Decision and Reasons for Decision

KC and Minister for Immigration and Multicultural Affairs (Migration) [2025] ARTA 358 (8 April 2025)

Applicant/s:	**KC, Bharat Bahadur**
Respondent:	**Minister for Immigration and Multicultural Affairs**
Tribunal Number:	**2025/0457**
Tribunal:	**Senior Member M Kennedy**
Place:	**Adelaide**
Date of Decision:	**8 April 2025**
Decision:	**The decision under review is affirmed.**

Date of Statement of Reasons: **10 April 2025**

Statement made on 10 April 2025 at 1:51pm

Catchwords

MIGRATION – decision of delegate of Minister not to revoke mandatory cancellation of visa – character test – Direction No 110 – primary and other considerations – protection of Australian community – nature and seriousness of criminal offending – risk to the Australian community should the Applicant commit further offences or engage in other serious conduct – strength, nature and duration of ties to Australia – best interests of children – expectations of the Australian community – extent of impediments if removed – decision under review is affirmed.

Legislation

Migration Act 1958 *(Cth)* ss *5AB, 15, 189, 196, 197C, 197C(1), 198, 499(1), 499(2A), 501(1), 501(2), 501(3A), 501(6), 501(7). 501(7)(c), 501CA, 501CA(4), 501E, 501F, 503, 5001, 5001(c).*

Cases

Khalil and Respondent for Home Affairs [2019] FCAFC 151

HZCP v Minister for Immigration and Border Protection [2018] FCA 1803

BSJ16 v Minister for Immigration and Border Protection [2016] FCA 1181

Hambledon v Minister for Immigration and Border Protection [2018] FCA 7

Taulahi v Minister for Immigration and Border Protection [2016] FCAFC 177

Rano v Minister for Home Affairs, Minister for Cyber Security (2 September 2024) [2024] FCA 1003

Plaintiff M1/2021 and Minister for Home Affairs [2022] HCA 17

Uelese v Minister for Immigration and Border Protection (2016) 248 FCR 296

Webb v Minister for Home Affairs [2020] FCA 831

CRNL v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCAFC 138

Mukiza and Minister for Home Affairs [2019] AATA 4445 (1 November 2019)

Secondary Materials

Minister for Citizenship, Citizenship and Multicultural Affairs, Direction no. 110 — Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501C (21 June 2024) – paras *5.1(4), 5.2, 5.1(8), 6, 7, 8, 8.1(1), 8.1(2), 8.1(2), 8.1.1, 8.1.1(1), 8.1.1(1)(a), 8.1.2, 8.1.2(2)(a), 8.1.2(2)(b), 8.2, 8.2(3), 8.3, 8.4, 8.4(4), 8.4(4)(a), 8.4(4)(b), 8.4(4)(c), 8.4(4)(d), 8.4(4)(e), 8.4(4)(f), 8.4(4)(g), 8.4(4)(h), 8.5(1), 8.5(2), 8.5(2)(a), 8.5(2)(b), 8.5(2)(c), 8.5(2)(d), 8.5(2)(e), 8.5(2)(f), 8.5(3), 9, 9.1, 9.1.2, 9.2, 9.2(1)(a), 9.2(1)(b), 9.2(1)(c), 9.3.*

Statement of Reasons

The decision in this matter was made and provided to the parties on 8 April 2025 with a note that written reasons would be provided within a reasonable time. These are those written reasons.[1]

During the hearing, counsel for Mr KC invited the Tribunal to consider making orders imposing a pseudonym for the applicant. I have decided not to impose a pseudonym for the applicant in this matter having regard to the concession and analysis at paragraphs 159-182 of these reasons. I have however used pseudonyms when identifying other witnesses and when referring to children.

Summary

1. Mr KC's visa was cancelled as a consequence of his conviction for multiple counts of obtaining property by deception, relating to a course of conduct perpetrated over 18 months which deprived 20 vulnerable victims of a total amount exceeding $220,000. I have decided not to revoke that cancellation decision after considering the matters provided for in Ministerial Direction 110. In particular, and in summary only, although I have placed significant weight on the best interests of Mr KC's daughter and the impact on his immediate family members, I consider his offending was serious in that it targeted vulnerable people over an extended period of time, and there is real, albeit low, risk of similar conduct being repeated. I consider the Australian community would expect the visa to be cancelled.

Background

2. Mr KC is a 43-year-old citizen of Nepal.[2] He arrived in Australia on 8 March 2008, and was ultimately granted a Skilled (subclass 189) visa as a secondary visa holder to his spouse.[3]

3. On 21 March 2022 Mr KC pleaded guilty and was convicted of 20 charges of obtaining property by deception in the County Court of Victoria.[4] Mr KC was on bail at the time of

[1] See *Khalil and Respondent for Home Affairs* [2019] FCAFC 151 at [41].
[2] Hearing Book ('**HB'**) 1 at [5].
[3] HB, 2558.
[4] HB, 2329.

most of his offending for another charge of obtaining property by deception which was subsequently dealt with summarily.[5]

4. Mr KC was sentenced to an aggregate period of 46 months (3 years and 10 months' imprisonment) with a non-parole period of 30 months (two and a half years).[6]

5. On 12 April 2022, Mr KC's visa was mandatorily cancelled under subsection 501(3A) of the *Migration Act 1958* (the Act) on account of his substantial criminal record.[7] At that time Mr KC was serving his sentence on a full time basis in a custodial institution for an offence against the law of Victoria. On 2 May 2022 he made representations to have that decision revoked under section 501CA of the Act.[8] On 14 January 2025, a delegate refused to revoke the decision to cancel Mr KC's visa.[9]

6. On 22 January 2025, Mr KC applied to the Tribunal for review of that decision.[10]

LEGISLATIVE FRAMEWORK

7. Under subsection 501(3A) of the Migration Act 1958 ('**the Act**'), the Minister must cancel a visa that has been granted to a person if, among other things:

   (a) the person does not pass the character test because of a substantial criminal record; and

   (b) the person is serving a sentence of imprisonment on a full-time basis in a custodial institution for an offence against a law of the Commonwealth, a State or Territory.

8. A person has a substantial criminal record in the circumstances set out in subsection 501(7) of the Act. These circumstances include that the person has been sentenced to a term of imprisonment of 12 months or more (paragraph 501(7)(c) of the Act). This applies no differently for a sentence imposed for two or more offences (section 5AB of the Act).

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[5] Ibid.
[6] HB, 2341.
[7] HB, 2559.
[8] HB, 2348.
[9] HB, 2297.
[10] HB, 2286.

9. If a visa is cancelled under subsection 501(3A), the Minister must give the person a written notice inviting them to make representations about revocation of the original decision.[11] If the person makes representations in accordance with the invitation, then under subsection 501CA(4), the Minister may revoke the original decision if satisfied that the person passes the character test or that there is another reason why the original decision should be revoked.

Ministerial Direction 110

10. Under subsection 499(1) of the Act, the Minister may give written directions to a person or body having functions or power under the Act, and a person or body must comply with any direction given by the Minster (subsection 499(2A)).

11. The Minister has issued Direction 110, *Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (‘**the Direction’**). It is expressed to apply to the Tribunal in making a decision under section 501 or section 501CA of the Act, and the Tribunal must comply with the Direction.

12. An objective of the Direction is to guide decision-makers in exercising powers under sections 501 or 501CA of the Migration Act.[12] In exercising the power under subsection 501CA(4), the Tribunal must have regard to the primary and other considerations set out in the Direction where relevant to the decision.[13]

13. Clause 5.2 of the Direction provides principles to provide a framework to approach decision making. These are:

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

[11] Migration Act s 501CA(3).
[12] Direction No 110 para 5.1(4).
[13] Direction No 110 para 6.

(2) The safety of the Australian Community is the highest priority of the Australian Government.

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

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

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

(6) With respect to decisions to refuse, cancel, and revoke cancellation of a visa, Australia may afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age.

(7) Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation.

(8) The inherent nature of certain conduct such as family violence is so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation, even if the information available at the time of consideration suggests that the non-citizen

> does not pose a measurable risk of causing physical harm to the Australian community.[14]

14. The Direction also sets out matters to be considered in refusing or not revoking the cancellation of a visa. It requires certain primary and other considerations to be considered in making a decision, and states that in taking these into account that:

> (1) In applying the considerations (both primary and other), information and evidence from independent and authoritative sources should be given appropriate weight.
>
> (2) The primary consideration … (protection of the Australian community) is generally to be given greater weight than other primary considerations. Otherwise, primary considerations should generally be given greater weight than the other considerations.
>
> (3) One or more primary considerations may outweigh other primary considerations.[15]

15. The Direction does not limit the matters the Tribunal can consider in deciding if there is another reason the cancellation of a visa should be revoked.

ISSUES

16. The issues before the Tribunal are therefore:

(a) whether the Applicant passes the character test, as defined by subsection 501(6) of the Migration Act; and

(b) if the Applicant does not pass the character test, whether the Tribunal is satisfied that there is another reason why the decision to cancel the visa should be revoked.[16]

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[14] Minister for Immigration, Citizenship and Multicultural Affairs (Cth), *Direction no. 110 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation under section 501CA* (dated 7 June 2024) cl 5.2 ('the Direction').

[15] Ibid cl 7.

[16] See subsection 501CA(4) of the Migration Act.

DOES THE APPLICANT PASS THE CHARACTER TEST?

17. As noted above, the character test is defined in subsection 501(6) of the Migration Act. Paragraph 501(6)(a) of the Migration Act provides that a person does not pass the character test if they have a 'substantial criminal record', as defined by subsection 501(7). Relevant to Mr KC's case, a person has a substantial criminal record if they have been 'sentenced to a term of imprisonment of 12 months or more'.

18. Mr KC was sentenced to a term of imprisonment of 12 months or more. I find he has a substantial criminal record and he does not pass the character test. Mr KC, who was represented by counsel in the proceedings, did not argue to the contrary.

IS THERE ANOTHER REASON WHY THE DECISION TO CANCEL THE VISA SHOULD BE REVOKED?

19. Clause 8 of the Direction contains five primary considerations, which are:

> (1) protection of the Australian community from criminal or other serious conduct;
>
> (2) whether the conduct engaged in constituted family violence;
>
> (3) the strength, nature and duration of ties to Australia;
>
> (4) the best interests of minor children in Australia;
>
> (5) expectations of the Australian community.

20. Clause 9 of the Direction contains other considerations, which are:

> (1) In making a decision under section 501(1), 501(2) or 501CA(4), the considerations below must also be taken into account, where relevant, in accordance with the following provisions. These considerations include (but are not limited to):
>
> a) legal consequences of the decision;
>
> b) extent of impediments if removed;
>
> d) impact on Australian business interests.

