Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number:	**2021/8277**
Re:	**Thanh Tu Bui**
	APPLICANT
And	**Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Senior Member D. J. Morris**
Date:	**18 January 2022**
Place:	**Melbourne**

Pursuant to section 43(1)(c)(i) of the *Administrative Appeals Tribunal Act 1975*, the Tribunal sets aside the decision of the delegate dated 26 October 2021 and substitutes a decision that the mandatory cancellation of the Applicant's Partner (Temporary)(Class UK) (Subclass 820) visa be revoked under section 501CA(4)(b)(ii) of the *Migration Act 1958*.

.....[sgd].....

Senior Member D. J. Morris

Catchwords

MIGRATION – applicant is a citizen of Vietnam – applicant's visa mandatory cancelled owing to conviction for serious offence – delegate refuses to revoke mandatory cancellation – minister had made direction – consideration of primary considerations in direction – protection of the Australian community – best interests of affected minor child – expectations of Australian community – other considerations – extent of impediments if removed – links to Australian community – any other relevant consideration – decision under review set aside and new decision substituted

PRACTICE AND PROCEDURE – leave sought to present evidence of courses applicant has done in prison as evidence supporting rehabilitation and employability – leave also sought to submit courses applicant could potentially undertake if allowed to stay in Australia – leave denied – applicant had ample opportunity to present evidence of courses done – Tribunal directly questioned applicant – respondent did not object to evidence so given – no weight would be given to courses applicant could potentially do where no enquiries yet made or enrolment sought

PRACTICE AND PROCEDURE – applicant submitted a Tribunal decision in response to respondent's closing submissions – applicant subsequently apologised for not giving notice – courtesy but no requirement to give notice – published Court or Tribunal decisions not precluded by s 500(6H) of Act requiring two days' notice to respondent – such authorities not personal to applicant – respondent can be assumed to have knowledge of published decisions – however no doctrine of stare decisis in Tribunal – particular circumstances of case always relevant

Legislation

Administrative Appeals Tribunal Act 1975 (Cth), s 33A
Drugs, Poisons and Controlled Substances Act 1981 (Vic), s 72A
Migration Act 1958 (Cth), ss 499, 500, 501CA
Sentencing Act 1991 (Vic)

Cases

Dawson and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs; Re [2021] AATA 4604
FYBR v Minister for Home Affairs [2019] FCAFC 185
Gaspar v Minister for Immigration and Border Protection (2016) 153 ALD 337
Goldie v Minister for Immigration and Multicultural Affairs [2001] FCA 1318
Uelese v Minister for Immigration and Border Protection [2015] HCA 15

Secondary Materials

Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (as later amended)
Migration Act 1958 – direction made under s 499 – Direction No. 90 – Visa cancellation and refusal under section 501 and revocation of mandatory cancellation of a visa under s 501CA (Made 8 March 2021/commenced 15 April 2021)

REASONS FOR DECISION

Senior Member D. J. Morris

18 January 2022

PRELIMINARY

1. The Applicant, Mr Thanh Tu Bui, was born in 1994 in the Socialist Republic of Vietnam and is a citizen of that country. He first arrived in Australia in November 2010 as the holder of a Student (Subclass 571) visa. In 2015 he was granted a Partner (Temporary) (Class UK) (Subclass 820) visa. That latter visa was cancelled on 13 February 2020, under section 501(3A) of the *Migration Act 1958* ('the Act') on the basis that Mr Bui had committed a serious offence within the meaning of that term in the Act.

2. Mr Bui made representations to the Department of Home Affairs ('the Department') and a delegate of the Respondent, the Minister for Immigration, Citizenship, Migrant Services and

Multicultural Affairs, decided on 26 October 2021 not to revoke the mandatory cancellation of his visa.

3. Mr Bui then brought the matter to the Tribunal to review that 26 October 2021 decision, by an application dated 5 November 2021. He is entitled to do so by section 500(1)(ba) of the Act. By operation of section 500(6L) of the Act, if the Tribunal has not made a decision in relation to his application by a period 84 days from the date Mr Bui was notified of the delegate's decision, that decision is taken to have been affirmed. The papers show that Mr Bui's representative was advised of the decision on 27 October 2021. The period under section 500(6L) therefore starts on 28 October 2021 and ends on 19 January 2022.

HEARING

4. The hearing was held by video-link on 10 and 11 January 2022, owing to the current public health emergency. The Applicant was represented by Mr David Harvey of David Harvey Law. The Minister was represented by Ms Daye Gang of counsel, instructed by Mr Matthew Daly of Mills Oakley Lawyers. The Applicant gave oral evidence and was cross-examined. He called the following other witnesses who also gave evidence: his wife, who I will call Ms AW, his sister-in-law, Ms AL; a family friend Mr AF and a prospective employer, Mr AE. The Tribunal was assisted by an interpreter in the Vietnamese language.

5. Mr Harvey said he proposed to call Mr Bui's mother-in-law to give oral evidence. The Tribunal noted that this person had not provided a written statement two business days before the hearing to the Respondent (as required by section 500(6H) of the Act), nor, on the Tribunal's reading, is there reference to her views about Mr Bui in other documents which have been lodged before this statutory deadline. Mr Harvey accepted this and did not press the matter.

6. At the hearing, the Minister tendered a volume of documents related to the decision which had been collated, which will be referred to as 'GD' documents (Exhibit R1), and supplementary or 'SGD' documents (Exhibit R2).

