Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

LMYW and Minister for Immigration and Border Protection (Migration) [2016] AATA 936 (24 November 2016)

Division	GENERAL DIVISION
File Number(s)	**2016/3564**
Re	**LMYW**
	APPLICANT
And	**Minister for Immigration and Border Protection**
	RESPONDENT

DECISION

Tribunal	**Deputy President Bernard J McCabe**
Date	**24 November 2016**
Place	**Brisbane**

The decision under review is set aside. The Tribunal decides in substitution that the cancellation decision is revoked.

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Deputy President McCabe

CATCHWORDS

VISA CANCELLATION – mandatory cancellation – where applicant has substantial criminal record – drug trafficking – protection of the Australian community – expectations of the Australian community –where applicant likely to face discrimination in home country if visa cancelled because he is homosexual – where evidence of rehabilitation – where serious impediments to applicant if they were to be removed – decision under review set aside – decision in substitution that cancellation decision revoked.

LEGISLATION

Crimes (Sentencing Procedure) Act 1999 (NSW) s 3A

Drugs Misuse and Trafficking Act 1985 (NSW)

Migration Act 1958 (Cth) ss 501, 501CA

CASES

CVA and Minister for Immigration and Citizenship (2011) 124 ALD 98

Do and Minister for Immigration and Border Protection [2016] AATA 390

Veen v R (1979) 143 CLR 458

Veen v R (No 2) (1988) 164 CLR 465

SECONDARY MATERIALS

Department of Immigration and Border Protection (Cth), *Ministerial Direction No 65 'Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA'*, 22 December 2014.

REASONS FOR DECISION

Deputy President McCabe

24 November 2016

1. The applicant's visa was cancelled under s 501(3A) of the *Migration Act 1958* after he was convicted of supplying dangerous drugs and sentenced to a term of imprisonment. The Minister's delegate subsequently declined to revoke the cancellation decision. That decision – made under s 501CA(4) – is before the Tribunal for review.

2. The applicant says the conduct leading to the criminal conviction was the product of a personal crisis that led to drug misuse and impaired judgment. He says the crisis has passed and he has overcome the drug misuse issues. He says he will not re-offend. His friends and independent witnesses have told the Tribunal they agree.

3. I am satisfied the applicant should be allowed to stay in this country. The revocation decision should be set aside. I explain my reasons below.

WHAT HAPPENED?

4. The applicant came to this country as a young student in 2000. He was 21 years of age. He is from a well-to-do family in a conservative country. His parents agreed to support him for the first year of his studies. He enrolled in a course at an institution in a regional city in November of that year. He secured a casual job: exhibit six.

5. In his statement, the applicant said he managed to balance his work and studies successfully throughout most of 2001. Everything was going to plan. But things started to change around the time the applicant commenced a new course at the end of 2001 in Sydney.

6. The applicant started attending nightclubs. That is not remarkable in and of itself: students often have an active social life. But the applicant had a secret he said he had been grappling with for some time. He was attracted to other men.

7. Homosexuality was taboo in the applicant's culture. Sexual relationships between men were prohibited under the law in his home country. He said in his statement that he had experienced same sex attraction for a number of years as a boy but he was acutely aware that gay men were routinely the victims of violence and persecution in his country. He also knew his family was unlikely to approve. He feared what would happen if he came out. None of this evidence is seriously contested or contradicted, and I accept it.

8. In his oral evidence, the applicant said he tried to deal with the feelings he experienced by making an effort to meet women. In his statement, he said he hoped he might be 'normal' if he dated members of the opposite sex: exhibit six. During early 2002, he struck up a relationship with a woman whom he liked. They had met at a club. I will refer to her in these reasons as Mary. She gave him an 'ecstasy' tablet while they were out together one night. He said that was the first occasion he had taken an illegal drug, and he liked it.

