



Administrative  
Appeals Tribunal

DECISION AND  
REASONS FOR DECISION

Division: GENERAL DIVISION

File Number(s): **2018/2427**

Re: **The Trustee for the Fuzzy Events Unit Trust**

APPLICANT

And **Minister for Home Affairs**

RESPONDENT

**DECISION**

Tribunal: **The Hon. Justice Stevenson, Deputy President**

Date: **7 September 2018**

Place: **Sydney**

The Tribunal decides:

1. To set aside the decision of the Delegate of the Minister for Home Affairs, made on 27 April 2018, whereby Joseph Junior Adenuga was refused a Temporary Activity (Class GG) visa.
2. Although Mr Adenuga does not pass the character test, the Tribunal does not exercise its discretion pursuant to subsection 501(1) of the *Migration Act 1958* (Cth) so as to refuse the application of Mr Adenuga for a Temporary Activity (Class GG) visa.



.....  
[SGD]  
The Hon. Justice Stevenson, Deputy President

## **CATCHWORDS**

*IMMIGRATION – character test – risk that visa applicant will commit a criminal offence in Australia – discretion – expectations of the Australian community in granting or refusing a visa – impact on Australian business interests if visa refused – decision set aside and substituted*

## **LEGISLATION**

*Migration Act 1958 (Cth) s 501*

*Sentencing Act 1991 (Vic)*

## **CASES**

*Labi and Minister for Immigration and Border Protection (Migration) [2016] AATA 316*

*Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559*

*Murphy and Minister for Immigration and Border Protection (Migration) [2018] AATA 750*

*Waits and Minister for Immigration and Multicultural Affairs [2003] AATA 1336*

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

## **REASONS FOR DECISION**

**The Hon. Justice Stevenson, Deputy President**

**7 September 2018**

1. On 27 February 2018 Mr Joseph Junior Adenuga ("Mr Adenuga") applied for a Temporary Activity (Class GG) Visa ("the visa") to enable him to enter Australia for a short period of approximately 10 days between 22 September 2018 to 1 October 2018. On 27 April 2018 a Delegate for the Minister for Home Affairs ("the Delegate") refused to grant the visa, on the basis that Mr Adenuga did not pass the character test pursuant to section 501(1) of the Migration Act 1958 (Cth) ("the Act").

2. The decision of the Delegate was expressed as follows:

24 *"I concluded that Mr ADENUGA represents a risk of harm to the Australian community which is unacceptable. I could not be satisfied that the risk of Mr ADENUGA reoffending was negligible. I found that there are no sufficient countervailing considerations in this case to warrant the Australian community accepting any level of risk.*

25 *Having given full consideration to all of these matters, I decided to exercise my discretion to refuse to grant Mr ADENUGA'S application for a Temporary Activity (Class GG) visa, under subsection 501(1)."*

3. On 1 May 2018 the Trustee of the Fuzzy Events Unit Trust ("the applicant"), applied for a review of the decision of the Delegate. This application for review came before me for hearing on 21 August 2018.

**BACKGROUND**

4. Mr Adenuga is a musician who is known by a stage name of "Skepta". He is scheduled to perform a series of concerts in Sydney, Melbourne, Brisbane, Adelaide and Perth between 22 September 2018 and 1 October 2018. These concerts were arranged by the Fuzzy Events Unit Trust, in which Mr Kun Ming Gan ("Mr Gan") holds a beneficial and controlling interest. In his statement of 24 July 2018 Mr Adenuga described his occupation as "an English grime artist, rapper, songwriter, record producer and music video director".
5. It is common ground that Mr Adenuga has a criminal history, which was set out accurately in the applicant's Statement of Facts, Issues and Contentions as follows:

<b>Country</b>	<b>Offence</b>	<b>Sentence</b>
<b>Australia</b>	<ul style="list-style-type: none"> <li>• <i>Recklessly cause injury (8 January 2016)</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>No conviction</i></li> <li>• <i>Fined \$2,500</i></li> <li>• <i>Compensation order to victim of \$10,000</i></li> </ul>
<b>United Kingdom (London)</b>	<ul style="list-style-type: none"> <li>• <i>Common assault (9 August 2009)</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>Community order</i></li> <li>• <i>Costs of £500</i></li> <li>• <i>Unpaid work requirement of 200 hours</i></li> </ul>
<b>Cyprus</b>	<ul style="list-style-type: none"> <li>• <i>Assault occasioning actual bodily harm (9 August 2006)</i></li> <li>• <i>Theft (9 August 2006)</i></li> <li>• <i>Assault occasioning actual bodily harm (9 August 2006)</i></li> </ul>	<ul style="list-style-type: none"> <li>• <i>Fine 300 Cypriot pounds</i></li> <li>• <i>Fine 750 Cypriot pounds</i></li> <li>• <i>Fine 500 Cypriot pounds</i></li> </ul>

6. The offence in Australia in January 2016 was dealt with pursuant to the *Sentencing Act 1991* (Vic), which provides relevantly as follows:

8 *Conviction or non-conviction*

1. *In exercising its discretion whether or not to record a conviction, a court must have regard to all of the circumstances of the case including –*

- (a) the nature of the offence; and*
- (b) the character and past history of the offender; and*
- (c) the impact of the recording of a conviction on the offender's economic or social well-being or on his or employment prospects."*

7. Mr Adenuga described the circumstances of each of these convictions in his Statement of 24 July 2018 and in his oral evidence given to the Tribunal by telephone on 21 August 2018. In his Statement Mr Adenuga wrote as follows in relation to his convictions:

- 14 *"First, on 8 January 2016, I was in Melbourne, Australia. I attended the Colonial Nightclub in Brown Alley (Melbourne) to watch DJ Premier perform. During the course of the evening whilst watching the show from the crowd, I was repeatedly knocked into by an intoxicated young male. I repeatedly asked this male to stop making contact with me, at which point he made a verbal threat towards me. Subsequently, a physical altercation broke out between this male and myself. During the course of this altercation, I threw one punch that made contact with the male's mouth.*
- 15 *My assault on this male resulted in me being arrested and charged, but I was released the subsequent day by Victorian police back into the community. As a result, I was able to continue with my Australian tour and perform my last two shows in Melbourne and Brisbane without incident.*
- 16 *Although I did not instigate the altercation with the victim, it must be accepted that I should never have thrown a punch at this person. Realising my wrongdoing, I pleaded guilty to the 'recklessly cause injury' offence at the Magistrates' Court of Victoria in Melbourne.*
- 17 *Secondly, on 9 August 2009, I was out in the West End of London in England (where I was walking through the streets with a friend talking). It was bustling and unfortunately there was a lot of intoxicated individuals walking around (given that it was late at night).*
- 18 *Subsequently, my friend became engaged in a verbal altercation with a random male person on the street. This altercation resulted in name-calling and erupted into a physical fight between the parties. I became involved to break up the fight, but unfortunately became involved in the scuffle between my friend and the random male.*
- 19 *As a result of my involvement in the fight between my friend and the victim, I pleaded guilty to common assault in the City of London Magistrates Court. Upon reflection, I should have not physically joined in the altercation between my friend and the victim. At the time, I was frustrated that I could not enjoy a brisk walk with my friend without running into trouble. Nonetheless, I accept*

*my wrongdoing and I am genuinely sorry for becoming involved in this incident.*

- 20 *Thirdly, on or about 9 August 2006, I was in Cyprus for purposes related to my music career. During an evening out on a night off after a show, I was preparing to enjoy a social evening at Aiya Napa. I recall that everyone was high-spirited and in a good mood that evening.*
- 21 *Whilst outside the venue at Aiya Napa, my friends and I were approached by a large group of males (who levied racial abuse towards us). Subsequently, this led to a physical altercation between these group of men and my group of friends (which included me). During the fight, I broke a chain belonging to a man from the random group that approached us. Subsequently, I threw the chain on the ground. As a result of this conduct, my friends and I got arrested and were put in cells for a few days. I recall this being a scary experience, not appreciating how the local authorities would deal with my friends and I as foreigners. In the end, I had to pay a notable fine. There was no trial for the offences related to this incident, although I acknowledge that I should never have become involved in the physical altercation between the random group of males and my group of friends."*

8. In his oral evidence Mr Adenuga described the altercation in Melbourne. He said that he was tired after a performance and had returned to his hotel room. His manager then texted him with information that a particular DJ was playing at a certain nightclub. Mr Adenuga said that he and his manager went to the nightclub, where they encountered the victim. Mr Adenuga said that the victim "was really aggressive" and that he "had grabbed" his friend near his mouth. Mr Adenuga maintained that the victim and his friend "were having a tussle" and "I had to intervene to split them up". Mr Adenuga said "I threw a punch to stop the situation".

9. A Statement of Alleged Facts prepared by police officers in relation to the events of 8 January 2016 read in part as follows:

*"On the 12:10 AM on 8th of January 2016 the accused was at the Colonial Nightclub in Brown Alley, Melbourne. A verbal altercation ensued between the victim and the accused on the dance floor. It appears that this altercation occurred as a result of a spilt drink or similar.*

*The altercation continued for about a minute, where associates of the accused appeared to get between the victim and the accused in the matter. This escalated when the accused subsequently pushed two of his associates out of the way to get to the victim. The accused has wound back his right first (sic) before punching the mouth of the victim with very significant force. This dazed the victim and also knocked 3 teeth out of the victims top jaw, and knocking one loose. The accused and his associates subsequently rushed out of the nightclub south bound on King Street, Melbourne.*

...

*Police also believe that a resolution between all parties is definitely achievable at the date of this remand hearing which will be beneficial to all parties. The victim in the matter was shocked by the assault and stated that he regrets he asked the accused as to why he was initially pushed. Upon hearing that the accused would be direct presented to court, the victim was satisfied that the matter may be able to be resolved today so he himself can put this behind him also.*

...