7. The Applicant tendered the following documents:

   (a) Statement of the Applicant, dated 17 December 2021 (Exhibit A1);

(b) Statement of Ms AW, dated 25 November 2021 (Exhibit A2);

(c) Statement of Ms AL, dated 30 November 2021 (Exhibit A3);

(d) Statement of Mr AE, dated 17 December 2021 (Exhibit A4);

(e) Statement of Mr AF, dated 16 December 2021 (Exhibit A5);

(f) Statement of the Co-ordinator of Indochinese Prisoners Support Program, not dated (Exhibit A6); and

(g) Applicant's application to enrol in English course at Kangan TAFE (Exhibit A7).

8. Both the Applicant and Respondent also submitted Statements of Facts, Issues and Contentions and the Applicant submitted a statement in reply.

LEGISLATIVE FRAMEWORK

What is the matter for the Tribunal to decide?

9. In reviewing a decision not to revoke the mandatory cancellation of a visa under section 501CA(4) of the Act there are two points to remember. First, the Tribunal is not reviewing the decision of the delegate. The Tribunal is making a fresh decision based on the law and the information before it. Secondly, both parties are entitled to make submissions and provide further information to the Tribunal as it conducts the review, including information that was not before the delegate when the original decision was made.

10. The Tribunal must evaluate the factors for and against revocation. The Federal Court made clear in *Gaspar v Minister for Immigration and Border Protection* (2016) 153 ALD 337, ('*Gaspar*') at [38]:

> *The preferable conclusion is that s 501CA(4)(b)(ii) requires the Minister to examine the factors for and against revoking the cancellation. If satisfied, following an assessment and an evaluation of those factors, that the cancellation should be revoked, the Minister is obliged to act on that view. There is a single, not a two stage, process and the Minister does not have a residual discretion to refuse to revoke the cancellation if satisfied that it should be revoked. In this instance the Minister acted in accordance with that construction of the section. He did not apply the wrong test.*

11. The Tribunal therefore must decide two questions. First, whether the Applicant fails the character test in the Act. If it is found that he does not, then the cancellation of the visa is

set aside, and that is the end of the matter. However, if the Tribunal finds that Mr Bui does fail the character test, there remains a second question for the Tribunal to consider – whether the cancellation of his visa should be revoked for *"another reason."*

The mandatory cancellation of the visa

Does the Applicant have a 'substantial criminal record'?

12. An Australian Criminal Intelligence Commission report ('ACIC report') dated 29 January 2021, relating to Mr Bui's criminal history was in evidence (GD, pp 30-31). The ACIC report records that on 5 December 2019, the Applicant was before the Magistrates' Court in Wangaratta charged with the offence of *Possessing cannabis* and the offence of *Possessing methylamphetamine*. These charges related to an arrest in October 2018. The Court adjourned the matters for 12 months and no conviction was recorded.

13. In January 2020, Mr Bui appeared before the County Court of Victoria in relation to an offence committed on 16 May 2019. He pleaded guilty. He was convicted of the offence of *Cultivate narcotic plant of commercial quantity – cannabis*, for which he was sentenced to 24 months' imprisonment. He was also convicted of the offence of *Commit indictable offence whilst on bail*. On the second charge he was sentenced to one month in prison, to be served concurrently with the head sentence. A 14-month non-parole period was set.

14. For the purposes of section 501(7)(c) of the Act, a person need only be convicted of a term of imprisonment for 12 months or more, which includes shorter terms of imprisonment which when counted together amount to 12 months or more (section 501(7)(d)). Mr Harvey conceded that Mr Bui has a *"substantial criminal record"*, thus meeting the criterion in section 501(3A)(a)(i).

15. Section 501(3A)(b) of the Act requires that the non-citizen must be serving a sentence of full-time imprisonment, for an offence against a law of the Commonwealth, a State, or a Territory, at the time his or her visa was cancelled. At GD p 43 was a Department file note recording that on 13 February 2020 when the visa was cancelled, Mr Bui was then serving a sentence of full-time imprisonment at a prison in Victoria.

16. I am satisfied that the Applicant's visa was cancelled mandatorily because he failed the character test.

The Ministerial Direction – Direction No. 90

17. Section 499 of the Act provides that the Minister may make directions which a person or body must consider in performing a function or exercising a power under the Act. Any such direction cannot be inconsistent with the Act, but a decision-maker must, under section 499(2) of the Act, comply with a relevant direction.

18. On 8 March 2021, the Minister made a direction under section 499, Direction No. 90 ('the Direction') which commenced on 15 April 2021. The Tribunal must have regard to the contents of the Direction in considering whether there is *"another reason"* to revoke the mandatory cancellation. The Direction requires that some considerations must be taken into account, where they are relevant. However, the Direction does not contain the Tribunal's task; it must look at any other relevant factor in the circumstances of the case.

PRIMARY CONSIDERATIONS

Protection of the Australian community (paragraph 8.1)

19. The Tribunal should consider the nature and seriousness of the non-citizen's conduct and 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 conduct (paragraph 8.1.1)

20. The Tribunal is obliged by the Direction to take into account, without limiting the range of conduct that may be considered very serious, whether the Applicant has committed violent or sexual crimes, crimes of a violent nature against women or children, or acts of family violence.

21. There is no evidence before the Tribunal that Mr Bui has been convicted of any sexual crimes or crimes of a violent nature against women or children. In respect of acts of family violence, I will consider that question under the later relevant primary consideration.

22. It would appear to me that Mr Bui's offending does not come within the categories of offending set out in paragraph 8.1.1(1)(b)(i) to (iv) of the Direction.