21. I have considered each one in turn, keeping in mind the principles in clause 5.2 of the Direction.

The protection of the Australian community

22. The Direction requires decision-makers to keep in mind that the safety of the Australian community is the highest priority of the Australian Government and that the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens.[17]

23. The Tribunal is directed to have particular regard to the principle that entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.[18]

24. Decision-makers should 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.[19]

Nature and seriousness of the conduct

25. I must consider the nature and seriousness of Mr KC's criminal offending or other conduct to date.[20] In doing so, paragraph 8.1.1(1) of Direction No 110 provides that, without limiting the range of conduct that may be considered to be either very serious or serious, certain types of crime and conduct are viewed very seriously or seriously by the Australian Government and the Australian Community.

26. The crimes or conduct viewed very seriously by the Australian Government or Australian Community are violent and sexual crimes, crimes of a sexual nature against women (regardless of the sentence imposed) and acts of family violence regardless of whether there is a conviction for an offence or a sentence imposed. Mr KC's conduct does not fall within any of these descriptors.

27. The Respondent contends that Mr KC's offending is to be considered to be serious because his crimes were committed against vulnerable members of the community,

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[17] The Direction cl 8.1(1).
[18] Ibid.
[19] Ibid cl 8.1(2).
[20] Direction No 110 para 8.1(1).

referring to cl.8.1.1(b)(ii) of the Directions. Mr KC concedes that his offending is clearly serious, recognising in written submissions that a number of the factors provided for in cl.8.1.1. point to that conclusion.

28. It is necessary therefore to outline the details of Mr KC's offending and detail the matters going to the gravity of that offending. The sentencing remarks of Judge Tinney of the County Court of Victoria provide an overview of the offending and a commentary on the conduct which his Honour ultimately describes as 'highly culpable',[21] 'starkly wrong, criminal and unconscionable',[22] 'nasty and cruel offending, deeply criminal',[23] 'pretty despicable behaviour'[24] of which Mr KC 'should be ashamed …, 'more ashamed than you are'.[25] Extracts of the sentencing remarks of Judge Tinney are outlined below:

> "*6. You were at the time of the offending a permanent resident of Australia. You were a member of the Nepalese community and had been running an import export business. In 2014-15 you began offering a remittance service to members of that small community. You used your contacts within that community to commit these offences. On occasions you offered to collect debts, but mostly you promised to remit moneys on behalf of clients to their families in Nepal. Amounts that might seem modest enough in Australian terms were very substantial indeed.*
>
> *7. You took advantage of the various victims' ignorance of the Australian banking and financial systems and received this money for services you did not intend to provide. Your conduct was sometimes questioned by those who sensed that you might be acting dishonestly and when questioned you just put them off. For instance, when [redacted name] (Charge 1) mentioned reporting your conduct to the police you said: "Do what you want. I don't care, I'm a permanent resident, they can't hurt me." You went on to say that he would never see his money and that his family would therefore be hurt. Similar sorts of statements are dotted throughout the summary (see paragraphs [18] and [60]), "There's no point taking me to court because I used to run a business and now I'm bankrupt" (see paragraph [99]). "Don't go to the police or tell anyone or take legal action or you will not get your*

[21] HB, 2330 at [9].
[22] HB, 2334 at [33].
[23] HB, 2335 at [35].
[24] HB, 2339 at [56].
[25] HB, 2339 at [59].

money back." One had you express the sentiment that unless the victim withdrew his complaint and the account was unfrozen the victim would not receive his money (see paragraph [107]).

8. You just kept offending, knowing as you did how these people trusted you and how significant the funds were to them or to their families. You also used a number of excuses to put people off your scent or to defer any action. A false name was employed and valueless cheques abounded here. Screenshots were sent by you suggesting payments had been made. You repaid small amounts to keep some of your victims at bay. You even had a practice of claiming that a person had been overpaid by one of your cheques when of course they had been paid not one cent, but then requiring a further payment to clear what you said was now owing to you. One instance even had you speaking to a victim's family in Nepal, setting their mind at rest in terms of the arrangement that was in place.

9. You were highly culpable. In this way you defrauded people of over $220,000, the vast majority of which has not been recovered. One can really only take with a grain of salt your vow to repay these outstanding funds. They are just words and I cannot put any store in them at all. By my calculations around $24,500 to $26,500 was repaid along the way. The reason why it is not so simple to calculate is even as you repaid some money, you sometimes required more payments coming in your direction from that same victim, claiming that you had overpaid them. As your counsel says, you were robbing Peter to pay Paul, and he said this indicating that you were fraudulently obtaining money to repay other victims. I am not sure how apt that description is. In such settings, 'Paul' is often enough left happy enough as he has been paid. There are no 'Pauls' in this case. Those who were paid money were paid only fractions of the amounts that you had spirited away. Here all your victims were the proverbial 'Peter'. They have all been left out of pocket by your conduct.

10. You were arrested on 30 July 2020 and interviewed and you co-operated with the police and made some admissions.

11. As I have said, you were on bail at the time of most of these offences having been bailed on two charges of obtain property by deception. Those charges were committed in February of 2019, you were bailed in late August

2019 and dealt with by a fine and compensation order imposed on 21 December 2021 at the Heidelberg Magistrates Court. Your character is not therefore as unblemished at it first appeared when I looked at the written submissions. That conduct had you order and obtain over 550 items worth around $9500 from a business known as Tibetan House in Heidelberg West. You had attended in person to obtain that property by deception.

12. You have been in custody since your arrest in July of 2020.

13. There is a chronology of the Court listings of this matter.
14. So much then for my short summary of the summary. I will sentence pursuant to the far more detailed statement which is marked as Exhibit A on the plea. That goes into all the actual detail of what you did to each one of these victims."[26]

29. I have had regard to the full written summary of the prosecution opening dated 7 October 2021 as referred to the court as an agreed summary. Without further reproducing the entirety of that document, I consider the details of the circumstances of the many victims of Mr KC's offending recounted in that document and summarised by the sentencing judge establish the vulnerability of the victims and Mr KC's calculated targeting of those vulnerabilities. The Respondent's submission that Mr KC's crimes and conduct should be viewed as serious under the Direction on account of the crimes being committed against vulnerable members of the community is well made out in my view and I accept it.

30. Furthermore, and in any event, I am to take into account the sentence imposed by the court for the crimes in considering the nature and seriousness of the offending. In reaching the sentence, the judge observed:

> "*59. I must also denounce your conduct. Again, that is important. You preyed on these people. You relied on their trusting you. It was disgraceful, serious criminal conduct. This sort of dishonest conduct must be strongly denounced and I do denounce it. You should be ashamed of yourself, more ashamed than you are.*
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> *…*

[26] HB, 2329-2331 at [6]-[14].

> *61. General deterrence is a significant sentencing purpose in this sort of case. That is the need to deter other offenders. This was systematic and serious dishonest offending targeting those in the community that you sought to exploit.*
>
> *…*
>
> *63. I must have regard to the maximum penalty of 10 years in each case. I must also take into account the impact and, as I have said, it has been sizeable in relation to many of these victims.*
>
> *…*
>
> *68. It is not just a matter of looking at the amount of each dishonest obtaining or even for that matter the global total. That sort of total might be achieved by a single keystroke entry by an accountant in another case or by a single alteration of a single cheque. So a single, isolated act. That is not what you were doing. Here there are 20 separate victims. All of them were targeted by you. So multiple dishonest acts, and I am required to look at the separate impacts. I must look at your knowledge of the victims that you were defrauding. This was serious criminal activity. As I have said, had a real nastiness to it.*
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> *69. Prison is a disposition of last resort. It is plainly warranted here. That much is conceded. It is plain that your conduct is deserving of a substantial term of imprisonment. Your counsel accepted that a non-parole period will be required here and of course he is right to make that submission."*[27]

31. The court observed that but for the guilty plea, Mr KC would have been sentenced to prison for 5 years and 2 months, but I have had regard to the ultimate sentence of three years and ten months. I note the court chose to pass an aggregate sentence instead of 20 individual sentences but in doing so the court explained it had arrived at the same end destination.

32. In considering the nature and seriousness of Mr KC's criminal conduct, I have considered the sentence imposed by the courts and find that the sentence and remarks made by the court around the imposition of the sentence reflect that the crimes committed by Mr KC were serious for the purposes of the Direction.

[27] HB, 2339-2340.

33. As to the impact of the offending on victims, there is a substantial body of evidence outlining that impact, forming as it does the basis for much of the sentencing court's condemnation of Mr KC's conduct. The court summarises the impact of Mr KC's conduct on his victims as follows:

> "*15. There are a large number of victim impact statements before me. Four of those were read aloud but five others were filed on the plea. I have read all of the victim impact statements again since the plea. I see no need to descend to the full detail of those impact statements. They make for sad reading. As I said on the day of the plea, one cannot help but see how deeply your financial crimes have struck. As you knew, these were significant sums of money for these people that you were targeting. You have wreaked havoc on many of them, that is not too strong a word. These crimes have had a range of quite predictable impacts upon your victims and their families. Some speak of the 'huge' sum of money lost, their life savings essentially lost to you. Another speaks of parents obtaining a loan to fund their son who was in need and adrift in Australia amidst the global pandemic only to see those borrowed funds lost. Others raise their inability to pay university fees or pay rent or even eat properly. Loss of homes and relationships and prospects. It is all there within this impact material. That is what you have brought about by your conduct. These sorts of sums either looked at in their individual amounts, charge by charge, or even globally, if fraudulently obtained from a bank, they would scarcely raise a blip on the radar. Here though, these were trusting and generally needy fellow citizens who trusted you and they were being fleeced by you of what were large if not very large amounts of money to them. They could not just absorb this sort of loss. Many have lost faith in their fellow man as a result of your conduct. The impact has been very sizeable in this case and I take it into account as I am required to.*"[28]

34. I have taken into account the evidence available in the hearing book addressing the very adverse impact of Mr KC's conduct on his victims. Mr KC appropriately concedes in his written submissions that the significant harm to the victims underscore the high level of criminality. I consider this demonstrates the seriousness of Mr KC's conduct for the purposes of the Direction.

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[28] HB, 2331 at [15].

35. As to the frequency of Mr KC's offending and the cumulative effect of repeat offending, it must be noted that Mr KC's offending was a course of similar conduct against multiple victims over a lengthy period of time. In this context therefore, it cannot be said that Mr KC's conduct was a one-off event. It is also the case that Mr KC was on bail for a similar offence at the time he committed the index offending, and that offence was subsequently dealt with, recounted by the sentencing judge for the index offending as follows:

> "*11. As I have said, you were on bail at the time of most of these offences having been bailed on two charges of obtain property by deception. Those charges were committed in February of 2019, you were bailed in late August 2019 and dealt with by a fine and compensation order imposed on 21 December 2021 at the Heidelberg Magistrates Court. Your character is not therefore as unblemished at it first appeared when I looked at the written submissions. That conduct had you order and obtain over 550 items worth around $9500 from a business known as Tibetan House in Heidelberg West. You had attended in person to obtain that property by deception.*"[29]

36. Mr KC does not however have any convictions prior to the course of conduct and similar conduct mentioned above. Nonetheless, the persistent nature of the offending over the course of an extended period of time and the targeting of multiple victims leads me to conclude that the frequency of Mr KC's offending and the cumulative effect of the repeated course of conduct is serious.

