Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number(s): **2022/10307**

Re: **BFMV**

APPLICANT

And **Minister for Immigration, Citizenship and Multicultural Affairs**

RESPONDENT

DECISION

Tribunal: **The Hon. John Pascoe AC CVO, Deputy President**

Date: **28 April 2023**

Place: **Sydney**

The correct and preferable decision is that the decision of the delegate of the Minister, dated 21 November 2022, is affirmed.

.....[SGD].....

The Hon. John Pascoe AC CVO, Deputy President

CATCHWORDS

REFUGEE – protection visa – whether the Applicant meets the criteria for a Protection visa in s 36(1C)(b) of the Migration Act 1958 – whether Applicant has been convicted by final judgment of a particularly serious crime – whether Applicant is a danger to the Australian community – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth) Section 36(1C)

CASES

WKCG v Minister for Migration and Citizenship [2009] AATA 512

DOB18 v Minister for Home Affairs [2019] FCAFC 63

LKQD v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2019] FCA 1591

SECONDARY MATERIALS

Department of Immigration and Border Protection – Refugee Law Guidelines – *Danger to the community of Australia having been convicted of a particularly serious crime*

REASONS FOR DECISION

The Hon. John Pascoe AC CVO, Deputy President

28 April 2023

BACKGROUND:

1. By way of application dated 18 December 2022, the Applicant seeks review of the decision of a delegate of the Respondent dated 21 November 2022 to refuse the grant of a Protection (subclass 866) visa to the Applicant, on the basis that the delegate was not satisfied that the Applicant met the criterion in section 36(1C) of the *Migration Act 1958* (Cth) (the Act).

2. I note the Respondent's Statement of Facts, Issues and Contentions contain a helpful factual summary of the application, much of which is replicated below.

3. The Applicant was born in Iraq in 1990. He arrived in Australia in 2010, holding a Refugee (subclass 200) visa.

4. On 21 January 2012 the Applicant received a traffic infringement notice for '*Exceed speed limit by more than 30 km/h but less than 45 km/h whilst driving a motor vehicle'*. His driving licence was suspended until 20 April 2012.

5. On 8 October 2014 the Applicant was convicted of '*Destroy or damage property (DV)*, and '*Assault occasioning ABH in the company of other(s) (DV)'*. As a result of these convictions the Applicant was ultimately subject to both a 16 month intensive correction order, and a 3 year good behaviour bond.

6. On 15 January 2019 the Applicant was convicted of:

   (a) *Destroy or damage property (DV);*

   (b) *Common assault – T2;*

   (c) *Common assault – T2*

   (d) *Destroy or damage property <=$2000 – T2;*

   (e) *Stalk/intimidate intend fear physical etc harm (personal) – T2;*

   (f) *Stalk/intimidate intend fear physical etc harm (personal) – T2;*

   (g) *Stalk/intimidate intend fear physical etc harm (personal) – T2.*

7. For the above offences, the Applicant was sentenced to an aggregate term of 18 months imprisonment.

8. On 14 February 2019, a delegate of the Respondent cancelled the Applicant's Refugee (subclass 200) visa, pursuant to section 501(3A) of the Act.

9. On 12 March 2019, the Applicant submitted a request for revocation of the mandatory cancellation of the Applicant's Refugee (subclass 200) visa.

10. On 14 September 2020, a delegate of the Minister decided not to revoke the mandatory cancellation of the Applicant's Refugee (subclass 200) visa.

11. On 8 December 2020, the Tribunal affirmed the decision not to revoke the mandatory cancellation of the Applicant's Refugee (subclass 200) visa.

12. On 2 June 2021, the Federal Court of Australia dismissed an application filed by the Applicant for review of the Tribunal's decision of 8 December 2020.

13. On 16 November 2021, the Full Court of the Federal Court of Australia dismissed an appeal filed by the Applicant in respect of the 2 June 2021 decision of the Federal Court.

14. On 20 December 2021, the Applicant applied for a Protection (subclass 866) visa.

15. On 21 November 2022, a delegate of the Minister decided to refuse to grant the Applicant a Protection (subclass 866) visa, which is the reviewable decision before this Tribunal.

ISSUE:

16. It is agreed by the parties that the Applicant has been convicted by final judgment of a particularly serious crime. Therefore, the only issue before the Tribunal is whether the Applicant is considered a danger to the Australian community for the purpose of s 36(1C)(b) of the Act.