*During recorded interview the accused made full admissions to punching the victim. The accused stated that it wasn't him in the sense that he is a well-respected person and out of character, and clearly a mistake on his part. The accused also stated that the victim may have been alcohol or drug affected and was making threats to knock him out.*

*The accused also stated that the victim may have known who he was and was attempting to instigate a fight by continually dancing near him."*

10. On 4 July 2016 Mr Adenuga pleaded guilty to a charge of "recklessly cause injury" in the Melbourne Magistrates Court. The orders of the Court were as follows:

*"The offender is to pay \$10,000 compensation. Without conviction, fined \$2500. But for the plea of guilty the sentence I would otherwise have imposed is A SENTENCE OF IMPRISONMENT."*

11. Mr Gan indicated in his supplementary statement that he contacted the victim, Mr Sanjay Sanjiven, on 26 July 2018 at the request of Mr Adenuga's management. He issued an invitation to Mr Sanjiven to attend Mr Adenuga's performance in Melbourne and to meet him for the purposes of an apology for the events of January 2016. Mr Sanjiven accepted this invitation and stated "I appreciate Skepta's kind gesture." Mr Adenuga said in his oral evidence that he discussed the prospect of this invitation with his management when he was invited to visit Australia.
12. Mr Adenuga also described the altercation on 9 August 2009 in London which led to his conviction for the offence of common assault. He said that he and a friend left a club at a late hour and his companion became involved in an argument with the victim. Mr Adenuga said that the victim "was shouting" and "saying bad things to my friend and me and he was fighting my friend". Mr Adenuga said "I accept that I assaulted him, I pleaded guilty, we had a fight in the street."
13. In relation to the incident in Cyprus on 9 August 2006 Mr Adenuga said "there was a standoff for some reason, we had a fight. They started fighting first and we defended ourselves." Mr Adenuga said also that "they said racist things to my friend and started fighting my friend and I defended him ..."

14. In his statement Mr Adenuga set out his current perception of these three offences as follows:

**"D. Reflection on Criminal History**

22 *I have had the benefit of over two years and six months to reflect on my criminality. With that in mind, I make the following observations.*

23 *First, although all the offences committed by me were spontaneous and impulsive, I realise now that I should have just walked away from the potential for engagement with physical violence. I accept that violence poses a risk of harm not only to individuals involved but can have an adverse psychological effect on others who witness the crime being committed.*

24 *Secondly, as I will detail in greater length shortly, I have channelled all my energies since early January 2016 towards excellence in the entertainment and music industry worldwide. I believe I have indeed become both a responsible and mature adult who is able to deal with potentially stressful and challenging circumstances. Given the extraordinary advancement in my music career since early 2016, I have grown as a person both emotionally and spiritually."*

15. In his oral evidence Mr Adenuga agreed that he took his offences "seriously". He said "it is not who I am, there is always a different way. I have learned from it and made myself not get into these problems."

16. Mr Adenuga stated that he completed his tour of Australia without incident after the events of 8 January 2016, with performances in Melbourne and Brisbane. He stated also that he has performed in the following 24 countries, without incident, since January 2016:

- Austria
- Belgium
- Canada
- China
- Croatia
- Czech Republic
- Denmark
- Dubai
- Finland
- France

- Germany
- Ireland
- Italy
- Japan
- Morocco
- Netherlands
- Nigeria
- Norway
- Poland
- Russia
- South Africa
- Spain
- Sweden
- United States of America.

He said that he performed at the 2017 Governor's Ball in New York during his tour of the United States.

17. Mr Adenuga won an award known as The Mercury Prize in 2016. He described this award as follows:

33 *"The Mercury Prize promotes the best of United Kingdom and Irish music and artists. The competition is open to all music genres and equivalent to the Booker Prize for literature and the Turner Prize for art. Twelve albums are short-listed for "Album of the Year" before one overall winner is chosen.*

34 *In winning the prestigious Mercury Prize, I won this award ahead of David Bowie and Radiohead who also short-listed for the prize. Previous nominees for the Mercury Prize include international music artists such as Adele, Ed Sheeran, Coldplay and Van Morrison."*

18. Mr Adenuga has won several additional awards and prizes in the music field since 8 January 2016. In 2017 he won two Ivor Novello Awards for Songwriter of the Year and

Best Contemporary Song. He also won the New Musical Express Prize for Best Male Artist.