9. The applicant said in his statement that he slid into a hectic lifestyle during 2002 which involved clubbing and drug use every weekend. By mid-2002, he had come to identify Mary as his girlfriend. They often went out together. But he also went out alone. Unbeknownst to Mary, the applicant began venturing into gay nightclubs on Oxford Street in Sydney. He said it became hard to keep up with his studies because he was constantly exhausted by the intensity of his drug-fuelled social life. He said he was spending all of his money on clubs and partying. He said the misuse of drugs gave him a sense of freedom: exhibit six at [13]-[15].

10. It was during this period that the applicant began to experience some minor problems with the law. In August and September 2002, he was issued with a string of speeding tickets. I will have more to say about his traffic history below.

11. The applicant said he enjoyed his relationship with Mary during this period. They had fun together. He said he loved her: exhibit six at [16]. She proposed to him and they married at the registry office in December 2002. He said they lived together as a married couple and the applicant applied for a spouse visa.

12. In the months that followed, the applicant was working regular part-time jobs. But he also persisted with an active social life that involved clubbing and taking drugs. The applicant said he was frequenting gay nightclubs more regularly. He explained in his statement that his marriage began to deteriorate as he attempted to negotiate his conflicted sexuality. He said (exhibit six at [20]):

> *In about mid 2003 after about six months of marriage things with [Mary] were difficult. My marriage fell apart as I started seeing gay people all the time. In being married I realised that I was not living as I really am, and I was more comfortable around the boys that I'd been seeing than in my life with [Mary]. I was hanging out with gay friends and was going out with them to Arq and Stonewall. So I was having fun and enjoying life but I couldn't stay in the marriage living a lie. In some ways the drugs and partying in the gay clubs was an escape from what I knew was a wrong marriage. Even when I was still married to [Mary] I had got together with men at the gay clubs. [Mary] found out about that after going through my phone one day and finding messages. She confronted me and I told her the truth. [Mary] actually understood, although she was very upset. We separated and I moved out of our house and to Campsie.*

13. Interestingly, one of the applicant's friends who gave evidence at the hearing said he understood the marriage to Mary was part of a show for the benefit of the immigration authorities so the applicant would qualify for a spouse visa. Mr F, the friend, was asked about this evidence during cross-examination. He ultimately appeared uncertain as to how he came to that view. I note Mr F was not an especially good historian: while he gave his evidence in a forthright and confident way, he had a poor recollection of some details, like dates. I accept Mr F drew an inference about the nature of the applicant's relationship with Mary from the fact the applicant was gay and a migrant. The applicant, when asked about the evidence, insisted the relationship was genuine, albeit misconceived given his conflicted sexuality. He said he did not talk about the relationship with most of his friends but expressly denied the relationship was a sham. I am not persuaded there is a good reason for rejecting the applicant's evidence on this point, and I accept it.

14. In any event, the applicant's application for a spouse visa was declined while he was still with his wife. While he and his wife initially sought review of the decision before the Migration Review Tribunal, they did not persist with the application because they broke

up: exhibit six at [22]. The applicant was able to remain in Australia on a bridging visa in the short term and applied for a protection visa in 2004 on the basis that he would be persecuted because of his sexuality if he returned home. He was granted a temporary protection visa on 16 November 2006. In November 2009, the applicant was granted a 'resolution of status visa', which was the functional equivalent of a permanent protection visa.

15. After the applicant and Mary broke up, the applicant continued working while pursuing an intense social life. He was a regular fixture on the Sydney clubbing scene. His friends confirmed in their evidence that the applicant was a popular member of their shifting social group. He would go out regularly to dance and take party drugs. It was during this period that the applicant said his drug-taking became more of a problem. He was taking stronger, more dangerous drugs like methylamphetamine, including ICE: exhibit six at [27]. He also had casual relationships with men. All of this behaviour continued for some time. Mr A, one of his friends, explained in his statement (exhibit seven at [4]-[6]) that he first met the applicant in 2006 when they frequented the same clubs. Mr A recalled:

> *When [the applicant] was taking drugs he was even happier. He always burnt up the dance floor. He'd have a boot full of shirts that he'd go through in one night. He'd dance all night, go out on the street to his car, use a towel to dry off and come back in with a clean shirt. He was always dancing and having fun and enjoying the scene.*

16. The applicant recalled he struggled with drugs and addiction between 2006 and 2011. He was going out three or four nights each week with friends, but he also started to mix with strangers who partied and took drugs: exhibit six at [30]-[31].