THE LAW:

17. The relevant legislation and policy is outlined below.

18. Section 36(1C)(b) states as follows:

> *(1C) A criterion for a protection visa is that the Applicant is not a person whom the Minister considers, on reasonable grounds:*
>
> *(b) having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community.*
>
> *Note: for paragraph (b), see section 5M.*

19. Section 5M states as follows:

> *For the purpose of the application of this Act and the regulations to a particular person, paragraph 36(1C)(b) has effect as if a reference in that paragraph to a particular serious crime included a reference to a crime that consists of the commission of:*
>
> *(a) a serious Australian offence; or*
>
> *(b) a serious foreign offence.*

20. In the Act, a 'serious Australian offence is defined as:

> *An offence against a law in force in Australia, where:*
>
> *(a) the offence:*
>
> *(i) involves violence against a person; or*
>
> *(ii) is a serious drug offence; or*
>
> *(iii) involves serious damage to property; and*
>
> *(b) the offence is punishable by:*
>
> *(i) imprisonment for life; or*
>
> *(ii) imprisonment for a fixed term of not less than 3 years; or*
>
> *(iii) imprisonment for a maximum term of not less than 3 years.*

21. The Refugee Law Guidelines, which guide departmental decision makers in assessing an Applicant against the relevant law, in relation to section 36(1C), provides as follows:

> *The Australian courts have determined that the approach to the assessment of whether an applicant, having been convicted of a particularly serous crime, is a danger to the community has two distinct considerations:*
>
> *1. whether, at some time in the past, the applicant has been convicted by a final judgment of a particularly serious crime, and*
>
> *2. whether the applicant is, at the time of the protection visa decision and into the future, a danger to the Australian community.*
>
> *In other words, the conviction by a final judgment of a particularly serious crime alone is not sufficient to say that the applicant is a danger to the community. Nor is it sufficient to find that the applicant was once a danger. Rather, decisionmakers must determine whether the applicant is, at 'present and for the indefinite future', a danger to the Australian community.*
>
> *Since the assessment of danger to the community is a consideration separate from the commission of a particularly serious crime, there is no 'category' of offending that will automatically result in a person being found to be a danger to the community. The assessment whether an individual is a danger to the community is one of 'fact and degree' to be 'determined in the circumstances of a particular case. In WKCG and Minister for Immigration and Citizenship (WKCG), the Tribunal listed factors that assist in assessing whether a person is a danger to a member or members of the community:*

> *Some relevant considerations include the seriousness and nature of the crimes committed, the length of the sentence imposed, and any mitigating or aggravating circumstances. The extent of the criminal history is relevant as is the nature of the prior crimes, together with the period over which they took place. The risk of re-offending and recidivism and the likelihood of relapsing into crime is a primary consideration. The criminal record must be looked at as a whole and prospects of rehabilitation assessed.*

Those relevant considerations were described as pertinent by Logan J in DOB18 v Minister for Home Affairs.

> *In forming a view of the risk of recidivism, re-offending or relapse, decision makers can consider the factors listed in WKCG, such as mitigating and aggravating circumstances during commission of the offences and the totality of the applicant's criminal record. As noted in Salazar-Arbelaez and Minister for Immigration and Ethnic Affairs:*
>
> *… The rehabilitation of a migrant who has suffered a conviction is not only in his interests – it is in the interests of the community of which he is a member. In the present case, the prospect of rehabilitation is the principal issue …*
>
> *…*
>
> *Rehabilitation is never certain. One cannot predicate of an offender that he will not fall again, whatever the circumstances. The duty of the Tribunal is to apprehend what is the acceptable level of risk, and to assess whether a particular applicant in the particular circumstances of his case, is at an unacceptable level of risk …*

Evidence of the Applicant:

22. The Applicant affirmed his statement of 28 February 2023.

23. The Applicant arrived in Australia in February 2010, as a refugee from Iraq. He was convicted of traffic infringements in 2011 and 2012, including a charge of *exceed speed limit by more than 30 but less than 45*, which the Applicant admitted was dangerous driving.

24. The Applicant said that he can read English, and has reasonable comprehension of the language, but he required an interpreter because English was not his first language.

25. There were two particular incidents which resulted in the Applicant being convicted and ultimately sentenced to an aggregate term of imprisonment of 18 months. In the first incident (the 2015 incident), the Applicant, along with two brothers and a friend assaulted Mr S, his ex-brother in law, and caused serious damage to his vehicle. At the time Mr S's father, mother and brother were also in the vehicle, and the father was also injured in the attack.