19. Mr Adenuga's uncontradicted evidence was to the effect that he has embarked upon a number of charitable pursuits since his last criminal conviction. He stated that he has become "an activist who uses a high profile platform to raise awareness around issues associated with racism, youth socio-economic disadvantage and homelessness". He stated that, in particular, he has undertaken the following charitable activities:
  - (a) In February 2016 he and his father organised the construction of a playground in the home village of his family in Nigeria;
  - (b) In 2016 he established a community youth music facility in London, in partnership with Levi Strauss & Co., as a component of which he mentored twelve young musicians; and
  - (c) In April 2017 he arranged and performed in a benefit show in the United Kingdom for a housing and homelessness charity known as "Shelter"
20. Mr Adenuga gave evidence that he was made a chief in his parents' home state in Nigeria in April 2018, with the official title of "Amuludun of Odo Aje" or "Chief Entertainer of Odo Aje". He stated that he received this title "given my positive contribution to community well-being".
21. Mr Adenuga gave uncontradicted evidence to the effect that he has developed an interest in fashion and design since January 2016 and launched commercial undertakings in that field. He said that he was appointed a brand ambassador for a label known as Uniqlo and collaborated with Nike on the creation of two new styles of sneaker. He said further that in June 2017 he launched his own clothing line known as "Mains".
22. Mr Adenuga gave evidence that he was invited to attend Paris Fashion Week shows in 2017 and 2018. He said that he had been nominated by GQ Men of the Year on several occasions and presented an award to the person selected as Designer of the Year.
23. Mr Gan provided a statement dated 24 July 2018 in support of the review application. He said that he has approximately 22 years experience in the music promotion business in

Australia and established the business known as Trustee for Fuzzy Events ("Fuzzy") in 2000 with two partners.

24. Mr Gan stated that he is aware of Mr Adenuga's criminal convictions but nevertheless supports his application and is very keen for the proposed tour of Australia to proceed in September/October 2018. At paragraph 21 of his statement Mr Gan set out his understanding of the musical achievements of Mr Adenuga as follows:

- *"Ten of Joseph's singles have been in the United Kingdom top 40s with another five singles reaching the United Kingdom top 75s"*
- *Two of Joseph's albums have reached the United Kingdom top 40s – 'Doin it Again' and 'Konnichiwa' with 'Konnichiwa' peaking at #2 on the official United Kingdom Albums Chart and #1 on the United Kingdom Independent Albums Chart*
- *'Konnichiwa' was certified Gold in the United Kingdom by the British Phonographic industry and was recognised in the 'Best Albums of 2016' by Apple Music, The Independent, Mojo and New Musical Express*
- *Joseph broke the daytime attendance record when he performed Reading Festival in August 2016*
- *Joseph is the second most streamed grime artist on Spotify*
- *In Australia, 'Konnichiwa' entered the Aria Charts at #3 and was in the charts 86 times (over a year and a half). This was the highest chart position reached outside of Europe*
- *In 2017, Boy Better Know took over the O2 in London, hosting a multi-venue, multidiscipline festival featuring 5-A-Side football tournaments, skateboarding, BMXing, roller disco, gaming events, cinema, food and music across six stages. The 20,000-capacity venue sold out*
- *In 2017, Joseph appeared in Debrett's list of the most influential people in the United Kingdom*
- *Joseph has collaborated with Ed Sheeran, Drake, Mick Jagger and A\$AP Rocky and is a close-friend of fellow North Londoner, Adele*
- *In 2018, A\$AP Rocky (also featuring on the 2018 Listen Out line-up) released his new single 'Praise the Lord' featuring Joseph. The song bulleted into the ARIA Singles Chart at #34 and has been a mainstay in the chart since its release*
- *Skeptak and fellow artist Stormzy have both featured predominantly in Fuzzy's Field Day ticket holder surveys which are designed to gauge which artist our patrons want to see perform at the event."*

25. Mr Gan stated that he has organised tours for approximately 150 artists but has refused to engage some musicians on account of their criminal convictions. He wrote:

- 19 *"It is also relevant to note that Fuzzy has declined to tour international artists in Australia in the past despite their exceptional talent and potential for high ticket sales (due to the artists conduct being incongruent with our values and type of environment we strive to create for patrons at our events.)"*

In his oral evidence Mr Gan said words to the effect "we have declined many artists we have been offered because for example they have been involved in sexual assaults."

26. Mr Gan gave evidence in relation to the economic losses which would flow to Australian businesses, in the event that Mr Adenuga is denied a visa and prevented from participating in the proposed tour. He was cross-examined by the respondent's lawyer in relation to the accuracy of his estimated figures. It seems logical, however, that there would be adverse financial consequences for Mr Gan's and other Australian businesses if Mr Adenuga is unable to proceed with the tour arrangement. Ultimately, a concession to that effect was made on behalf of the respondent.
27. The respondent tendered in evidence incoming passenger cards in relation to trips to Australia made by Mr Adenuga in 2009 and 2012. In these documents Mr Adenuga stated that he has no criminal convictions.

## **CONSIDERATION**

28. The first issue is whether Mr Adenuga passes the character test for the purposes of s 501 of the Act. The respondent contended that Mr Adenuga fails the character test pursuant to s 501(6)(a)(i) of the Act, which provides as follows:

6 *"For the purposes of this section, a person does not pass the "character test" if:*

...

