conduct even taking account that the victim did not suffer physical injury. It would be very unusual if the victim, having been harassed and threatened like that to the point of fearing that he would be killed, was not impacted psychologically. I also take into account the damage the Applicant did to the victim's vehicle and the fear he would have caused the witness.

59. The court regarded the Applicant's behaviour as very serious, imposing sentences of imprisonment for the various offences he committed. Those sentences ranged from two months to 15 months. The learned sentencing Judge regarded the Applicant's behaviour as unjustified in any context.

60. There was another instance when the Applicant drove when under the influence of methamphetamine and without a license. Driving under the influence of any substance that impairs perception and judgment must increase the risk of collision and, consequently, the risk of injuring or killing other road users.

61. Regarding the drug offences, the Applicant did not own the quantity of methamphetamine and the other drugs that he did own were in very small quantities and for his own use. He was not involved in supplying drugs to anyone else. I do not regard this offending as very serious.

62. The Applicant's traffic infringements are at the lower end of the spectrum of seriousness as far as traffic infringements go, although there are several.

63. The Applicant engaged in one episode of unprosecuted family violence in August 2018 followed by offending episodes between April and July 2019. It is frequent offending within a confined period of time. The seriousness of his offending escalated. A cumulative effect cannot be identified from the relatively isolated offences committed in this period.

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

64. 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 that it may be repeated may be unacceptable.

65. Paragraph 8.1.2(2) provides that in considering the risk to the Australian community, a decision-maker must have regard to the following relevant 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 available information and evidence on the risk of the non- citizen re-offending; and evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since the most recent offence.

<u>Nature of harm should the Applicant engage in further criminal or other serious conduct</u>

66. The assessment of the nature of the harm to individuals or the Australian community were the Applicant to engage in further criminal or other serious conduct, is properly informed by the nature of his offending to date, including any escalation.

67. Should the Applicant engage in further drug driving and/or dangerous driving the harm to individuals in the Australian community includes serious injury and death. Brandishing weapons while experiencing drug-induced paranoia, with the intention of harming or killing people, is very likely to cause psychological trauma to victims and has the clear potential to cause serious injury or worse.

68. Assisting others to hide their illicit drugs, presumed to be for their personal use, is reasonably benign conduct: the Applicant was not encouraging drug use or supply.

Likelihood of engaging in further criminal or other serious conduct

69. The Applicant came to Australia as an adult and set about securing gainful employment, establishing a home with Ms B and starting a family. He lived a law-abiding life and made significant voluntary contributions to his community (discussed further on in these reasons). If his early traffic infringements are ignored, he first broke the law in 2015 by using cannabis, which he did to alleviate back pain. That does not appear to have led to consequential offending until 2018 when he assaulted his wife.

70. According to both the Applicant and Ms B, his assault on her was isolated. It was not a prolonged assault, he did not use denigrating or threatening language, he did not seek to stop her from calling the police, and he co-operated with the police when they arrived. His behaviour has all the indications of a person who engaged in uncharacteristic behaviour, instantly regretted it, and accepts full responsibility for it.

71. The drug offence, drug-driving and second violent episode all occurred in the context of a methamphetamine addiction, emotional hardship and impoverished circumstances. The Applicant became addicted after meeting drug users when he was homeless. He was homeless because after being asked to leave the family home he chose to give so much of his salary to Ms B that he could not afford to rent accommodation.

72. The Applicant recognises that his offending is attributable to homelessness, associating with the wrong people and drug use.[66] He said that since entering gaol and sobering up he has re-engaged heavily in his Christian faith, made a complete transformation and feels like his old self again. In his revocation request, he said he had started treatment for pre-existing anxiety and depression disorders - he was taking daily medication and undergoing psychological treatment. However, by the time of the hearing he said his mental health was good except for missing his children.[67]

73. The Applicant has not consumed any drugs since being incarcerated.[68] He has been of good behaviour in gaol and immigration detention. If he gets his visa back he intends to avoid drugs and alcohol and people who use drugs and alcohol.[69] He wants to raise his children and support Ms B financially and emotionally.[70] He wants to enjoy life with his children. He described himself as having been an "*idiot*" before and said that he now knows the meaning of life and the meaning of family.[71]

74. The Applicant sees a psychologist on a monthly basis.[72] In gaol, he attended some Alcoholics Anonymous meetings which he found helpful.[73] In immigration detention, he attended group meetings with other detainees with respect to drugs and alcohol.[74] These meetings appear to be structured, organised meetings which the Applicant described as the same as the Narcotics and Alcoholics Anonymous meetings that he was doing in gaol.[75]

75. The Applicant completed an online anger management course and, at the time of the hearing, he was doing an online drugs and alcohol course.[76] He previously started a "*Do It*" program but was unable to complete it because he was transferred to another detention centre. He intends to continue to attend Narcotics Anonymous meetings if he is returned

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66 Exhibit G1, Section 501 G documents, G3, page 24.
67 Transcript, page 40, lines 23 to 27.
68 Transcript, page 21, lines 1 to 4.
69 Transcript, page 14, lines 44 to 47.
70 Exhibit G1, Section 501 G documents, G3, page 12.
71 Transcript, page 61, lines 10 to 20.
72 Transcript, page 66, lines 5 to 9.
73 Transcript, page 14, lines 34 to 38.
74 Transcript, page 61, lines 23 to 44.
75 Transcript, page 62, line 5 to page 63, line 6.
76 Transcript, page 64, lines 9 and 10.

to the community[77] and to do more counselling with a psychologist as he finds it beneficial.[78] He believes that Professor James Freeman (referred to below) will assist him to engage with appropriate counselling and supports[79] and he appeared very enthusiastic about that. The Applicant has not done any rehabilitation directed towards positive relationships or domestic violence.[80] I note that following the assault on Ms B, the Applicant continued to live in the home for a period and, after he moved out he attended her home frequently to collect and drop off their daughters for several months. There is no evidence of any further aggression from the Applicant toward Ms B.

76. Before the period of offending, the Applicant used to attend church regularly for several years,[81] however described his understanding of the bible as superficial then and he claims to now have a better understanding of Christianity.[82]

77. The Applicant reported that his back is good as is his physical health. He is doing exercise, and getting good food and rest.[83] Specifically for his back, he does exercise and has regular medical check-ups.[84] He is looking forward to resuming employment.[85]

78. Some people who know the Applicant provided letters of support and/or gave evidence in the hearing. The witnesses who gave evidence impressed as sincere.