17. The applicant said things got worse for him when he re-engaged with his family in late 2009. He had not been in contact with his family for some time but he received word from his brother through friends that his father was seriously ill. The applicant's sister was also to be married in December of that year. The applicant agreed to return home for a visit. In his statement, he said he flew out of Australia to Thailand on 3 December 2009 with the intention of continuing on to his home country but he panicked and returned to Australia on 5 December. After further contact with his brother, he relented and made the journey to his home country on 9 January: exhibit six at [37]-[38].

18. The visit did not go well. The applicant recalled what happened in his statement (exhibit six at [40]-[43]) at follows:

> *It wasn't easy returning to [my country] in 2010. I knew I had to hide who I was and I was afraid to be back in [my country]. I was worried as a lot of people from [my country] would know I'm gay through the ties I have in Sydney. The people who transferred messages between my family in [my country] and me in Sydney knew I was gay. I limited my movements in [my country] to avoid any trouble. I didn't go out and instead I stayed with my family in their home. I just went to visit my dad at hospital and that was it.*
>
> *My brother had not told me parents that I had stopped studying. I told him not to tell them. I thought it might make dad even worse. My parents asked why I hadn't contacted them. I told them as first that I was working and busy. Whilst I was in [my country] my parents talked a lot about marriage. In my culture families often arrange marriages. My parents had found a woman that they wanted me to marry and had certain ideas about my future.*
>
> *It was at that point that I had to tell them the truth. I told them that I was gay and I couldn't get married. My parents were very upset and angry. My parents told me they worry about other people and what they will think and said being gay won't be acceptable. Mum and dad said they would disown me and that I was not a part of them anymore. My sister and my mother are very religious Muslim women and its completely unacceptable for them to accept me. I had to leave my family home straight away after I told my parents about my sexuality. I didn't want to stay in the family home upsetting them. I left their house the same day that I told them. I went to a hotel and then I flew home to Australia the next day.*

19. Upon his return to Australia, the applicant said he began to spend less time at clubs but his drug misuse worsened. He said he was firmly entrenched in an unhealthy environment where his home was regularly frequented by acquaintances who took drugs: exhibit six at [45]. He remained in contact with his regular friends but a number of them gave evidence at the hearing suggesting they were becoming concerned about his erratic behaviour: see, for example, exhibit nine at [9]-[10]; exhibit seven at [9]-[10].

20. The applicant was not just taking prohibited drugs. He was also supplying them – and he was getting caught.

21. The applicant's criminal record is set out in exhibit one at pp 35-36. The first entry notes his conviction in May 2005 for driving without a licence. A small fine was imposed and he was disqualified from driving. In August 2006, he was convicted on charges of possessing a prohibited drug, supplying a prohibited drug and having goods in custody suspected of being stolen. He was fined, sentenced to community service (in relation to the supply charge) and given a bond (in respect of the possession charge). In November 2007, he

was convicted on charges of possessing a prohibited drug and possessing or attempting to possess a restricted substance. He was fined and given a bond. He was also fined and disqualified from driving on a charge of excessive speeding. There were two further convictions for possession of prohibited drugs in May 2011 resulting in small fines. The applicant was also convicted on the same day of having goods in personal custody that were suspected of being stolen. He was given a bond in respect of that conviction.

