FEDERAL COURT OF AUSTRALIA

EGH19 v Minister for Home Affairs (No 2) [2021] FCA 903

File number(s):	NSD 261 of 2021
Judgment of:	**GRIFFITHS J**
Date of judgment:	5 August 2021
Catchwords:	**MIGRATION** – judicial review of visa refusal decision under s 501(1) of the *Migration Act 1958* (Cth) – whether Minister failed to carry out statutory task – consideration of risk of recidivism – whether Minister failed to engage in active intellectual process with psychologist's report and applicant's submissions – whether Minister's decision legally unreasonable – where Minister's reasons reflected fundamental misunderstanding of reports on risk of recidivism – application upheld – matter remitted for reconsideration according to law
Legislation:	*Migration Act 1958* (Cth) ss 501(1), 501G
Cases cited:	*Applicant WAEE v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 184; 236 FCR 593 *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 94; 277 FCR 420 *BUD17 v Minister for Home Affairs* [2018] FCAFC 140; 264 FCR 134 *EGH19 v Minister for Home Affairs* [2020] FCA 692 *Minister for Immigration and Border Protection v Sabharwal* [2018] FCAFC 160 *Minister for Immigration and Border Protection v Singh* *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1 *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541 *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; 243 CLR 164 *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611 *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; 212 FCR 99

	Muggeridge v Minister for Immigration and Border Protection [2017] FCAFC 200 *National Home Doctor Services Pty Ltd v Director of Professional Services Review* [2020] FCA 386; 276 FCR 338 *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; 258 CLR 173 *SZSSC v Minister for Immigration and Border Protection* [2014] FCA 863 *VAAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 117
Division:	General Division
Registry:	New South Wales
National Practice Area:	Administrative & Constitutional Law & Human Rights
Number of paragraphs:	94
Date of hearing:	27 July 2021
Counsel for the Applicant:	Dr J Donnelly
Solicitor for the Applicant:	Ghan Migration
Counsel for the Respondent:	Mr B Kaplan
Solicitor for the Respondent:	Australian Government Solicitor

ORDERS

NSD 261 of 2021

BETWEEN:	**EGH19** Applicant
AND:	**MINISTER FOR HOME AFFAIRS** Respondent

ORDER MADE BY:	**GRIFFITHS J**
DATE OF ORDER:	**5 AUGUST 2021**

THE COURT ORDERS THAT:

1. The respondent's decision dated 23 February 2021 be set aside.
2. The applicant's application for a protection visa be remitted for reconsideration according to law.
3. The respondent pay the applicant's costs, as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GRIFFITHS J:

Introduction

1 This case has an unfortunate history. It is the latest in a series of legal proceedings relating to the applicant's migration status. That litigation history will be elaborated upon shortly.

2 The present proceeding is a judicial review challenge to a decision dated 23 February 2021 by the then **Minister** for Home Affairs refusing to grant the applicant a protection visa under s 501(1) of the ***Migration Act** 1958* (Cth). One notable (and unusual) feature of the decision is the Minister's conclusion that the applicant should be refused a protection visa notwithstanding the Minister's acceptance that Australia owed him protection obligations and that returning him to his country of origin presented a real risk that the applicant would be killed. Moreover, the Minister stated that the applicant should not be granted a protection visa notwithstanding that the Minister explicitly acknowledged that removing him to his country of origin would put Australia in breach of its *non-refoulement* obligations and have serious implications for Australia in terms of its international standing and reputation.

Background facts summarised

3 The applicant is in his early thirties. He has lived in Australia for over 16 years.

4 When he was 16 years old the applicant was convicted of murder. On appeal his initial sentence was reduced to 17.5 years with a non-parole period of 12.5 years. On 21 December 2017, when the applicant was still in criminal detention, he applied for a protection visa. That application was refused by the Minister's delegate on 9 February 2018. The applicant was successful in having that decision reviewed by the AAT, which found that the applicant was a person in respect of whom Australia owed protection obligations. The matter was remitted for reconsideration. On 11 September 2019, the same Minister as in the present proceeding refused to grant the applicant a protection visa under s 501(1) of the *Migration Act*. The applicant sought a judicial review of that decision in this Court.

5 On 25 May 2020, the Minister's first refusal decision was set aside and the matter was remitted for reconsideration according to law (see *EGH19 v Minister for Home Affairs* [2020] FCA 692 – ***first EGH19 judgment***). The general background facts relating to the applicant and his migration status are set out in that previous judgment and need not be repeated here.

6 On 17 August 2020, the Department issued the applicant with a **Notice of Intention** to Consider Refusal of a protection visa. The applicant was provided with a copy of **Direction** 79 and was invited to use it as a framework for any response he wished to make (even though the Direction was not binding on the Minister). One of the primary considerations identified in the Direction was protection of the Australia community, which necessarily focussed on the question of the risk of the applicant re-offending. It is also apt to note that in his first visa refusal decision, the Minister had assessed that risk as low to moderate. The applicant responded to the Notice of Intention with a detailed submission dated 23 November 2020, which included a copy of a recent and detailed expert psychologist's report which assessed the applicant's risk of re-offending as low. As will shortly emerge, the significance of this report and the submissions made in respect of it figure prominently in the present judicial review challenge.

7 As noted, on 23 February 2021, the Minister decided for the second time to refuse the applicant a protection visa. It is this decision which is the subject of the present judicial review challenge, which was commenced on 28 March 2021.

The relevant statutory provisions

8 It is desirable to set out the relevant terms of ss 501 and 501G of the *Migration Act*, which relate to the Minister's decision to refuse the applicant a protection visa:

> **501 Refusal or cancellation of visa on character grounds**
>
> *Decision of Minister or delegate—natural justice applies*
>
> (1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.
>
> Note: ***Character test*** is defined by subsection (6).
>
> …
>
> *Character test*
>
> (6) For the purposes of this section, a person does not pass the ***character test*** if:
>
> (a) the person has a substantial criminal record (as defined by subsection (7)); or
>
> …
>
> *Substantial criminal record*
>
> (7) For the purposes of the ***character test***, a person has a substantial criminal record if:
>
> …

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

…

501G Refusal or cancellation of visa—notification of decision

(1) If a decision is made under subsection 501(1) or (2) or 501A(2) or section 501B, 501BA, 501CA or 501F to:

(a) refuse to grant a visa to a person; or

…

the Minister must give the person a written notice that:

(c) sets out the decision; and

(d) specifies the provision under which the decision was made and sets out the effect of that provision; and

(e) sets out the reasons (other than non disclosable information) for the decision; and

…

(3) A notice under subsection (1) must be given in the prescribed manner.

(4) A failure to comply with this section in relation to a decision does not affect the validity of the decision.

The two judicial review grounds

9 The Minister's decision is challenged on two grounds. The first is a claim that the Minister failed to carry out the statutory task under s 501(1) of the *Migration Act* because he failed meaningfully to engage with a significant submission and supporting material put by the applicant on the issue of the risk of harm he posed to the Australian community.

10 The second ground is that the Minister's decision was affected by legal unreasonableness.

11 To avoid adding unnecessarily to the length of these reasons for judgment, I will not separately summarise the parties' respective submissions on these grounds. Instead, I will address the primary relevant submissions in my reasons for judgment below.

Consideration and determination

12 It is convenient to deal with the two grounds of review in turn.

(a) Failure to carry out statutory task

13 The core of this ground is that the Minister failed to discharge his statutory task because he failed actively to engage in the requisite active intellectual process with respect to the expert

psychologist's report obtained by the applicant from **Mr** Patrick **Sheehan** relating to the risk of the applicant re-offending. Detailed submissions were made by the applicant on the significance of this report and a full copy was provided to the Department and was placed before the Minister. It is notable that while the Minister's statement of reasons refers in a few paragraphs to Mr Sheehan's report, nowhere in that statement did the Minister explicitly address the submissions on the risk of recidivism as set out in the submissions dated 23 November 2020.