79. The Applicant's sister described the Applicant's actions as out of character. She said she had been visiting him at the various detention centres where he was housed, and he had told her how much he regretted his decisions.[86]

80. "Ms H", a friend, has known the Applicant now for eight years. She spoke about his kindness to other people and to her. She said he helps people even if it means giving up

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77 Transcript, page 63, lines 15 to 24.
78 Transcript, page 64, lines 24 to 28.
79 Transcript, page 15, line 21 to page 16, line 21.
80 Transcript, page 66, lines 10 to 14.
81 Transcript, pages 68 to 75.
82 Transcript, page 70, lines 45 to 48.
83 Transcript, page 40, lines 8 to 22.
84 Transcript, page 56, line 31 to 38.
85 Exhibit G1, Section 501 G documents, G12, pages 79 to 81.
86 Exhibit G1, Section 501 G documents, G17, page 89.

something of his own. She visited him in prison and in immigration detention, and he expressed remorse and determination to improve his life and be there for his children.[87]

81. "Mr T" provided a letter of support in which he indicated he has known the Applicant for 16 years, since they were both in Sudan. He spoke positively of the Applicant and he offered his support to the Applicant in terms of attending volunteering activities, helping him engage with the community and giving employment assistance.[88]

82. "Ms J" is the daughter-in-law of the owner of a mechanic business that employed the Applicant before he stopped working. Through her involvement in the business, she came to know the Applicant. She spoke very highly of the Applicant and commented that sometimes his working hours required him to stay until midnight which she thought put a strain on his marriage. She was aware that he was homeless and sometimes slept in his car. She is aware of his driving offences and the offending on the motorway.[89] In a letter she wrote some time before the hearing she said the business would hire the Applicant again.[90] (On the first day of the hearing, the Applicant said he intended to work in that business if he got his visa back). However, by the time of the hearing, the business had closed down. Ms J said that when she told the Applicant, which I accept was after he had given his evidence, the only concern he expressed was for the owner, asking if he was okay. Ms J manages a labour hire company and she is confident that she can get the Applicant a job immediately, probably working for a soft drink company in Ipswich, running the machinery.[91]

83. "Ms F" has known the Applicant's family since they came to Australia.[92] She described the Applicant as a close family friend. She has seen him help people even when it was inconvenient. She said he has given a lot to the Ethiopian and Eritrean community. He fixed people's cars for free, especially people who could not afford to pay, for example single mothers struggling to make ends meet. She added that the Applicant helps:

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87 Exhibit G1, Section 501 G documents, G18, page 90.
88 Exhibit G1, Section 501 G documents, G25, page 139 to 140.
89 Transcript, page 127, line 3 to page 12, line 6.
90 Exhibit G1, Section 501 G documents, G14, pages 85 and 86.
91 Transcript, page 128, line 4 to page 129, line 30.
92 Transcript, page 131, lines 32 to 37.

> "*whenever someone is in need of-you know, bit of money, or need of transportation, need of any communication things, he help. He helped whenever he can do it, whoever asked him to do for them*"

84. Ms F said accordingly the community had raised the money to pay for him to try to get his visa back (presumably his legal fees), and "*everybody is happy to help [the Applicant]*."[93] Ms F said everybody in their community loves the Applicant and would do anything for him.[94] She said they are willing to support him with whatever he needs.

85. Ms F has lived in Australia for 21 years. She has visited the Applicant in prison and in immigration detention.[95] She is aware of the Applicant's criminal history, having seen it "*in paper*" and spoken with his former lawyer.[96] She has also discussed it with the Applicant and she believes he is remorseful and deeply regrets what he did.

86. Ms F has offered the Applicant accommodation in her home. He plans to live with Ms F until he gets a job and is able to rent a house with two bedrooms so his children can stay with him on weekends.[97] Ms F lives with her adult daughter[98] and neither of them drink alcohol or take drugs. Nor do they smoke cigarettes.[99] Ms F can lend the Applicant a car so he can commute to work.[100] Both Ms F and her daughter are employed.[101] Ms F said that if the Applicant lived with her and started using drugs or drinking alcohol she would take him to counselling, talk to him about it, and get people in the community to talk to him about it or get him into "*rehab*".[102]

87. The Applicant has not lived with Ms F before. When he was homeless, he associated with other drugs users near a particular hospital. That hospital is at the northern end of suburb A. Ms F lives in suburb B which is just south of suburb A.[103] The suburb where Ms B

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93 Transcript, page 131, lines 44 to page 132 line 21.
94 Transcript, page 132, lines 23 to 28; page 136, lines 5 to 7.
95 Transcript, page 133, lines 1 to 4.
96 Transcript, page 135, lines 5 to 15.
97 Transcript, page 17, lines 24 to 31.
98 Transcript, page 135, lines 19 to 21.
99 Transcript, page 135, lines 20 to 26; line 37.
100 Transcript, page 135, lines 27 to 35.
101 Transcript, page 135, line 39.
102 Transcript, page 135, lines 40 to 45
103 Transcript, page 34, lines 40 to 46.

works is also close to suburb B. The Respondent put forward concerns that living in suburb B would place the Applicant close to the bad influences he took drugs with.[104] The Applicant said he is no longer in contact with those people and he will continue to avoid them. He will surround himself with people who are a good influence.[105] He never wants to see those people or any person associated with drugs again.[106] I consider that the Applicant will be far enough away from the hospital to avoid his old associates. I am satisfied that, having secure accommodation with Ms F, the Applicant would have no need to be near the hospital or associate with his former associates.

88. Further, I see Ms F as a strong protective factor. She is offering stable accommodation and the use of a car to make it easier for the Applicant to engage in employment which is another stabilising factor. Her home is free of alcohol and drugs. She is connected to a community of people who have already proven their willingness to help the Applicant. She is willing to call on that community to provide further assistance including getting the Applicant into a rehabilitation facility if he relapses.

89. As discussed under Primary Consideration 3, Ms B and the Applicant both want him to look after their daughter's before school every day and take them to school (and possibly collect them after school). This routine will be an additional stabilising factor.

90. Professor James Freeman, consultant psychologist (forensic – clinical), interviewed the Applicant and administered some risk assessment tools by video conference (with the assistance of an interpreter) for the purpose of this application.

91. Professor Freeman diagnosed the Applicant with:

- *Cannabis Use Disorder (partial remission in a controlled environment)*
- *Methamphetamine Dependency (partial remission in a controlled environment)*
- *Adjustment Disorder (provisional diagnosis) (e.g depression) that directly stems from the emotional stress associated with his current predicament e.g., incarceration, separation from family, anxiety about possible deportation*

[104] Transcript, page 67, lines 1 to 7.
[105] Transcript, page 88, lines 1 to 8.
[106] Transcript, page 67, lines 9 and 10.