26. The Applicant admitted that he and the other assailants were carrying bats with which they broke the windows of Mr S's car and beat him and his father. The mother and brother were in the car, but were not injured.

27. The Applicant was said to have been carrying a knife at the time, but denied that he was in fact, carrying a knife. The Applicant agreed that the evidence of Mr S to the Court was an accurate statement of what had actually occurred. He could not remember exactly where the attack on Mr S took place, but said that it was close to his house.

28. The Applicant and the other assailants travelled to that location in two separate cars, and all brought the bats with them.

29. When asked whether any of the assailants had knives, he said that he could not remember. He accepted however, that they all carried bats with them, with the intention to beat up Mr S.

30. The Applicant said that at the time of the attack, Mr S was sitting in his car. The Applicant said that the incident occurred because Mr S was 'harming my sister'.

31. The Applicant's attention was drawn to his pre-sentence assessment in relation to the 2015 incident, where it was recorded under the heading 'attitude to offending', that the Applicant denied being there and claimed to have been falsely accused.

32. Under questioning the Applicant accepted that he was not falsely accused, and that he knew that what he said to Ms D'Angelo at the time of the report was untrue. He said that he had been untruthful because it was the first time he had had a problem with the law, that he was not aware of the law, and that he was 'afraid and scared'. When further questioned by the representative for the Minister, the Applicant denied that he was trying to avoid the consequences of his actions and said again that he was scared and did not know how to react. The Applicant admitted that he had a legal representative prior to the preparation of the sentencing report. The Applicant explained that he felt scared because of what he had witnessed in Iraq.

33. The Applicant was also taken to a report of his conversation with an officer from the Minister's Department, which he said he remembered. In that interview, the Applicant said that

> *I followed my sister's ex-husband and I had a fight with him, and I did break his (…) car window, his car window when we had the fight (…) I hit the window so I break the window*

34. He went on to say 'that's all that happened'. The Applicant said that he did not mention that he had hit Mr S with a bat because he did not have an interpreter and did not understand all of the questions. The Applicant denied that he was trying to minimise the seriousness of his offending.

35. The Applicant was taken to the transcript of the interview with the officer from the Minister's Department. In particular, the following statement:

> *'When you were sentenced in 2019, the most recent one, the judge made comments at the court hearing. I have those comments. Okay. I've got a printout of those comments. He made reference to your 2013 offending against your brother-in-law. The judge said that you were one of, you were there with 4 other men, you approached the car. So you and 4 other men. The van had people inside. Before them getting out, one of the men that you were with, you were saying yourself, smashed the window of the car with a bat and then kept hitting the window of the car. You then pointed a knife in the window of the vehicle and tried to stab the victim in the chest with that knife. The judge said that that was a disgraceful example of an assault. What I just read to you were the facts of the case that were described by the judge. Is that…Today, you didn't mention anything about a knife, you said you just punched on. Did you have a knife on that occasion?'*

36. When asked about this in the hearing, in response the Applicant said, 'if they say I was holding a knife in the paperwork, then I accept it', but went on to say that he was not holding a knife, but said as long as the police report 'says I was' then I accept it.

37. The Applicant also accepted that he had told the officer of the Department that only 'me and my brother' were involved in the assault on Mr S.

38. When questioned by the representative for the Minister, the Applicant said that there were in fact 4 people – himself, 2 brothers and a friend. He said he was being truthful when he told the Departmental representative that he could not remember the details of the attack on Mr S and his family.

39. The Applicant was referred to the evidence of Mr S's father, that the Applicant was trying to stab Mr S in the chest. When asked whether he accepted this, the Applicant said 'yes, if it says so in the paperwork'.

40. The Applicant accepted that all 4 people in Mr S's car were victims of the attack.

41. In relation to the second offence in 2019. The Applicant admitted that he had punched Mr A. Mr A had come to the Applicant's house because the Applicant had become engaged to Mr A's partner. The Applicant said he did not know his then fiancé was in another relationship at the time.

42. The Applicant accepted that he committed a serious assault on Mr A, by punching him to the ground and then kicking him whilst he was on the ground. The Applicant said that he didn't mean to hurt him but that he 'did it out of anger'. He said that what made him so angry was that his girlfriend was in another relationship of which he was not aware, and Mr A had punched him in front of his own house. He said he felt insulted that his fiancé was in another relationship and finding out about it made him angry. He said that the family of the girl had not previously told him about the relationship.