(i) Some relevant legal principles summarised

14 It is convenient to set out in full my summary in the *first EGH19 judgment* at [51] of the relevant principles relating to a claim that a decision-maker has failed meaningfully to engage with a substantial claim or submission (see also *SZSSC v Minister for Immigration and Border Protection* [2014] FCA 863 at [75]-[81] per Griffiths J) (emphasis in original):

> 51 The relevant primary principles may be summarised as follows.
>
> (a) Careful attention must be paid to the relevant statutory provisions applicable to the decision which is the subject of challenge. Some of the cases referred to above relate to different Ministerial powers under the [*Migration Act*], including ss 501A(2), 501CA(3), 501CA(3A) and 501CA(4). Some of those powers make explicit reference to an applicant's statutory entitlement to make representations to the Minister as to why a particular decision should be revoked. There is no express reference to "representations" in s 501(1). It is indisputable, however, as is made explicit in the heading to the sub-section, that the exercise of the Minister's power under that provision is subject to the requirements of natural justice (in contrast with the position under s 501(3)). Natural justice requires the Minister to provide a person such as the applicant here with an opportunity to respond to a proposal to refuse to grant a visa under s 501(1), including by making submissions or representations. In those circumstances, I consider that the general principles outlined in cases relating to "representations" also apply generally to the exercise of power under s 501(1).
>
> (b) The material provided by the applicant as part of his or her natural justice rights in the s 501(1) decision-making process plays an important part in the Minister's determination of whether or not he or she should exercise the power under that provision to refuse to grant a person a visa if the Minister is not satisfied that the person passes the character test. The Minister is obliged to give meaningful consideration to a submission which is squarely raised or clearly articulated.
>
> (c) Whether a claim has been squarely raised or clearly articulated will depend upon the facts and circumstances of an individual case. A claim or submission which is unsupported by any other material and is essentially a bare assertion is unlikely to constitute a claim or submission which has been squarely raised or clearly articulated.

(d) In assessing whether this particular type of jurisdictional error has been established, it is critical to bear in mind the need to maintain the distinction between review of legality and merits review. This was emphasised by the Full Court in *AXT19* at [56]:

> 56. Considerable caution needs to be exercised in resolving an argument that a claim has been made in sufficiently clear terms that it should in turn be considered by the Tribunal. The greater the degree of clarity in which a claim has been made and advanced for consideration, the greater may be the need for the Tribunal to consider the claim in clear terms. Conversely, the more obscure and less certain a claim is said to have been made, the less may be the need for the Tribunal to consider the claim. The need for caution arises lest a reviewing Court is propelled from its sole task of undertaking judicial review and into the murky waters of impermissible merits review. The task of a court undertaking judicial review is not to elevate a statement that may have been made in passing by a claimant into a clearly articulated claim in need of resolution. For a Court undertaking judicial review to engage in such a process has all the dangers of the Court resolving a different factual case to the one advanced to the Tribunal and thereby trespassing into merits – and not judicial – review.

(e) Careful consideration must also be given to the individual facts and circumstances of a particular case in determining whether or not the decision-maker has engaged in an active intellectual process and meaningfully considered a claim or submission which has been squarely raised. Some of the considerations which may be relevant to that assessment were identified by the Full Court in *EVK18*. They include whether the decision-maker's reasons indicate that:

(i) the decision-maker has not merely repeated the relevant claim, but has gone further and demonstrated an understanding of the factual basis upon which the claim has been made;

(ii) the use of terms in a statement of reasons such as "acknowledge", "note" and "I have taken into account" need to be read in context with a view to assessing whether they simply repeat the claim or submission which has been made or rather whether they are to be understood as an acceptance by the decision-maker that there is a factual substance to the claim or submission.

(f) Although each case necessarily turns upon its own particular facts and circumstances, it may be noted, again by way of general guidance, that in *EVK18* the Full Court explained at [35] why it was satisfied that the Assistant Minister there had engaged in an active intellectual process and that his reasons were more than a mere repetition of a claim. Rather, the use of terms there such as "acknowledge" and "I have taken into account", when read in context, went beyond simply repeating the claim made and were to be understood as the Assistant Minister accepting that there was factual substance to the claim. The Full Court concluded at [35] as follows:

…

> Such consideration of the materials of relevance to the claim in respect to "mental health" goes well beyond, for example, those statements of reasons to be found in other cases which merely summarise the claims made and thereafter make no attempt to go back and try to relate those claims to the materials relied upon and to each of the matters raised for consideration. The variety of references to the materials or relevance to the Appellant's "*mental health*" expose an active consideration of the relevance of those claims to the matters otherwise required to be taken into account.

(g) In *GBV18* at [32(d)] the Full Court reaffirmed the Chief Justice's important observations in an earlier case, which in their terms are directed to s 501 generally and not merely to s 501CA(3) (emphasis added):

> The decision-maker's obligation to engage in an active intellectual process with significant and clearly expressed relevant representations made in response to an invitation under s 501CA(3)(b) is consistent with the observations of the Chief Justice in *Hands v Minister for Immigration and Border Protection* [2018] FCAFC 225; 364 ALR 423 at [3] (with whom Markovic and Steward JJ agreed) (emphasis in original):
>
> By way of preliminary comment, it can be said that cases under s 501 and the question of the consequences of a failure to pass the character test not infrequently raise important questions about the exercise of Executive power. Among the reasons for this importance are the human consequences removal from Australia can bring about. Public power, the source of which is in statute, must conform to the requirements of its statutory source and to the limitations imposed by the requirement of legality. Legality in this context takes its form and shape from the terms, scope and policy of the statute and fundamental values anchored in the common law: *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1 at 5 [9]; *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 357 ALR 408 at 423 [59]. **The consequences of these considerations are that where decisions might have devastating consequences visited upon people, the obligation of real consideration of the circumstances of the people affected must be approached confronting what is being done to people. This obligation and the expression of its performance is not a place for decisional checklists or formulaic expression. Mechanical formulaic expression and pre-digested shorthand expressions may hide a lack of the necessary reflection upon the whole consideration of the human consequences involved. Genuine consideration of the human consequences demands honest confrontation of what is being done to people. Such considerations do not detract from, indeed they reinforce, the recognition, in an assessment of legality, that those entrusted with such**

responsibility be given the freedom of lawful decision-making required by Parliament.

(h) Another important guideline is that identified by the Full Court in *GBV18* at [32(e)] regarding the need, at least in some cases, for the decision-maker to make specific findings of fact as part of the process of giving meaningful consideration to a claim (or submission) which has been clearly articulated:

> (e) Giving meaningful consideration to a clearly articulated and substantial or significant representation on risk of harm independently of any claim concerning Australia's *non-refoulement* obligations, may require the decision-maker to do more than simply acknowledge or note that the representations have been made. As stated at *Omar* at [39], depending on the nature and content of the representations, the decision-maker "may be required to make specific findings of fact, including on whether the feared harm is likely to eventuate, by reference to relevant parts of the representations in order that this important statutory decision-making process is carried out according to law".

(i) It is not suggested that the Minister must always make findings of fact in respect of every claim or contention of a person in the applicant's position. That is made clear in binding authorities such as *Minister for Home Affairs v* ***Buadromo*** [2018] FCAFC 151 at [46]; *Minister for Immigration and Border Protection v Maioha* [2018] FCAFC 216 at [41] and *Minister for Home Affairs v Ogawa* [2019] FCAFC 98 at [103].

(j) A finding that a decision-maker has not engaged in a meaningful or active intellectual process will not lightly be made (*Carrascalao* at [48]). As has been emphasised, each case necessarily turns on its own facts and circumstances. Moreover, in accordance with well-established authorities, a statement of reasons is not to be read with an eye finely attuned to the detection of error (noting, however, the need not to overstate that principle, as observed by Bell P and Payne JA recently in *Ballas v Department of Education (State of NSW)* [2020] NSWCA 86 at [79] and [80]).

15 I did not understand the Minister in the present proceeding to dispute the correctness of that summary of the relevant principles. Rather, the parties disagreed on the application of those principles to the particular facts and circumstances of this matter.

16 For the following reasons, I consider that ground 1 of the originating application is established. The error is not dissimilar to the jurisdictional error found to be established in the *first EGH19 judgment*, save that the Minister's error here was essentially his failure to make relevant findings and meaningfully engage with one of the applicant's primary submissions, supported by Mr Sheehan's recent psychologist's report, in which he assessed there to be only a low risk

of the applicant re-offending. This contrasted with the Minister's previous assessment of the applicant posing a low to moderate risk of re-offending. It is worth emphasising that the claimed error by the Minister was not a failure to take into account Mr Sheehan's report — rather, the error was said to lie in the Minister's failure to address and grapple with critical relevant features of that report (and the applicant's submissions in relation to it) and to provide a rational explanation as to why he seemingly gave them no weight in his assessment of risk.