37. No issues arise as to false or misleading information being provided to the Department or Mr KC re-offending since being formally warned or made aware in writing about the consequences of further offending in terms of his migration status. There is no evidence of offending in another country.

38. On balance, I consider Mr KC's offending is clearly serious for the purposes of the Direction, noting in particular the sentencing judge's statements condemning Mr KC's conduct, references to the high level of criminality the conduct involved and the adverse impact on many vulnerable victims.

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[29] HB, 2330 at [11].

39. Finally, in the course of his oral evidence, Mr KC referred in passing to approximately $9000 in traffic fines being waived by Victorian authorities when he was imprisoned. Mr KC said that these fines had been incurred largely through his use of mobile telephones while driving. Also, Mr KC mentioned that he had accrued approximately $80,000 in unpaid taxation liabilities and penalties since approximately 2016. Although this evidence is before me through Mr KC's oral evidence, and I take it into account, it is not the subject of documentary evidence, other than correspondence confirming the waiving of an unspecified amount of outstanding fines, and the particulars are no more detailed than Mr KC's oral evidence. The information Mr KC provided in terms of his other conduct in Australia in accruing substantial fines over what must be incorrigible poor and dangerous traffic conduct given the amount he says was waived, and disregard for his obligations to the community to pay his taxes reflects very poorly on Mr KC.

40. Below at paragraphs 48 - 51 I address a submission made on behalf of Mr KC addressing whether the existence of a gambling disorder reduces the seriousness of his offending. Those remarks are equally applicable to my consideration of this issue. Overall I view the evidence available regarding the nature and serious of Mr KC's criminal offending and other conduct as serious for the purposes of the Direction.

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

41. The Tribunal must also consider the risk to the Australian community should the Applicant commit further offences. Clause 8.1.2 of the Direction states, in part:[30]

> (1) In considering the need to protect the Australian community (including individuals, groups or institutions) from harm, decision-makers should have regard to the Government's view that the Australian community's tolerance for any risk of future harm becomes lower as the seriousness of the potential harm increases. Some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk that it may be repeated may be unacceptable.
>
> (2) In assessing the risk that may be posed by the non-citizen to the Australian community, decision-makers must have regard to, cumulatively:

[30] See also the Direction, cl 8.1(2)(b).

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

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

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

ii. evidence of rehabilitation achieved by the time of the decision, giving weight to time spent in the community since their most recent offence (noting that decisions should not be delayed in order for rehabilitative courses to be undertaken). …

42. This requires an assessment of the nature of the harm should the Applicant engage in further criminal or other serious conduct.[31] It also requires an assessment of the likelihood of the Applicant engaging in such conduct.[32] There is no statutory constraint on the way that risk is assessed by the decision-maker other than that there must be a rational and probative basis for the assessment.[33]

Nature of the harm

43. I have found that Mr KC's conduct was serious and has had a profound and adverse impact on a large number of vulnerable victims. Should Mr KC engage in further criminal conduct of a similar nature, the nature of the harm would likewise be serious.

44. In particular, aspects of Mr KC's conduct that involved the calculated targeting of vulnerable people in circumstances of limited empathy towards his victims,[34] to the point that the sentencing judge observed that Mr KC's 'job' in the phase of his life when he was offending involved 'tricking trusting fellow Nepalese countrymen into parting with their hard earned money'[35] tends to underscore the harm, in the sense of the gravity of consequence, that would be faced by vulnerable members of the community should Mr

[31] The Direction, cl 8.1.2(2)(a).
[32] Ibid cl 8.1.2(2)(b).
[33] See *BSJ16 v Minister for Immigration and Border Protection* [2016] FCA 1181, [68] per Ovshinsky J; *Hambledon v Minister for Immigration and Border Protection* [2018] FCA 7, [41] per Kenny J.
[34] As observed by the sentencing judge at HB, 2334 at [33].
[35] HB, 2335 at [35].

KC embark again on such a course of conduct. At the time of his offending therefore, it is apt to view Mr KC as having been a predator on vulnerable people.

45. I am confident to conclude that any real risk, in the sense of likelihood, that the Australian community would again be exposed to such predation and harm at the hands of Mr KC is unacceptable.

Likelihood of the conduct being repeated

46. I have taken into account the observations of the sentencing judge as to the likelihood of Mr KC engaging in further criminal conduct. In accordance with submissions made on behalf of Mr KC however, I observe that the sentencing judge does not refer to any expert psychological evidence regarding psychological factors that may amount to criminogenic causes of Mr KC's offending, or offering a predictive opinion about the likelihood of reoffending. The psychological evidence available to me post-dates Mr KC's sentencing. This observation however should not be understood to reduce the weight to be attached to the observations in the sentencing remarks, as they are clearly well founded having regard to the details of the offending and impact on the victims. What it does mean however, is that I must reflect carefully and place due weight on the psychological opinions now before me pertaining to criminogenic factors, how they might be addressed, and the prospects of rehabilitation and likelihood of repeat offending.

47. For context, expert psychological opinion before the Tribunal expresses the opinion that Mr KC had a gambling addiction at the time of his offending, a condition that is in remission at the current time. That opinion is expressed both by Ms Ferrari, Forensic Psychologist, in her report of 25 September 2022,[36] and by Dr Milic in his reports of 18 February 2025,[37] and 12 March 2025.[38] It was also elaborated upon and tested in Dr Milic' oral evidence. Ms Ferrari did not give oral evidence to the Tribunal, but Dr Milic did.

48. The sentencing judge was also aware that gambling issues were at play in relation to Mr KC's offending but remarked that Mr KC's criminal conduct was not really explained by

[36] HB, 2410 at 2418.
[37] HB, 440-445.
[38] HB, 423.

any gambling issue,[39] and further observed that it was in no way mitigatory that [Mr KC] offending to fund his own gambling addiction.[40] The sentencing judge observed that it had not been suggested that there should be any reduction in Mr KC's moral culpability (in the context of remarks regarding Mr KC's gambling addiction), a position with which his Honour clearly agreed, describing the conduct as despicable and serious calculated criminal conduct.

49. Counsel on behalf of Mr KC developed submissions to the effect that if a non citizen's criminal offending is associated with and linked to a mental health disorder, then it's open to me to offset the adverse weight and moral culpability of the offending because of the connection between the mental health disorder and the criminality. In this regard, counsel for Mr KC cited *Mukiza and Minister for Home Affairs* [2019] AATA 4445 (1 November 2019) at [44]:

> *On that basis, it is proper to conclude, in accordance with well accepted principles of criminal justice, the criminal behaviour of a person who is affected by mental illness and whose mental health contributed to his offending in a material way, should be regarded as less culpable than an ordinary person so unaffected:* R. v Hemsley [2004] NSWCCA 228 *at [33] per Sperling J. The Tribunal takes the view that this is the proper approach to take when considering the seriousness of the Applicant's offending.*

50. I do not doubt the principles referred to by the Tribunal in that authority and the rationale in the authorities cited. However, while I accept it is open for me to recognise that the existence of a mental health disorder reduces the level of culpability, it will always be a matter of fact and degree. Not all criminal offending is the same and nor is the impact on mental health disorders on behaviours, moral culpability and the seriousness of criminality the same.

51. In *Mukiza*, the Tribunal was dealing with an applicant diagnosed with schizophrenia who was also using illicit drugs. The nature of the offending under consideration, generally speaking, might be described as impulsive (theft of automobiles and police chases). The Tribunal in that case found that the entirety of the applicant's offending had its foundation in the Applicant's schizophrenia. Generally speaking, I recognise that schizophrenia is a

[39] HB, 2335.
[40] HB, 2339.

mental health disorder impacting on perceptions of reality, manifesting in a wide variety of ways.

52. In Mr KC's case, I respectfully consider the sentencing judge's observation that Mr KC's gambling addiction was a context, and in no way reduced his moral culpability was an observation with which I find myself agreeing having regard to the calculated and targeted nature of the offending. I accept it is open to me to recognise that a mental health disorder may reduce the level of culpability, but I do not accept that it does in Mr KC's case, having regard to the nature of his mental health diagnosis, and the elements of his behaviour over a protracted period of time that earned the sentencing judge's condemnation in the terms expressed.

53. In relation to remorse, the sentencing judge accepted there was some limited remorse but did not consider it fulsome. Turning to the prospects of rehabilitation, the sentencing judge observed the absence of previous offending, but did not view the conduct as transitory poor behaviour.[41] Nonetheless, the sentencing judge ultimately accepted a submission that Mr KC's prospects of rehabilitation should be viewed as positive, recognising the time Mr KC had to reflect on his conduct, and some family support which his Honour perceived to be 'not unconditional'.[42]

54. Turning to the expert psychological evidence on the risk of Mr KC re-offending, Ms Ferrari opined that the risk was low, noting Mr KC had no prior convictions, no history of antisocial acquaintances, criminal attitude or belief system, historical or current substance abuse, stable psychosocial circumstances or any current issues with self-regulation, problem solving, risk-taking behaviour, impulsivity or psychopathy.[43] Ms Ferrari further observed that Mr KC had engaged in appropriate interventions since the offence. In relation to anti-social behaviour, Ms Ferrari considered Mr KC did not demonstrate anti-social behaviour, although Ms Ferrari's articulation of that conclusion[44] was difficult to reconcile with the objectively identified circumstances of the offending, other than the absence of impulsivity. I am conscious I have been unable to put those concerns to Ms Ferrari or seek clarification.

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[41] HB, 2335.
[42] HB, 2335.
[43] HB, 2417, 2419.
[44] HB, 2419 at [91].

55. Similarly, Dr Milic opined that Mr KC's offences '*were most likely a manifestation of his gambling addiction*'[45] and observed that Mr KC's imprisonment and detention had a very aversive effect on him and has damaged his family, and that this would act as a deterrent to future gambling and offending. Dr Milic opined that Mr KC's prospects for rehabilitation were strong, albeit subject to a number of provisos, including living with his wife and daughter, not gambling, being open about any gambling relapses and, unhelpfully as to the question of risk in my view, working in a job where he does not have ready access to other people's money.[46]

56. Later in his evidence, Dr Milic confirmed that in his opinion Mr KC was suffering from gambling addiction at the time of his offences, but does not meet the criteria at the current time due to his situation. Dr Milic explained that he had not diagnosed Mr KC with gambling addiction by reference to the *Diagnostic and Statistical Manual of Mental Health Disorders-5*, because he was very familiar with gambling disorder and did not need to refer to that publication. When invited to express an opinion as to whether Mr KC met the DSM-V criteria for gambling disorder at the time of the offending, Dr Milic said he considered that he did. In response to the Tribunal's questions, Dr Milic also confirmed his opinion that gambling disorder was the causative criminogenic factor leading to the offences.

57. Dr Milic was asked to elaborate on what other criminogenic factors he had considered in concluding that the offending was 'most likely' the manifestation of a gambling addiction.