22. The applicant says his bad behaviour came to a head later in 2011 when he was arrested on charges of supplying larger quantities of prohibited drugs including cocaine and ICE: exhibit one at p 49. He was also charged with drug possession and holding what were suspected to be the proceeds of a crime (he was found with a large quantity of cash). He was remanded in custody for two months. The applicant said prison was a life-changing experience for him. He explained (exhibit six at [48]):

> *Soon after my arrest I spent 2 months in custody before I was out on bail which was a real turning point for me. I had never been in jail before. It meant I was away from the party lifestyle. I started seeing things in a new way. I looked back on what I was doing. It became clear to me that what I'd done wasn't right. That was the beginning of my detox. I've been clean since. That two month period of my life was life-changing. I realised the way I was going was not the right way. I would end up with more crime and consequently I would have spent more time in prison again, and I would lose the friends like Dan and Michael and Isaac that I considered my family. I didn't want to lose them. I wanted to be with my friends again and be who I knew I could be; someone with a good job and a career and with goals.*

23. The applicant was released from remand on 29 December 2011. In early 2012, he secured employment. He reconnected with his old friends but said he decided to be more selective about his social interactions, he explained in his statement (exhibit six at [50]):

> *"I didn't want to be around drugs or anyone who uses drugs. I didn't want to be tempted and to return to the life I was living before I was arrested."*

24. He pointed out his core group of friends – even those who dallied with drugs or experienced trouble with the law – had grown up and moved on in their lives. Many of them had families and careers. They no longer went clubbing and tended to more sedate pursuits like barbeques and trips to the beach. The applicant says he happily fitted in with that more measured lifestyle. He says he was embraced by his friends. He insists he has not taken any drugs since he was arrested and imprisoned in October 2011. I note there is no evidence to suggest the applicant has relapsed at any point, and I accept his evidence that he has abstained.

25. I note the applicant continued to commit traffic offences while he was on bail. He has a string of speeding offences recorded in 2013. He also failed to stop at a red arrow. He was given a good behaviour bond in relation to his licence on 19 November 2013.

The sentencing judges' remarks

26. The applicant remained at large until the scheduled date of his trial in July 2014. He pleaded guilty to the charges against him. He was sentenced to 2 years and 8 months in gaol. The sentencing judge's remarks are reproduced in exhibit one at pp 27ff.

27. Wells DCJ had the benefit of a pre-sentencing report. A copy of the report is reproduced in exhibit two at pp 50ff. The report notes:

> *According to the Level of Service Inventory – revised actuarial risk/needs assessment tool, the offender is assessed as a low risk of re-offending.*

28. Wells DCJ noted the applicant had a poor record given he was aware of the threat of deportation. (I note the applicant acknowledged in cross-examination he received but did not carefully read a letter from the respondent dated 28 October 2009 warning that his visa might be cancelled if he engaged in further offending.) Her Honour also recognized the applicant was struggling with his sexuality and with drug abuse.

29. The sentencing judge went on to remark that the applicant had been involved in "substantial drug trafficking" and concluded "he was no street level user/dealer; he was well above that in the hierarchy of drug trafficking". Her Honour said the applicant was not merely selling drugs to finance his own drug abuse; he was making a good deal more money out of the operation than that. Having said that, her Honour went on to characterize "the objective seriousness of his involvement in drug trafficking [as being] toward the lower end of the mid-range of objective seriousness".

30. Wells DCJ went on to acknowledge the applicant had behaved well while on bail. That good behaviour suggested he was capable of rehabilitation although her Honour was guarded on this point given the applicant's history of committing similar offences and his failure to avail himself of assistance in relation to his mental health issues.

Evidence of rehabilitation

31. The applicant insisted in his statements and in his oral evidence that he was reformed. That is welcome evidence of his commitment, but of limited weight. Good intentions are a necessary but not sufficient condition for establishing the applicant has been rehabilitated. I was also provided with statements from a number of the applicant's close friends. Some of them gave evidence at the hearing in person, and one appeared by telephone. Each of them demonstrated a sincere commitment to their friend and I accept all honestly believed he was rehabilitated and that he would not re-offend. But all of them have had limited direct contact with the applicant while he was incarcerated or, more recently, while he has been detained by the Minister. It is no surprise that they think well of their friend, but their opinion about his prospects are of limited weight. Having said that, I accept their evidence confirms the applicant is likely to have a relatively stable and benign support network available to him if he is permitted to remain in this country. While the good wishes of his friends tell me little about whether he is genuinely rehabilitated, the existence of a stable support network maximizes his chances of not re-offending. I note Mr K and Mr A have both indicated they would assist with employment and a number of the applicant's friends have offered to assist with accommodation: exhibit ten and exhibit seven.