(ii) The applicant's submission dated 23 November 2020

17 As noted above, in response to the invitation contained in the Notice of Intention, the applicant provided a detailed submission on 23 November 2020. The submission was nine pages in length. It identified what were described as "five main factors which should be given significant weight" in the Minister's decision. Those five matters included the following two matters which are relevant to this judicial review challenge:

(a) specific reference to Mr Sheehan's report and his assessment that there was a low risk of re-offending; and

(b) that the applicant would be subject to parole supervision and restrictions imposed by the NSW State Parole Authority until 7 January 2023.

18 Because of its significance to ground 1, it is desirable to set out the entirety of the submission which was made on the applicant's behalf in response to the Notice of Intention with particular reference to Mr Sheehan's report (noting that the reference in the first sentence is to the Minister's previous reasons for refusing to grant the applicant a protection visa):

> **Psychologist's report**
>
> The Minister considered there was a risk to the community of [the applicant] reoffending if he was granted a visa and released from immigration detention. At the time, there was no psychologist's report detailing the potential risk of [the applicant] to the community, if granted a visa. We have obtained a forensic psychologist's report, dated 19 November 2020, and enclose a copy.
>
> The Report finds there is a low risk of [the applicant] engaging in any criminal activity, based on the Violence Risk Scale (VRS), which is the same level assessed by NSW Corrective Services in 2014: Court Book 157.
>
> The VRS has regard to a list of factors:
>
> 1. Violent Lifestyle
> 2. Criminal Personality
> 3. Criminal Attitudes

4. Work Ethic

5. Criminal Peers

6. Interpersonal Aggression

7. Emotional Control

8. Violence during institutionalisation

9. Weapons Use

10. Insight into Violence

11. Mental Disorder

12. Substance Abuse

13. Stability of Relationships

14. Community Support

15. Released to High Risk Situations

16. Violence Cycle

17. Impulsivity

18. Cognitive Distortion

19. Compliance with Supervision

20. Security Level of Release Institution

21. Risk Scenarios and formulation

22. Potential protective factors

The Report considers these factors and finds there is a low risk of future offending:

> 62. The overall totality of evidence suggests to me that [the applicant] would be considered to be within the low risk category of violent offending relative to other adult male offenders. There are no other considerations that cause me to depart from the scoring range on the VRS tool. His substance use requires attention and needs to be extinguished entirely, even though this has not resulted in aggressive behaviours in institutional settings. In my view, [the applicant's] developmental age at the time of the offence, and the absence of violence behaviour over the intervening period of 16 years, are of compelling significance in determining the risk of future violence.

The Report concludes:

> 64. I have assessed that [the applicant] presents a low risk of violence relative to other male offenders. I note that a rating of low risk is at the bottom of the risk spectrum. There is no category of nil risk on standardised risk measures. In this sense it is never possible to rule out the possibility of further offending. I note that previous assessments have referred to estimates of low to medium risk. This does not necessarily imply that the prior and current assessments are in conflict. It is important to note that risk is dynamic, changing over time. [The applicant] would have been assessed as high risk at the time of his initial sentencing. The evidence is that as [the applicant]

> continues to age, his risk will likely continue to attenuate.
>
> 65. In my view, were [the applicant] to be released to the Australian community, this should be undertaken as soon as practicable, maximising the benefit of supervised parole, which will expire in January 2023.
>
> We submit the Report should be given significant weight. The Report determines that the boy who committed the murder in July 2005 is not the same man in November 2020. He has undergone rehabilitation to a remarkable extent. Undoubtedly there were opportunities in a prison environment over 12 years 6 months to engage in gang-related activities, acts of violence and other anti-social behaviours, but he did not. His family have supported him during this period and have continued to do so by engaging this writer.
>
> We submit that granting a visa and releasing him into the community, under the supervision of the NSW State Parole Authority until January 2023 is the most appropriate option.

(iii) Mr Sheehan's expert report

19 The submission was accompanied by a copy of Mr Sheehan's 19 page report dated 19 November 2020. Before emphasising relevant parts of that report, it is appropriate to note that Mr Sheehan is a registered psychologist who has practised since 1996. He has a Master of Psychology (Clinical), a Bachelor of Arts (Honours) Psychology and a Bachelor of Arts (Double Major in Psychology).

20 Mr Sheehan noted that he had conducted a 2.5 hour long telehealth interview with the applicant on 18 November 2020 and that he had read various documents which had been referred to him by the applicant's representative, including the Court Book and Supplementary Court Book in the previous judicial review proceeding. Those materials included a document prepared by the persons supervising the applicant's immigration detention entitled "Conduct in Immigration Detention". This document describes several incidents involving the applicant while he was in immigration detention in 2018. As will shortly emerge, it is evident that Mr Sheehan was briefed with a copy of that document and he addressed it in his report.

21 In the present proceeding, however, the Minister placed heavy reliance upon the fact that Mr Sheehan was not briefed with a copy of a subsequent Client Incident Report, which detailed additional incidents involving the applicant while he was in immigration detention covering the period early 2018 to 15 June 2020. This document was provided to the applicant for comment under cover of the Notice of Intention dated 17 August 2020 but it appears not to have been briefed to Mr Sheehan. I will return below to address the significance of this omission given the emphasis placed upon it by the Minister in the present proceeding (although, as will emerge, not in his statement of reasons). It should also be noted that while Mr Sheehan

did not address that material, in the submission dated 23 November 2020, the applicant's representative submitted that none of the incidents involving the applicant while in immigration detention could be described as having any element of violence. In addition, it was submitted that none of the incidents had been properly investigated by an independent body and no findings had been made.

22 It is evident from Mr Sheehan's comprehensive report that he paid close attention to the materials which were briefed to him relating to the applicant's circumstances, including his family history, his development, education and vocational history, his social relationships, his history of substance abuse, his medical and psychiatric history, and the circumstances relating to his criminal offence. Mr Sheehan also noted that the applicant had been released on parole on 7 January 2018, following favourable reports by NSW authorities, but that he had been immediately taken into immigration detention. Mr Sheehan noted that in his previous decision in September 2019 the Minister had found that the applicant was a "low to medium risk" of re-offending.

23 At [25] of his report, Mr Sheehan directly addressed several incidents relating to the applicant's conduct in immigration detention during the period July to October 2018, which were set out in the document entitled "Conduct in Immigration Detention", as referred to at [20] above. As previously mentioned, Mr Sheehan did not address the subsequent "Client Incident Report" because it was not briefed to him.

24 In responding to the specific issue for which he had been retained, namely to opine on the applicant's risk of recidivism, Mr Sheehan explained why he considered the applicant to be within "the low risk category of violent offending relevant to other adult male offenders". Mr Sheehan described at length the risk assessment process which he had undertaken. This involved taking into account what he described as "static and dynamic risk factors" so as to produce a comprehensive approach to risk prediction and treatment planning.

25 It is desirable to set out [34] of Mr Sheehan's report, in which he acknowledged earlier assessments of the risk of the applicant re-offending as being in a higher category than that assessed by him and he explained why a different assessment methodology should be used:

> 34. I note that the file estimates of [the applicant's] risk that settled on a Low-Medium risk category would appear to have been based on scoring of the Level of Service Inventory – Revised (LSI-R), which was scored by corrections staff at Blacktown Community Corrections (1 September 2010). I note that the LSI-R is a tool designed to guide treatment intervention needs for offending in a general sense. In my

> view, given the nature of the current proceedings, the most relevant risk assessment target would be specific to risk of violence. Therefore, I have focused on this:

26 Mr Sheehan then explained at [35] how he applied a conceptual actuarial tool that was specifically developed to assess the risk of violence for forensic clients, known as the Violence Risk Scale (**VRS**). He stated at [35] that the overall result of the VRS estimated the applicant's risk for violence "as within the Low range, relative to the sample population used in the study". Mr Sheehan then noted at [35] that "the same category was also reached in a previous VRS rating by CSNSW (Lau, 3 February 2014)". Finally, in [35] Mr Sheehan said that not having access to the case notes of Corrective Services or the body supervising the applicant's immigration detention (i.e. SERCO) "is a disadvantage in scoring the VRS, given that [the applicant's] entire adult life has been lived in institutional settings".

27 As will shortly emerge, the Minister contended that Mr Sheehan erred in his description of Ms Lau's assessment of the applicant's risk of re-offending as being "low". The Minister also highlighted Mr Sheehan's acknowledgment that he was disadvantaged in scoring the VRS because *inter alia* he did not have access to the Client Incident Report relating to the applicant's conduct in immigration detention from early 2018 to June 2020.