92. In the hearing, Professor Freeman clarified that "*Cannabis Use Disorder*" is a way of expressing that the Applicant used cannabis, but it is not known whether he was dependent on it. He noted that cannabis, alcohol and methamphetamine consumption each promote maladaptive decision making and/or elevated risk-taking propensities.

93. Professor Freeman thought the Applicant displayed appropriate remorse and appeared to have sufficient levels of insight and self-awareness. He reported that the Applicant lamented refusing to accept housing assistance from friends as well as his employer, saying "*I was trying to hide my problems. I didn't want to be a burden to my friends.*"

94. Professor Freeman administered two assessment tools that seek to indicate a person's propensity to violence. The *Hare Psychopathy Check List (PCL-R)* is, according to Professor Freeman, widely considered to be one of the most effective predictors of re-offending. The Applicant's scores were well below the average. *The HCR-20 (Historical, Clinical and Risk Management Violence Assessment Scheme)* is designed to assess the risk for future violent behaviour in criminal and psychiatric populations. It put the Applicant in the low risk category in relation to future acts of violence. Professor Freeman said it was important that the Applicant avoid relapsing into substance use and contact with negative peers and regain lifestyle stability. He pointed to a number of protective factors including employment opportunities, return to parental duties and lack of a major mental illness.

95. In his oral evidence, Professor Freeman provided some further explanation of his assessment of the Applicant, and he responded to some information about the Applicant that he was not aware of when he provided his report. He was not aware of the domestic violence in 2018, that the going armed offences involved the Applicant attempting to set the victim on fire, or the Applicant's traffic history. After being informed of these matters, his overall assessment did not change significantly.

96. To summarise his reasons, his view was that the Applicant had successfully integrated into the Australian community, but when he became homeless, his life unravelled and the domestic violence and other offences occurred in a period when he was under the influence of a very addictive drug (methamphetamine) that has negative effects on mental

health. He noted that THC (in cannabis) and methamphetamine impair perceptions and responses to risk. He saw the offending as uncharacteristic, erratic, and not consistent or reflective of the Applicant's long-term functioning in the community.

97. With respect to the traffic infringements that occurred during the period when the Applicant was using drugs, Professor Freeman thought that was natural given the Applicant was living in his car, smoking ice and driving around. With respect to the traffic offences that the Applicant committed before he started using methamphetamine, he said there was no literature to indicate that speeding or traffic offences are clearly linked to criminal violent offending. He was unable to give an opinion about whether the infringements indicated a propensity or preparedness to break rules. I note that those early offences were all speeding by not more than 20kmph and some minor infringements as opposed to more aberrant traffic infringements such as speeding in a school zone or dangerous driving. They clearly show a preparedness to break certain rules to a certain degree, but I accept Professor Freeman's evidence that it does not speak to the risk of violent offending.

98. In terms of risk of relapse, Professor Freeman emphasised that methamphetamine is highly addictive, more than cannabis, and that injecting methamphetamine intravenously is more addictive than smoking it. He said the longer a person is dependent upon something, both psychologically and physiologically, the harder it is to give it up, and that research indicated that with early intervention the prospects of a positive outcome are much better. The Applicant smoked methamphetamine for around six months before incarceration effectively stopped him.

99. Professor Freeman pointed out that where the Applicant is in remission in a controlled environment, there is a question whether he could sustain that in the community. The structure and stability he currently has in detention and the fact that he is under surveillance are protective factors while he is there. The key is whether the Applicant can transfer his behaviour into the community. He opined that his release plan suggests it is possible. Overall, Professor Freeman seemed to consider the Applicant's risk of re-offending to be low given the protective factors he has.

100. My strong impression of the Applicant is that he has spent most of his life as a law-abiding, contributing member of society whether that was in Ethiopia, Sudan or Australia, and that this is the life he wants to lead. His offending was aberrant, and I am satisfied that he is genuine in his commitment to his rehabilitation, and that he has strong support around him. He now knows how to manage his back pain with exercises and regular check-ups. Professor Freeman considered that his relapse prevention plan was realistic. The Applicant expects to face harm if he is removed to Ethiopia, and he does not wish to be separated from his children and in fact his key motivator seems to be his children. Ms B will not only allow him to be involved in their lives, she welcomes his involvement.

101. It seems most unlikely that the Applicant will become involved with drugs again, and if he does, he has strong community support to get him back on the right track. As his criminal offending (including the family violence) was significantly contributed to by drug use, I am satisfied that there is a low risk that he will commit more criminal offences. The Applicant appears to appreciate that any offending, including breaking road rules, is unacceptable, and I am satisfied that the risk of further traffic infringements is also low.

Conclusion: Primary Consideration 1

102. This Primary Consideration weighs moderately against revocation of the cancellation of the Applicant's visa.

PRIMARY CONSIDERATION 2: FAMILY VIOLENCE

103. Paragraph 8.2 of the Direction provides that 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.

104. I am not only to consider family violence that is the subject of a conviction. I am to consider information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence, where the non-citizen has been afforded procedural fairness.

105. I have addressed the assault on Ms B in my discussion under Primary Consideration 1. I add that the Applicant showed an understanding of the impact on Ms B and the children. In fact, his actions at the time after the assault - hugging his children so they would not be upset - showed that he immediately understood the potential impact on them.

106. The fact that this assault was family violence amplifies its significance as a factor against revocation in my overall assessment of whether there is another reason to revoke the visa cancellation.

PRIMARY CONSIDERATION 3: THE BEST INTERESTS OF MINOR CHILDREN IN AUSTRALIA

107. Paragraph 8(3) of the Direction compels a decision-maker to consider the best interests of a minor child in Australia. Under paragraph 8.3, I must determine whether non-revocation under section 501CA is or is not in the best interests of a child under the age of 18 affected by the decision.

108. The Direction sets out a number of factors to take into consideration with respect to the best interests of minor children in Australia. Those include, relevantly:

- the nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);
- the extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;
- the impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;
- the likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;
- whether there are other persons who already fulfil a parental role in relation to the child;

- any known views of the child (with those views being given due weight in accordance with the age and maturity of the child); and
- evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

109. The Applicant has two minor biological children in Australia, Child H and Child D, his two daughters with Ms B, who are currently 6 and 7 years old.