(d) *in the event the person were allowed to enter or remain in Australia, there is a risk that the person would:*

(i) *engage in criminal conduct in Australia ..."*

If it is determined that Mr Adenuga does not pass the character test, the Tribunal must then determine whether to exercise discretion pursuant to s 501(1) of the Act so as to refuse to grant the visa.

29. These determinations are to be made with reference to Ministerial Direction No. 65 ("the Direction"). This Direction sets out seven principles as follows:

### **"6.3 Principles**

- 1 *Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*
- 2 *The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia or elsewhere.*
- 3 *A non-citizen who has committed a serious crime, including of a violent or sexual nature, and particularly against vulnerable members of the community such as minors, the elderly or disabled, should generally expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.*
- 4 *In some circumstances, criminal offending or other conduct, and the harm that would be caused if it were to be repeated, may be so serious, that any risk of similar conduct in the future is unacceptable. In these circumstances, even other strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa.*
- 5 *Australia has a low tolerance of any criminal or other serious conduct by people who have been participating in, and contributing to, the Australian community only for a short period of time. However, Australia may afford a higher level of tolerance of criminal or other serious conduct in relation to a non-citizen who has lived in the Australian community for most of their life, or from a very young age.*
- 6 *Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.*
- 7 *The length of time a non-citizen has been making a positive contribution to the Australian community, and the consequences of a visa refusal or cancellation for minor children and other immediate family members in Australia, are considerations in the context of determining whether that non-citizen's visa should be cancelled, or their visa application refused."*

30. Annexure A to the Direction provides guidance as to the application of the character test in relation to s 501(6)(a)(i) of the Act as follows:

#### **"6 Risk in regards to future conduct (section 501(6)(d))**

- 1 *A person does not pass the character test if, in the event that the person were allowed to enter or remain in Australia, there is a risk that the person would engage in any of the conduct specified in section 501(6)(d) of the Act. The types of conduct specified are discussed below.*
- 2 *The grounds are enlivened if there is evidence suggesting that there is more than a minimal or remote chance that the person, if allowed to enter or to*

*remain in Australia, would engage in conduct specified in section 501(6)(d) of the Act.*

- 3 *It is not sufficient to find that the person has engaged in conduct specified in paragraph 501(6)(d) of the Act in the past. There must be a risk that the person would engage in the future in the specified conduct set out in section 501(6)(d) of the Act.*

**6.1 Risk of engaging in criminal conduct in Australia (section 501(6)(d)(i))**

- 1 *A person does not pass the character test if, in the event that the person were allowed to enter or remain in Australia, there is a risk that the person will engage in criminal conduct in Australia.*
- 2 *The reference to criminal conduct must be read as requiring that there is a risk of the person engaging in conduct for which a criminal conviction could be recorded."*

31. The applicant submitted that Mr Adenuga passes the character test, despite his three offences, for the following reasons:

- (a) He has committed no criminal offences since January 2016, although it was conceded that this period "is not substantial";
- (b) Since his last offence Mr Adenuga "has undergone extraordinary changes in his life", which reflect that he "has become rehabilitated and has no real propensity to engage in further criminal conduct in the future";
- (c) Since early 2016 he has travelled to 24 countries and committed no criminal acts;
- (d) He pleaded guilty to each of his acts of criminal conduct and has expressed remorse for his behaviour;
- (e) His charitable and community-focussed activities demonstrate that he is "a changed man" and he "has utilised a great deal of his energies to further his career in fashion and design since early 2016; and
- (f) While it must be accepted that his previous criminal history demonstrates some propensity to engage in violent activity, these acts were committed when he was a person of limited musical career success; without international recognition and not engaged in charitable and community-focussed pursuits and successful commercial activities.

32. The respondent submitted that Mr Adenuga fails the character test and pointed to the wording of s 501(6)(d)(i) of the Act prior to an amendment in 2014. That amendment removed the requirement of "significant risk" of future criminal conduct. The respondent drew attention to the Explanatory Memorandum in relation to this amendment, which relevantly stated as follows:

*"The purpose of this amendment is to clarify the threshold of risk that a decision-maker can accept before making a finding that the person does not pass the character test in relation to paragraph 501(6)(d) of the Migration Act. The intention is that the level of risk required is more than a minimal or trivial likelihood of risk, without requiring the decision-maker to prove that it amounts to significant risk."*

33. The respondent submitted that Mr Adenuga has been involved in three incidents of criminal conduct over a period of twelve years and claimed on each such occasion that he was provoked by the victims. The respondent pointed to remarks by the High Court of Australia (Brennan CJ, Dawson Toohey Gaudron McHugh and Gummow J) in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 574 as follows:

*"Past events are not a certain guide to the future, but in many areas of life proof that events that have occurred often provides a reliable basis for determining a probability – high or low – of their recurrence."*

34. The respondent emphasised the limited period since Mr Adenuga's last offence and the consequent difficulties in accepting that he has in fact rehabilitated himself since January 2016. The respondent contended that Mr Adenuga "has attempted to consistently downplay the nature of his offending" and "attempted to paint a favourable picture of his conduct".