32. There is other evidence on the question of rehabilitation, and it tends to carry more weight. It starts with the pre-sentencing report that I have already mentioned. The report assessed there was a low risk of the applicant re-offending. His record in prison and other evidence suggests that assessment was right.

33. The applicant said he decided to make the most of the opportunities available to him in prison. He enrolled in TAFE courses and obtained qualifications in food handling and general construction: exhibit one at pp 54ff. He completed the 'Getting Smart' drug and alcohol program (exhibit one at p 50) and he said he regularly attended meetings of Alcoholics Anonymous and Narcotics Anonymous. He pointed out in cross-examination there were plenty of opportunities to obtain dangerous drugs in prison or while he was in immigration detention but he has stayed clean.

34. The NSW Probation and Parole Service prepared an assessment of the applicant while he was still in prison. The report dated 8 October 2014 is reproduced in exhibit one at pp 72ff.

It notes the applicant's record of achievement while in prison and considered the support arrangements he was likely to have in place when and if he were released. It concludes:

> *[the applicant] did not present as a man that would pose an unacceptable risk to the community when released from custody.*

35. There are also two references provided by officers who worked at a prison where the applicant was incarcerated. One of the officers who worked closely with the applicant observed in a letter dated 12 April 2016 (exhibit one at p 51):

> *I am aware of the very real possibility of [the applicant's] deportation and can only say that from my observation of him I would be confident that he will not re-offend if afforded the opportunity to remain in Australia.*

36. In a letter dated 12 April 2016 (exhibit one at p 52), the second officer spoke positively of the applicant and concluded:

> *I am confident he would be a valued member of our community if allowed to remain in Australia.*

37. I was also provided with a psychologist's report prepared by Ms Andrea Davidson at the request of the applicant: exhibit 8. Ms Davidson gave evidence at the hearing. She opined that the applicant's drug use and misbehaviour were the product of conflict over his sexuality which was exacerbated around 2010 when he had an unsuccessful visit with his family in his country of origin. Ms Davidson said she was confident the applicant had effectively addressed the issues surrounding his sexuality and family acceptance, which meant the principal trigger for substance abuse was no longer present. Ms Davidson added that prison gave the applicant the opportunity to address his substance abuse. The positive steps he took while he was on bail and then while he was in prison reinforced his abstinence. She said the applicant was a low risk of reoffending.

38. Ms Dejean, who appeared for the Minister, challenged Ms Davidson's evidence. Ms Dejean pointed out Ms Davidson had only interviewed the applicant over the phone from Christmas Island on one occasion. Ms Davidson agreed that sort of remote contact was not ideal. She preferred to see clients face-to-face; she noted she was supposed to speak with the applicant in a video-conference but the video-conference facilities provided by the

respondent were unavailable.[1] But she said she was confident she had sufficient exposure to the applicant to form a reliable view.

39. I agree it would have been better if the applicant had seen Ms Davidson in person. It is always easier to establish a rapport and make a more nuanced assessment of a person's character and testimony if they are in the same room. (That is precisely why the Tribunal generally conducts hearings in person.) But the limitations were inevitable given the respondent chose to detain the applicant in one of the most remote places on earth and failed to provide functioning video-conferencing facilities. As it happens, Ms Davidson's oral evidence and her detailed response to the criticisms persuaded me that she was not at such a disadvantage in the preparation of her report that I should discount her conclusions.

40. Ms Dejean suggested Ms Davidson failed to take account of notes prepared by a psychologist who had seen the applicant on Christmas Island. There were also questions about a report prepared by Dr Jacmon, a psychologist, in 2007. That report had been completed in connection with court proceedings. Dr Jacmon had found the applicant did not suffer from anxiety and depression when he was examined. Dr Jacmon also recorded the applicant's advice that he was not misusing drugs at the time. (In cross-examination, the applicant admitted he misled Dr Jacmon as to his drug use. The applicant said addicts often denied the extent of their addiction.)