58. In explaining why he had used that language, Dr Milic explained that stress and anxiety might separately influence the offending, perhaps via gambling – adding that no causal analysis in mental health can be definitive. In response to a line of questions exploring whether it could be said that Mr KC's gambling addiction had been or could be cured, Dr Milic explained that there was a school of thought to the effect that gambling addiction could never be cured but only placed into remission, but he argued that sustained remission would be as good as a cure for someone who hadn't gambled for several years, and hadn't had cravings or distress from managing those cravings. Dr Milic went on to observe that there was not much opportunity to gamble in prison, but a gambling addiction

[45] HB, 444.
[46] Ibid.

was more likely to be put to the test in immigration detention where detainees have access to smart phones. Dr Milic also recognised that the gambling addiction currently in remission would be put to the test in the community.

59. I refer again to my concerns about Ms Ferrari's report regarding her perception of the absence of anti-social behaviour being inconsistent (to me) with the circumstances of the offending. Fortunately, I was able to ask Dr Milic to specifically consider and comment on the observations of the sentencing judge regarding Mr KC's sustained and calculated conduct, and the lack of empathy towards his victims. Having regard to those remarks, I asked if Dr Milic considered a personality disorder may be present.

60. Dr Milic considered the lack of empathy could be regarded as an enduring trait or it could be regarded as a defence mechanism, where people can blunt their feelings of empathy to cope with bad feelings about things that they have done. They can also be a manifestation of an antisocial personality disorder or a tendency towards psychopathy. Further as to whether a personality disorder may be in play, Dr Milic observed that Mr KC's history was fairly unremarkable, and just seemed to be an ordinary person prior to the offending and gambling. Dr Milic said that a personality disorder may have been latent, but if so it would not have been a severe personality disorder.

61. As to the provisos set out in his report identifying strong prospects of rehabilitation, Dr Milic conceded that the inclusion of a proviso that Mr KC not have access to other people's money could be understood to mean that Mr KC was not to be trusted with other people's money. Dr Milic explained having access to money was a risk factor for relapse. Dr Milic explained that his identifications of risk for Mr KC were both situational and innate – emphasising that the punishment inflicted on Mr KC would have had an aversive effect and Mr KC had gained some skills through his participation in rehabilitative courses.

62. Under cross-examination, Dr Milic was asked if he would be concerned if there was evidence or a suggestion that Mr KC had engaged in gambling while in prison. Dr Milic explained it would concern him and be a sign of a relapse, and the question then would be whether it was a minor step back or a return to full blown addiction and loss of control. A lack of honesty and openness in dealing with a relapse could lead to bigger lapses.

63. The foundation for this question in cross examination can be found in the Hearing Book page 1295, an incident report date 30 August 2023 where correctional staff have documented discovering buprenorphine patches, other contraband, mobile phone numbers and betting slips when searching a cell in which Mr KC was present with others, documented to suggest that the other prisoners were standing around Mr KC and watching what he was doing. Mr KC is documented to have pleaded guilty at a Governor's disciplinary hearing in respect of a 'drug offence' on 5 September 2023. Mr KC, under cross examination, had denied involvement in gambling in prison.

64. When Dr Milic was asked whether it would affect his assessment as to the prospects for rehabilitation if he were to assume that there was evidence of gambling activity in prison in 2023, Dr Milic said he would put less weight on evidence of a relapse in 2023 as it was at an early stage in his recovery, but in general it would count against his prospects for rehabilitation.

65. Turning to Mr KC's own evidence relevant to the likelihood of reoffending, in his statement,[47] Mr KC points to engaging in extensive rehabilitation to address what he sees as the underlying cause of his offending: his gambling addiction. Mr KC says he has completed 16 sessions at Geelong and a further 12-13 session with Anglicare to address his gambling-related issues. Mr KC also says he has participated in an alcohol and other drugs course while in prison despite not having a drug problem.

66. However, it is necessary to again note that prison records document an incident of a positive urine sample for buprenorphine (and a number of negative urinalysis results) and a number of incidents where buprenorphine contraband was found either in Mr KC's possession or in his proximity.[48] I disregard as insignificant a single incident of non-illicit contraband medication being found in Mr KC's cell. On balance, while there is evidence of some illicit drug use and possession in prison, I recognise it is not extensive. The possession or at least presence of buprenorphine patches in conjunction with the discovery of betting slips is of more significance in my view on the question of rehabilitation, criminogenic factors and the potential risk to the Australian community of reoffending.

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[47] HB, 407-408 at [9]-[13].
[48] HB, 1291, 1295, 1299.

67. Mr KC says the impact of imprisonment and detention on him has been painful and has caused him to deeply regret his past actions and come to understand the value of his family. He says he has worked hard to rehabilitate himself and is committed to never reoffending.

68. Mr KC's wife, Ms "A", also gave evidence relevant to the risk of Mr KC reoffending. She says that Mr KC has expressed deep remorse to her since he was taken into custody, and has fully acknowledged his wrongdoing. She believes his remorse is genuine and explains that the focus in their regular conversation is how they will rebuild their family life.

69. Similarly, Mr KC's sister-in-law, Ms "BA" explained that she is convinced Mr KC had turned his life around and no longer has issues with gambling, expressing her confidence that Mr KC will not commit further offences in Australia.

70. I have also had regard to a statement from the Applicant's friend, Mr "KS" and note he says he met Mr KC while in prison in 2023, and expresses his confidence that Mr KC is genuinely remorseful, is not a violent person and that he has witnessed his determination for change.

71. I have also had regard to a statement of Mr "SQ", former co-worker and now friend of Mr KC, who says he has known Mr KC since 2016. Mr "SQ" believes Mr KC is genuine in his remorse, although acknowledges he does not have detailed knowledge of Mr KC's criminal matters.

72. As to rehabilitative courses and education during Mr KC's period of incarceration, I have examined the Correction Victoria records from pages 1445 to 1583 of the Hearing Book detailing Mr KC's interactions with prison staff in addressing goals and participation in prison activities. Some apparently automated records suggest Mr KC had low levels of attendance,[49] but these issues were not explored at the hearing and I am not satisfied to trust or interpret automated file notes of this nature.

[49] See, for example: HB, 1449 and 1450.

73. Documentary evidence indicates Mr KC completed a 6 hour '*Tuning into Respectful Relationships*' programme,[50] an '*ATLAS*' program (pertaining to adaption into the prison system), [51] courses in workplace safety, prepared a learning plan and language, literacy and numeracy.[52]

74. Correspondence from Mr John Hall of Anglicare Victoria confirms Mr KC participated in the Gambler's Help Program, [53] and engaged consistently and 'far more than an average client'. Mr Hall considered Mr KC had demonstrated insight and a capacity for change, a willingness to accept and learn from his mistakes and acknowledged the harm his gambling had caused his family and the community.

75. Mr KC also attended gambler help counselling sessions via Zoom with Bethany Therapeutic Services,[54] discussing his gambling history, desire to make changes and identifying resources to make change.

76. Mr KC has also engaged in financial counselling with Catholic Care Victoria to address matters such as his unpaid taxation debt. Submissions advanced on behalf of Mr KC also point to other vocational courses such as IT, horticulture and forklift licensing.

77. I recognise also that there are potentially important protective factors to drive Mr KC's motivation to avoid further offending. Mr KC's motivation to re-join his wife and daughter cannot be understated, and indeed it is a clear theme of his interactions with prison counsellors and representations to the Department and the Tribunal. It was a defining feature of his oral evidence to the Tribunal.

78. Overall, I accept that Mr KC had gambling disorder at the time of his offending. As noted by the sentencing judge, the gambling disorder was a context to his offending. Later, his Honour described the context as a 'hollow one'.[55] With the benefit of the expert opinion evidence now before me I proceed on the basis that while a context, it is no 'mere'

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[50] HB. 1564.
[51] See, for example: HB, 1668.
[52] HB, 1650.
[53] HB, 2449.
[54] HB, 2371.
[55] HB, 2333 at [25].

context, but rather it is an important context. I remain troubled however by the features of the offending that also troubled the sentencing judge, namely the sustained criminality and lack of empathy for vulnerable victims. I have reflected carefully on Dr Milic's evidence suggesting that this may have been a defence mechanism, and to the extent that it has exposed a latent personality disorder (if at all) any such personality disorder is minor. I accept Dr Milic's evidence in this regard.

79. Recognising that the existence of a gambling disorder is, in the opinion of the expert evidence before me, the primary criminogenic factor in Mr KC's offending I recognise that Dr Milic's opinion that Mr KC has strong rehabilitative prospects in that regard is important in understanding the overall risk (in the sense of likelihood) of Mr KC repeating similar conduct. After listening carefully to Dr Milic's evidence about his choice of language in describing his opinion in this regard, and his elaboration on the provisos he has identified I find myself continuing to hold reservations. I am concerned that there is evidence that Mr KC was involved in gambling activity while in prison. I am concerned that a proviso that he not have access to other people's money tends to undermine the persuasiveness of the expressed opinion that there are strong prospects of rehabilitation and I am most concerned, in the context of protecting the Australian community, that the remission of the criminogenic condition is the product of Mr KC's ongoing incarceration and is therefore untested in the community.

80. I recognise that Mr KC has undertaken a range of rehabilitative activities while in prison, with his attention to gambling problems being the most relevant. I also accept that Mr KC's experience in prison, his now fragile migration status and his motivation to return and remain with his wife and daughter are all powerful factors acting upon him to discourage repeat offending.

81. The sentencing judge viewed Mr KC's prospects of rehabilitation as positive, but those remarks read in context are hardly emphatic. Ms Ferrari opined that the risk of Mr KC reoffending was low. Dr Milic opined that Mr KC had strong prospects of rehabilitation subject to the provisos that have caused me concern. Both psychologists identified gambling disorder as extant at the time of Mr KC's offending, and I identify gambling disorder as the primary criminogenic factor – but by no means an excuse or a factor operating to reduce the seriousness of the offending or the culpability. On balance. I consider that the evidence points to an assessment of the risk of repeat conduct of a

similar nature as low. However, I do not ascribe to the label 'low' any notion of the risk being trivial, unreal, or at a background level to the risk generally present in the community. As mentioned above, Mr KC's conduct was sustained, calculated and lacking in empathy as vulnerable victims were targeted. His remission is untested and there is evidence of a relevant lapse in relation to the primary criminogenic factor. I consider the risk is low, but real – and a risk to be guarded against in protecting the Australian community from the serious criminal conduct Mr KC has perpetrated.

82. I assess Mr KC's criminal conduct to be serious, and the nature of the harm to the Australian community should he reoffend as serious, such that any real risk of that conduct being repeated is unacceptable. I have identified after careful analysis a low but real risk, in the sense of likelihood of such conduct being repeated.

83. Subject to the overall evaluative process with which I am charged, my consideration of the primary consideration of the protection of the Australian community weighs very heavily against revoking the decision to cancel Mr KC's visa.