110. Until January 2019, both Ms B and the Applicant fulfilled parenting roles on a full-time basis. Ms B described the Applicant as a good father and a devoted father.[107] She does not seem to have any interest in reconciling with the Applicant,[108] but she said she is supporting him in his application for the sake of their children.[109]

111. Ms F saw the Applicant with his children at birthday parties, at church, at the park, and when she visited their home. In her opinion they love him very much and he loves them.[110] She considers the Applicant to be a great father,[111] and she said the children ask about him all the time.[112] Ms H described the Applicant as a loving and devoted father. She said his children love him dearly and ask about him frequently.[113] The Applicant's sister said much the same - every time she visits the children, which is around once every week or two weeks, they tell her they love him and ask about him.[114]

112. After January 2019, the Applicant remained involved in the children's lives although he did not live in the family home. He said every Saturday and Sunday he took them to the playground[115] and Ms B's evidence was consistent with him frequently taking them to the park or playground. For around two months he continued to contribute to the mortgage on the family home, to his own detriment.

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[107] Exhibit G1, Section 501 G documents, G16, page 38
[108] Transcript, page 98, lines 25 to 35.
[109] Transcript, page 90, lines 25 to 28.
[110] Transcript, page 132, lines 30 to 41.
[111] Exhibit G1, Section 501 G documents, G25, page 141.
[112] Transcript, page 133, lines 18 to 20.
[113] Exhibit G1, Section 501 G documents, G18, page 90.
[114] Transcript, page 111, lines 5 to 15.
[115] Transcript, page 91, lines 9 to 20.

113. Since July 2019 the Applicant has been incarcerated, but he speaks with his daughters on Saturdays and Sundays.[116]

114. According to a letter from Ms B, the children's separation from the Applicant is having a negative impact on them and she sees it on a day-to-day basis. She said they miss him terribly and ask about him. It would distress them greatly to be separated from him long-term.[117] In the hearing she said they ask why the Applicant does not pick them up from school and they cry after speaking with him on the telephone.[118]

115. The children once visited him in detention, and they cried. Believing that it was harmful for them to think he was incarcerated, the Applicant now tells them he is away working.[119] So does Ms B.[120]

116. At some point after the Applicant was incarcerated, Ms B was unable to keep up with the mortgage payments. With the Applicant's consent, she sold their house and now rents a place closer to her work. The Applicant allowed her to keep all of the proceeds of the sale because he wants her to be able to buy another house for the benefit of their children.[121]

117. On a practical level, currently Ms B has to wake the children up at 5.00am and take them to family day care so she can start her job cleaning a school. She does not pick them up straight after school, but she collects them from after-school care after she finishes her work.[122] The Applicant used to wake the children at around 7.00 to7.30am and take them to school.[123] He said that if his visa is returned to him, and if Ms B allows it, he will come to their home every school morning so they can sleep longer, then take them to school.[124] Ms B said she would trust the Applicant to look after the children before school and after school and she has asked him to do that.[125]

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[116] Transcript, page 19, lines 35 to 40.
[117] Exhibit G1, Section 501 G documents, G16, page 38.
[118] Transcript, page 91, line 42 to page 92, line 2.
[119] Transcript, page 18, lines 19 to 35.
[120] Transcript, page 92, lines 7 to 11.
[121] Transcript, page 17, line 35 to page 18, line 14; page 19, lines 16 and 17.
[122] Transcript, page 94, lines 30 to 41.
[123] Transcript, page 18, line 44 to page 19, line 26.
[124] Transcript, page 72, lines 17 to 26.
[125] Transcript, page 94, lines 42 to 46.

118. There is no prospect of Ms B and the children moving to Ethiopia if the Applicant is deported.[126] Neither the Applicant nor Ms B want that for them. If the Applicant is removed to Ethiopia, he will never be present in the children's lives and they would probably have very limited contact with him given the potential difficulties with internet or telephone communications within Ethiopia.

119. On the other hand, if the Applicant is allowed to return to the wider Australian community, I am in no doubt that he would make a very significant positive contribution to the lives of these children emotionally, financially and practically. His desire to be a hands-on parent is not merely aspirational: he has proven to be an engaged, devoted parent over many years.

Conclusion: Primary Consideration 3

120. The best interests of the children mentioned above weigh heavily in favour of the revocation of the cancellation of the Applicant's visa.

PRIMARY CONSIDERATION 4 – THE EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

The relevant paragraphs in the Direction

121. Primary Consideration 4 provides that the Australian community expects non-citizens to obey Australian laws while in Australia. I should consider whether the Applicant has breached, or whether there is an unacceptable risk that he would breach, this expectation by engaging in serious conduct. 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, relevantly in this case, acts of family violence or serious crimes against women. These expectations apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.

[126] Transcript, page 98, line 44 to page 99, line 4.

122. Paragraph 8.4(4) of the Direction provides that I should proceed on the basis of the Government's views as to the expectations of the Australian community as a whole as articulated in the Direction. This approach is consistent with the decision of the Full Court of the Federal Court in *FYBR v Minister for Home Affairs* [2019] FCAFC 185.

Analysis – Allocation of Weight to this Primary Consideration 4

123. Accordingly, in assessing the weight attributable to Primary Consideration 4, it is necessary to have regard to the following matters:

- the Applicant moved to Australia in 2012 when he was 31 years old. He is now 40 years old;
- the Applicant committed an act of family violence in 2018, six years after arrival and he committed his first prosecuted offence eight months after that;
- the Applicant's offences and serious conduct include an episode of family violence and an episode of serious harassment and aggression against a stranger;
- the assault on Ms B occurred in a time of unusual stress and drug use, and the other offending occurred in the context of drug addiction and homelessness. This conduct was uncharacteristic;
- there is a low risk that he will re-offend;
- the Applicant has a solid history of employment and of voluntary work and charitable acts in his community;
- he is a devoted older brother and father, having tangibly demonstrated his devotion to his daughters and to his younger sister; and
- if he is removed to Ethiopia it will adversely affect him, his daughters, his younger sister and Ms B. It would also sadden members of his local community who care about him and want him to stay in Australia.

Conclusion: Primary Consideration 4

124. This Primary Consideration must weigh in favour of non-revocation of the cancellation of the Applicant's visa. However, putting the Applicant's offending in context, and taking into account the matters in his favour, I do not consider that the expectations of the Australian community strongly favours non-revocation. I allocate very limited weight to this Primary Consideration.

OTHER CONSIDERATIONS

125. It is necessary to look at the Other Considerations listed at paragraph 9 of the Direction. I will now consider each of the four stipulated sub-paragraphs (a), (b), (c) and (d).

(a) International non-refoulement obligations

126. The Applicant contends that he would face harm on the basis of his ethnicity if removed to Ethiopia because of the conflict between the government in Tigray and the Ethiopian government.

127. Paragraph 9.1(1) of the Direction provides that a non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm, and it refers to Australia's non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CAT), and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR).