43. The Applicant said that Mr A had come to his house and confronted him and that he had hit the Applicant. He said he then lost control because he was so angry and that was why he had continued to kick Mr A when he was on the ground. The Applicant said that prior to the incident he did not know Mr A personally, but that the Applicant's mother and Mr A's mother were cousins. He had never previously met Mr A or been to his house. He admitted however, that after the attack his brother came home and drove him to Mr A's house.

44. The Applicant denied that he wanted revenge and said that he did not know why he went to Mr A's house. He said he didn't attack anyone at the house, but that he looked around and went home. When asked why he had taken a knife with him, the Applicant said 'I don't know (…) I should be calling the police to deal with it because I had a right to do that and it wasn't my fault'.

45. When questioned further, about this statement the Applicant said that if Mr A had not come to his house, he would not subsequently have gone to Mr A's house with a knife, frightened his family and use the knife to slash a screen door.

46. The Applicant said that he accepted responsibility for what he did but said that it was in response to Mr A coming to his house, and that he had lost control and 'didn't mean these things to happen'.

47. He admitted screaming and frightening the occupants of the house. He couldn't remember whether he slashed a screen door with a knife, but he remembered breaking a window.

48. The Applicant accepted that he was on a good behaviour bond at the time the incident occurred.

49. The Applicant was taken to the confidential psychological treatment report dated 15 May 2019, prepared by Hanan Dover, a clinical psychologist. In the report the psychologist, under the heading 'circumstances' stated as follows:

> *The Facts Summary outlines the incidents that occurred on 13.1.2018 in two different incidents. He was found guilty but [Applicant] continued to deny any violence or committing the acts and instead claimed that he was the victim of the agendas of those who had made the police statements against him.*
>
> *[Applicant] appeared distressed every time the current court case incidents were discussed. He stated that he had suffered injustices escaping war and trauma overseas and experienced flashbacks after being charged with the current index offence.*

50. When asked whether he denied violence in relation to the second incident when he was talking to the psychologist, the Applicant said that 'Mr A came to my house, I don't deny responsibility, but I didn't know the law'. He went on to say that he 'didn't start it. He came to my place'.

51. The Representative for the Minister questioned the Applicant about his previous denials to Ms D'Angelo and his claims to be the victim of false allegations. The Applicant when questioned about the similarity of what he had told Dr Dover and Ms D'Angelo said that his English was not good and that it was a misunderstanding and a miscommunication.

52. The Applicant admitted that he needed mental health assistance but that he had not researched the services that might be available to him if he were to be released from detention and live in south-west Sydney. He said it was difficult to search for appropriate services in detention, but there were many people he could ask for help if he were to be

released into the community. He had not enquired as to whether Dr Dover would be able to see him.

53. The Applicant denied that he was only saying he would seek specialist help because it might be what the Tribunal wanted to hear and said that he had received mental health assistance whilst in detention. The Applicant said that if he were to be released from detention he would live with his parents, his sister and his younger brother.

54. When asked whether he would react in a similar way if he were to encounter stressful situations if he were to be released from detention, the Applicant said that he had completed a course in anger management, and had also done other courses in relation to mental health. He had not reacted to stressful situations whilst in prison and in immigration detention, despite the many challenges that he faced.

55. The Applicant said that he would not be a risk to the community if he were to be released, and said that 'I have learned my lesson' and that he did not want to be involved in any further offending. The Applicant expressed on a number of occasions his remorse for the crimes that he had committed, and said that he had learned from his time in gaol and in detention and did not want to waste his life any further.

The Applicant's sister:

56. The Applicant's sister gave a statement in support of the Applicant but was not required for questioning.

Discussion:

57. The Parties were ad idem, that the Applicant had been convicted by final judgement of a particularly serious crime, and that the question to be determined by the Tribunal is whether the Applicant is a danger to the Australian community, for the purposes of s36(1C)(b) of the Act.

58. The issue requires the Tribunal to consider a number of factors as set out in *WKCG and Minister for Migration and Citizenship* [2009] AATA 512, namely:

    a. The seriousness and nature of the crimes committed;
    b. The length of the sentence imposed;

c. Any mitigating or aggravating circumstances;
d. The criminal record in totality and the period over which offences took place;
e. The risk of re-offending, recidivism;
f. the likelihood of relapsing into crime; and
g. any prospects of rehabilitation.