Family violence committed by the non-citizen

84. Clause 8.2 of the Direction provides that decision-makers, such as the Tribunal, must have regard to family violence perpetrated by the non-citizen when deciding whether to revoke a visa cancellation decision.

85. There is no evidence that Mr KC has perpetrated family violence. This consideration is therefore not relevant.

The strength, nature and duration of ties to Australia

86. This consideration requires the Tribunal to have regard to the strength, nature and duration of the Applicant's ties to Australia. Clause 8.3 of the Direction provides that:

> (1) Decision-makers must consider any impact of the decision on the non-citizen's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely.

(2) Where consideration is being given to whether to cancel a non-citizen's visa or whether to revoke the mandatory cancellation of their visa, the decision-maker must also consider the strength, nature and duration of any other ties that the non-citizen has to the Australian community. In doing so, decision-makers must have regard to:

a) how long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that:

i. less weight should be given where the non-citizen began offending soon after arriving in Australia; and

ii. more weight should be given to time the non-citizen has spent contributing positively to the Australian community

b) the strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia.

Immediate family

87. Mr KC's spouse, Ms "A" and daughter "S" constitute his immediate family. Mr KC also has close familial links with his sister-in-law's family consisting of his sister-in-law Ms "BA", her two children "P" and "O" and presumably her husband. All are Australian citizens. For the purposes of considering the strength, nature and duration of Mr KC's ties to Australia, I proceed on the basis that Ms "BA" and her family also form part of Mr KC's immediate family, noting the evidence elaborated upon below about the closeness of the two households.

88. I will consider the circumstances of "S", "P" and "O" under the next primary consideration, as all are minor children in Australia.

The Applicant's Wife: Ms "A"

89. Ms A provided written statements and gave oral evidence to the Tribunal.[56] She explains that she and Mr KC married legally in 2007 and culturally in 2012. In evidence, Mr KC explained that the delay between the two events arose because he was from a lower

[56] See, for example: HB, 2378 (dated 4 May 2022); 2389 (undated); 411 (dated 10 February 2025).

caste, and the marriage could progress only after he had become more successful. Ms A secured a student visa in 2008 and Mr KC arrived in Australia as a secondary visa holder to her. Their daughter was born in 2016 after medical intervention and she started working as a nurse in 2017.

90. Ms A speaks to her husband daily by telephone. She has experienced extreme emotional turmoil and feels anxious, depressed and overwhelmed by the responsibilities of single parenthood. She works 76 hours per week, saying this schedule is necessary to meet her daughter's needs as she is now the sole breadwinner. Ms A also has responsibilities to support her parents who are currently in Australia as the holders of visitor visas, and they require access to medical care, and Ms A must meet the full cost.

91. Under cross examination, it was established that Ms A earned a relatively high income, no doubt because of her extraordinary working hours as a graduate nurse working in mental health. In light of her evidence about her expenses, I accept the submission from the Respondent that the financial impact on her due to Mr KC's incarceration does appear to be overstated. I note that Ms A acknowledged she had accrued some savings and gave evidence that she had been able to take her daughter on a holiday. I accept the financial hardship may be overstated and the justification for Ms A working such excessively long hours with the resultant stress and exhaustion becomes somewhat elusive.

92. Ms A described in her statements her shock at Mr KC's arrest. He had started opening up to her about his gambling problem a few months after being arrested. She said he had mentioned that his business was not doing very well, and he had made a contract under pressure with the Nepalese community, and he was very distressed. Ms A said there was a cultural taboo against gambling in Nepal. She had felt something was wrong but didn't know what it was.

93. She had received threats from members of the Nepalese community as early as 2018. The Police did not assist. A brick was thrown through the window. When Mr KC was arrested, she was shocked to learn the allegations and subject of the threats were true. She sees that Mr KC's hiding of things from her at the time were to protect her.

94. Ms A said Mr KC supported her and their daughter from the day she was born. She says she has forgiven him and she trusts him. She will not divorce him even if he returns to

Nepal. If Mr KC is removed from Australia, she and her daughter will not accompany him, but she will stay in Australia with a broken heart. She accepts that she may visit him from time to time if he were to return to Nepal.

95. If Mr KC is permitted to remain in Australia, Ms A said she does not anticipate he will work immediately, but instead he will provide care to their daughter. She has savings to allow this to happen. Ms A expects her husband would return to work eventually.

96. In relation to the impact of the decision on her, Ms A said she works almost 17 hours per day, does not get enough sleep, gets anxious and angry and cries in front of her daughter. If Mr KC was home, he could spend time with their daughter and she could get some sleep. She currently has some assistance with childcare from her parents, but will lose this when they return to Nepal. She does not think she can continue as things are. If Mr KC returns to Nepal, Ms A considers her life will be dysfunctional. Ms A believes she has anxiety and depression, but has not sought treatment because she considers the side effects of any drugs might affect her capacity to maintain her demanding work schedule. I note there is no medical diagnosis in respect of Ms A's mental health.

97. Dr Milic provided a report in relation to Ms A. In his report, he describes Ms A as experiencing 'distress'. I suggested to Dr Milic that this language was not demonstrative of a psychological diagnosis, and Dr Milic confirmed that to be so. Dr Milic also accepted my proposition that it would be inappropriate to identify a mental health diagnosis following a 17 minute telephone conversation with Ms A. Ultimately Dr Milic' report in relation to Ms A offers limited assistance in understanding the impact on the decision on Ms A beyond what Ms A was able to articulate to me directly. I accept she is distressed at her predicament. I consider the other opinions expressed by Dr Milic in this report, that she will lose years off her lifespan because of her stress, and she would be at risk of suicide if it were not for her daughter, are speculative and uninformative in the absence of a medical diagnosis. Such opinions are not accepted on the basis of a 17 minute phone conversation with Ms A.

98. I do however accept that Ms A is distressed and exhausted on the basis of her evidence to that effect. I accept that she is committed to her marriage with Mr KC and sees direct and immediate relief should Mr KC be permitted to remain in Australia and return to the family home.

99. I find that Ms A will be profoundly and adversely impacted by a decision not to revoke the cancellation of the visa. Such a decision will mean that her family will not be reunited in Australia as is her wish, and she will not have access to the emotional and perhaps ultimately financial support from her husband.

The Applicant's Sister-in-Law: "Ms BA"

100. Ms BA is Ms A's sister. She is employed full-time in the retail sector. She describes Mr KC as one of the biggest supports in her life, emotionally and practically. In her statements,[57] and evidence, she described the strong familial bond between her household and Ms A and Mr KC's household, explaining that her children use a Nepalese term for 'Daddy' to refer to Mr KC. I accept her evidence as to the closeness of the two families.

101. In relation to the impact of the decision on her, she described her very close relationship with her sister, and said that his presence is crucial for the well-being of his wife, child and extended family, referring to her own family.

102. I find that Ms BA will be somewhat adversely affected by a decision not to revoke the decision to cancel Mr KC's visa but recognise that the bulk of her evidence was expressing concern for her sister and niece.

"Ms BA's husband"

103. Although not put forward as an immediate family member whose circumstances I should take into account, the evidence before me as to the closeness of the relationship between the two households suggests that it would be appropriate for me to turn my mind to the impact of the decision on him, albeit I have no direct evidence from him.

104. Ms BA explained that she, her husband, Ms A and Mr KC once all lived together prior to building her house. Also, in her statement, Ms BA explained that Mr KC had helped her get married, so I understand Ms BA may have been introduced to her husband through Mr KC. This underscores the closeness of the two households.

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[57] HB, 417, 380.

105. In her first statement, Ms BA mentioned that her husband is jealous of her and her sister's bond, and would not let her look after her niece ("S").[58] Ms BA explained in her oral evidence that when Mr KC was taken away her husband expressed views that their reputations had been tarnished, but he no longer holds those beliefs. She said every now and then her husband speaks of supporting Mr KC and regretting the impact of the circumstances on his niece.

106. Although the information is limited, I consider that the impact of a decision to refuse to revoke the decision to cancel Mr KC's visa will be somewhat adverse to Ms BA's husband, with the adversity arising primarily due to the closeness of the two households and the support Ms A and "S" may require from his household.

107. Overall, I consider the impact of the decision of Mr KC's immediate family members in Australia will be profoundly adverse in the case of Ms A, and somewhat adverse in the case of Ms BA and her husband.

108. I must also consider the strength, nature and duration of other ties Mr KC has to the Australian community. In doing so I must have regard to how long Mr KC has resided in Australia, including whether he arrived as a young child, with more or less weight being given depending on whether the non-citizen began offending soon after arriving in Australia and where the non-citizen has spent time contributing positively to the community, and the strength nature and duration of any family or social links with Australian citizens, permanent residents or people with an indefinite right to remain in Australia.

109. There is limited evidence of ties to the Australian community beyond Mr KC's immediate family. In his personal circumstances form Mr KC said that he had always helped the Nepalese community for Nepali programs,[59] but no one was willing to give references. This is unsurprising in the circumstances. A barely legible certificate from the Federation of Handicraft Associations of Nepal was provided,[60] but it appears to be Nepalese in origin. It is of little weight in any event.

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[58] HB, 2380.
[59] HB, 2365.
[60] HB, 2452.

110. In her evidence, Ms A mentioned Mr KC having previously obtained an award from Nepal in 2013 and 2014 as he had been a successful businessman. Mr KC said in his evidence that before his addiction he would help the Nepalese community by helping people to find a job or housing upon arrival in Australia. He ultimately said he had helped over 100 people in this way. Mr KC conceded he is now estranged from the Nepali community.

111. In the absence of corroborating evidence, I am not satisfied that Mr KC provided assistance to newly arrived Nepalese persons in any philanthropic way. It would be inappropriate to accept Mr KC's evidence in this regard without corroboration given the nature of his offending.

112. Mr KC first arrived in Australia on 8 March 2008, thereafter holding a series of temporary visas and bridging visas until 8 November 2017 when he was granted a permanent visa. For the purposes of cl.8.3(2), I proceed on the basis that Mr KC has resided in Australia from the time of his first arrival, as that is the most favourable interpretation of the mixed language used in the Direction. I accept that Mr KC has resided in Australia for some 16 years.

113. Mr KC did not arrive in Australia as a young child, but I accept that it cannot be said that he began offending soon after arriving in Australia. I accept there were a number of years of employment and apparently successful business operation before the offending began. However, as mentioned above, I have limited evidence of positive contribution to the Australian community. What limited evidence there is suggesting a prior contribution to the Nepalese community in Australia is uncorroborated and would, in any event be greatly reduced in weight given the nature of his offending. Similarly, what limited contribution might be identified from Mr KC's successful operation of a business must be reduced given his failure to comply with taxation obligations resulting in the substantial indebtedness to the Australian Taxation Office he disclosed in his evidence.

114. On balance, the strength, nature and duration of Mr KC's ties are substantial having regard to the adverse impact on Mr KC's immediate family members, and in particular his spouse. I afford this consideration significant weight in favour of revocation of the cancellation of the visa, subject to the overall evaluative process I am to undertake.