128. The paragraph goes on to say that the Act, particularly the concept of "*protection obligations*", reflects Australia's interpretation of non-refoulement obligations and the scope of the obligations that Australia is committed to implementing and that in considering non-refoulement obligations where relevant, decision-makers should follow the tests enunciated in the Act.

129. Sections 36(2)(a) and 36(2)(aa) of the Act provide the tests for the grant of protection visas on the basis of refugee status and for complementary grounds for protection. Those tests contain exclusions that are not contained in the CAT or ICCPR. Accordingly, a person who could not satisfy the criteria for a protection visa under the Act may still engage Australia's non-refoulement obligations as a matter of fact despite the

Government's interpretation of the scope of its obligations. As Mortimer J said in *Minister for Home Affairs v Omar*[127]*:*

> *"Critically, what matters for the exercise of the s 501CA(4) discretion is not the consideration of a visa criterion which might have similar content (in some respects) to Australia's non-refoulement obligations: it is whether Australia's non-refoulement obligations are* ***engaged*** *in respect of a particular individual."*[128]
>
> (Emphasis in original)

130. I am not required to make a determination on whether non-refoulement obligations are owed[129] however, I must give meaningful consideration to the Applicant's representations on the claimed risk of harm if returned to Ethiopia and consider claims of harm or hardship separately to the question of whether those claims engage Australia's non-refoulement obligations.

131. Article 33 of the Refugees Convention[130] provides that:

> *1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

132. Article 3.1 of the CAT[131] provides that:

> *"No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".*

133. Part of the definition of "*torture*" is that it is intentionally inflicted.[132]

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127 [2019] FCA 279.
128 At [59].
129 See paragraph 9.1(6) of the Direction and *STZS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 1140 at [49], citing *Ali v Minister for Immigration and Border Protection* [2018] FCA 650 at [28], [34] and *Greene v Assistant Minister for Home Affairs* [2018] FCA 919.
130 *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) as amended by the *Protocol Relating to the Status of Refugees*, opened for signature 31 July 1967, 606 UNTS 267 (entered into force 4 October 1967).
131 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
132 Ibid, Article 1.

134. Articles 2, 6 and 7 of the ICCPR[133] are collectively taken to create an obligation not to remove a person to a place, if there are substantial grounds for believing that there is a real risk of irreparable harm in the form of torture or cruel, inhuman or degrading treatment or punishment, or being arbitrarily deprived of their life.

135. The Applicant is from Tigray and he speaks Tigrinya. His revocation request contained country information to the effect that towards the end of 2020 fighting broke out between the local government in Tigray, where the Applicant is from, and the Ethiopian government. The country information indicated, among other things, that Tigray was experiencing mass displacement and food shortages, among other problems, as a result of the conflict. It further indicated that ethnic profiling of Tigrayans was occurring in Addis Ababa.

136. It was contended on the Applicant's behalf that, should the Applicant be removed to Ethiopia and settle in Tigray:

- he would be exposed to harm, discrimination and violence on account of his Tigrayan ethnicity;
- without social or familial support, he would be especially vulnerable to endemic inter-communal and ethnic violence;
- as Ethiopia is plagued by unemployment and food insecurity, he would likely be exposed to destitution and famine;
- he would likely be exposed to risk of crimes against the person and property, including looting, indiscriminate attacks on civilians and the destruction of civilian property;
- because of his Tigrayan ethnicity he would face the prospect of death and torture in Tigray from the Ethiopian army and the Eritrean army; and
- he could not re-locate to any other part of Ethiopia because, due to government policy, Tigrinya speaking Ethiopians are being dismissed and denied employment in Ethiopia, which would effectively deny him the right to a livelihood.[134]

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[133] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty*, GA Res 44/128 (15 December 1989, entered into force 11 July 1991).

[134] Exhibit G1, Section 501 G documents, G21, pages 117 to 119.

137. The Applicant further claimed to be aware of news reports from Al Jazeera, CNN and BBC that Tigrayans returning to Ethiopia were being arrested and killed.[135] However, no such country information was put forward even after the Tribunal asked both parties for country information about the treatment of Tigrayans in Ethiopia (see below). I do not accept that Al Jazeera, CNN and BBC reported that Tigrayans returning to Ethiopia were being arrested and killed.

138. The country information concerning the conflict in Tigray was all dated around the beginning of this year. Given the dynamic nature of such a situation, the Tribunal obtained more recent country information pursuant to its power to inform itself on any matter in such manner as it thinks appropriate under s 33(1)(c) of the *Administrative Appeals Tribunal Act 1975*. Those articles, marked Exhibit T1, are:

- International Medical Corps, *Ethiopia-Tigray Region Humanitarian Situation Update* (15 September 2021);
- UN OCHA, *Ethiopia - Northern Ethiopia Humanitarian Update* (30 September 2021);
- SmartTraveller *Advice – Ethiopia* (7 October 2021); and
- World Food Programme, *Tigray: Conflict Affected Areas Update #1* (23 September 2021).

139. Additionally, at the beginning of the hearing the Tribunal asked the parties for recent country information pertaining to the treatment of Tigrayan people outside Tigray, in particular in Addis Ababa. On the evening of the first day of the hearing, the Applicant provided to the Tribunal and Respondent a four page summary containing extracts from the following articles:

- Human Rights Watch, *Ethiopia: Ethnic Tigrayans Forcibly Disappeared* (18 August 2021);
- Amnesty International, *Ethiopia: End arbitrary detentions of Tigrayans, activists and journalists in Addis Ababa and reveal whereabouts of unaccounted detainees* (16 July 2021);
- Reuters, *Ethiopia's crackdown on ethnic Tigrayans snares thousands* (7 May 2021); and
- Human Rights Watch, *The Latest on the Crisis in Ethiopia's Tigray Region* (30 July 2021).

[135] Transcript, pages 28 and 29.

140. That document is marked Exhibit T2. As the document was provided at the request of the Tribunal, it is not a "*document submitted in support of the [Applicant's] case*" and therefore it does not come within the purview of s 500(6J) of the Act.

141. The Respondent was on notice from the time the Applicant provided his Statement of Facts Issues and Contentions that he made non-refoulement claims on the basis of the conflict in Tigray, and that the filed country information was, by the time of the hearing, not current. The Respondent agreed that the Tribunal could consider the country information that became Exhibit T2. The Respondent's reasoning was that the Tribunal could consider it on the third day of the hearing because by that time the information would had been given to the Respondent two clear business days prior to that hearing day. I accept that this reasoning is supported by the decision in *Uelese v Minister for Immigration and Border Protection* [2015] HCA 15 and I commend the Respondent for its reasonable and fair approach.