28 After identifying multiple dynamic risk factors identified by the VRS in relation to the applicant, Mr Sheehan came to the following conclusion at [62] of his report regarding the risk of the applicant re-offending (emphasis in original):

> 62. The overall totality of evidence suggests to me that [the applicant] would be considered to be within the **low** risk category of violent offending relative to other adult male offenders. There are no other considerations that cause me to depart from the scoring range on the VRS tool. His substance use requires attention and needs to be extinguished entirely, even though this has not resulted in aggressive behaviours in institutional settings. In my view, [the applicant's] developmental age at the time of the offence, and the absence of violence behaviour over the intervening period of 16 years, are of compelling significance in determining the risk of future violence.

29 Mr Sheehan added at [64] and [65]:

> 64. I have assessed that [the applicant] presents a low risk of violence relative to other male offenders. I note that a rating of low risk is at the bottom of the risk spectrum. There is no category of nil risk on standardised risk measures. In this sense it is never possible to rule out the possibility of further offending. I note that previous assessments have referred to estimates of low to medium risk. This does not necessarily imply that the prior and current assessments are in conflict. It is important to note that risk is dynamic, changing over time. [The applicant] would have been assessed as high risk at the time of his initial sentencing. The evidence is that as [the applicant] continues to age, his risk will likely continue to attenuate.
>
> 65. In my view, were [the applicant] to be released to the Australian community,

> this should be undertaken as soon as practicable, maximising the benefit of supervised parole, which will expire in January 2023.

These paragraphs are significant in two respects. First, Mr Sheehan opines that there is simply no category of "nil risk" on standardised risk measures and that it is never possible to rule out the possibility of further offending. Secondly, he refers to "previous assessments" having referred to estimates of low to medium risk. It is not entirely clear which previous assessments Mr Sheehan was referring to. It may be a reference to the State Parole Authority Report dated 10 November 2017 (which contains a reference to the "results of a comprehensive risk assessment estimate the offender's overall risk of re-offending as within the Low-Moderate range"). It might also be a reference to the report dated 3 February 2014 prepared by a psychologist, **Ms** Mandy **Lau**.

30 It should be noted that the evidence did not include a full copy of Ms Lau's report, but there are references to parts of it in other materials. For example, the "Initial Report of the Serious Offenders Review Council" dated 26 September 2016 (**Initial SORC Report**), which was before Mr Sheehan, referred to Ms Lau concluding that the results of the comprehensive risk assessment estimated the applicant's overall risk of re-offending as "within the Low-Moderate range". But earlier in the Initial SORC Report, under the heading "Risk Assessment results", reference was made to Ms Lau's report and her conclusion that the "overall result of the VRS estimated [the applicant's] risk for violence was **towards the upper limit of the Low range** …" . I will return below to address the Minister's claim that the cogency of Mr Sheehan's report is affected by what the Minister claimed to be his erroneous statement that he and Ms Lau both arrived at an assessment of risk as "low".

31 Copies of the State Parole Authority Report, the Initial SORC Report and another report dated 27 October 2017 called the "Pre-Release Report" prepared by Corrective Services NSW were before the Minister (see Attachments H, J and I to the statement of reasons respectively). As will shortly be developed, the Minister now claims that he was entitled to give preference to the State Parole Authority Report and the Pre-Release Report over that of Mr Sheehan.

32 It is plain from the matters set out above that the applicant squarely raised as a primary matter for the Minister's consideration his claim that, in contrast to the Minister's previous determination, the risk of the applicant re-offending was only low, a claim which was supported by Mr Sheehan's recent report.

33 In applying the relevant legal principles summarised above, it is important to have regard not only to those parts of the Minister's statement of reasons relating to the risk of the applicant re-offending and the materials relating to that topic, including Mr Sheehan's report, but also to the submissions made to the Minister on this topic by his Department. As will shortly emerge, and as is usually the position, they substantially overlap.

(iv) The relevant parts of the Department's submission summarised

34 It is convenient first to describe the relevant parts of the Department's submission to the Minister relating to the risk of the applicant re-offending. This issue was dealt with in two parts of the Department's submission. The first was under the heading "Offending History". The Department drew attention at [25] and [27]-[28] to the State Parole Authority Report (which formed Attachment H to the submission). The Department referred at [27] to the report stating that, after a comprehensive risk assessment, the applicant's behaviour was deemed satisfactory "and with a low to moderate level of risk of re-offending". The Department also referred at [29] to the Initial SORC Report (Attachment J to the submission) and summarised the material therein relating to the applicant having demonstrated "good rehabilitative behaviour in the community through escorted work excursions and more recently work release and day leave" while he was in criminal detention.

35 Later, at [31] ff of the Department's submission, reference was made to the applicant's involvement in several incidents while in immigration detention since 7 January 2018, including allegations of assault of other detainees. These matters are dealt with at [31]-[33] of the Department's submission which should be set out in full:

> 31. Since being held in immigration detention from 7 January 2018, [the applicant] has been involved in a number of incidents including allegations of assault of other detainees, speaking in an aggressive and abusive manner, recording a positive urine test for amphetamines and benzodiazepines, filming centre staff while a room search was being undertaken, filming conversations between detainees and staff even after being told to stop recording, and posting videos to social media which showed he felt highly aggrieved (**Attachment NN**).
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> 32. [The applicant's] Client Incident Report indicates that on 9 June 2019 [the applicant] reportedly created a disturbance after his father was denied entry to the detention centre due to a double positive reading on the IONSCAN (an explosives and narcotics trace detection unit). On 15 July 2019 detention staff reportedly witnessed [the applicant] physically assaulting another detainee for an unknown reason. On 22 July 2019 [the applicant] is reported to have allegedly punched another detainee on the forehead, which required detention staff to intervene to protect [the applicant] from retaliation. On 22 August 2019 he displayed abusive and aggressive behaviour to detention centre staff when he wilfully damaged Commonwealth property by hitting a television with a plastic chair breaking the screen as he was upset about his "*buy up*"

points (**Attachment NN**).

> 33. The Client Incident Report also indicates that on 28 November 2019 [the applicant] assaulted another detainee who was a new arrival moving into the shared room with [the applicant]. [The applicant] is reported to have been agitated, stating 'I am going to belt this cocksucker' and then he walked up to the detainee and slapped the left side of his face with an open hand. On 29 November 2019 [the applicant] assaulted another detainee. The Client Incident Report notes that detention centre CCTV shows [the applicant] running towards another detainee, punching him several times in the torso and pushing him to the ground. [The applicant] then walked away after another detainee intervened. The detainee did not wish to pursue the matter further stating 'he did not want to be labelled a dog'. (**Attachment NN**).

36 Having highlighted for the Minister's consideration these various incidents involving the applicant's conduct in immigration detention, it is a little curious that the Department did not draw to the Minister's attention the fact that in all but one of the incident reports the matter was characterised as "minor".

37 The issue of the risk of re-offending was revisited by the Department later in its submission to the Minister. Under the heading "Protection of the Australian Community", the Department purported to summarise the applicant's submission dated 23 November 2020 (together with his previous response to the earlier Notice of Intention to Consider Refusal issued on 27 September 2018). The Department's summary was made under two sub-headings, namely "Nature and seriousness of the conduct" and "Rehabilitation and mitigation". The summary under the second sub-heading is set out at [41]-[57] of the Department's submission. It is notable that [47] of the submission is entirely blank. There is nothing in the material before the Court which indicates whether the Minister was aware of this omission, nor is there any evidence to indicate the nature of the missing material. It should also be noted that the Department made no attempt to summarise those parts of the submission dated 23 November 2020 which related specifically to the risk of re-offending as opposed to setting out two paragraphs from Mr Sheehan's report.

38 At [48], the Department referred to the Pre-Release Report (Attachment I to the submission) and the information it contained regarding continuing support given to the applicant from his family and the applicant's intention to return to his family home if released on parole. It is notable that the Department's submission makes no reference to any part of that report relating to an assessment of the risk of the applicant re-offending.