23. In respect to paragraph 8.1.1(1)(c), the Tribunal must have regard to the sentences imposed. Mr Bui received a two-year sentence for an offence that carries a maximum possible sentence of 25 years under section 72A of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). It can thus be gleaned that the Court considered his offending to be at the lower end of the range. However, the sentencing Judge also took into account that the very fact that the legislature set such a long period of imprisonment at the highest level indicates it is a serious crime. Because Mr Bui entered a plea of guilty at an early opportunity, His Honour took that into account in discounting the sentence, he said, by one year.

24. It is clear to me that, as the Court found and the Respondent conceded, Mr Bui did not stand to gain financially from the planned sale of the cannabis crop he was tending. It is also clear to me that the Applicant was something more than a *"crop sitter"*, by the very fact that on the facts as set out by the sentencing Judge, he had recruited two other persons to assist him in the drug-keeping exercise. The sentencing Judge said (GD, p 38):

> *Your role was to look after the crop. You also recruited the two [persons named] to assist you in that role. The charge covers one day. The threshold for a commercial quantity is 25 kilograms. The amount of cannabis yield in this case was 83.012 kilograms of cannabis. So, they are 3.32 times the commercial threshold. You had no financial or propriety interest in the criminal enterprise. The prosecution accepts that you were in the lower end of the range in terms of your role but wherever you precisely fit in the classification of offenders, the role that you were playing was integral and cannot be underestimated.*

25. His Honour described Mr Bui's role as that of a *"minder and caretaker"* to a Mr Anh. The police were prompted to visit the house where the Applicant, two others, and the cannabis and extensive propagation paraphernalia were found. The house was rented in Mr Bui's name and his name was found on power bills found at the house. It was in fact the electricity company which alerted the police to unusually heavy power usage at the residence, which prompted the police to visit. On arrival they encountered Mr Bui dressed in a facemask with gloves and other cultivation equipment, together with two women who told police they had been recruited *'that day'* to help cut the crop.

26. The Tribunal notes that in her July 2020 report (GD, p 82), Dr Debra Bennett, forensic and clinical psychologist, provides further information on the offending from what the Applicant told her when she examined him. Dr Bennett reports that Mr Bui said Mr Anh asked for his driver licence and passport and photocopied them, and then used these documents to

apparently secure a lease on a house in a rural city in country Victoria and to have the electricity connected at the house in Mr Bui's name.

27. Paragraph 8.1.1(1) lists crimes in the following categories which the Direction states are viewed very seriously by the Government and by the Australian community (by which decision-makers should take it that these categories should be deemed to be so viewed): violent and/or sexual crimes; crimes of a violent nature against women or children; acts of family violence. Mr Harvey submitted (rightly) that none of Mr Bui's offending falls within these categories. However, Ms Gang also rightly drew the Tribunal's attention to paragraph 8.1.1(1)(c) that a decision-maker should also take into account the sentence imposed by a Court for a crime or crimes. Ms Gang submitted that the Applicant in this case was sentenced to 24 months in prison having never received a custodial sentence before, which indicates the seriousness with which the Court viewed the offending.

28. In his written statement (Exhibit A1) the Applicant states he was arrested in November 2011, one year after arriving in Australia aged 16, in relation to a charge relating to the commercial cultivation of cannabis. He described his role as 'watering some plants', but he knew they were illegally-grown plants. He said:

> *Because of my young age, the case in [the Children's] Court was dismissed: I wish, now, that I had learn[t] my lesson.*

29. Because this was a Children's Court matter and no conviction was recorded, it does not appear on the ACIC Report. It is somewhat to Mr Bui's credit that he disclosed this information in his statement to the Tribunal, otherwise it may not have come to the notice of the parties. Ms AW in her evidence said that after they had been going out for about three months, Mr Bui disclosed this prior offending to her.

30. Paragraph 8.1.1(1)(d) of the Direction requires the Tribunal to consider the frequency of offending. While the Tribunal does not place significant weight on the 2011 finding of guilt by the Children's Court because the Applicant committed this offence as a minor, it is significant that this offending also related to the cultivation of illegal drugs (also cannabis), so there is a pattern, albeit only a pattern of two, in Mr Bui's criminal history. The possession charges of December 2019 are also relevant, not insofar as they are of themselves serious offences, given they were dealt with by the Magistrates' Court without conviction and adjourned, but because they also relate to illicit drugs. They are also significant because

the Applicant was on notice that he must not re-offend for the 12-month period he was on bail after the adjournment of those charges, and yet he did commit a further (more major) offence within this period, and thus was also convicted of committing an indictable offence whilst on that bail.

31. Paragraph 8.1.1(1)(e) of the Direction requires the Tribunal to have regard to the cumulative effect of repeated offending. There is repeated offending, even if it cannot fairly be said that the Applicant has amassed a significant criminal record.

32. Paragraph 8.1.1(1)(f) and (g) require me to have regard to any false or misleading information given by the Applicant to the Department or whether he has re-offended since being given a formal warning about the possible effect on his immigration status by the Department, noting that the absence of a warning should not be considered to be in his favour. There was no evidence before me that Mr Bui has received a previous warning from the Department.

33. From the evidence, Mr Bui got himself into debt by gambling. He said he owed $16,000. The person (apparently Mr Anh) to whom he owed this debt offered the Applicant the chance to pay-down this debt by working for him as cultivator of cannabis. He did not disclose his gambling, nor the debt he accrued, to his wife or other members of his family or the friends who gave evidence.