41. Ms Davidson confirmed she was aware of Dr Jacmon's report. She said she had also spoken with a counsellor on Christmas Island. She was able to provide a coherent explanation of the applicant's problem and how it was effectively addressed.

42. Taken together, this evidence from objective, experienced observers confirms there is a low risk of the applicant offending again notwithstanding his criminal history. The evidence strongly suggests that prison worked: the applicant's arrest and incarceration on remand in 2011 was the start of a process of rehabilitation. He has dealt with the issues that triggered the bad behaviour in the first place. There is good reason to believe he will not offend again. I would add the evidence suggests there is good reason to believe the

[1] Ms Davidson is not the only person to experience problems with video-conferencing facilities. The start of the hearing was delayed by 30 minutes on the first day after there were difficulties establishing a connection between the Tribunal's hearing rooms in Sydney and Christmas Island where the applicant was in detention.

applicant would be especially unlikely to return to drug-dealing or other serious criminal conduct.

THE DISCRETION TO REVOKE THE CANCELLATION

43. There is no doubt the applicant is unable to satisfy the character test in s 501 of the Act. The applicant has a *substantial criminal record* within the meaning of that section, and his visa was therefore cancelled pursuant to s 501(3A). I must consider whether there is a reason why that decision should be revoked. When considering the exercise of the discretion, I am required to have regard to Ministerial Direction No 65 'Visa refusal and cancellation under s 501 and revocation of a mandatory cancellation of a visa under s 501CA' (the Direction).

44. I note the Direction points out in the preamble (at [6] of the Direction) that remaining in Australia is a privilege for non-citizens. The Australian community expects non-citizens living here to behave. Persons who commit especially serious crimes should generally expect to forfeit the privilege of remaining in this country. The preamble also notes the Australian community has a low tolerance for criminal conduct, although it might be expected to show rather less tolerance for conduct that is more serious, or where the applicant is applying for a visa or holds a limited stay visa.

45. Against that backdrop, I move to consider the matters referred to in Part C of the Direction. Part C identifies a number of primary considerations that must be given particular weight in my deliberations. It also refers to a number of other considerations that may be relevant. I will deal with the primary considerations first, insofar as they are relevant.

Protection of the Australian community

46. The Direction requires (at [13.1(1)]) decision-makers to be mindful of the government's commitment to protecting the Australian community from harm as a result of criminal activity or other serious conduct. The Direction also requires the decision-maker (or the Tribunal on review) to consider *the nature and seriousness of the non-citizen's conduct to date* and *the risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct.* I will deal with each of these considerations in turn.

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

47. The applicant has been convicted of a number of drug offences, although he also has a reasonably extensive history of minor traffic infringements. None of the traffic infringements is serious when viewed in isolation, although the frequency of the offences is troubling – as is the fact the applicant continued to commit traffic infringements while he was on bail in 2013. Ms Dejean suggested the pattern of traffic offences was problematic because it may suggest the applicant habitually disregarded the law. Alternatively, the pattern may simply suggest the applicant is a poor driver.

48. I have already set out details of the applicant's criminal record. None of the offences involved violence or predation or sexual assault. The offences were not directed against vulnerable members of the community or officials. But the most significant offences were moderately serious, as the sentencing judge noted in her remarks. Drug-trafficking – particularly trafficking in a notoriously dangerous drug like ICE – is widely condemned, and the applicant was not a street-level dealer when he was arrested in 2011. The court's view of the applicant's offending was reflected in the sentence of 2 years and 8 months. It was not an especially lengthy sentence given the maximum sentence of 15 years under the *Drugs Misuse and Trafficking Act 1985* (NSW), but it was not insignificant. I note the offences that resulted in the prison sentence were not the applicant's first offences: he had been convicted of less serious drug offences in the relatively recent past, and he has a string of mostly minor traffic offences. The Minister argued there was a trend of increasing seriousness in the offending. I think that is right. The seriousness of the offending appeared to increase – he became a dealer as opposed to a mere user – as the applicant became more involved in the drug scene. The accumulation of offences was one of the factors that appeared to prompt the sentencing judge to impose a custodial sentence even though the pre-sentence report indicated the applicant was suitable for a community service order: exhibit two at p 52.