39 Turning now to the Department's analysis of Mr Sheehan's report, it is desirable to set out in full [52] and [53] of the Department's submission, which contains all the summarised information provided to the Minister in relation to Mr Sheehan's report on the issue of risk,

and noting that both these paragraphs appear verbatim at [40] and [41] of the Minister's statement of reasons (emphasis in original):

> 52. In a Psychological assessment of [the applicant] from Mr Patrick Sheehan dated 19 November 2020 (**Attachment QQ3**), Mr Sheehan states that having been in custody since the age of 16, [the applicant] has never cohabitated with an intimate partner. He states that [the applicant] maintained a number of relationships through gaol visits, the longest being four years. He states that [the applicant] is currently in a relationship that commenced 12 months ago with a woman who has a small child, and that he hopes to build this relationship in the community should he be successful in obtaining a Protection visa.
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> 53. The Psychological assessment also states that in 2012-2013 while in custody, [the applicant] commenced smoking non-prescribed buprenorphine, which was associated with him experiencing apathetic and nihilistic beliefs about his future due to the length of his sentence. [the applicant] reported that subsequent to his successful appeal, he began to feel hope for the future and ceased drug use in 2013, remaining abstinent until 2018 where in immigration detention he again felt disappointment and a loss of hope, and he commenced smoking buprenorphine and methylamphetamine once to twice a week for a period of several months and then occasionally until two or three months prior to the Psychological assessment (circa August 2020). [The applicant] reported this cessation was due to a growing appreciation that drug use was contradictory to the emotional commitment he has made to his partner and her young son. Mr Sheehan finds that the overall totality of the evidence suggests that [the applicant] would be considered to be within the low risk category of violent offending relative to other adult male offenders and that [the applicant] should be released to the Australian community as soon as practicable to maximise the benefit of supervised parole, which will expire in January 2023 (**Attachment QQ3**).

40 As is evident from these extracts, a full copy of Mr Sheehan's report was attached to the Department's submission. It should also be noted that there is no reference anywhere in the Department's submission to the fact or significance of Mr Sheehan not having been briefed with the latest Client Incident Report.

(v) The relevant parts of the Minister's reasons summarised

41 Turning now to the Minister's statement of reasons (which adopted without alteration the draft statement of reasons placed before the Minister by his Department), under the heading "Risk to the Australian Community", commencing at [21], the Minister explained why he concluded that there was a "low to medium risk" of the applicant re-offending. The Minister referred at [24]-[26] to the applicant's involvement in various incidents while in both criminal and immigration detention, including the applicant's response dated 24 October 2018 to those matters (Attachment P to the statement of reasons, noting that the distinction between this response and the detailed submissions made on 23 November 2020, which were Attachment QQ2 to the statement of reasons). Express reference was made at [28] and [29] to several incidents identified in the latest Client Incident Report (which was Attachment NN to

the statement of reasons), particularly incidents which occurred on 15 June 2020 (verbal threats), 29 November 2019 (assaulting another detainee), 28 November 2019 (assaulting another detainee), 22 August 2019 (abusive and aggressive behaviour and wilful damage to Commonwealth property), 22 July 2019 (punching another detainee on the forehead), 15 July 2019 (physical assault of another detainee) and 9 June 2019 (creating a disturbance after his father was denied visiting access). It is appropriate to repeat that Mr Sheehan did not address those incidents in his report, because he had not been briefed with the latest Client Incident Report.

42 As mentioned above, apart from Mr Sheehan's report, there were three other reports which were briefed to the Minister by his Department which contained information concerning the applicant's risk of re-offending, copies of which became Attachments H, I and J to the statement of reasons (i.e. mirroring the attachments to the Department's submission).

43 It is desirable to highlight the key relevant features of those documents before identifying how they were used by the Minister in his statement of reasons.

44 Attachment H, is the State Parole Authority Report, which provided notice to the applicant of the Authority's intention to grant the applicant parole. On the third page of that document, after referring to the applicant having completed various programs while in criminal detention, the Authority said:

> The results of a comprehensive risk assessment estimate the offender's overall risk of re-offending as within the Low-Moderate range.

45 Attachment I is a copy of the Pre-Release Report by Corrective Services. At page 5 of that document, it was stated that the applicant was "suitable for a **medium-low** level of intervention by Corrective Services NSW, commensurate with the assessed risk and identified criminogenic needs" (emphasis in original).

46 Attachment J is a copy of the 24 page Initial SORC Report. This document was among the materials referred to in the State Parole Authority Report. This document referred to the sentencing judge's remarks that the applicant was under peer pressure when he committed the offence of murder and "that is not likely to reoccur so that he is unlikely to offend again". Later in the Initial SORC Report, under the heading "Contact with Psychological Services", there is a reference to a psychologist's report dated 16 April 2010, when the applicant was in juvenile detention, which assessed him as "not being an elevated risk of violence and he is classified as medium B1". At [32] of the Initial SORC Report, there is a reference to Ms Lau's report dated

3 February 2014 which concluded that the "results of the comprehensive risk assessment estimate [the applicant's] risk of reoffending as within the Low-Moderate range".

47 It is revealing to now turn to the body of the Minister's statement of reasons to see how he relied upon those materials (which substantially reflected the Department's limited summaries and analysis of the materials). The only reference to the Pre-Release Report is at [36], where the Minister noted that the report indicated that the applicant had had past and ongoing contact and support from his family and friends. There are references at [42], [43] and [45] of the statement of reasons to the State Parole Authority Report. At [42], after referring to this report, the Minister said that "after a comprehensive risk assessment, [the applicant's] behaviour has been deemed satisfactory and with a *low to moderate* level of risk of re-offending".

48 At [45] of his statement of reasons, referring specifically to Attachment H, the Minister noted the State Parole Authority's view that the applicant's continued criminal detention was no longer warranted and the Minister said that the applicant was still "deemed by Community Corrections to be of a low to medium risk of re-offending" (as will shortly emerge, this reveals an important misunderstanding on the Minister's part). It is convenient to set out in full [45] of the statement of reasons (emphasis in original):

> Despite the rehabilitative measures that [the applicant] has undertaken while incarcerated and the determination from the NSW State Parole Authority that his continued detention was no longer warranted, [the applicant] was still deemed by Community Corrections to be of a low to medium risk of re-offending (**Attachment H**). I have considered [the applicant's] efforts at rehabilitation, which are significant and I have also given weight to his relationships with family in Australia and his partner which I consider a protective factor. Nevertheless, [the applicant] remains subject to a parole order until January 2023 and his rehabilitation has not yet been tested in the community. Therefore I find there is a risk that [the applicant] will reoffend, albeit it a low to medium risk.

49 The only reference in the body of the Minister's statement of reasons to the Initial SORC Report occurs in [44]. Having referred to the Serious Offenders Review Council's assessment of the applicant's conduct under work release, the Minister noted at [44] that the Council's view was that it was appropriate to release the applicant on parole.

50 The Minister emphasised in the present proceeding that he gave preference to the assessment of risk in the State Parole Authority Report and the Initial SORC Report. This presents several significant difficulties for the Minister's defence in this proceeding, which I will develop below. Before doing so, it is desirable to address the extent to which the Minister engaged in

an active intellectual assessment with Mr Sheehan's report and the submissions made by the applicant in respect of it.

51 Apart from an alleged indirect reference in the second sentence of [45] (extracted at [48] above), the entirety of the Minister's analysis and assessment of Mr Sheehan's report, in the context of assessing risk (noting that there is a brief reference elsewhere with reference to other matters arising under Direction 79), is contained in [40] and [41] of the statement of reasons. These paragraphs, as extracted below, mirror [52] and [53] of the Department's submission (extracted at [39] above) (emphasis in original):

> 40. In a Psychological assessment of [the applicant] from Mr Patrick Sheehan dated 19 November 2020, Mr Sheehan states that having been in custody since the age of 16, [the applicant] has never cohabitated with an intimate partner. He states that [the applicant] maintained a number of relationships through gaol visits, the longest being four years. He states that [the applicant] is currently in a relationship that commenced 12 months ago with a woman who has a small child, and that he hopes to build this relationship in the community should he be successful in obtaining a Protection visa (**Attachment QQ3**).
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> 41. The Psychological assessment also states that in 2012-2013 while in custody, [the applicant] commenced smoking non – prescribed buprenorphine, which was associated with him experiencing apathetic and nihilistic beliefs about his future due to the length of his sentence. [the applicant] reported that subsequent to his successful appeal, he began to feel hope for the future and ceased drug use in 2013, remaining abstinent until 2018 where in immigration detention he again felt disappointment and a loss of hope, and he commenced smoking buprenorphine and methylamphetamine one to two times a week for a period of several months and then occasionally until two or three months prior to the Psychological assessment (circa August 2020). [The applicant] reported this cessation was due to a growing appreciation that drug use was contradictory to the emotional commitment he has made to his partner and her young son. Mr Sheehan finds that the overall totality of the evidence suggests that [the applicant] would be considered to be within the low risk category of violent offending relative to other adult male offenders and that [the applicant] should be released to the Australian community as soon as practicable to maximise the benefit of supervised parole, which will expire in January 2023 (**Attachment QQ3**).