35. The respondent contended that the submission that Mr Adenuga's increased career success renders him less likely to re-offend lacks substance. The respondent pointed to Mr Adenuga's career successes prior to January 2016.

36. Objectively, there is no doubt that Mr Adenuga has enjoyed much greater success in his musical career since January 2016. He has won several awards and prizes, including the Mercury Prize and two Ivor Novello awards. He has achieved international recognition and toured in 24 countries.

37. There was no evidence that Mr Adenuga engaged in charitable works or undertook commercial activities in the fashion industry prior to January 2016. I accept the

submission on behalf of the applicant, to the effect that Mr Adenuga has devoted considerable energy and focus to these pursuits since his last conviction.

38. Mr Adenuga has expressed remorse for his three offences of assault and I have no reason to question his sincerity. I have no reason to doubt his evidence that he has learned from his experiences and now believes that he is better "able to deal with potentially stressful situations".
39. The Delegate conceded that there is a "low" risk of re-offence by Mr Adenuga. I agree with this assessment and determine that there is a low risk that Mr Adenuga would engage in criminal conduct in Australia. In reaching that conclusion I have regard to the circumstances of his offences, his expression of remorse and his professional and personal achievements since January 2016.
40. The short period since January 2016, however, leaves me with difficulty in finding that there is a minimal or negligible risk that Mr Adenuga would engage in criminal activity in Australia. Accordingly, I must find that Mr Adenuga does not pass the character test for the purposes of s 501 of the Act.
41. Having determined that Mr Adenuga does not pass the character test, I am now to decide whether it is appropriate to exercise the discretion conferred by s 501(1) of the Act so as to refuse to grant the visa. This discretion is to be exercised in compliance with the Direction.
42. The Direction sets out three primary and four additional considerations which, where relevant, must be taken into account in the exercise of discretion pursuant to s 501(1) of the Act. Clause 11 sets out the primary considerations as follows:
- 1 *In deciding whether to refuse a non-citizen's visa, the following are primary considerations:*
    - (a) *Protection of the Australian community;*
    - (b) *The best interests of minor children in Australia who are affected by the decision;*
    - (c) *The expectations of the Australian community.*

The primary consideration of the best interests of minor children obviously is irrelevant for present purposes.

43. Clause 12 of the Direction sets out the "Other considerations" which must be taken into account where relevant. The considerations include, but are not limited to:

- (a) *International non-refoulement obligations;*
- (b) *Impact on family members;*
- (c) *Impact on victims;*
- (d) *Impact on Australian business interests.*

The only "Other consideration" which is relevant for present purposes is cl 12.4, being the impact on Australian business interests.

#### **PRIMARY CONSIDERATION 1: PROTECTION OF THE AUSTRALIAN COMMUNITY**

44. Clause 11.1 of the Direction provides as follows:

##### ***"11.1 Protection of the Australian community***

1 *When considering protection of the Australian community, decision-makers should have regard to the principle 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. There is a low tolerance for visa applicants who have previously engaged in criminal or other serious conduct. Decision-makers should also give consideration to:*

- (a) *The nature and seriousness of the non-citizen's conduct to date; and*
- (b) *The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct."*

45. Counsel for the applicant conceded that "the inherent nature of assault offences involves violence and thus are to be viewed seriously". On behalf of the applicant it was contended, however:

- Mr Adenuga's crimes were not committed against vulnerable members of the community or a government representative or official acting in his or her position;
- No crime was committed while Mr Adenuga was subject to immigration detention;
- The respondent did not rely upon section 501(6)(c) of the *Migration Act* so as to assert that Mr Adenuga does not pass the subjective limb of the character test;
- The court elected to record no conviction and impose a financial penalty in relation to the incident in January 2016 in Melbourne;
- The court imposed a community service order and a financial penalty in relation to the August 2009 incident in London;

- The court imposed a financial penalty in relation to the incident in August 2006 in Cyprus;
  - These penalties indicate that Mr Adenuga's offences are "at the lower end of the scale", with "large gaps" between these events; and
  - Mr Adenuga's offences do not demonstrate a trend of increasing seriousness.
46. The respondent submitted that the victim of the "assault" in January 2016 may be regarded as "a vulnerable member of the community", as Mr Adenuga considered that he was intoxicated at the time of the incident. As noted above, however, the Statement of Alleged Facts recorded that Mr Adenuga told police "the victim may have been alcohol or drug affected and was making threats to knock him out". In his statement to police, the victim said that he had drunk two beers at the nightclub and had four drinks before he arrived at the premises at about 8.30 pm.
47. In my view this victim should be regarded as a young man who was drinking alcohol in a public entertainment venue when he became involved in the incident with Mr Adenuga. cl 11.1.1(b) refers to "vulnerable members of the community (such as minors, the elderly and the disabled)". I do not consider that the victim of the incident in January 2016 could be regarded as "a vulnerable member of the community".
48. The respondent submitted that, contrary to cl 11.1.1(h), Mr Adenuga failed to disclose his overseas convictions in a visa application made in February 2018 and on his incoming passenger cards. In the visa application Mr Adenuga answered "yes" to the question whether he had ever been convicted of an offence in any country. The visa application read "please see accompanying documents" but the material before the Tribunal made it difficult to identify this material.
49. The respondent submitted correctly that Mr Adenuga's conduct in London and Cyprus would constitute offences in Australia. As submitted by the applicant, however, the circumstances of his conviction for theft in Cyprus were unclear and appear to amount to Mr Adenuga throwing a victim's necklace to the ground during the scuffle.
50. Clause 11.1.2 of the Direction provides as follows:

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

- 1 *In considering whether the non-citizen represents an unacceptable risk of harm to individuals, groups or institutions in the Australian community, decision-makers should have regard to the principle 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 likelihood that it may be repeated may be unacceptable.*
- 2 *In addition, decision-makers should have regard to the principle that Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.*
- 3 *In considering the risk to the Australian community, decision-makers must have regard to, cumulatively:*
  - (a) *The nature of the harm to individuals or the Australian community should the non-citizen engage in further criminal or other serious conduct; and*
  - (b) *The likelihood of the non-citizen engaging in further criminal or other serious conduct, taking into account:*
    - (i) *information and evidence from independent and authoritative sources on the likelihood of the non-citizen re-offending; and*
    - (ii) *evidence of any 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); and*
    - (iii) *the duration of the intended stay in Australia.*
- 4 *Decision-makers should consider the risk of harm in the context of the purpose of the intended stay, and the type of visa being applied for, including whether there are strong or compassionate reasons for granting a short-stay visa."*

51. The applicant submitted that there was no evidence that any of the victims of Mr Adenuga's offences have substantial ongoing physical or psychological harm. There was no evidence at all as to the impact upon the victims of the offences in Cyprus and London.

52. As noted above, the victim of the offence in Melbourne was willing to resolve the matter at an early stage. He has now accepted an invitation to attend Mr Adenuga's concert and to meet him personally for the purpose of accepting an apology. The respondent adduced no evidence to the effect that this victim has suffered ongoing physical or psychological harm.

53. Counsel for the applicant submitted that Mr Adenuga accepts the principle that non-citizens who have engaged in criminal conduct should hold no expectation that they will be permitted to come to Australia. In his statement Mr Adenuga wrote "I really hope I get the opportunity to showcase my dedication and love of music with the people of Australia". He added "I humbly request that I be given a second chance to return to Australia and add to the cultural and musical excellence of this country."
54. It was conceded on behalf of the applicant that a repeat assault offence by Mr Adenuga would be likely to result in physical harm to individuals in the Australian community. Counsel for the applicant submitted, and I accept, "it cannot be said that the nature of the harm would be very substantial ...". In acceding to this submission, I do not condone the past actions of Mr Adenuga but I consider that his offences fall in the lower range of seriousness.
55. The applicant contended that the likelihood that Mr Adenuga will engage in future criminal conduct is "minimal or remote" and relied upon the submissions outlined above in relation to the positive changes and developments in his life since January 2016. The respondent contended that the likelihood that Mr Adenuga may re-offend is increased if he considers himself to be provoked by a member of the Australian community.
56. I have found above that I consider that there is a low risk that Mr Adenuga will commit criminal acts in Australia. In reaching this conclusion I have regard to the following matters:
- Mr Adenuga entered early pleas of guilty to all three of his offences and has now expressed remorse for all of his actions;
  - The Melbourne Magistrates' Court saw fit to deal with the January 2016 incident without recording a conviction;
  - The victim of the January 2016 incident has accepted an invitation to attend Mr Adenuga's concert and to receive his apology; and
  - Mr Adenuga has achieved substantial career success and embarked on charitable and commercial enterprises since January 2016.
57. I take into account further in my assessment of the low likelihood of future criminal or serious conduct on the part of Mr Adenuga the wide support base which has been

marshalled in favour of his proposed tour of Australia. In evidence were letters of support from people in the fields of music and sport, including a senior producer at Sydney Opera House, an official of the Musicians Union of Australia, the CEO of Sony Music Entertainment UK Limited and a prominent member of the Australian Opals basketball team who shares Mr Adenuga's Nigerian heritage.

58. In this regard, I take into account further that Mr Adenuga's intended stay in Australia is 10 days duration. In his oral evidence Mr Adenuga said that he intends to rest as much as possible during this period, rather than attend nightclubs and similar venues.