115. I do not consider Mr KC's other ties increase the favourable weight to be attached to this consideration. In reaching this view, I have read and considered the statements of other persons in the material before me: Mr "KS",[61] Mr "SQ"[62] and Mr "SS"[63].

Best interests of minor children in Australia affected by the decision

116. Paragraph 8.4 of Direction No 110 requires the Tribunal to consider the best interests of minor children in Australia affected by the decision. Under paragraph 8.4, the Tribunal must make a determination whether cancellation or refusal under s 501, is or is not, in the best interests of children who are under 18 at the time the decision is expected to be made.

117. Mr KC has a daughter, "S". I am also asked to take into account the best interests of Mr KC's niece and nephew, "O" and "P". On the evidence before me, I consider "O" and "P"'s best interests and circumstances do not materially differ, but their circumstances are different to "S".

118. Clause 8.4(4) of the Direction goes on to outline the factors that a decision-maker must consider when determining the best interests of a child affected by the decision where relevant. Those factors which include:[64]

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

[61] HB, 420-422.
[62] HB, 449-450.
[63] HB, 2450.
[64] Direction no. 110, cl 8.4(4)(a)-(h).

- any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);
- evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the non-citizen, or has otherwise been abused or neglected by the non-citizen in any way, whether physically, sexually or mentally; and
- evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

The Applicant's Daughter: "S"

119. "S" is currently 9 years old and is the biological daughter of Mr KC and Ms A. She lives with Ms A and has regular telephone contact with Mr KC. S has not visited Mr KC in prison because she is unaware that he has been in prison and immigration detention with the possibility of removal from Australia. She has been told he is overseas for work and that his documents had expired. When Mr KC was first arrested, she was much younger, and her parents thought it best she not be told of the circumstances.

120. Ms A relies on her parents who are currently in Australia to assist with care and supervision of "S" and has also relied on support from her sister Ms BA.

121. Mr KC says in his statement that his daughter has been deeply affected by his absence and has struggled emotionally during his incarceration.[65]

122. Ms A says that her daughter is in a crucial stage of her development and need regular parental guidance, attention and emotional support. Ms A concedes she struggles to spend quality time with her daughter given her long working hours. Ms A says "S" repeatedly asks when her father is coming home and her inability to give a clear answer has been heartbreaking.[66] In her oral evidence she confirmed that Mr KC and A are very close, and Mr KC had been a very good dad when he was with her and would take her to all of her activities. Ms A is not always able to take S to her activities given her work commitment.

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[65] HB, 407 at [5].
[66] HB, 413.

123. In the even that Mr KC had to leave Australia, Ms A said that she would do her best to continue to foster the relationship Mr KC has with his daughter. Visits to Nepal would be difficult because it may require taking "S" out of school.

124. Ms BA says that Mr KC's presence is crucial for the wellbeing of A. Ms BA also said that "S" uses the same term to refer to her husband as her children use to refer to Mr KC.

125. I have no expert opinion evidence specifically addressing "S"' circumstances or expressing an opinion regarding the impact of separation from Mr KC. Ms Ferrari identifies research highlighting that children deprived of paternal contact may experience emotional insecurity, diminished self-esteem and long-term mental health challenges. I accept prolonged separation of the kind that will be brought about by refusing to revoke the decision to cancel the visa will impact "S" adversely.

126. I find that the nature and duration of the relationship between "S" and Mr KC is very substantial, parental and has consists of ongoing meaningful contact. I accept the evidence of Mr KC's attentive parental role during "S"'s early childhood and the evidence of ongoing regular meaningful contact.

127. I consider that Mr KC would be likely to play a positive parental role in the future, and Mr KC is able to provide a positive influence and role model before "S" turns 18. A decision to refuse to revoke the cancellation of the visa will substantially reduce the role Mr KC can play in "S"' childhood and diminish his capacity to positively influence her as she grows up.

128. There are no relevant restrictions or court orders affecting Mr KC and "S".

129. Mr KC's prior conduct is not of a nature to have had a direct impact on "S" in itself, other than obviously the conviction and penalty has resulted in Mr KC's incarceration and immigration detention and separation from "S". Mr KC and Ms A will face an almost unimaginable difficulty in explaining to "S" the reality of Mr KC's absence for the previous years.

130. In the event that Mr KC and "S" were to be separated through Mr KC's removal from Australia, I am satisfied the impact will be profoundly adverse having regard to the

closeness and parental nature of the relationship. While some amelioration to the impact of separation arises given Mr KC has been physically absent for a number of years, I accept the transition to this being a practically permanent situation will be adverse to "S". While it is true that contact can be maintained electronically and perhaps through irregular visits of "S" to Nepal (or India, or some other third country), I consider that contact of that nature will not be an ample substitute and the effect of any separation will remain profoundly adverse to "S".

131. Ms A fulfills a parental role in respect of "S", and I note in that regard she has described how difficult it has been for her to do this on her own. I note "S" also benefits from the presence of her grandparents at the current time, and a close relationship with her aunt and cousins. "S"' grandparents hold temporary visas for Australia and may or may not be able to remain longer term.

132. "S"' views are not known beyond what may reasonably be implied from Ms A's evidence to the effect that she regularly asks when her father will be coming home. I proceed on an assumption that "S" would very much prefer the decision to cancel her father's visa to be revoked so he may re-join the family in Australia.

133. There is no evidence of "S" experiencing any relevant trauma arising from Mr KC's conduct, and no evidence of family violence in this matter.

134. I find that "S"'s best interests are served by revoking the decision to cancel Mr KC's visa so as to permit Mr KC to remain in Australia with her and her mother. Subject to the overall evaluative exercise with which I am engaged, "S"'s best interests in this regard weigh very heavily in favour of revoking the decision to cancel Mr KC's visa.

The Applicant's Niece & Nephew: "O" and "P"

135. "O" and "P" are Ms BA's children and Mr KC's niece and nephew. "P" is 7 and "O" is 3. "O" was born after Mr KC's incarceration.

136. Ms BA says that Mr KC played a significant role in raising "P" as they lived in the same household. Mr KC would provide care for "P" when she was working. Ms BA said both her children have a close relationship with MR KC and refer to him with a term translated as

'Daddy' in recognition of the closeness of his role. Ms BA believes it to be very important that her children maintain their relationship with Mr KC.

137. I find that the nature and duration of the relationship between "O" and "P" is of reduced substance compared to "S" having regard to their ages and the time when Mr KC was taken into custody, and the nonparental nature of their relationship. Nonetheless, accepting the evidence of the closeness of the two households, I accept that there is potential for the relationship to be substantial, albeit avuncular in nature and non-parental. I accept the evidence given regarding the cultural significance placed on the relationship demonstrated by the use of a term that translates to 'Daddy' but I do not accept the relationship is therefore parental in nature. The relationship has the potential to become an avuncular relationship of substance, and I recognise the importance of positive relationships of that nature in the lives of children. Mr KC will not play a positive parental role in the future, as "O" and "P" have their parents.

138. Mr KC's conduct is not of a nature to have had adverse impact on "O" and "P".

139. Separation from Mr KC will have an adverse impact on "O" and "P" as it will reduce the avuncular relationship that might otherwise have developed. "O" and "P" will be able to maintain contact with Mr KC electronically and perhaps by infrequent visits to Nepal or another third country, if that is mutually desired and supported by their parents. This substantially reduces the adverse impact in the circumstances of "O" and "P".

140. There is no evidence of "S" experiencing any relevant trauma, and specifically physical or emotional trauma, arising from Mr KC's conduct, and there is no evidence of family violence in this matter.

141. I find that "O" and "P"'s best interests are served by revoking the decision to cancel Mr KC's visa, as to do so will allow them to recommence and commence regular contact with him and develop the positive avuncular relationship indicated by the closeness of the two families. This consideration, of itself, attracts some weight, but not so as to fundamentally change the overall very significant weight I have attached to this consideration having regard to the circumstances of "S", subject to the overall evaluative determination I am undertaking.

Expectations of the Australian Community

142. The fifth primary consideration requires the Tribunal to weigh the expectations of the Australian community. Paragraph 8.5(1) of Direction No 110 provides that the Australian community expects non-citizens to obey Australian laws while in Australia. The Direction goes on to state that 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 would not allow them to enter or remain in Australia.

143. Paragraph 8.5(2) directs that visa cancellation or refusal, or non-revocation of the mandatory cancellation of a visa, may be appropriate simply because 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.

144. Direction No 110 notes that the Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they raise serious character concerns through conduct, in Australia or elsewhere, of particular kinds. The paragraph directs that, in particular, the Australian community expects that the Australian Government should cancel a non-citizen's visa if they raise serious character concerns through specific conduct listed in sub-paras 8.5(2)(a)–(f). Those particularised types of harm generally reflect the types of conduct identified in para 8.1.1 as conduct which is considered '*very seriously*' or '*serious*'.

145. Paragraph 8.5(3) of Direction No 110 further confirms that the stated expectations apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community. In doing so, para 8.5(3) arguably further qualifies the '*norm*' expressed in para 8.5(1), which refers to the '*unacceptable risk*' of conduct being engaged in. This makes it clear that a '*measureable* [sic] *risk*' of physical harm to the community is not required for the community expectation that the non-citizen not hold a visa to be engaged, where serious character concerns are raised through the persons conduct or offending.

146. This consideration will, in most cases, weigh against revocation of a cancellation decision if that expectation has been breached.

147. And indeed it squarely does in Mr KC's case. Mr KC has engaged in conduct identified in paragraphs 8.5(2)(c) by virtue of his convictions in the form of fraud and financial abuse against vulnerable people.

148. I have no hesitation in finding that the Australian community would expect that Mr KC's visa would remain cancelled on the basis of the expressed norms provided for in the Direction. I consider that the expectation of the Australian community weighs heavily against revocation in the context of the overall evaluative determination I am undertaking.

Other considerations

149. Paragraph 9 of Direction No 110 states:

> *(1) In making a decision under section 501(1), 501(2) or 501CA(4), the considerations below must also be taken into account, where relevant, in accordance with the following provisions. These considerations include (but are not limited to):*
>
> *a) legal consequences of the decision;*
>
> *b) extent of impediments if removed;*
>
> *d) impact on Australian business interests*

Legal consequences of decision under section 501 or 501CA

150. The Tribunal is required to consider the legal consequences of a decision on a non-citizen, including having regard to Australia's non-refoulement obligations in respect of unlawful non-citizens.[67]

151. While this consideration in Direction No 110 refers to non-refoulment obligations, it also makes reference to detention and removal, highlighting that there are a range of legal consequences of a decision not to revoke the cancellation of the Applicant's visa. The consequences of a visa refusal or cancellation under s 501 or related provisions include:

- Unlawful status;
- The likelihood of becoming subject to detention and/or removal;[68]

[67] Direction No 110 para 9.1.