52 As noted above, there is no reference at all in the body of the Minister's statement of reasons to the detailed submissions dated 23 November 2020 in relation to the central topic of the risk of re-offending.

(vi) The Minister's submissions

53 In responding to the first ground of judicial review, the Minister submitted that the applicant had misread the Minister's statement of reasons relating to the applicant's risk of re-offending and overstated the import of Mr Sheehan's report. In particular, the Minister relied heavily on the fact that Mr Sheehan had not been briefed with a copy of the Client Incident Report, a copy

of which had been provided to the applicant's representatives on 17 August 2020 with the Notice of Intention. In the present proceeding, the Minister submitted that this omission exposed what he described as a "fundamental flaw" in Mr Sheehan's report, namely that he was assessed as posing only a low risk of violent offending principally on account of a lack of evidence which demonstrated that he had engaged in violent conduct after his murder conviction. The Minister submitted that "there was a not insubstantial body of material suggesting otherwise that the applicant chose not to provide to the author of that report".

54 In the present proceeding, the Minister submitted that he was under no obligation to have regard to Mr Sheehan's report because of its deficiencies. The Minister referred to what Robertson J said in *Minister for Immigration and Citizenship v* ***SZRKT*** [2013] FCA 317; 212 FCR 99 at [112] where his Honour stated that whether a tribunal is obliged to consider a document or documents will depend on the circumstances of the case and the nature of the document (referring to what the Full Court said in *VAAD v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 117 at [77] per Hill, Sundberg and Stone JJ). Justice Robertson added that, in a case relating to corroborative evidence, relevant factors include the "cogency of the evidentiary material" and the place of that material in the assessment of the applicant's claims (see also *BUD17 v Minister for Home Affairs* [2018] FCAFC 140; 264 FCR 134 at [65] per Robertson, Steward and Thawley JJ and the cases cited therein).

55 The Minister's alternative submission was that if he was under a duty to have regard to Mr Sheehan's report, he was entitled to give the document minimal, if any, weight. The Minister drew attention to the fact that he had summarised Mr Sheehan's report at [40] and [41] of his statement of reasons and that the Court should infer that it was taken into account in the Minister's assessment that there was a low to medium risk that the applicant would reoffend. The Minister submitted that the Court should accept that he placed greater weight on the State Parole Authority Report and the Pre-Release Report. He submitted that his decision to place greater weight on those two reports than on Mr Sheehan's report was "entirely" a matter for him, citing *Minister for Immigration and Citizenship v* ***SZJSS*** [2010] HCA 48; 243 CLR 164 at [32]-[35]).

56 For the following reasons, I do not accept these submissions concerning ground 1.

57 First, although as the Minister correctly points out, ultimately it is a matter for him as the primary decision-maker to decide what weight he attaches to materials which are placed before him, it is equally clear that that choice needs to be based on a correct understanding and

appropriate analysis of those materials, particularly where they are relevant to a critical issue in the decision-making process, as is the case here. Where the Minister is statutorily obliged to provide a statement of reasons for his decision, as was required in this case (see s 501G(1)(e) of the *Migration Act* extracted at [8] above), he should provide a rational and intelligible explanation as to why he chose to give greater weight to some material over other material where it relates to a significant issue which has been the subject of detailed submissions. As the Full Court stated in *Minister for Immigration and Border Protection v* ***Singh*** [2014] FCAFC 1; 231 FCR 437 (see at [45]-[47] per Allsop CJ, Robertson and Mortimer JJ), where a primary decision-maker has provided the statement of reasons for a decision, those reasons become the focal point in determining where there is unreasonableness in the legal sense. A similar approach is appropriate where the legal challenge is a failure to engage in an active intellectual process with a submission and supporting materials relating to a significant issue for determination. The statement of reasons here indicates that the Minister made no attempt to analyse and evaluate the reasoning underlying Mr Sheehan's different assessment of the risk of the applicant re-offending.

58 A second and separate difficulty is that the so-called deficiencies which the Minister now highlights in Mr Sheehan's report, particularly the omission to brief him with the latest Client Incident Report detailing aspects of the applicant's conduct in immigration detention, are simply not referred to in either the Department's submission or the Minister's statement of reasons. This alleged omission was raised for the first time in the Minister's submissions in the current proceeding. It has the hallmarks of an afterthought and seeks retrospectively to fill a serious gap in the Minister's reasons as to why he now says he preferred those other two reports to that of Mr Sheehan, particularly in circumstances where Mr Sheehan's report was the most current report dealing with the risk of recidivism before the Minister. As stated by Charlesworth J (Flick and Perry JJ agreeing) in *Muggeridge v Minister for Immigration and Border Protection* [2017] FCAFC 200 at [48], "… it is not to be presumed that the Minister has reasoned in a particular fashion in a particular case, merely because that manner of reasoning would be permissible".

59 Thirdly, I do not consider that Robertson J's remarks at [112] of *SZRKT* support the Minister's position in this case. Those remarks were directed to a case in which it was claimed that the decision-maker, in making an adverse finding regarding the applicant's credibility, had failed to take into account corroborative evidence in the form of a certified academic transcript. His Honour made clear at [102] and [111] that the decision-maker in that case was obliged to

consider evidence or contentions where the evidence was relevant to the criteria for the grant of a protection visa and the contentions are not "misconceived" (quoting *Applicant WAEE v Minister for Immigration and Multicultural Affairs* [2003] FCAFC 184; 236 FCR 593 at [44]-[46] per French, Sackville and Hely JJ). His Honour emphasised at [111] that there was no clear distinction between an applicant's claims and evidence advanced in support of those claims, with the fundamental question being "the importance of the material to the exercise of the [Administrative Appeals] Tribunal's function and thus the seriousness of any error". I respectfully agree with those observations.

60 As I have emphasised, the applicant's complaint here is a failure to engage in the requisite intellectual process in respect of both the applicant's submissions and Mr Sheehan's report on the issue of risk. Unlike the position in *SZRKT*, the applicant here does not contend that the Minister failed to take into account Mr Sheehan's report. Rather, his complaint is directed to the adequacy of the Minister's engagement with that report.

61 Moreover, the applicant complains that the Minister's statement of reasons fails to respond at all to what was claimed in his detailed written submission dated 23 November 2020 regarding the risk of recidivism, that being a relevant and important matter in the Minister's exercise of power under s 501(1) of the *Migration Act*.

62 In any event, assuming that the "cogency" of evidence or submissions is a relevant matter, I do not accept the Minister's submission that Mr Sheehan's report should not be regarded as "cogent evidence". That report was the most up to date report before the Minister on the issue of risk. It provided an expert assessment of risk which differed from the Minister's previous assessment of the level of risk and the material on which that previous assessment was based. I do not accept that Mr Sheehan's report was stripped of its cogency because of the failure to brief Mr Sheehan with the Client Incident Report. Whether the material relating to the applicant's conduct in immigration detention during the period 2018-2020 would have affected Mr Sheehan's assessment of risk is entirely speculative. It may be significant, however, that only one of those incident reports describes the subject matter as "major". All the other reports describe the subject matter as "minor".

63 As to the "major" incident, it is notable that the description of the events which occurred on 22 July 2019 portray the applicant as the victim and not the perpetrator of an assault. The report refers to an incident on that day at approximately 11.27 am where "unplanned and control use of force was utilised by ERT staff to separate and deescalate an altercation" between

[the applicant] and other detainees. The report later refers to "unplanned force" being used by staff to move the applicant to an interview room during an altercation between himself and other detainees. It is then stated that the other detainees "assaulted [the applicant] by punching him on the face several times during what appeared to be a heated discussion between them". Thus this incident, which was described as "major", apparently involved the applicant being physically assaulted by other detainees. It is not easy to understand how that incident, as reported, would count heavily against the applicant in an assessment of his risk of re-offending.