### **PRIMARY CONSIDERATION 3: EXPECTATIONS OF THE AUSTRALIAN COMMUNITY**

59. Clause 11.3 of the Direction provides as follows:

#### **"11.3 Expectations of the Australian Community**

1 *The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to refuse the visa application of such a person. Visa refusal may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not be granted a visa. Decision-makers should have due regard to the Government's views in this respect."*

60. The respondent submitted that the Tribunal is bound by a decision of Mortimer J in the Federal Court in *YNQY v Minister for Immigration and Border Protection* [2017] FCA 1466 ("YNQY"). That case considered cl 13.3 which relates to expectations of the Australian community in the revocation of a visa, however I note that the principles are also applicable in a case such as this where the question is the grant of a visa. At [76] Mortimer J said:

*"In substance this consideration is adverse to any applicant. As the Minister submits, it is inextricably linked to the other primary consideration of protection of the Australian community. In particular, the last two sentences of para 13.3 of the Direction suggests the "expectations" about which it speaks are expectations adverse to the position of any applicant who has failed the character test and been convicted of serious crimes. In this primary consideration as expressed (and despite the references earlier in the Direction to "tolerance") the Australian community's "expectations" are defined only in one particular way; namely, that the Australian community "expects" non-revocation where a person has been convicted of serious crimes of a certain nature. That is, this is not a consideration dealing with any objective, or ascertainable expectations of the Australian community. It is a kind of deeming provision by the Minister about how he or she,*

*and the executive government of which he or she is a member, wish to articulate community expectations, whether or not there is any objective basis for that belief. That is the structure of this part of the Direction."*

61. In *Murphy and Minister for Immigration and Border Protection (Migration)* [2018] AATA 750 at [56] Senior Member Taylor of the Administrative Appeals Tribunal made the following remarks concerning the statements of Mortimer J in YNQY:

*"The thrust of Mortimer J's observation was to emphasise the prescriptive nature of the concept of community expectation that Clause 13.3 sets out. But the actual statement that the expectation is defined only as one of non-revocation where a person has been convicted "of serious crimes of a certain nature" is not precisely accurate – having regard to the actual wording of Clause 13.3 reveals. There are four significant aspects of Clause 13.3. The first is the emphasis it places on the visa holder's compliance with the expectation implicit in the visa grant – conformity with Australian law. The second is that, despite that emphasis, it eschews the inflexible refusal of visa status, even in the case of convictions. The third is that it nevertheless contemplates that "non-revocation may be appropriate" because of the nature of a particular offence and, inferentially, even in the absence of apprehensions of unacceptable risk of repetition of the offending conduct. The fourth is the opaque requirement, in the last sentence, that decision-makers "should have regard to the government's views in this respect".*

62. I have regard to the remarks of Deputy President McCabe in *Labi and Minister for Immigration and Border Protection (Migration)* [2016] AATA 316 at [60] as follows:

*"The Direction points out the Australian Community expects non-citizens will obey Australian laws while they remain in this country. But the Direction implicitly acknowledges the community is not completely intolerant of risk: rather, it will have regard to the nature of the character concerns or offences and make a reasonable judgment. In short, one can rely on the Australian community, when fully informed of the facts, to demonstrate some perspective and settle on an outcome that is proportionate."*

63. I have regard also to remarks expressed by Deputy President Block in *Waits and Minister for Immigration and Multicultural Affairs* [2003] AATA 1336 at [36] as follows:

*"... the expectations of the Australian community should be taken to be the expectations of the informed, reasonable member of the Australian community, rather than a member of the Australian community who is only prepared to consider the punitive aspects of the power under s 501."*

64. In my view the wording of cl 11.3 of the Direction makes clear on its face that the decision-maker has a discretion whether to refuse a visa application, taking into account inter alia the expectations of the Australian community. The words "may be appropriate to refuse a visa" appear in cl 11.3 and clearly indicate and authorise a discretionary approach.

65. It is my view that the Australian community would afford recognition to Mr Adenuga for his life changes since January 2016 and extend to him the "second chance" which he requests so as to undertake the proposed concert tour. I am of the view further that the Australian community would not expect our country to be the only one of twenty-five nations to deny entry to Mr Adenuga to enable Australian citizens to experience his recognised musical skills.

## **OTHER CONSIDERATIONS**

### **Impact on Australian businesses**

66. No "Other consideration" was advanced as relevant for present purposes by the applicant. The respondent appropriately conceded that "the decision to refuse to grant a visa will have some impact on Australian businesses". As observed above, I consider that there is no necessity that I ascribe a dollar or precise value to the impact of a visa refusal on Australian businesses.

## **CONCLUSION**

67. For these reasons I conclude that the correct and preferable decision is that the decision of the Delegate of the Minister made on 27 April 2018 is set aside and in substitution, discretion exercised, pursuant to s 501(1) of the Act so as not to refuse the visa to Mr Adenuga.

*I certify that the preceding 67  
(sixty -seven) paragraphs are  
a true copy of the reasons for  
the decision herein of The  
Hon. Justice Stevenson,  
Deputy President*

.....  
Associate  [SGD]  
Dated: 7 September 2018

Date(s) of hearing: **21 August 2018**

Counsel for the Applicant: **Mr J Donnelly**

Solicitors for the Respondent: **Mr J Hutton, Australian Government Solicitor**