59. When the above factors were taken into consideration by the Federal Court in *DOB18 v Minister for Home Affairs* [2019] FCAFC 63, Logan J noted:

> *The relevant considerations, noted in WKCG are pertinent and the determination of danger to the community is a matter of fact and degree in the circumstances of each case.*
>
> *'Danger' and 'Risk' are not exactly synonymous and for the purpose of 36(1C)(b) it is unlikely that danger refers to a risk that is discernible but trivial, nothing more than a bare possibility.*
>
> *The danger posed need not be proved to demonstration but requires satisfaction that the person 'is, and will into the indefinite future be a danger'.*
>
> *'danger' in s36(1C) connotes present and serious risk.*

60. In *LKQD v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1591, Jackson J stated:

> *There is no ambiguity in s36(1C), the words and plain and simple English and 'the section does not say 'very serious danger'. It just says 'danger'*
>
> *Logan J's consideration that danger means a 'a present and serious risk' may be at odds with WKCG, but 'even the standard suggested by his Honour does not rise to the level of 'very serious danger'.*

61. Put simply, if the Tribunal were to not to affirm the decision of the delegate, it would need to be satisfied that the Applicant did not pose a present and/or ongoing danger to the Australian community. In this context, danger means more than a possible risk, but does not mean that the Tribunal must find that the level of risk is serious. Clearly the level of risk must be beyond trivial and there must be at least a present and ongoing likelihood of harm to the community.

62. In *Maxwell v R* [1996] HCA 46 the High Court determined that 'a conviction occurs when the court disposes of a case 'which results in the judgement of the court embodying a determination of guilt'.

63. There is in my view, no doubt that the Applicant has been convicted of particularly serious crimes, the details of which are set out to the background to these reasons. This was accepted by both parties.

64. The comments of the sentencing Judge are relevant, in relation to the seriousness of the Applicant's 2019 offence. Magistrate Miller said that the offence was 'extremely serious, as the potentiality of injury is enormous'. Magistrate Miller went on to note that the intimidation offences were significant and are well above the mid-range of objective seriousness', and that there were 'possession and threats of the use of the weapons they were armed with'.

65. Having determined that the Applicant has been convicted by final judgement of a serious crime, the Tribunal must now determine whether the Applicant is a danger to the Australian community having regard to the authorities to which I have already made reference.

66. In considering the totality of the Applicant's criminal offending, I note that he has been convicted of driving offences, to which I give little weight, and that the major offences were the two serious offences for which he was convicted in 2015 and 2019. The Applicant's ultimate sentence in 2019 was an aggregate sentence of 18 months imprisonment, which is not an insubstantial period, and reflects the sentencing judge's assessment of all of the relevant circumstances.

67. I accept Dr Hanan Dover's diagnosis that the Applicant suffers from post-traumatic stress disorder, and I am of the view that this may have contributed to the Applicant's impulsivity. it does not explain the serious offences of which he has been found guilty. Rather, the Applicant appears to have reacted to what he perceived to be disrespect shown to him or to other members of his family.

68. Whilst particularly in the second incident, the Applicant's immediate reaction in punching the victim may be seen to be impulsive, the Applicant went on from assaulting the victim to wait for his brother to come home, in order to get his victim's address, so that he could go to the victim's house. He went to that house armed with a knife, smashed a window and slashed the screen door of the Applicant's house. Given the lapse of time between the Applicant's initial encounter with the victim and his arrival at the victim's house, his behaviour could not, in my opinion, be seen to have been an impulsive reaction. Rather it

appears more like a considered action to continue to harm the victim, and anyone else at the house, regardless of whether they were in any way directly involved.

69. Similarly, in the first instance the Applicant, a friend and his brothers, arranged to travel in two cars to Mr S' home, where the assault on Mr S occurred. Mr S' family, who were with him in the car, appeared to have simply been treated as collateral damage. Although Mr S' mother appears to have escaped any physical harm, his father was also beaten with a bat.

70. the evidence clearly shows a level of malevolence towards the Applicant's victims, and a disregard for other members of the community who simply happened to be in the wrong place at the time. In my view, it goes beyond a temporary loss of control, and in assessing present and future danger to the community it is an important factor to which the Tribunal must give weight. The Tribunal must also give weight to the fact that no member of the Applicant's family appears to have made any effort to dissuade him from the attack on Mr S and members of his family.