64 Nor do I accept the Minister's submission that the cogency of Mr Sheehan's report is affected by what the Minister claimed to be an error at [35] of that report, when Mr Sheehan said that a "low range" category had been reached by Ms Lau in her 3 February 2014 VRS rating. The Minister contended that this was inconsistent with the reference in Initial SORC Report to the applicant's VRS having been assessed as "Low/Moderate" in Ms Lau's report. The difficulty with this submission is that, as noted above, there is an earlier reference in the Initial SORC Report to Ms Lau having concluded in her 3 February 2014 report to the VRS estimate of the applicant's risk for violence "was **towards the upper limit of the Low range** …" (emphasis in original). Accordingly, Ms Lau's assessment is referred to inconsistently in the Initial SORC Report. Mr Sheehan can scarcely be criticised for having correctly relied upon what was attributed to Ms Lau (and indeed what appeared to be an extract from her report) earlier in the Initial SORC Report. As I have emphasised, neither the Minister nor Mr Sheehan had available a full copy of Ms Lau's assessment. Only extracts from that assessment were included in the material.

65 Fourthly, it is evident that the Department misread the State Parole Authority Report, which misreading was adopted by the Minister. The State Parole Authority referred to the finding of the sentencing judge that it was "unlikely" that the applicant would re-offend and that he had good prospects for rehabilitation. The report then states (emphasis added):

> He is assessed as **low risk** and requiring a medium-low level of intervention by Community Corrections.

66 Thus, contrary to the view taken by both the Department and adopted by the Minister, the State Parole Authority assessed the applicant as low risk as at 10 November 2017. The reference to "requiring a medium-low level of intervention by Community Corrections" is not a statement of the level of the risk of the applicant re-offending, but rather describes the level of ongoing supervision of the applicant by Community Corrections if he were released on parole, as recommended by the State Parole Authority.

67 There is a reference earlier in the State Parole Authority's report (at page 3) to the "results of a comprehensive risk assessment estimate the offender's overall risk of re-offending as within the Low-Moderate range". The context in which that statement is made is a summary of the rehabilitative steps taken by the applicant while he was in juvenile detention up until mid-2010 and then in the adult criminal incarceration. Although the State Parole Authority did not explicitly identify the author of the "comprehensive risk assessment", it is evident from the context of that statement that this assessment was made prior to 10 November 2017, which is the date of the State Parole Authority's report.

68 Some further light on this issue is cast by the Initial SORC Report, a copy of which was before the State Parole Authority when it was deciding whether to release the applicant on parole. The Initial SORC Report contains a reference to a psychologist's report dated 16 April 2010, when the applicant was detained by Juvenile Justice. That report concluded that the applicant was then assessed as not being an elevated risk of violence and "is classified as medium B1". In his written submissions in the present proceeding the Minister expressly disavowed any reliance by him on that 2010 report. It is also notable that in those submissions, the Minister did not suggest that anything in the Initial SORC Report influenced him in his decision to give less weight to Mr Sheehan's report.

69 As noted at [30] above, there is a separate reference in the Initial SORC Report to Ms Lau's psychologist's report dated 3 February 2014, where the following conclusion was expressed:

> The results of the comprehensive risk assessment estimate [the applicant's] overall risk of reoffending as within the Low-Moderate range.

70 Given this language, it appears that this is the report which the Minister primarily relied upon in making his own finding regarding the risk of re-offending. Significantly, the Minister offered no rational explanation in this proceeding (or, indeed, in his statement of reasons) as to why he preferred one assessment of risk apparently given by Ms Lau on this subject, as opposed to the views of the sentencing judge, the State Parole Authority and Mr Sheehan's report dated November 2020 (not to mention the fact that the extracts from Ms Lau's report contained inconsistent assessments of risk, as emphasised above).

71 Equally significantly, it is notable that the Minister's statement of reasons does not explain why greater weight was not given to Mr Sheehan's report, in circumstances where it was the most up to date and detailed assessment of the risk of the applicant re-offending. As has been emphasised, Mr Sheehan's assessment that the level of risk was low was supported *inter alia*

by the State Parole Authority's report and also by the remarks of the sentencing judge. The Minister was not obliged at law to accept that assessment, but in the particular circumstance of this case he was obliged to explain why he preferred other much earlier assessments, including one of two apparently conflicting assessments attributed to Ms Lau. In particular, the statement of reasons is entirely silent on the principal matter upon which the Minister now relies in the present proceeding in defending his "choice" between the competing evidence, namely the failure to brief Mr Sheehan with the latest "Client Incident Report".

72 Fifthly, these significant deficiencies and omissions in the Minister's reasoning on risk are not overcome by the fact that the last sentence of [45] of his statement of reasons commences with the word "Therefore" (see [48] above). The Minister contended that this demonstrated that he had taken into account all the material before him on risk, including Mr Sheehan's report. The difficulty, however, is that the use of the term "therefore" does not remedy the multiple deficiencies and omissions in the Minister's analysis of the reports by Mr Sheehan and others. The Minister's contention also misconceives the gravamen of ground 1, which focusses on the adequacy of his intellectual engagement with the relevant materials on risk.

73 Finally, it is notable that the Minister did not dispute, nor seek to explain, why there is no reference or response at all in his statement of reasons to those parts of the applicant's detailed submissions dated 23 November 2020 relating to the risk of him re-offending.

74 In opposing ground 1, the Minister urged the Court to adopt the approach taken by the Full Court in *Minister for Immigration and Border Protection v* ***Sabharwal*** [2018] FCAFC 160. In upholding the Minister's appeal in that case, the Full Court disagreed with the primary judge's conclusion that the Minister had overlooked or failed to give proper, genuine and realistic consideration to a psychologist's report in exercising his discretion to refuse a visa under s 501(1) (see at [75]-[85] per Perram, Murphy and Lee JJ).

75 As I have emphasised, each case must be looked at with close attention to its own particular facts and circumstances. The circumstances in *Sabharwal* are distinguishable. First, as the Full Court stated at [77], the Minister's summary of the psychologist's report in that case was comprehensive and constituted a "fair summary of the salient parts of the report". That is not the case here. The Minister's summary of Mr Sheehan's detailed report, which is contained in two paragraphs of the statement of reasons, does not engage at all with the methodology and underlying reasoning provided by Mr Sheehan for his expert assessment.

76 Secondly, unlike the position here, the Minister in *Sabharwal* made multiple references to the psychologist's report, including specifically when assessing the risk that Mr Sabharwal would re-offend (at [78]).

77 Finally, and significantly, the Full Court emphasised at [83] that it did not view the psychologist's report as "central" to the Minister's exercise of discretion. That is to be contrasted with the position here where Mr Sheehan's report was relevant to a central issue as to whether the Minister should exercise his power under s 501(1), namely the risk of the applicant re-offending and broader issue of the risk of harm to the Australian community.

78 The Minister's reliance on *SZJSS* at [32]-[35] (see [55] above) is also misplaced. The High Court allowed an appeal from the Full Court, which had held that the Administrative Appeals **Tribunal** fell into jurisdictional error in giving no weight to certain letters when the Tribunal concluded, on the basis of other evidence, that the applicant was not in danger from Maoists in Kathmandu. The other evidence which the Tribunal accepted post-dated the letters and included evidence from the applicant himself on the topic. The High Court said at [35] that there was no failure by the Tribunal to respond to a substantial argument.

79 The position is different here. Mr Sheehan's report provided the most up to date expert assessment of the applicant's risk of recidivism. Moreover, the Minister misread or misunderstood important parts of the earlier risk assessments which he preferred to rely upon in concluding that the risk was low-medium and not merely low as claimed by the applicant. Finally, although the Minister purported to take into account Mr Sheehan's report, his summary and understanding of it as disclosed in his statement of reasons was seriously inadequate for the reasons given above, particularly in the context of the emphasis which the applicant placed upon that report in his submissions dated 23 November 2020.

80 Nothing I have said above denies the incontrovertible proposition that ultimately it is a matter for the Minister as the primary decision-maker to determine what weight he gives to materials which are placed before him (putting to one side a case of unreasonableness in the outcome). However, the law requires the Minister to engage in an active and rational intellectual process in considering relevant evidence and submissions on a central issue for determination, which in this case undoubtedly included the risk of recidivism.

81 For these reasons, I consider that the Minister failed to engage in the requisite active intellectual process in assessing the risk of the applicant re-offending, having regard to the prominence

given to that issue by the applicant in his submissions and his reliance on Mr Sheehan's report. The error is plainly material because the Minister may have reached a different conclusion on the risk of re-offending and the significance of that conclusion on his ultimate visa refusal decision if he had conducted a proper and informed analysis of the relevant materials. Accordingly, his error is a jurisdictional error.