49. I am not persuaded the applicant has provided false or misleading advice to the immigration authorities in the past. He did however continue offending after he received a formal counselling letter from the respondent. A copy of the letter is reproduced in exhibit one at pp 37-38. The letter warns the applicant his visa might be at risk if he continued to engage in criminal conduct. That letter is dated 28 October 2009. The applicant said in his

oral evidence that he recalled the letter but did not read it closely at the time and certainly did not absorb the warning he was given.

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

50. The Direction points out (at [13.1.2(1)]) that the community's appetite for risk of future harm is likely to diminish as the seriousness of the potential harm increases.

51. I have already referred to the evidence suggesting the applicant is rehabilitated and that there is a low risk of further offending. That evidence (of his insight into his own offending, and what I take to be the deterrent effect of the prison experience) suggests the applicant is particularly unlikely to return to more serious offending, even if there is a chance he might commit further minor traffic offences or even experience a temporary relapse in his recovery from addiction. Given those findings, I am satisfied the Australian community is most unlikely to be exposed to even moderately serious harm.

52. I am satisfied the first primary consideration does not weigh heavily against the exercise of the discretion notwithstanding the circumstances of the offending. The Australian community is at *very* low risk of serious harm, and at low risk of any harm.

Best interests of minor children in Australia affected by the decision

53. The applicant does not have any children. This second primary consideration is not relevant to the exercise of the discretion.

Expectations of the Australian community

54. The third primary consideration is complicated by the fact the Direction does not give a clear indication of how a decision-maker might divine the expectations of the Australian community. The Tribunal has grappled with this issue before in cases like *CVA and Minister for Immigration and Citizenship* [2011] AATA 742; (2011) 124 ALD 98 and *Do and Minister for Immigration and Border Protection* [2016] AATA 390. Those cases concluded authoritative statements by public bodies – by courts, or by ministers of the crown in formal utterances like the Determination – might be useful guides to community values and standards. It might also be possible to infer community expectations from statements of public policy, empirical research or historical fact.

55. There seems little doubt the community is concerned about the traffic in a particularly dangerous and addictive drug like ICE. Individuals who deal in ICE facilitate drug misuse which has a corrosive effect on drug users, their families, police, health services, and the wider community. That condemnation is evident in the drug enforcement policies of all Australian governments that single out ICE as a particularly obnoxious drug. One would expect the Australian community to be generally unsympathetic to an individual that deals in ICE. The community might be especially unimpressed if the applicant was previously warned about his conduct. The community might think the applicant has already had his second chance, and thus a fair go.

56. But that is not the end of the story. The community also believes in the possibility of rehabilitation and redemption. That much is clear from s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) which sets out the objectives of sentencing in the criminal courts. In doing so, the legislation articulates the approach of the common law that was discussed in cases like *Veen v R* [1979] HCA 7; (1979) 143 CLR 458 and *Veen v R (No 2)* [1988] HCA 14; (1988) 164 CLR 465. Those objectives include punishment or retribution, expiation, incapacitation, deterrence, denunciation – and rehabilitation.

57. It is one thing to say (as the Direction does) that the community is, in effect, entitled to be risk averse in the face of offending conduct. Most individuals who are the subject of visa cancellation proceedings under s 501 and its associated provisions insist they have been reformed and that they are unlikely to offend again. Given most of them have a history of previous offending, it is understandable that decision-makers and the community are sceptical of those claims. But that is not the same thing as saying the community does not value rehabilitation when there is cogent evidence before the decision-maker that suggests rehabilitation has genuinely occurred. The community is sceptical of individuals who claim to conform to widely shared values, but the community is not so cynical as to proclaim the value but simultaneously discount it when it is demonstrated. Someone who has genuinely rehabilitated might even hope to be embraced by the community.

58. In all the circumstances, I am not satisfied this consideration weighs against the exercise of the discretion. Indeed, it may actually weigh *in favour* of the exercise of the discretion.