34. The Respondent submitted that the Tribunal should consider Mr Bui's offending in May 2019 to be serious, because he received a custodial sentence. However, I note that because of the quantity of the drugs seized, the offence falls into category 2 of the *Sentencing Act 1991* (Vic) which requires a sentence of imprisonment unless certain exceptions, not relevant here, are satisfied. So, the fact that it was a prison term was inevitable. However, there is no doubt to me that commercial cultivation on this scale, over several months and involving planning (even if some of the planning was by the principal and not Mr Bui), amounts to serious offending. Having said that, I consider that it is not at the most serious end of the spectrum.

The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct (paragraph 8.1.2)

35. The Direction requires the Tribunal to consider both the nature of harm should the Applicant engage in further criminal or other serious conduct and the likelihood of him so engaging.

36. There is no evidence of Mr Bui ever engaging in violent offending. Dr Bennett examined Mr Bui in July 2020 and her report was before the Tribunal (GD, pp 82-91). Mr Harvey told the Tribunal that the Applicant conceded the weight that should be attributed to Dr Bennett's report should be lessened because Dr Bennett had not been given full details of Mr Bui's criminal offending history. The Tribunal further notes that Dr Bennett records that the Applicant told her he had used illicit drugs *"in his late teens"* but not since. This is at odds with the franker evidence that Mr Bui gave in the hearing that he was indeed using both cannabis and 'ice' (methamphetamine) in 2017 but that he stopped after being arrested on possession charges in 2018. The Applicant's wife said in her evidence she was unaware of this conviction until shortly before the hearing.

37. During the oral evidence, Mr Bui was asked about a passage in the personal circumstances form he submitted to the Department in February 2020 (GD, p 66) where he wrote, in response to the part of the form which states 'Outline any factors you believe help explain your offending, that you want the decision-maker to take into account':

> *To make money because I wanted to help my parents as they and I owe a lot of debt.*

38. Mr Bui conceded this was untrue and that his parents were not in debt. He said, because of his lack of English, another prisoner was helping him with the form and this person advised him this would sound better than explaining to the Department he had a gambling debt which led to his offending.

39. The Tribunal also noted that the sentencing Judge referred to a marriage breakdown in 2016. Mr Bui agreed in his evidence that he had told police this was a factor, but it was not true. Ms AW said that their marriage had never broken down, although it was strained after his arrest.

40. Both these untruths are concerning, because they indicate a willingness to subordinate truth to paint a more beneficial picture to, in one case, the police and ultimately the Court, and in

the second case, to the Department. In particular, the Applicant allowed material to go forward, ultimately for consideration by a judicial officer, that he knew was misleading.

41. Dr Bennett administered certain actuarial psychological assessment tools to Mr Bui and concluded he was a 'low' risk of re-offending. The Respondent submitted that minimal weight should be given to these conclusions because they were made without Dr Bennett having full knowledge of the criminal background of the subject. Dr Bennett recorded that Mr Bui *"had no prior convictions".* That is an accurate statement, but it is not a complete statement, because it appears Dr Bennett was unaware of the Court process in 2011 involving the Applicant. Had Dr Bennett been apprised of this information, it may have affected her clinical assessment, at the very least I believe it would have prompted questions about the similarity in offending.

42. However, the Tribunal is inclined not to completely discount Dr Bennett's report. She is a person well qualified to make a clinical assessment, being not only a forensic psychologist with a doctorate in psychology, but also an experienced criminal profiler. She opined that Mr Bui was, at the time of the (2019) offences (GD, pp 82-83):

> *gullible, emotionally immature and naïve to the potential impact of his behaviours on his family and himself. His current mental state is one of increased maturity and remorse. His likelihood of violent recidivism is low.*

43. She further formed the opinion that Mr Bui was unsophisticated and ruing his demonstrated gullibility. On the whole of the evidence before me, I am inclined to agree with that characterisation. However, I consider that Ms Gang's submission that Mr Bui should be regarded as a *"moderate risk"* of re-offending in a similar nature is a more reliable measure, taking into account the two matters involving cultivation of cannabis, and I make that finding. Given there is no evidence of any other criminality, I also find that the Applicant is a low to very low risk of general re-offending, not related to illicit drug cultivation.

44. It is a particular concern to the Tribunal that Mr Bui deceived his wife, his mother-in-law and sister-in-law in Australia and, it would appear from Dr Bennett's report, his parents back in Vietnam, about his criminal conduct. They believed he had gone to work in the country in the construction field and he told his wife he was saving his salary for the future benefit of their son and the family generally. This was untrue. He was involved in cultivation of cannabis. It may be accepted that he was undertaking this task to satisfy his gambling debt. It may also be that he hoped to make some financial gain from tending the crop, which he

could use to his family's benefit. The Tribunal accepts to some extent Mr Harvey's submissions that young Vietnamese males who get themselves into debt are ripe targets for drug dealers. To that I would add persons like Mr Bui who are on visas are often also attractive prey, because if they are caught, their immigration status is in jeopardy and the principal offenders treat them as expendable.

45. However, it is also evident that Mr Bui, since finishing school, has held down several legitimate jobs, if indeed casual and 'cash in hand', including in delivering produce, working in a food market, working as a bricklayer's assistant and as a handyman. He does not have vocational skills but has shown himself able to find employment. He has also been offered employment in a restaurant owned by Mr AE. While the gambling debt may have been the precipitator, I do not consider Mr Bui was so naïve or, in the words of Mr Harvey, such an *"idiot cog"* not to fully appreciate that what he was doing was illegal. His experience of arrest in 2011 and the subsequent Court-ordered diversion course should have impressed, even on an unsophisticated mind, that fact.