(b) Legal unreasonableness

82 The applicant's second ground of judicial review relies upon the concept of legal unreasonableness. He claims that there was a lack of evident and intelligible justification for a critical step in the Minister's reasoning process, namely that relating to his risk assessment regarding the applicant. In brief, the applicant contends that the Minister failed to engage with Mr Sheehan's report, provided reasons that were contrary to the evidence and otherwise bore no apparent rational connection with the risk assessment question.

83 Having regard to the applicant's success with ground 1, it is strictly unnecessary to determine ground 2. If it had been necessary, however, it also would have been upheld for the following reasons.

84 There are numerous cases which discuss and analyse relevant legal principles guiding judicial review for unreasonableness in the legal sense. They include *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332; *Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16; 240 CLR 611; *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; 264 CLR 541; *Plaintiff M64/2015 v Minister for Immigration and Border Protection* [2015] HCA 50; 258 CLR 173; *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; 237 FCR 1; *Singh* and *BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 94; 277 FCR 420.

85 It is convenient to repeat my summary of the principles which emerge from such cases in *National Home Doctor Services Pty Ltd v Director of Professional Services Review* [2020] FCA 386; 276 FCR 338 at [119]:

> 119 Some of the relevant principles which emerge from those cases may be summarised as follows:
>
> (a) Both grounds of judicial review are stringent and confined and require the judicial review court "to assess the quality of the administrative decision by reference to the statutory source of the power exercised in making the decision" (*SZVFW* at [79] per Nettle and Gordon JJ) and

on the basis of the factual information before the decision-maker (*Stretton* at [7]-[13]).

(b) Where reasons are provided, as is the case here with respect to both the ss 89C and 93 reports, they are the focal point for the assessment of legal unreasonableness (*SZVFW* at [84] per Nettle and Gordon JJ and *Singh* at [47] per Allsop CJ, Robertson and Mortimer JJ).

(c) Although the standard of legal unreasonableness applies across a range of statutory powers, the indicia of legal unreasonableness must be found in the scope, subject and purpose of the particular statutory provisions in issue in any given case and the reasoning process in review for legal unreasonableness is inevitably fact dependent (*Singh* at [48]).

(d) Legal unreasonableness can either be "outcome focussed" (without necessarily identifying another underlying jurisdictional error) or it can focus on an examination of the reasoning process by which the decision-maker arrived at the exercise of power (*Singh* at [44]-[47]).

(e) In a case where a decision-maker's statutory function calls for a "broad and subjective" evaluation, the task of demonstrating the requisite lack of an "evident and intelligible justification" becomes a "virtually insuperable hurdle" (*Plaintiff M64/2015* at [55]-[57]).

(f) Legal unreasonableness requires the Court to acknowledge that there is "an area of decisional freedom" vested in the decision-maker in exercising a statutory discretionary power (*Li* at [28] per French CJ and *Singh* at [44]).

86 Consistently with those principles, where reasons have been provided, as is the case here having regard to the Minister's obligation under s 501G(1)(e), those reasons are the focal point for an assessment of whether there is legal unreasonableness.

87 In his written submissions, the Minister characterised ground 2 as a complaint that the Minister's finding at [45] of his statement of reasons (i.e. that the applicant presented a low to medium risk of re-offending) was irrational or illogical. It is desirable to set out [22] and [23] of the Minister's written outline of submissions, which encapsulate why the Minister says that his finding on risk was not illogical or irrational (emphasis in original, footnotes omitted):

> 22. The Minister's conclusion at CB 22 [45] was not illogical or irrational. It was supported by (at least) the Parole Report, the Pre-Release Report and the Initial Report of the Serious Offenders Review Council dated 26 September 2016 (**SORC Report**). In making the finding at CB 22 [45], the Minister relied not on a 2010 risk assessment (cf AS [26]), but on the October 2017 risk assessment conducted by Muswellbrook Community Corrections in the Pre-Release Report (CB 154). That assessment appears to have been adopted by the State Parole Authority in the Parole Report (CB 147). Alternatively, the State Parole Authority adopted a risk assessment conducted by Mandy Lau (a psychologist) on 3 February 2014 (**Lau Report**), which assessed the applicant's "overall risk of offending as within the Low-Moderate range" (CB 177 [32]) and was consistent with the assessment conducted in the Pre-

> Release Report. On any view, the Minister's finding was not based on the 2010 assessment, for that assessment was conducted before the applicant had engaged in any rehabilitation programs in prison). For at least these reasons, there was plainly a logical connection between the Minister's finding and the Parole Report, Pre-Release Report, SORC Report and/or Lau Report.
>
> 23. The Minister's finding was also supported by the evidence that suggested that the applicant had engaged in violent conduct in immigration detention between 2018 and 2020 (CB 19 [28]-[29]).

88 These submissions are revealing. In [22] the Minister expressly disavowed any reliance upon the 2010 risk assessment referred to by Mr Sheehan at [34] of his report (see [25] above). The Minister claims that his finding of risk at [45] of his statement of reasons relied on the October 2017 risk assessment in the Pre-Release Report, with express reference to p 154 of the Court Book. It is desirable to repeat that reference:

> Taking into account the above information and incorporating a standardised risk/needs instrument, the offender is suitable for a **medium-low** level of intervention by Corrective Services NSW, commensurate with the assessed risk and identified criminogenic needs.

89 The Minister's submission discloses a fundamental misunderstanding of this statement in the Pre-Release Report. As I have highlighted above in my reasons relating to ground 1, the reference to "medium-low" is a reference to the level of intervention by Corrective Services if the applicant was released on parole, as was recommended by the State Parole Authority. The Minister appears to have read the statement as meaning that Community Corrections had assessed the applicant's risk of re-offending as medium-low. That constitutes a serious misreading of the statement. That misreading is not overcome by the reference elsewhere on that page, under the heading "Post-Release Plans" and sub-heading "Level of surveillance / monitoring" to the applicant having a "T3/Medium-Low risk rating", because neither the materials before the Minister nor before the Court disclose what is meant by this expression. The context in which the reference appears, namely in relation to supervision of the applicant while on parole, strongly suggests that it is not directed to an assessment of the risk of recidivism.

90 The Minister's written submission advanced an alternative submission, namely that the State Parole Authority adopted Ms Lau's assessment back on 3 February 2014 that the overall risk of the applicant offending was within "the low-moderate range". That submission fails to confront what is said above regarding the State Parole Authority Report which refers to a comprehensive risk assessment estimating the applicant's overall risk of re-offending as within

the "Low-Moderate range", which presumably is a reference to Ms Lau's report dated 3 February 2014.

91 Later in its report, the State Parole Authority assessed the applicant as being only "low risk and requiring a medium-low level of intervention by Community Corrections". This statement is significant. It demonstrates that in November 2017 the State Parole Authority assessed the applicant as being "low risk", despite having regard Ms Lau's report. The reference to "medium-low level of intervention by Community Corrections" serves further to underline the distinction between the assessment of risk and the level of intervention if the applicant was released on parole, as recommended by the State Parole Authority. It is also significant to note that the State Parole Authority referred to the fact that the sentencing judge had described the applicant as "unlikely to re-offend and has good prospects for rehabilitation". Again, the Minister made no express reference to this in his statement of reasons.

92 I have analysed above at some length those parts of the Minister's reasons which relate to the risk of the applicant re-offending. The significant deficiencies and omissions in those reasons and in the Minister's analysis and findings on the issue of risk have been highlighted above. In my view, the deficiencies and omissions are of such a magnitude as to constitute unreasonableness in the legal sense. For similar reasons to those given above, I consider that the deficiencies and omissions are material, in the sense that if they had not occurred, it is possible that the Minister may have reached a different conclusion in his assessment of risk, which may in turn have produced a different outcome with respect to his consideration of the applicant's protection visa application. Accordingly, I would have regarded this error as also amounting to a jurisdictional error.

Conclusion

93 For these reasons, the Minister's decision dated 23 February 2021 will be set aside and the application for a protection visa will be remitted for reconsideration according to law. The reference to "according to law" assumes a particular significance of resonance in this case given the applicant's multiple successful challenges to decisions affecting his migration status. This has had the effect of prolonging his immigration detention for more than three and a half years, with the inevitable stressful ramifications that produces for both the applicant and his family, who continue to give him strong support in his endeavours to remain with them here in Australia.

94 The Minister must bear the applicant's costs.

I certify that the preceding ninety-four (94) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Griffiths.

Associate:

Dated: 5 August 2021