71. During the hearing the Applicant said that he should have called the police in relation to the second incident. I note that in relation to the first incident the offensive conduct on behalf of Mr S was directed to the Applicant's sister, and there was some evidence before the Tribunal that she had made a complaint to the police. There was no evidence as to why the matter had not been left in the hands of the police.

72. The Applicant told the Tribunal that at least in relation to the second incident he should have stayed at home and called the police. However, he did not do so, despite the fact that he was on a good behaviour bond at the time of the time of incident. Clearly, that was not sufficient to deter him from his criminal offending. The Applicant did not appear to have paused at all to consider that his violent acts were taking place in front of women and children who were in no way to blame for any of the wrongs the Applicant may have perceived as being done to him or his family.

73. At the risk of repetition, it is important to highlight the fact that in both instances the Applicant did not call the police, but rather elected to take the law into his own hands and respond in a particularly violent way. The Applicant's violence was not restricted to the person who had directly offended him, but rather extended to members of that person's family. In both

offences, violent acts were committed in front of women who were terrified by the attacks, and in the case of the 2019 offences in front of children, who were also terrified.

74. There was little indication of any regard on the part of the Applicant for the fact that women and/or children were present at the time the offences were committed. I give considerable weight to this aspect of the Applicant's behaviour, which in my view, considerably raises the level of risk and consequent danger to the community. There is a big difference between an immediate response to an act of physical violence and/or a perceived insult, and one which is delayed for a period long enough to enable the involvement of others or to obtain weapons. There is also, in my opinion, a significant difference between reacting to the person who has caused offence and involving innocent third parties directly, as in the case of Mr S's father who sustained injuries, or indirectly, as in the case of Mr S's mother, brother and in the case of the second offence, those persons, including children, who were at the home of the second victim at the time of the Applicant's offending behaviour. It appeared to make little difference that the victim himself was not at the house.

75. It is of concern that throughout the hearing the Applicant has continued to demonstrate that he does not fully accept the responsibility for his criminal offending. For example, in relation to the second incident, the Applicant on a number of occasions blamed Mr A for having gone to his house, and for punching him first. This does not, in my opinion, excuse the Applicant's response, which went well beyond what might have been regarded an impulsive or 'spur of the moment' reaction. The Tribunal was left with the impression that the Applicant failed to understand his responses were out of proportion and could not be justified.

76. Magistrate Miller noted the Applicant's continued denial, and lack of contrition and remorse and also referred to the Applicant denying violence and attributing blame to his victims. Although I accept the Applicant's expressions of remorse, and regret for the consequences of his actions, which led him to be imprisoned and placed in immigration detention, he has continued to attribute at least some blame to his victims for his offending. I note that the Applicant did accept that he had caused harm to third parties during both incidents and that he accepted that was wrong.

77. The Tribunal must also take into account that the Applicant lied to an officer from the Department of Immigration when he said to the officer 'that's all that happened' in relation

to the 2015 incident. In other words, the Applicant sought to downplay the seriousness of the incident when speaking to the officer.

78. The Applicant said at the hearing that there was a misunderstanding due to his lack of familiarity with the English language. However, the transcript of the interview shows that he was actually asked at the outset of the interview whether he needed an interpreter and said that he did not.

79. I accept that the Applicant has completed a number of courses in relation to Anger Management, and that he is receiving some mental health assistance whilst in detention. It is, however, impossible to be satisfied that the Applicant will continue to receive appropriate mental health treatment if he were to be released into the community.

80. If released into the community, the Applicant said he had no other place to go other than his parent's home. The Applicant said that if he were released into the community he hoped to immediately find a job, and would eventually have his own home. It was put to the Tribunal on behalf of the Applicant, in written submission, that living at home would indeed be a protective factor against further offending.

81. I'm sure the Applicant's family is loving and supportive. He gave evidence that his younger brother is now an Australian citizen, and apart from the incident involving Mr S, appears to have not to have been involved any unlawful behaviour. In order for the Tribunal to be satisfied that living at home would be a strong protective factor, there would need to be some evidence of a capacity to restrain the Applicant from any likelihood of violence against another person.