142. The Respondent submitted that the Tribunal should be cautious about country information from sources that are not as reliable as the Department of Foreign Affairs and Trade country report on Ethiopia[136] ("DFAT report"). The evidence in T1 and T2 is not of the same calibre as the DFAT report, however, the DFAT report was prepared before the armed conflict in Tigray started. It does not appear that there is any current, relevant country information that is on par with the DFAT report, such as a report from the United Kingdom Home Office or the United States Department of State. Accordingly, it is appropriate to have regard to evidence from other sources in addition to the DFAT report.

143. The DFAT report is dated August 2020. It indicates that, at the time the report was prepared, ethnic Tigrayans constituted 6.1 per cent of the population and resided predominantly in Tigray State which borders Eritrea (where Tigrayans constituted a majority). Tigray State was considered one of the safest states in the country. The largest concentration of Ethiopian Tigrayans outside Tigray State at the time of the 2007 census was in Addis Ababa.

[136] Exhibit R3, DFAT Country Information Report Ethiopia dated 12 August 2020, paragraph 2.1.

144. Despite their minority status, until very recently, Tigrayans wielded significant political and economic influence and controlled the federal security apparatus, including the military and intelligence services, through the Tigray People's Liberation Front ("TPLF"). The background to that is that in 1974, a Communist military junta known as the Derg overthrew the long-serving Emperor and abolished Ethiopia's monarchy. Ethiopia descended into civil war until rebel forces from the Ethiopian People's Revolutionary Democratic Front ("EPRDF"), a multi-ethnic alliance led by the Tigrayan people, ousted the Derg in 1991. The TPLF was the most influential party within the former EPRDF coalition. Tigrayans have also traditionally had strong links to state-owned enterprises.

145. However, Tigrayan influence at the federal level had been declining steadily since 2012, and since April 2018 Ethiopia has had an Oromo Prime Minster. In 2019 the TPLF elected not to join the ruling Ethiopian Prosperity Party (formally the EPDRF). Tigrayans had systematically been removed from leadership positions in the military, the National Intelligence and Security Service and Metals and Engineering Corporation, though many were still part of the senior executive of the respective organisations.

146. In general, according to the DFAT report, official discrimination, including systematic state-sanctioned discrimination, denial of public services and higher detention rates, based on race and/or ethnicity was rare. Societal discrimination based on ethnicity could occur but was predominantly in the form of positive discrimination in favour of a particular ethnic group rather than active discrimination against people of a different race or ethnicity.[137]

147. However, the report also indicated that anti-Tigrayan sentiment had become more overt since 2018 and hate speech against ordinary Tigrayans increased in that time. Further, the Government of Tigray was engaged in a number of border disputes, predominantly with the Government of Amhara state. Conflict persisted in rural areas, and Tigrayans were targets for violence in eastern Amhara State. Excluding Addis Ababa, ethnic

[137] Exhibit R3, DFAT Country Information Report Ethiopia dated 12 August 2020, paragraph 3.4.

Tigrayans faced a moderate risk of violence in rural parts of states where they constituted a minority.[138]

148. Accordingly, the DFAT report indicates that even before the outbreak of war, Tigrayans faced a real risk of violence, based on their ethnicity, in some parts of Ethiopia outside Tigray. According to the more recent country information, they are now at risk of harm inside Tigray, and at risk of discrimination in Addis Ababa.

149. According to the International Medical Corps Situation Update, dated 15 September 2021, at that date, there had been nine months of conflict between the Ethiopian National Defence Force and the TPLF, and the security situation in Tigray was continuing to worsen.

150. According to the World Food Program report dated 23 September 2021, renewed fighting in Tigray since June 2021 had worsened food insecurity so that 4.4 million people were in "*high acute food insecurity*" and resulted in an increase of internally displaced people linked to the conflict in Tigray to 2.46 million.

151. According to the United Nations Office for the Coordination of Humanitarian Affairs report dated 30 September 2021 ("UN OCHA report"), the humanitarian situation in Tigray was dire. Food prices had "*skyrocketed*" and the agricultural planting season had been missed in some areas resulting in no available food stock. Humanitarian trucks containing food, water, sanitation and hygiene and other items were reaching Tigray but trucks containing fuel and medical supplies were being denied entry. Fuel shortages were hampering the delivery of aid and medical supplies were not being replenished.

152. According to the smarttraveller.gov.au "*Latest Update*" that was still current on 7 October 2021, there were ongoing armed clashes and deadly violence in Tigray. There was also ongoing military action in surrounding areas. Travellers were advised not to travel to Tigray or surrounding areas.

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[138] Exhibit R3, DFAT Country Information Report Ethiopia dated 12 August 2020, paragraphs 3.11 to 3.15.

153. I am satisfied that if the Applicant were to return to Tigray, he would be in a dangerous environment where there is a humanitarian crisis including mass internal displacement, acute food insecurity and depleted medical supplies. His lack of strong familial and social support there would make him particularly vulnerable. There was nothing in the country information that expressly stated that Tigrayan civilians in Tigray are being targeted by Ethiopian government forces although the high number of internally displaced persons could suggest that. Whether the Applicant would be at risk of discrimination, or harm that is personal to him and not faced by the general population, he would still be at considerable risk of serious harm and hardship in Tigray.

154. In relation to Addis Ababa, the DFAT report indicates:

- as Ethiopia's administrative and commercial capital, it attracts migrants from across the country in search of economic opportunities and has a multi-ethnic character;
- while the security situation has deteriorated in parts of Ethiopia since 2018, including due to inter-ethnic clashes, Addis Ababa has largely been immune and is particularly stable;
- different ethnic groups have a history of co-existence in Addis Ababa, and discrimination on ethnic grounds is not common there. One source described ethnicity as a non-factor in Addis Ababa, and most people consider themselves from Addis Ababa as opposed to a particular ethnic group; and
- violence based on ethnicity is not common in Addis Ababa.[139]

155. According to the UN OCHA report, the UN was operating flights between Addis Ababa (the national capital) and Mekelle (the Tigray capital), and passengers reported moderate searches at Addis Ababa airport on departure and arrival.

156. However, according to several other sources, the targeting of Tigrayans by the national government is worse than that.

157. Reuters reported in May 2021 on several cases of Tigrayans being targeted and placed under suspicion on the basis of their ethnicity. The report states that the Ethiopian

[139] Exhibit R3, DFAT Country Information Report Ethiopia dated 12 August 2020, paragraph 3.3.