- Refusal of other visa applications and cancellation of other visas;[69]
- A prohibition on applying for other visas;[70] and
- Periods of exclusion and special return criteria may apply.[71]

152. Generally, if a visa is cancelled its former holder becomes an unlawful non-citizen immediately after cancellation.[72] Under section 189 of the Act, the Applicant must be detained and removed as soon as reasonably practicable under section 198 of the Act.

153. If the cancellation of the visa is not revoked, and subject to the discussion below regarding Mr KC having raised a fear of harm if returned to Nepal, Mr KC will continue to be detained under section 189 of the Act for the purpose of effecting removal and will be removed from Australia to Nepal as soon as practicable under section 198 of the Act.

154. As his country of nationality is Nepal, and again subject to the discussion below regarding Mr KC's claimed fear of harm, there is no evidence of any practical difficulty in effecting removal to Nepal. I am satisfied that the legal consequences of a decision not to revoke the visa cancellation is that Mr KC will be removed to Nepal.

155. Section 501E of the Act operates to very substantially restrict Mr KC's ability to apply for another visa while in the migration zone. Furthermore, certain visas (indeed most classes of visa) are subject to special return criteria 5001(c) which provides for 'permanent' exclusion if a visa has previously been cancelled under section 501 of the Act and there has been no revocation under section 501CA, although special return criteria cease to apply if the Minister acts personally to grant a permanent visa to a person whose visa was cancelled under section 501 of the Act.

156. At the time of this decision, the law as to whether the operation of special return criterion 5001(c) amounts to a legal consequence of the decision appears to be somewhat unsettled. In this regard, I mention the decision of *Taulahi v Minister for Immigration and*

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[68] Migration Act ss 189, 196, 197C, 198.
[69] Migration Act s 501F.
[70] Migration Act s 501E.
[71] Migration Act s 503, special return criteria (**SRC**) 5001.
[72] Migration Act s 15.

Border Protection [2016] FCAFC 177; 246 FCR 146 and more recently *Rano v Minister for Home Affairs, Minister for Cyber Security* (2 September 2024) [2024] FCA 1003.

157. I understand that *Rano* has been appealed by the Respondent, but at the time of my decision it relevantly binds me. In that matter, the Court concluded that the applicant's indefinite exclusion from travel to, entry and (or) remaining in Australia was a legal consequence of a decision to cancel his visa…and [a]ccordingly was a consideration the Minister was bound to take into account (at [14]). However, the Court in *Rano* recognised that the outcome was an obvious outcome and was plainly intended from the overall statutory scheme. It was not necessary to expressly mention it because it looms large and forms part of the implicit, if not explicit, assumption and backdrop against which all considerations are to be evaluated.

158. As the practical operation of these provisions are currently understood to amount to a legal consequence of a decision not to revoke a visa cancellation, and in any event, I record for completeness that I am acutely aware of them and take them into account.

159. Mr KC has made statements raising non-refoulement claims in respect of Nepal, although in closing submissions counsel for Mr KC conceded that even accepting the evidence at its highest, it was a remote prospect that MR KC could establish a risk of harm. It was submitted that a non-refoulement claim could not be made and the approach envisaged by the Directions that consideration may be deferred to a protection visa claim was not established I the absence of probative evidence.

160. While ultimately I will conclude that the concession was appropriate, I have nonetheless engaged with the claims put forward by Mr KC in this regard to the level of detail envisaged by the Directions in circumstances where it is appropriate to recognise that Mr KC may apply for a protection visa, and if and when he does his claims will be assessed as required by section 36A of the Act before consideration is given to any character or security concerns, and that will take place in a process specifically designed for the consideration of non-refoulement obligations as given effect by the Act.

161. Mr KC's claims arise out of his offending. He says he fears for his life if returned to Nepal due to threats from individuals connected to his offending. He says his offences in Australia involved members of the Nepali community including individuals who are

powerful and potentially dangerous. He has received direct threats on social media, including Facebook, where pictures of his wife and daughter were posted as intimidation.

162. Mr KC says his parents in Nepal were threatened by individuals seeking retribution against him.

163. He says the environment in Nepal is unsafe, corruption is widespread and individuals with financial or political power can easily harm or eliminate adversaries. Mr KC says he genuinely fears he would be harmed or killed upon arrival in Nepal.

164. Ms A also expressed fears for Mr KC, and also for herself and her daughter if they returned to Nepal. In relation to the basis for the fear, she said that she received threats to harm her, her daughter and her parents if a debt was not repaid, with the threats made through phone calls and social media. In her evidence, Ms A confirmed that these threats were made and received in Australia. Ms A said that she has returned to Nepal with her daughter recently when her father was ill, but stayed indoors out of fears for her safety. She said that she did not believe Nepal would offer any protection to herself, her daughter or her husband.

165. To avoid doubt, while I recognise Ms A has raised fears pertaining to herself and her daughter, she has also clearly indicated that she will not be relocating to Nepal regardless of the outcome. Her evidence of her fears in relation to herself and her daughter therefore are relevant only to the extent that they elaborate upon the fears expressed by Mr KC.

166. In his oral evidence, Mr KC confirmed the nature of his fears. He says that he was reported to Police by the Nepalese community, and as Nepal is a corrupt country, if you have money and power you can do anything. Mr KC recounted the events relating to the threats made to his wife, explaining that threats were made in 2018, 2019 and 2020. When asked if he thought the victims would still want to harm him in 2025, he said that it was definitely going to happen. He said his 20 victims in Australia might have 100 people in Nepal, all corrupted government and cops. Mr KC also described an incident where people had come to his wife's parents house to threaten them, although they had gone away when they didn't open the door, after knocking several times.

167. In response to my questions, Mr KC confirmed that his business in Australia had imported items from India and Nepal, and he had travelled to India previously. Mr KC confirmed my understanding that Nepalese citizens have a free right of entry and residence in India. As to whether he could relocate from Nepal to India therefore, Mr KC said that he believed these people could harm him in India too, and India was a worse and more corrupted place. Mr KC said it was the same thing whether he went to India or Nepal.

168. In her evidence, Ms A recounted receiving threats in Australia and reporting them to the Police who took no action. In relation to Mr KC, she said she had serious concerns for him in Nepal, as her parents had received threats including people coming and knocking on their door, demanding money and threatening to kill her and rape her daughter. She said those threats had been made to her and her daughter who had done nothing, and her husband was the person who had actually [offended]. Ms A said the threats were delivered to her parents in 2020, but nothing had happened since.

169. For completeness, I note that Mr KC has provided the Tribunal with Country Information pertaining to Nepal produced by the Department of Foreign Affairs and Trade ('DFAT').[73] That information confirms the existence of an open border arrangement with India, including the right to free movement and residence. The information also describes Nepali police as poorly paid and overworked, and misconduct and corruption are common. Mr KC's claims invite recognition of a non-refoulement obligation in respect of Nepal through attempting to engage Australia's protection obligations in respect of him. The Direction points out that subsection 197C(1) of the Act provides that it is irrelevant for the purpose of section 198 whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. The Direction specifically addresses circumstances where a non-citizen is covered by a 'protection finding' as defined in section 197C of the Act. In these circumstances, section 198 of the Act does not authorise or require removal of the non-citizen to a country in respect of which a protection finding has been made, meaning that a non-citizen cannot be removed to that country in breach of non-refoulement obligations even if an adverse decision is made under section 501 of the Act. They will instead remain an unlawful non-citizen and must remain in immigration detention unless and until they are granted another visa or are removed to a country other than the country by reference to which the protection finding was made. I take note of these matters.

[73] DFAT Country Information Report Nepal (1 March 2024).

170. Mr KC is not the subject of a protection finding. Mr KC confirmed that a reference in Ms Ferrari's report to him applying for a protection visa was factually incorrect and he has not done so.

171. The Direction goes on to state that where it is open for a person to apply for a protection visa, it is not necessary to consider non-refoulement issues in the same level of detail in the context of a section 501CA process (as here) as such issues will be considered in a protection visa application, where the process is specifically designed for that process. Having considered the person's representations, the decision-maker may choose to proceed on the basis that if and when the person applies for a protection visa, any protection claims they have will be assessed before consideration is given to any character or security concerns associated with them.

172. In *Plaintiff M1/2021 and Minister for Home Affairs* [2022] HCA 17 the majority of the High Court answered the question of law stated for the Court as follows:

> *In deciding whether there was 'another reason' to revoke the Cancellation Decision pursuant to s 501CA(4)(b)(b)(i) of the Migration Act 1958 (Cth), where the plaintiff remained free to apply for protection visa under the Migration Act:*
>
> *(1) the Delegate was required to read, identify, understand and evaluate the plaintiff's representations made in response to the invitation issued to him under section 501CA(B)(b) that raised a potential breach of Australia's international non-refoulement obligations;*
>
> *(2) Australia's international non-refoulement obligations unenacted in Australia were not a mandatory relevant consideration; and*
>
> *(3) to the extent Australia's international non-refoulement obligations are given effect in the Migration Act, one available outcome for the Delegate was to defer assessment of whether the plaintiff was owed those non- refoulement obligations on the basis that it was open to the plaintiff to apply for protection visa under the Migration Act.*[74]

[74] *Plaintiff M1/2021 and Minister for Home Affairs* [2022] HCA 17 at [42].

173. Thus, deferral of the assessment of whether the Applicant is owed non-refoulement obligations is 'one available outcome' for the Tribunal. However, before determining whether to do so, I am required to 'read, identify, understand and evaluate' Mr KC's representations that raise a potential breach of Australia's non-refoulement obligations.

174. In respect of a decision-maker's approach to representations, the High Court said that what is necessary will depend on the 'nature, form and content of the representations' and that the 'requisite level of engagement…will vary, among other things according to the length, clarity and degree of relevance of the representations'.[75]

175. I have considered the claims raised by Mr KC as elaborated upon also by Ms A in relation to why he fears returning to Nepal. I have engaged with those claims to the superficial extent that I can on the very limited particulars he has raised.

176. I consider that Mr KC's claims face many barriers in being accepted as establishing a non-refoulement obligation in respect of him.

177. First, to the extent that the threats received might justify a well-founded fear of persecution or other harm, it must be noted that those threats were sent and received in Australia from people in Australia. While I accept the existence of those threats tend to demonstrate the anger felt towards Mr KC as a consequence of his criminal conduct, the existence of threats in Australia from his victims in Australia do not establish to my satisfaction that it will follow that people in Nepal will become aware of his presence or will be motivated to harm him. I consider Mr KC's fear of harm in Nepal from associates of his victims to be essentially speculative.

178. Second, to the extent that Mr KC's claims might rely on an assertion that Australia has protection obligations in respect of him because he is a refugee, a real question arises as to whether his claims pertain to a fear of persecution for one of the five reasons described at paragraph 5J(1)(b) of the Act. His fears have not been articulated in those terms, but I struggle to identify which of those reasons would be applicable.

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[75] Ibid at [25].