46. In terms of rehabilitation, at the conclusion of the hearing Mr Harvey sought leave to submit further evidence of courses Mr Bui has undertaken or prospectively could undertake. The Tribunal did not grant leave, because I took the view that such material strayed into the field of 'new information' precluded from being brought forward by an applicant less than two business days before a hearing without being provided to the Minister (see section 500(6H) of the Act). However, the Tribunal directly questioned Mr Bui on courses he had undertaken in prison or detention.

47. The Applicant said he had undertaken a welding course in prison and hoped he could pursue a further course if he is allowed to stay in Australia. He said he also undertook a barista course but did not receive a certificate before the pandemic restrictions took effect. He also said he received a certificate in cleaning operations. Mr Bui said he had attended English classes in prison. When pressed as to whether he had undertaken any courses relating to his gambling problem, Mr Bui said he had enrolled in a 'Quit Gambling' course and had attended two days of that course before the lockdown restrictions were imposed and the course presenter could no longer come to the prison.

48. The Tribunal asked the Respondent whether they challenge the Applicant's evidence as having undertaken these courses. Ms Gang said the Minister has no basis to challenge the

evidence. However, the Tribunal also notes there is no specific documentary proof of these courses, apart from the welding course. The Tribunal accepts this is some evidence of the Applicant's desire to improve his employability skills and, in terms of the 'Quit Gambling' course, evidence that he accepts the need to address this personal vulnerability. I expressed the view that even if I had given leave for information on prospective courses to be provided, I would have attached little weight to them in the absence of evidence of prior arrangements for the Applicant to enrol or engage in such courses. The mere availability of a suitable course carries no weight.

49. In terms of remorse and an appreciation of his offending, the Tribunal notes Dr Bennett's remarks in her report (GD, p 87):

> *Without prompting, Mr Bui professed he also feels significant remorse for his involvement on the likely damage caused to members of the community by his offending behaviours. He stated, "I know drugs are no good for the community and I regret it greatly and I was stupid to do it. I think about my son because my son is a member of the community and therefore my son could be a victim".*

50. Overall, the Tribunal finds that this consideration weighs moderately against revoking the mandatory cancellation of the Applicant's visa. He has a low, to very low, risk of re-offending in a general sense but a moderate risk of re-offending in relation to drug cultivation, if not use.

Family violence committed by the non-citizen (paragraph 8.2)

51. Paragraph 8.2 states:

> *(1) 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…*
>
> *(2) This consideration is relevant in circumstances where:*
>
> *(a) A non-citizen has been convicted of an offence, found guilty of an offence, or had charges proven howsoever described, that involve family violence; and/or*
>
> *(b) There is information or evidence from independent and authoritative sources indicating that the non-citizen is, or has been, involved in the perpetration of family violence, and the non-citizen being considered under section 501 or section 501CA has been afforded procedural fairness.*

52. The Direction requires the Tribunal to consider the frequency of the conduct, and whether there is any trend of increasing seriousness; the cumulative effect of repeated acts of family violence; rehabilitation achieved at the time of the decision since the person's last known act of family violence, including:

- The extent to which the person accepts responsibility for their family violence related conduct;
- The extent to which the non-citizen understands the impact of their behaviour on the abused and witnesses of that abuse, particularly children; and
- Efforts to address factors which contributed to their conduct.

53. The parties submitted that this primary consideration is not relevant given the criminal history of Mr Bui and the absence of evidence of any other conduct in this category. The Tribunal agrees and finds that this consideration weighs neutrally.

Best interests of minor children in Australia affected by the decision (paragraph 8.3)

54. The Tribunal is required to make a determination regarding the best interests of any relevant minor children who may be affected by the decision. The Direction requires the Tribunal to make separate determinations about relevant minor children where there is evidence that their interests might differ.

55. There is one child who has been identified as relevant in this matter, the Applicant's son, 'AS', who was born in the third quarter of 2014 and is therefore aged seven. He is an Australian citizen, as is his mother, the Applicant's wife Ms AW.

56. The Respondent accepted that, before he was incarcerated, Mr Bui was a present and attentive father. There was also evidence that when he was away living in country Victoria (ostensibly at a legitimate job), he kept in regular contact with AS by telephone and video calls. He took AS to Vietnam on two occasions, the first for a holiday with his wife, and on the second occasion he took AS to live with his paternal grandparents for a year. Both his evidence and Ms AW's was that this was driven by a desire by AS's paternal grandparents to be more involved in the life of their grandson, who Ms AW said is the only grandson in the family so far. The evidence also was that Mr Bui has maintained his relationship with AS since going to gaol, noting that only one in-person visit was possible before prison visits

were suspended owing to the pandemic. He has kept in daily contact by electronic means since then, including since being released from prison and entering immigration detention.

57. The Respondent noted that having a young son did not stop Mr Bui offending, both in October 2018 and May 2019. That is self-evident. There is also little evidence that Mr Bui was providing financial support for AS when he was away 'working'; he said he sent back small amounts of money to Ms AW on one or two occasions to help purchase groceries. The main financial support for AS has come from Ms AW's own earnings, her social security payments and in-kind support from her mother and sister, who share a home with Ms AW to defray household costs.

58. The Direction, at paragraph 8.3(4) sets out certain sub-factors that should be considered when assessing the best interests of a minor child. In terms of the nature and duration of the relationship, the Respondent conceded that the Applicant has been involved in AS's life since birth, noting his absence for some five or so months when in country Victoria (with AS being in Vietnam for most of this period). The Tribunal concludes that Mr Bui is likely to play a positive role in the life of AS (provided he does not re-offend) and that his criminal conduct to date has not had a direct impact on AS.