Other considerations

59. The Determination acknowledges other considerations may be relevant, even if they generally carry less weight than the primary considerations.

60. The applicant urged me to take account of *Australia's international non-refoulement obligations*. The statement of Ms Rochelle Johnston has been tendered to that end. The statement includes information about the treatment of homosexual persons in the applicant's country of origin. The Minister accepts the applicant is entitled to apply for a protection visa on the basis of that information which means it is unnecessary to consider those matters in these proceedings: see the Direction at [14.1(4)].

61. I agree it would be preferable to address Australia's non-refoulement obligations in the course of a tailored review process in which those obligations were explored in more detail. I therefore do not propose to address them here although the facts and circumstances that potentially give rise to those obligations may yet be relevant to my deliberations. I will have more to say about that below.

62. The *strength, nature and duration of the applicant's ties to Australia* are certainly relevant. The applicant arrived here as a student in October 2000 when he was 21 years of age. He has spent most of his adult life in this country. He has been able to work in gainful employment for much of the time he was in the community, which is all to the good.

63. I note the applicant was issued with the first of a series of speeding tickets in August 2002, although I do not attach much weight to those matters. His first criminal charge – for unlicensed driving – occurred in 2005, some time after he arrived in this country.

64. He does not have a family here but he has a committed circle of friends, many of whom gave evidence at the hearing. While those relationships appear to be strong, they are not familial relationships.

65. The applicant's ties offer some support for the exercise of the discretion in his favour. The absence of familial relationships and the fact offending began relatively early and continued over time limits the weight that might otherwise be given to the applicant's strong social ties to other Australian citizens.

66. I am also required to consider the *impact on Australian businesses* if the applicant is not permitted to stay. Mr K and Mr A have both indicated they would like to have the applicant work in their businesses: exhibit ten at [17]; exhibit seven at [23]. The applicant explained he is skilled in the use of information technology and his technical skills are of considerable value to employers here. But there is no suggestion an Australian business will be adversely impacted if the applicant cannot stay. While it would be convenient for the witnesses to hire the applicant whom they know and trust, there is no evidence that their businesses would be compromised if he were unable to stay. It follows I am not satisfied this consideration counts in favour of the applicant.

67. There is no evidence that a decision to revoke the cancellation decision would have any *impact on victims*. It follows this consideration does not count for or against the applicant.

68. The last of the enumerated considerations is the extent of *impediments if the applicant were removed*. This consideration weighs heavily in favour of the exercise of the discretion. I accept the applicant is a young man and in reasonable health. I also accept he would not face a language barrier or any medical issues if he were required to return to his country of origin. He would presumably be able to get a job and support himself. But the applicant's uncontradicted evidence establishes he is estranged from his family on account of his sexual orientation, and he has not retained social links. He could expect to be socially isolated, especially if people were aware of his sexual orientation. The evidence in Ms Johnston's affidavit establishes the applicant is likely to face discrimination and persecution in that community if his sexual orientation were to become known. While he might be able to avoid persecution if he repressed his sexuality – something he tried to do for many years with disastrous results, culminating in his criminal offending – that is an onerous burden.

CONCLUSION

69. I have explained that the first primary consideration does not count heavily against the exercise of the discretion, while the third primary consideration may actually weigh in favour of the exercise of the discretion – but certainly does not weigh against it. Most of the enumerated other considerations do not weigh heavily one way or another apart from the last. That consideration weighs heavily in his favour. On balance, I am satisfied the discretion should be exercised in the applicant's favour. In those circumstances, I set

aside the decision under review and decide in substitution that the cancellation decision should be revoked.

I certify that the preceding 69 (sixty - nine) paragraphs are a true copy of the reasons for the decision herein of Deputy President McCabe.

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Associate

Dated 24 November 2016

Date(s) of hearing	**21 and 24 November**
Counsel for the Applicant	**Ms D Bampton**
Solicitors for the Applicant	**Legal Aid NSW**
Advocate for the Respondent	**Ms Hervee Dejean**
Solicitors for the Respondent	**Australian Government Solicitor**