82. Unfortunately however, from the evidence before the Tribunal I am unable to conclude that living at home with his family would be a protective factor for the Applicant. His younger brother, who was one of the persons who joined the Applicant in the attack on Mr S, lives at home. There is no evidence that any member of the Applicant's family had attempted in any way to calm him down, or to try to counsel him against violently responding to perceived insults. It appears that the Applicant's younger brother willingly accompanied him to attack Mr S and his family, and another brother gave him the address for Mr A, and accompanied him to the house, where there was property damage, and Mr A's family, including young siblings, were terrified by the behaviour of the Applicant and his brother.

83. I give some weight to the Applicant's sister's statement in support of the Applicant. I note however, that she there is no acknowledgement of the Applicant's crimes in her statement and that, although I'm sure she is a most sincere and honest person, she cannot be said to be impartial.

84. I accept that the Applicant has not had any problems whilst in prison or in detention, and appears to have managed what must undoubtedly have been very stressful situations without any adverse reaction. The Applicant appears to have been able to walk away from confronting situations and I also accept that he has witnessed traumatic events whilst in detention, including the death of an inmate, which the Applicant said had made him realise the value of life and how it could be lost in a matter of seconds.

85. I also accept however, the Respondent's submission that being detained is a very different situation to the circumstances which gave rise to the Applicant's offending, namely, what the Applicant perceived as insults, or disrespect to himself or his family. The Representative for the Respondent said, and I accept, that that stressor has not been tested, and that it is dangerous to think that family related stressors are the same as the stress that might be experienced in prison or in detention.

86. In all of the circumstances, I find that the risk of the Applicant re-offending at some time in the future is high, and that if the Applicant were to re-offend, there is also the prospect of serious risk to the community. This finding is particularly supported by the Applicant's willingness to involve third parties in both his first, and his second offences, and by the remarks of the sentencing judge in both cases.

87. I do not regard the Applicant as incapable of rehabilitation. He is clearly an intelligent man, and has made some effort at rehabilitation. However, I can only give limited weight to the Applicant's prospects of rehabilitation at the current time given that the Applicant continued to blame his victims even though he also said that he accepted responsibility for his crimes.

88. I accept that he has completed courses whilst in detention and I also accept that he has had time for reflection, and that he does not want to spend any more of his life in prison or detention. He has had a difficult childhood and I have no doubt that as refugees his family suffered greatly. In my view there is a prospect of the Applicant undertaking successful rehabilitation, but that is dependent on him positively engaging with relevant services if he

were to be released into the community. The Applicant's evidence was that he intends to do so, but there was no evidence of him taking any steps to do so, although I accept that this would not be easy to do whilst in detention.

89. In looking at future or ongoing risk, it is relevant that there is a period of 5 years between the Applicant's offences, and that he was on a good behaviour bond at the time of the offence. Unfortunately however, when presented with a perceived insult the Applicant's response on the second occasion was similar to the first. It is not possible, on the basis of the evidence given to the Tribunal, to conclude that a similar reaction would not occur at some time in the future, with resultant serious risk to the Australian community. It is also relevant that no-one in the Applicant's family appears to have made any effort to deter him from any such course of conduct. It simply impossible for me to conclude at this time that the Applicant's prospects of rehabilitation are sufficient to ensure that level of risk to the community is minimal.

90. I have found the circumstances of this case very difficult. On the one hand the Tribunal is faced with an Applicant who, together with his family, are clearly entitled to compassion given all the difficulties they have faced together. The problem for the Tribunal is that in this case, the only question before the Tribunal is whether the Applicant, having been convicted by final judgement of a particularly serious crime is a danger to the Australian community. This question is to be determined in light of the authorities to which I have already referred.

91. Having considered the totality of the evidence within the frame of section 36(1C)(b) the relevant authorities, I find that the Applicant has been convicted of a very serious crime, and is a danger to the Australian community for the purposes of section 36(1C)(b), and therefore the decision of the delegate must be affirmed.

92. The test in section 36(1C)(b) is a narrow one. Although it may properly be considered to be beyond the remit of the Tribunal, it would seem appropriate in the circumstances of this case that the Minister consider other options available to him to enable the Applicant to be released into the community with appropriate safeguards to minimise risk.

I certify that the preceding 92 (ninety -two) paragraphs are a true copy of the reasons for

the decision herein of The Hon. John Pascoe AC CVO, Deputy President

.....[SGD].....

Associate

Dated: 28 April 2023

Date(s) of hearing:	**12 April 2023**
Counsel for the Applicant:	**Dr Jason Donnelly**
Solicitors for the Respondent:	**Mr Oliver Morris**