59. The Respondent accepted that Mr Bui's deportation would negatively affect Ms AW's mental health and might affect her caring capacity of AS, and conceded it was against AS's interests for his father to be deported. In terms of whether others play a parental role in the life of AS, obviously the main person in this category is his mother, Ms AW. Evidence was given by the Applicant's sister-in-law that she and her mother assist Ms AW with daily care of AS, including taking him to and from the local school and helping his mother. Although Ms AL stressed that they did not seek to undermine his mother's role in AS's life in so doing. I do not regard their assistance as being 'parental', but it is certainly important in terms of the welfare of the Applicant's son.

60. Overall, the Tribunal determines that this consideration weighs heavily in favour of revoking the mandatory cancellation of the visa.

Expectations of the Australian Community (paragraph 8.4)

61. Paragraphs 8.4(1) and (2) of the Direction state:

> *The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia.*
>
> *In addition, visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because of the nature of the character concerns or offences is such that the Australian community would expect that the person should not be granted or continue to hold a visa. In particular, the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia, of the following kind:*
>
> *…*

62. The Direction lists at paragraph 8.4(2) specific sorts of conduct, none of which is relevant to Mr Bui's criminal history.

63. The expectation of the Australian community is taken to be a *'norm'*. The word 'norm' means of a 'standard' or 'pattern or type'. A superseded version of the Direction (Direction No. 65) contained generally similar wording to paragraph 8.4 and was considered by the Full Court of the Federal Court of Australia in *FYBR v Minister for Home Affairs* [2019] FCAFC 185 ('*FYBR*'). The Court held that it is not for a decision-maker to make his or her own personal assessment of what the *'expectations'* of the Australian community may be. The expectations articulated in the Direction are '*deemed'*; they are what the executive government has declared are its views, not what a decision-maker, including this Tribunal, may seek to derive by some other evaluative or balancing process.

64. Direction No. 90, issued after *FYBR*, imports the statement that the expectations of the Australian community are to be considered as a *'norm'*, which acknowledges the approach taken by the plurality of the Court in *FYBR*. Therefore, while the expectations of the community are *'deemed'* to weigh against an applicant (a position accepted by the parties in this matter), the relative weight will be affected by circumstances in the individual case.

65. Mr Bui does not have a long history of offending. He has been before the Courts on three occasions, one as a minor. On two of these occasions no conviction was recorded. However, it is notable that on the third occasion one of the offences of which he was convicted relates to the fact that he was on bail when he committed what is the principal offence that led to him going to gaol. That shows a lack of insight into the consequences of his offending, and a lack of respect for the conditions of his bail.

66. He was also involved in facilitating the commercial cultivation of illicit drugs for sale into the community. Some might regard cannabis as a more benign drug on the scale of illicit and addictive drugs which are a malign feature of society. But the fact is that many persons who become addicts and then commit criminal offences to fund their habit often start by taking cannabis. Indeed, many commercial drug dealers entice people into being their customers through cannabis, with a view to introducing their customers to other more toxic drugs. It is axiomatic from scientific studies that cannabis is addictive. It is also well-established that persons addicted to harder drugs often report they started with marijuana.

67. I conclude that the expectation of the community would be that his visa is not restored. The weight of that expectation would however be affected by the fact that the Court found he was not the ultimate financial beneficiary of the drug operation and was something of a 'bit player', though not in my view (nor the sentencing Judge's) at the very lowest end.

68. Overall, the Tribunal finds that this primary consideration weighs against revoking the mandatory cancellation of the Applicant's visa, and the weight I attach to that is moderate to high. Society does not condone illicit commercial drug operations, regardless of the drug in question.

OTHER CONSIDERATIONS

International non-refoulement obligations (paragraph 9.1)

69. The Direction sets out that a non-refoulement obligation is an obligation on Australia not to forcibly return, deport or expel a person to a place where they would be at risk of a specific type of harm. Australia has international treaty obligations which it must honour, through the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol ('the Refugees Convention'), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights and its Second Optional Protocol.

70. The parties agreed that this consideration is not engaged. If Mr Bui was repatriated to Vietnam, he did not contend to the Tribunal that he would face particular harm.

71. The Tribunal assigns neutral weight to this consideration.

Extent of impediments if removed (paragraph 9.2)

72. The Tribunal must consider the extent of any impediments the Applicant may face if removed from Australia to Vietnam in establishing himself and maintaining basic living standards in the context of what is generally available to other citizens of that country, taking into account his age and health, any substantial language or cultural barriers and any social, medical, and economic support available to him.

73. There was no evidence from the parties that Mr Bui was in other than good health. He said, and it was accepted by the Respondent, that he stopped taking illicit drugs in 2018. He is fluent in Vietnamese, having lived in Vietnam for the first 16 years of his life. It is fair to say that, in Australia, Mr Bui has maintained strong links with the Australian-Vietnamese diaspora. He said that some of his employment has been with Vietnamese-speaking Australians. Ms AW said that her husband has struggled learning to speak English, though he understands it relatively well. There was no evidence before the Tribunal that the Applicant's parents would not be able to assist him in resettling if repatriated, though their ability to provide financial assistance might be limited given the evidence that the company that employed them went into bankruptcy, they were laid off, and they have since established a small home-based grocery business.

74. The Tribunal accept that there may be initial difficulties with Mr Bui establishing himself in Vietnam, given he has not lived there as an adult. His work history in Australia involves activities which are readily transferable to Vietnam, such as labouring, delivery driving and working as a handyman. He has also undertaken a welding course in prison. The Tribunal accepts that the medical and economic support available to him would not be at the same level as in Australia, but the reference point in the Direction is maintaining basic living standards in the context of other Vietnamese nationals; it is not measuring those living standards against the yardstick of living standards in Australia.