179. Third, the detail provided about the specific events in Nepal that have given rise to his fear raise doubts about the motivation of the antagonists to those events. Ms A described an event where people knocked at her parent's door but departed after the door remained closed, and that this event occurred approximately 5 years ago without being repeated. This suggests that the motivation in those antagonists is low. Mr KC described the incident, as I understand it, to have been associated with him passing a bad cheque to his accountant, and his accountant seeking to have money owed to him paid. If that is so, it doesn't follow that the motivation for making that contact was persecutory in nature or of a nature of seeking to perpetrate harm. It may have simply been a person who was owed payment seeking payment.

180. Finally, sub-section 36(3) of the Act provides (essentially) that Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail themselves of a right to enter and reside in a country other than Australia. Noting that Mr KC appears to have a right to enter and reside in India, a real question arises as to whether Mr KC would be credibly be able to establish that a fear that people in Nepal wishing to harm him would do so in India was well founded, or that there would be substantial grounds for believing that they could do so, having regard to India's diversity and vastness.

181. Ultimately, having engaged with Mr KC's claims as expressed in the proceedings, I consider that it is most unlikely that those claims would be accepted to establish that Australia has protection obligations in respect of him. Having undertaken engagement to that extent, I would defer assessment of Mr KC's claims under the more appropriate mechanisms available for such claims to be considered when and if Mr KC were to apply for a protection visa.

182. Having regard to the legal consequences of the decision, I have identified that those consequences would be short term immigration detention and then removal to Nepal, subject only to Mr KC's entitlement to apply for a protection visa. I do not consider that anything arises from the analysis of the legal consequences of the decision that falls outside the implicit, if not explicit, assumption and backdrop against which all considerations are to be evaluated. I take that into account as part of the overall evaluative process with which I am engaged.

Extent of impediments if removed

183. Paragraph 9.2 of Direction No 110 provides that taking into account the matters identified in sub-paragraphs 9.2(1)(a), (b) and (c) of Direction No 110, the Tribunal must consider the extent to which the Applicant would face an impediment or impediments in establishing himself and maintaining basic living standards in the context of what is generally available to other citizens of that country. The matters identified under sub-paragraphs 9.2(1)(a), (b) and (c) are:

(a) The Applicant's age and health;

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

(c) Any social, medical and/or economic support available to the Applicant in their country.

184. Mr KC submits he will endure extreme hardship if removed from Australia. He has identified the need for cataract surgery and a decline in his mental health during incarceration. It is submitted that his gambling disorder will be untreated in Nepal and he will not have access to critical familial support and professional assistance, presenting a risk of relapse. Mr KC also believes that his extended absence from Nepal will pose difficulties, and he will have difficulty securing employment as a deportee.

185. There is a substantial body of academic literature in the material before me to establish that persons leaving prison face difficulty in securing employment upon release. The material is primary sourced from the United States, and does not establish any different position in Nepal to that which I accept on notice; namely, that people with conviction who are released from prison may face difficulty obtaining employment – especially if the offending is of the nature of fraud.

186. As to Mr KC's age, I do not consider his age represents an impediment if removed. Mr KC is 43 years of age.

187. As to Mr KC's state of health, I do not accept that his state of health represents an impediment if removed in circumstances where I must consider this in terms of Mr KC establishing himself and maintaining basic living standards in the context of what is generally available to other citizens of Nepal. While it may be accepted that counselling,

support and indeed medical services in Nepal are less accessible or of a lower standard than may be found in Australia, the DFAT Country Information Report for Nepal establishes that Nepal has a variety of public and private health care facilities.[76]

188. In relation to Mr KC requiring cataract surgery, I have not been able to identify medical evidence confirming that to be so, although there is evidence indicating he has a chronic corneal ulcer following a shuttle cock injury.[77] The management plan for that injury did not include surgery.[78] In any event, even if Mr KC required cataract surgery or surgical intervention for his corneal ulcer, I am satisfied on the evidence pertaining to the health system in Nepal that such treatment would be available.

189. I reach the same finding in relation to other medical conditions identified in the documentary evidence and mentioned in submissions, including high blood pressure, diabetes, and reflux.

190. In relation to Mr KC's mental health, prison health records show that Mr KC was regularly screened for mental health disorders, typically with no such disorders identified. There is however evidence of an adjustment disorder,[79] difficulty sleeping, and remarks made in the course of the hearing that are open to be interpreted as an expression of suicidal ideation if the decision does not go his way. No mental health disorder has been diagnosed other than the gambling addiction already discussed in detail. Mr KC does not take any psychiatric medication, although did take an anti-depressant for a short period before deciding to cease it on the advice of Ms A.

191. The country information mentioned above described mental health services in Nepal as being not universally available and under-resourced. Mental health services are however available in federal or provincial level hospitals.[80]

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[76] HB, 51.
[77] HB, 2029.
[78] HB, 2026.
[79] See, for example: HB, 1688 (Provisional Diagnosis); 1701 (GP noted as past medical history); 1962 (Reference to 'Hx of mental illness' not further elaborated).
[80] HB, 52.

192. In relation to Mr KC's mental health concerns, I accept as self-evident that removal to Nepal will serve as a psycho-emotional shock and may well precipitate a reaction similar to the mental health difficulties he experienced in prison. However, mental health treatment in a context generally available to other citizens of Nepal will be available to him if it is needed. I accept however that the impact of removal to Nepal and separation from his family will impact on Mr KC's mental health and presents an impediment to removal. I take this into account in the overall evaluative task I am undertaking.

193. Mr KC migrated to Australia from Nepal as an adult. I do not accept he will face any language or cultural barriers that would amount to an impediment to removal. I have had regard to the submissions explaining that reintegration back into Nepali society by a person who has been deported from Australia as a convicted felon may be difficult, and I accept that is possible. I have taken that into account.

194. As to social support available to Mr KC in Nepal, I consider there is evidence that there would be ample social support available to him. Mr KC's parents reside in Nepal, as do a number of his siblings. Submissions on behalf of Mr KC accepted that the hardship he will face may be offset by that degree of social support available. I note Mr KC appeared reluctant to accept that such support may be available, and unwillingness to return to his parents may be influenced by his perception of risk of harm based on the incident he described. Nonetheless, I am satisfied Mr KC will be able to access familial support in Nepal and this will reduce the hardship he will face.

195. Ultimately, while I accept that there are impediments to Mr KC's removal occasioned primarily by his history of mental health fragility and the disappointment and shock of removal to Australia and separation from his family should the visa cancellation be maintained, I consider the impediment will be reduced by his capacity to access medical and mental health treatment if necessary, and his capacity to access family support. The impediments Mr KC faces in removal to Nepal attract moderate weight in favour of revocation of the cancellation of the visa in the overall evaluative task I am undertaking.

Impact on Australian business interests

196. Paragraph 9.3 of Direction No 110 states:

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

197. Mr KC did not advance a case in this regard at hearing, but I note that in earlier submissions to the Department it was suggested that Ms A holds a senior position in tow hospitals, and in light of significant shortages in the Australian healthcare industry, there may be consequences for the hospitals in which she works if is forced to leave Australia. As Ms A has make it clear she will not be leaving Australia, the foundation for that submission does not exist.

198. Mr KC operated a business in Australia for some time, importing giftware from India and Nepal. Mr KC will not be able to operate that business if his visa remains cancelled. However, Mr KC explained during his evidence that his substantial unmet taxation obligations prohibit him from operating that business at the present time, and he did not intend to recommence operating that business. I have considered the impact of the decision on Mr KC's business, but consider it carries minimal weight. I have no evidence of any other business or employment link that may be relevant, and none was identified in submissions.

CONCLUSION

199. Clause 7 of the Direction sets out the way in which the relevant considerations are to be taken into account and weighed.

200. There has been extensive judicial consideration on the exercise of balancing and weighing considerations contained in the relevant Ministerial Directions (considering a number of Ministerial Directions preceding the Direction).

201. The Full Court of the Federal Court in *CRNL v Minister for Immigration, Citizenship and Multicultural Affairs* ('*CRNL*') said:

> *'[t]he real burden of the task to be undertaken by a decision-maker who must comply with the Direction* [the precursor Direction 90] *is to bring together the considerations as part of a single evaluation of their relative significance thereby weighing them all together.*[81]

202. I find the guidance from the Court at paragraph [38] is particularly instructive:

> *The balancing process is directed to determining whether there is "another reason" why the visa cancellation should be revoked. It requires an identification of the matters that may constitute "another reason" and bringing to bear the considerations that the Direction requires the Tribunal to take into account where relevant in determining whether or not the Tribunal is satisfied that there is another reason (or reasons) to revoke the visa cancellation. Some of the considerations set out in the Direction, where relevant, may weigh in favour of revocation, and so may constitute "another reason" capable of supporting the state of satisfaction required in order for revocation under s 501CA(4)(b)(ii) to occur. But whether they do qualify as a reason of that kind will need to be assessed in the context of different considerations set out in the Direction which may weigh against revocation, where relevant. That is why it is appropriate to describe it as a process of weighing and balancing. But to go beyond that to treat the Direction as mandating some sort of calculation of the net weight to be given to the considerations on each side is to lose sight of the ultimately evaluative nature of the statutory task.*

203. In my evaluation, I have identified that the best interests of "S" in particular carries significant weight, as does the adverse impact of the decision on Ms A, as a member of Mr KC's immediate family. These factors weigh in favour of revoking the decision to cancel the visa, and are reinforced by other factors of lesser weight in my view, such as the best interests of "O", "P" and the impact on Ms BA and her husband, and the impediments to removal to Nepal that Mr KC will face.

204. The best interests of "S" weigh particularly heavily in my view. I have reflected for some time and with some difficulty over the consequences of this decision for her. The benefit to her future of having a united family with her in Australia cannot be doubted. Although my focus is on the best interests of "S" and not on the impact of this circumstance on Mr KC, it was obvious to me during the hearing that this issue above all others distressed him.

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[81] [2023] FCAFC 138, [23].

205. However, as observed by the sentencing judge, Mr KC was 'highly culpable', his conduct was 'starkly wrong, criminal and unconscionable', and was 'nasty and cruel offending, deeply criminal'. His victims were vulnerable, and his course of conduct calculated and protracted. I have found his offending was serious, the risk of reoffending while low is real, and the risk to the Australian community is unacceptable. I have found with a high degree of confidence that in this case, the Australian community would expect that Mr KC's visa remain cancelled.

206. I have therefore decided that the result of the overall evaluative exercise I have undertaken is that there is not another reason to revoke the decision to cancel Mr KC's visa.

207. The decision under review is affirmed.

I certify that the preceding 207 (two-hundred and seven) paragraphs are a true copy of the reasons for the decision herein of Senior Member Kennedy.

.....[SGND].....
Associate

Dated: 10 April 2025

Date of hearing: **26 and 27 March 2025**

Applicant's Representative: **Dr J Donnelly (Latham Chambers)**

Respondent's Representative: **Ms T Weir (HWL Ebsworth Lawyers)**