Attorney General said there was no government policy to "*purge*" Tigrayan officials but he conceded that some state organizations "*may have overestimated their exposure or vulnerability*" to penetration by the TPLF and "*I would not rule out that innocent people might be caught up in this situation.*" The report added that around 300 Tigrayans were held in a warehouse-style building on the southern outskirts of Addis Ababa, according to a health worker who said he was detained there and a lawyer with friends and family inside. A priest, two women with small children and a beggar were among the detainees. They had been arrested after showing police an identity card issued by Tigray authorities. The health worker said he was released without charge after eight days, along with more than 100 others, after Reuters sent the Attorney General an email asking about the arrests and conditions inside the building.

158. A Human Rights Watch report, dated August 2021, claimed that since late June 2021, after Tigray forces recaptured Mekelle, Ethiopian authorities had arbitrarily detained, forcibly disappeared, and committed other abuses against ethnic Tigrayans in Addis Ababa. The report claimed that in July 2021, the Addis Ababa police commissioner told the media that over 300 Tigrayans had been arrested as they were under investigation for supporting the TPLF which was designated as a terrorist group in May 2021. Human Right Watch claimed that although the Attorney General told the media that ordinary citizens would not be affected, most if not all of those arrested appeared to have been targeted on the basis of their ethnicity. The report said those who were arrested were secretly transferred to unidentified locations. The whereabouts of some remained unknown. Human Rights Watch reported that the government had forced business owned by Tigrayan's in Addis Ababa to close.

159. These reports are broadly consistent. They indicate that Tigrayans outside Tigray are at risk of being arrested and discriminated against by the national government and that Addis Ababa is no longer a place where ethnicity does not matter.

160. I am satisfied that there is a real possibility that the Applicant would be targeted by the government on the basis of his ethnicity if he were outside Tigray, including if he were in Addis Ababa. However, without more comprehensive country information, I am unable to find a real risk that the Applicant would be targeted in a way that involves serious harm.

161. It appears that if the Applicant returns to Tigray, it is likely that he will live in terrible, unsafe conditions and if he relocates to an area outside Tigray he runs a real risk of being discriminated against to an extent that I am unable to gauge on the information before me.

162. I am not satisfied that the Applicant would be at any real risk of harm from the Eritrean army in Ethiopia. There is no evidence of a current conflict between Eritrea and either Ethiopia or Tigray State.

163. The Applicant is not barred from applying for a protection visa should I decide not to revoke the cancellation of his visa. In the hearing he said he would not as he could not afford it. However, he is able to submit an application without the help of a lawyer.

164. If the Applicant's visa is not returned to him, then:

- if he makes a successful Protection visa application, he will return to the wider Australian community;
- if he makes an unsuccessful Protection visa application but a "*protection finding*" is made, he will not be removed to Ethiopia,[140] which raises the likelihood of indefinite detention; or
- if he does not make a Protection visa application and the Minister does not exercise his powers to allow the Applicant to return to the wider community, he will be removed to Ethiopia as soon as that is reasonably practicable. This could involve some delay if he does not return voluntarily as the DFAT reports suggests that Ethiopia may not accept involuntary returnees.[141]

165. This Other Consideration weighs heavily in favour of revocation of the cancellation of the Applicant's visa.

(b) Extent of Impediments if Removed

166. As a guide for exercising the discretion, 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

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[140] Section 197C(3) of the *Migration Act 1958* (Cth).

[141] Paragraph 5.7 of the DFAT report refers to the Ethiopian government having typically welcomed voluntary returnees without stating whether it is prepared to accept involuntary returnees .

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.

167. The Applicant is a 40 year old man who is currently able bodied although he has a back condition that he is managing with exercise. He disclosed a dislocated arm in his revocation request,[142] but he did not mention it in the hearing, so it appears to have been resolved. The Applicant mentioned past, but not current, anxiety and depression. Professor Freeman diagnosed him with an adjustment disorder which he thought was a direct result of the emotional stress of his detention and his predicament regarding his visa. According to the Applicant he could not imagine living in another country separated from his family and children. His physical, emotional and mental health would suffer. He would be tortured daily with the guilt of what he has done and the thought of what has become of them.

168. The Applicant has employment skills in a trade and in manual labour. He has a work history in Ethiopia. However, the Ethiopian economy is weak, unemployment is high, and his efforts to earn a living may be impacted by discrimination because he is Tigray.

169. The Applicant has aunts, uncles, nephews and nieces in Ethiopia,[143] but the last time he had any contact with his relatives there was when he was in Ethiopia and he is not sure if they are still there.[144] He conceded that there are people in Ethiopia that he used to know when he lived there but he said he lost contact with them after moving to Australia.[145]

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[142] Exhibit G1, Section 501 G documents, G3, page 26.
[143] Exhibit G1, Section 501 G documents, G3, pages 21 and 23; G22, page 133.
[144] Transcript, page 30, lines 3 to 15.
[145] Transcript, page 32, lines 28 to 41.

170. The Applicant will have much more limited access to adequate social, medical, psychological and economic support in Ethiopia than he has in Australia, although it would be commensurate with what is generally available to other citizens of Ethiopia. He would probably be more impacted by the relative lack of support if he could not establish familial or social support in Ethiopia. This depends on whether he can make contact with any relatives or old friends in Ethiopia or join a supportive church community.

171. The Applicant lived in Ethiopia for most of his childhood, he is an active member of an Ethiopian community in Australia, and he agreed that he is familiar with Ethiopian culture.[146] He speaks Tigrinya, Arabic and broken Amharic, and he has a reasonable grasp of English although he required an interpreter to assist him in the hearing.[147] These languages are all spoken in Ethiopia. I am satisfied that the Applicant would not face any substantial language or cultural barriers in Ethiopia.

172. There are other barriers to the Applicant establishing himself and maintaining basic living standards in Ethiopia that I have addressed in Other Consideration (a) and I will not allocate additional weight to those here.

173. This Other Consideration (b) weighs moderately in favour of revocation of the mandatory cancellation.

(c) Impact on victims

174. This Other Consideration (c) requires me to assess the impact of the decision on members of the Australian community, including victims of the Applicant's criminal behaviour, and the family members of the victim or victims, where information in this regard is available and the Applicant has been afforded procedural fairness.

175. Ms B is a victim of the Applicant's domestic violence. She is his wife, albeit estranged, and the mother of his children. I will take her interests into account as someone who is a member of the Applicant's family who is affected by the decision because it is in that

[146] Transcript, page 27, lines 27 to 31.
[147] Transcript, page 26, line 43 to page 27, line 25.

capacity that she has expressed that she will be impacted. She did not express any impact on her as a victim. I do not allocate additional weight on the basis of her being a victim. There is no evidence regarding the impact on any other victims.

(d) Links to the Australian Community

176. In consideration of this Other Consideration (d), paragraph 9.4 of the Direction requires that decision makers must have regard to the following two factors set out in paragraph 9.4.1 and paragraph 9.4.2 respectively:

- the strength, nature, and duration of ties to Australia; and
- the impact on Australian business interests.