75. The Tribunal accepts submissions from both Mr Harvey and Ms Gang that the Applicant may be hampered in his ability to remit funds to support Ms AW and their son back in Australia if deported. Although Ms AW works on a part-time basis, that would affect her and AS.

76. Overall, the Tribunal finds that this consideration weighs slightly in favour of revoking the mandatory cancellation of the visa.

Impact on victims (paragraph 9.3)

77. The Direction requires the Tribunal to consider the impact of the cancellation of the visa on members of the Australian community, including victims of the Applicant's criminal behaviour, where that information is available.

78. The Tribunal interprets this to mean; first, that a victim of a non-citizen's offending must be aware of the immigration action taken by the Minister or delegate and, second, that they must have expressed a view that is before the decision-maker.

79. The drugs being cultivated by Mr Bui were seized by the police and were ordered to be destroyed by the Court (GD, p 41). They therefore did not enter the illicit market for which they were intended, where the victims would ultimately have been persons who bought them or were offered them as inducements by dealers as enticements.

80. The Tribunal finds that this consideration weighs neutrally in this assessment.

Links to the Australian community (paragraph 9.4)

Sub-consideration: The strength, nature, and duration of ties to Australia (paragraph 9.4.1)

81. This consideration requires the Tribunal to consider the impact of the decision to revoke the visa on Mr Bui's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have the right to remain in Australia indefinitely. The Tribunal must have regard to how long the Applicant has resided in Australia, giving less weight where he offended soon after arriving in Australia and more weight to time he has spent contributing positively to Australia.

82. Mr Bui arrived in Australia on a student visa in 2010. He was then aged 16. He has therefore been in Australia all his adult life. He was before the Children's Court in 2011, but this was dealt with by means other than penal sanction and he does not appear to have offended for the next several years. He was arrested in October 2018 in relation to charges which eventually were heard at Court in December 2019. He then committed the principal offence in May 2019 which led to the cancellation of his visa.

83. The Applicant's wife is an Australian citizen. His sister-in-law and mother-in-law live in Australia. He has a circle of other friends in Australia, some of whom provided statements of support and two of whom gave oral evidence. The Tribunal was particularly impressed with the evidence of Mr AE, who indicated he was fully aware of Mr Bui's criminal offending but was nonetheless happy to confirm his written offer for the Applicant to work in his vegan restaurant. Mr AE told the Tribunal in his evidence that he is now aged over 60 and indicated that, if things worked out, he could see Mr Bui and perhaps his wife taking a more major role in the restaurant in future years.

84. There is no evidence that his relationship with his family in Australia is other than close and loving. Ms Gang characterised Mr Bui as *"kind, gentle and helpful to the family he loves"*, and then contrasted that with his willingness to get involved in illicit drug cultivation.

85. Ms AW indicated that if the Applicant is deported, she will not relocate to Vietnam, but she would be prepared to visit, as she has done in the past, and take their son on such trips.

86. Because of the Applicant's extensive links with Australian citizen family and other friends who are either citizens or permanent visa holders, the Tribunal finds that this sub-consideration weighs relatively heavily in favour of revoking the mandatory cancellation of the visa.

Sub-consideration: Impact on Australian business interests (paragraph 9.4.2)

87. This part of the Direction notes that, in assessing impact on Australian business interests, an employment link would generally only be given weight where the decision under review would "*significantly compromise the delivery of a major project, or delivery of an important service in Australia.*"

88. Mr Bui has been employed in various short-term and casual legitimate occupations as outlined in more detail above. I do not consider that these rise to employment significant enough to invoke this consideration.

89. I therefore find that this sub-consideration weighs neutrally in this consideration.

90. The Tribunal's overall assessment of the consideration of Links to the Australian community is that this consideration weighs relatively strongly in favour of revoking the mandatory cancellation of the Applicant's visa.

PROCEDURAL MATTER: Citing of a case without notice by the Applicant

91. In his oral reply to the Respondent's oral closing submissions, Mr Harvey drew the Tribunal's attention to a recent decision, *Re: Dawson and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 4604 ('*Dawson*'), as support for the contention that the Tribunal recently revoked the mandatory cancellation of a visa in a case where an applicant had a much more substantial history of violent offending against the person.

92. After the hearing Mr Harvey contacted the Tribunal and apologised for mentioning an authority without prior notice to the Respondent and remarked that he should not have done so because of section 500(6H) of the Act.

93. Section 500(6H) of the Act states:

> *If:*
>
> *(a) an application is made to the Tribunal for a review of a decision under section 501 or a decision under subsection 501CA(4) not to revoke a decision to cancel a visa: and*
>
> *(b) the decision relates to a person in the migration zone;*
>
> *the Tribunal must not have regard to any information presented orally in support of the person's case unless the information was set out in a written statement given to the Minister at least 2 business days before the Tribunal holds a hearing (other than a directions hearing) in relation to the decision under review.*

94. The Tribunal interprets 'written statement' in this section to encompass any relevant document submitted in support of an applicant's case, given by the Applicant to the Respondent prior to the two-business day period before a hearing. (See, for example, *Goldie v Minister for Immigration and Multicultural Affairs* [2001] FCA 1318 where, at [25] the Full Court (Gray, R.D. Nicholson, and Stone JJ) refers in discussing section 500(6H) of the Act to 'any document'.).

95. In *Uelese and Minister for Immigration and Border Protection* [2015] HCA 15 ('*Uelese*'), the High Court of Australia (French CJ, Kiefel, Bell, Keane, and Nettle J (Nettle J separately but concurring as to outcome) held, at [57]:

> *Section 500(6H) should not be construed to restrict the flexibility of the Tribunal to ensure procedural fairness to the parties to a review beyond what is required by its terms. Specific powers under the AAT Act that would be restricted in their operation on the Tribunal's understanding of s 500(6H) include: s 39(1), which obliges the Tribunal to "ensure that every party to a proceeding…is given a reasonable opportunity to present his or her case."; s 33(1)(c), which allows the Tribunal to "inform itself on any matter in such manner as it thinks appropriate", and s 33(2A)(a), which allows the Tribunal to "require any person who is a party to the proceeding to provide further information in relation to the proceeding".*

96. The High Court went on to say that the apparent purpose of section 500(6H) was to prevent applicants from manipulating the system in an attempt to delay deportation. The Tribunal also considers it serves a useful purpose as a 'no surprises' rule, in that information beneficial to an applicant, but hitherto unknown to the Respondent, can come to light because of the requirement.

97. I do not consider merely drawing the Tribunal's attention to an authority, whether a previous Tribunal decision or a Court judgment, is precluded by section 500(6H) of the Act. To adopt such a strict view would not take account of the ebb and flow of submissions, especially in an instance like this, where the Applicant's solicitor was responding in reply to the Minister's oral closing submissions. Procedural fairness may also be affected where the Respondent, not being bound by section 500(6H) would, if this strict interpretation was followed, be able to hand up authorities but an applicant could not. Avoiding the preclusory architecture of section 500(6H) leading to an impingement on fairness beyond its terms goes to the heart of what the High Court was saying in *Uelese*. Citing or handing up a published decision is not, to my mind, intended to be precluded by the terms of section 500(6H)(b) because such a decision is not personal to the Applicant himself: the action either draws the Tribunal's attention to the law as stated by a Court or how another Tribunal Member has considered a matter. In addition, where the Respondent is a party, a published decision can be assumed to be in the knowledge of the Respondent. This was not a case where the Applicant was attempting to delay the hearing or seek an adjournment for his own purposes.

98. It is usual courtesy that a party gives prior advice to the other side of the intention to cite a decision, which did not appear to occur in this case. I note that Ms Gang did not object to Mr Harvey citing the decision *per se*, however she (rightly) said that each section 501CA

case turns on its own circumstances. In *Dawson*, the applicant was 52 and had significant health problems including a leg amputation owing to prolonged heroin abuse. He had other medical challenges. Senior Member Millar also took into account the significant effect of removal on Mr Dawson's elderly mother, who had cardiac problems and whose evidence was she would return to the UK if her son was deported, leaving grandchildren and great grandchildren in Australia.

99. There is no doctrine of *stare decisis* in the Tribunal. Each decision requires the examination of an administrative decision in the terms relevant to the particular circumstances. Reference to other Tribunal decisions can, however, be useful where the facts or personal circumstances of an earlier case have some similarities. There are no similarities I can identify in Mr Dawson's personal circumstances and the Applicant's.

SUMMATION

100. The Tribunal is not confined to consider only the considerations as stipulated in the Direction, where on the facts they are relevant, but may consider any other relevant factor that is consistent with the tenor and purpose of the Act. The Tribunal has not identified any other matter not otherwise covered above.

101. In regard to the primary considerations, the first one relating to the protection of the Australian community weighs against the Applicant. The consideration relating to family violence is not engaged. The consideration relating to the best interests of an affected minor child weighs heavily in favour of revoking the mandatory cancellation of the visa. The consideration relating to the expectations of the Australian community weighs against revoking the mandatory cancellation, but not strongly so.

102. In regard to the other considerations, the only ones the Tribunal has found to be relevant are the links with the Australian community, which weighs relatively heavily in favour of Mr Bui, and the extent of impediments if removed, which weighs slightly in his favour.

103. After careful consideration and taking into account that the Applicant does not have an extensive history of offending and was not the instigator of the cultivation of the drugs he was tending, and my findings about the best interests of Mr Bui's young son and wife, I find that the best interests of AS is determinative in this case. This is not a case where a parent has only peripheral involvement in a relevant child's life; the evidence supports a close,

positive, and beneficial relationship. It is my conclusion that the Applicant has been shaken into reality by the two-year sentence he received and that there is a significant circle of family and friends ready to assist him to obtain gainful employment, to improve his English, and to undertake vocational courses to improve his employability. The vital thing for Mr Bui will be to listen to them. He knows that should he re-offend, his migration status would likely be compromised.

104. I am satisfied that the discretion available under section 501CA(b)(4)(ii) of the Act is enlivened and there is another reason to revoke the mandatory cancellation of the Applicant's visa. The consequence is that the reviewable decision should be set aside.

DECISION

105. Pursuant to section (43)(1)(c)(i) of the *Administrative Appeals Tribunal Act 1975*, the Tribunal:

1. sets aside the decision of the delegate dated 26 October 2021; and

2. in its place substitutes a decision that the mandatory cancellation of the Applicant's Partner (Temporary) (Class UK) (Subclass 820) visa be revoked under section 501CA(4)(b)(ii) of the Act.

I certify that the preceding 105 (one hundred and five) paragraphs are a true copy of the reasons for the decision herein of Senior Member D. J. Morris

.....[sgd].....

Associate

Dated: 18 January 2022

Dates of hearing: **10 and 11 January 2022**

Solicitor for the Applicant:	**Mr David Harvey**
Solicitors for the Applicant:	**David Harvey Law**
Counsel for the Respondent:	**Ms Daye Gang**
Solicitors for the Respondent:	**Mills Oakley Lawyers**