The strength, nature, and duration of ties to Australia

177. The Applicant came to Australia at the age of 31 and lived in the wider Australian community for seven years before he was incarcerated. His descent into offending conduct commenced six years after arriving in Australia.

178. The Applicant has a solid work history in Australia. It is clear from Ms J's evidence that he was a valued employee of her father-in-law's business. He has contributed a great deal to the local Ethiopian and Eritrean communities such that they raised money to help him in his efforts to remain in Australia. He did not disclose his voluntary work in the community and the financial assistance he has given to others: this was communicated to the Tribunal by witnesses from that community. The Applicant disclosed "*blood donation*" and "*cancer donation*"[148] and that he donates blood every month[149]. I accept that the Applicant donated blood but I doubt he could have when he had drugs in his system.

[148] Exhibit G1, Section 501 G documents, G3, page 26.
[149] Exhibit G1, Section 501 G documents, G3, page 26.

179. The Applicant has an aunt in Melbourne but she is not involved in his life.[150] Apart from them, the only family he has in Australia is Ms B, his daughters and his sister, "Ms S".

180. Ms B wants the Applicant to remain in Australia for the sake of his daughters. It would indirectly affect Ms B in a negative way if her children's interests were negatively impacted. It would directly impact her if she did not have the Applicant's assistance looking after the children.

181. Ms S is a single mother.[151] She provided a letter of support and she gave evidence in the hearing. When she was 11 years old her mother passed away and the Applicant raised her as her guardian.[152] He has always been there for her, provided for her and fought for her to have a great life. She sees him as a father figure, and if he is removed to Ethiopia she will miss him as one misses a parent.[153] She and the Applicant have a good relationship[154] and she has visited him in both prison and immigration detention.[155]

182. I have addressed in Primary Consideration 3 the impact on the Applicant's daughters should he be removed to Ethiopia.

183. It is apparent that in the time the Applicant has been in Australia he has developed strong social ties to his local community, the church community, and through his past employment.

184. There is no evidence that the Applicant's removal from Australia would adversely impact on Australian business interests.

Conclusion: Other Consideration (d)

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[150] Exhibit G1, Section 501 G documents, G22, page 125.
[151] Transcript, page 110, lines 22 to 24.
[152] Transcript, page 107, lines 44 to 48.
[153] Transcript, page 108, lines 10 to 13.
[154] Transcript, page 109, line 42 page 110, line 16.
[155] Transcript, page 111, lines 16 to 24.

185. Overall, the Applicant's links to the Australian community weighs very much in his favour in terms of there being another reason to revoke the cancellation of the Applicant's visa.

CONCLUSION

186. I am now required to decide whether there is another reason to revoke the cancellation of the Applicant's visa taking into account all of the Considerations in accordance with the Direction. It is significant that for most of the Applicant's time in Australia, he was a contributing, well-behaved member of the community, and a responsible and devoted father. His offending was uncharacteristic. I consider it likely that if his visa is returned to him, he will be a better citizen that he was before. His absence if removed to Ethiopia will be felt by his immediate family and his community. Given the conditions for Tigrayan people in Ethiopia, the Applicant will be at considerable risk of harm and hardship if he is removed there. If his visa remains cancelled, and a protection finding is made, indefinite detention is likely. The totality of these matters, which are captured by Primary Consideration 3 and Other Considerations (a), (b) and (d) outweigh Primary Considerations 1, 2 and 4 combined.

187. Application of the Direction therefore favours the revocation of the cancellation of the Applicant's visa.

DECISION

188. On 8 October 2021, pursuant to section 43 of the *Administrative Appeals Tribunal Act 1975* (Cth), the Tribunal set aside the reviewable decision made by the delegate of the Respondent dated 28 July 2021 and substituted a decision that the cancellation of the Applicant's visa be revoked under section 501CA(4)(b)(ii) of the Migration Act 1958 (Cth).

I certify that the preceding 188 (one hundred and eighty-eight) paragraphs are a true copy of the reasons for the decision herein of Member Rebecca Bellamy

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

Dated: 4 November 2021

Date of hearing:	5, 7 and 8 October 2021
Solicitor for the Applicant:	Ms Jennifer Samuta
	Samuta McComber Lawyers
Solicitor for the Respondent	Mr Jake Kyranis
	Sparke Helmore

ANNEXURE A – EXHIBIT LIST

EXHIBIT	DESCRIPTION OF EVIDENCE	PARTY	DATE OF DOCUMENT	DATE RECEIVED
G1	Section 501 G-Documents (paged 1–279)	R	12 August 2021	12 August 2021
R1	Respondent's Statement of Facts, Issues and Contentions (paged 1–17)	R	22 September 2021	22 September 2021
R2	Respondent's Tender Bundle (paged 1–90)	R	22 September 2021	22 September 2021
R3	DFAT Country Information Report Ethiopia dated 12 August 2020		12 August 2020	4 October 2021
A1	Applicant's Statement of Facts, Issues and Contentions (paged 1–16)	A	1 September 2021	1 September 2021
A2	Applicant's reply (paged 1–3)	A	29 September 2021	29 September 2021

A3	Psychological Report of Dr James Freeman (paged 1–12)	A	29 August 2021	1 September 2021
A4	Applicant's Further Evidence (5 pages, including cover page)	A	29 September 2021	29 September 2021
A5	Applicant's Supplementary Statement (9 pages, 116 paragraphs)	A	29 September 2021	29 September 2021
T1	Country Information – Tigray, Ethiopia (52 pages) – *International Medical Corps, Ethiopia-Tigray Region Humanitarian Situation Update (15 September 2021)* – *UN OCHA, Ethiopia - Northern Ethiopia Humanitarian Update (30 September 2021)* – *SmartTraveller Advice – Ethiopia (7 October 2021)* – *World Food Programme, Tigray: Conflict Affected Areas Update #1 (23 September 2021)*	-	-	5 October 2021
T2	Research on Persecution of Tigrayans in Addis Ababa (42 pages) – *Human Rights Watch, Ethiopia: Ethnic Tigrayans Forcibly Disappeared (18 August 2021)* – *Amnesty International, Ethiopia: End arbitrary detentions of Tigrayans, activists and journalists in Addis Ababa and reveal whereabouts of unaccounted detainees (16 July 2021)* – *Ethiopia's crackdown on ethnic Tigrayans snares thousands (7 May 2021)* – *Human Rights Watch, The Latest on the Crisis in Ethiopia's*	-	5 October 2021	5 October 2021

	Tigray Region (30 July 2021)			