Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division: GENERAL DIVISION

File Number(s): **2022/5221**

Re: **DCBC**

APPLICANT

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

RESPONDENT

DECISION

Tribunal: **Deputy President Boyle**

Date: **24 October 2023**

Place: **Perth**

The decision of the delegate of the Minister made on 16 June 2022 to refuse to grant the Applicant Class XA (subclass 866) Protection visa under s 65 of the Act is affirmed.

.....[Sgd].....

Deputy President Boyle

CATCHWORDS

MIGRATION – *s 36(1C) of the Migration Act – refusal to grant a protection visa under s 65 of the Migration Act – whether the Applicant has been convicted by final judgment of a particularly serious crime – whether Applicant is a danger to the Australia community – multiple violent offences – multiple dishonesty offences - several terms of imprisonment – alcohol and drug misuse as a risk factor – poor record of behaviour in prison and immigration detention – lack of protective factors against reoffending – Applicant would pose a real or significant risk or possibility of harm if released into the Australian community – reviewable decision affirmed*

LEGISLATION

Migration Act 1958 (Cth) ss 5, 5M, 36(1C), 36(2)(a), 36(2)(aa), 36(2C)(b)(ii), 65, 500(1)(c)(i), 501(3A), 501CA(4)

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth)

CASES

A v Minister for Immigration and Multicultural Affairs [1999] FCA 227

AFY18 v Minister for Home Affairs [2018] FCA 1566

Al-Sirri v Secretary of State for the Home Department [2012] UKSC 54; [2013] 1 AC 745

Applicant in WAD 531/2016 v Minister for Immigration and Border Protection [2018] FCA 27

CCYW and Minister for Immigration, Citizenship and Multicultural Affairs [2022] AATA 4452

CKL21 v Minister for Home Affairs [2022] FCAFC 70

DMQ20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] FCAFC 84

DMQ20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCA 514

DOB18 v Minister for Home Affairs [2019] FCAFC 63

EBD20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 334

EWG17 v Minister for Immigration and Border Protection [2018] FCA 1536

HSCK and Minister for Home Affairs [2019] AATA 4392

LKQD v Minister for Immigration [2019] FCA 1591; (2019) 167 ALD 17

MVLW and Minister for Immigration and Border Protection [2017] AATA 1557

MQHN and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] AATA 119

PNLB and Minister for Immigration and Border Protection [2018] AATA 162

RWDX and Minister for Home Affairs [2019] AATA 123;

Salazar Arbelaez v Minister for Immigration and Ethnic Affairs [1977] AATA 35

SLGS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2023] FCAFC 104

SQDD and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] *AATA 2980*

SZOQQ v Minister for Immigration and Citizenship [2013] HCA 12; (2013) 251 CLR 577

Vabaza and Minister for Immigration and Multicultural Affairs [1996] AATA 769

XFKR and Minister for Immigration, Citizenship and Multicultural Affairs [2023] AATA 95

SECONDARY MATERIALS

Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), art 33

Department of Home Affairs, Refugee Law Guidelines (15 November 2022) paras 3.26.3

REASONS FOR DECISION

Deputy President Boyle

24 October 2023

THE APPLICATION

1. This is an application for the review of a decision of a delegate of the Respondent (**Minister**) made on 16 June 2022 to refuse to grant the Applicant Class XA (subclass 866) Protection visa (**the protection visa**) under s 65 of the *Migration Act 1958* (Cth) (**the Act**).[1]

2. The protection visa was refused because the delegate of the Minister was not satisfied that the Applicant met the criterion in s 36(1C) of the Act for a protection visa. In particular, the delegate was satisfied that the Applicant, having been convicted of a "particularly serious crime", is a danger to the Australian community and, as a consequence, did not satisfy the criterion in s 36(1C)(b) of the Act.

3. The application is made pursuant to s 500(1)(c)(i) of the Act, which allows an application to be made to the Administrative Appeals Tribunal (**Tribunal**) for review of a decision under s 65 to refuse to grant a Protection visa relying on s 36(1C).

THE ISSUES

4. The issues for determination are:

   (a) whether the Applicant has been convicted by a final judgment of a particularly serious crime within the meaning of s 5M of the Act; and

   (b) whether the Applicant is a danger to the Australian community.

BACKGROUND

5. The Applicant is a citizen of Zimbabwe, born in November 1991.

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[1] R1/335.

6. The Applicant was granted a Class BV subclass 855 **Labour Agreement Visa** as a dependant and arrived in Australia on 4 May 2006.

7. The Applicant has been convicted of numerous offences. The Applicant's full criminal record, as disclosed by the Australian Criminal Intelligence Commission report,[2] is included at Annexure 1.

8. On 22 October 2018 the Applicant's Labour Agreement Visa was cancelled under s 501(3A) of the Act.[3]

9. On 8 November 2018, the Applicant requested revocation of the cancellation of the Labour Agreement Visa. On 14 May 2020, the Minister personally decided, under s 501CA(4) of the Act, not to revoke the cancellation.[4] The Applicant did not seek review of that decision.

10. On 27 April 2021, the Applicant applied for the protection visa.[5]

11. On 31 May 2021, a delegate of the Minister refused to grant the protection visa.[6] The Applicant sought review of the delegate's decision in the Tribunal[7] and, by decision made on 30 August 2021, the Tribunal remitted the application for the protection visa to the Minister for reconsideration with a direction that the Applicant satisfied the criterion in s 36(2)(a) of the Act.[8]

12. By the decision dated 16 June 2022 (see [1] above), a delegate of the Minister decided that the Applicant was a person in respect of whom Australia had protection obligations under s 36(2)(a) with respect to Zimbabwe and that the Applicant would satisfy s 36(2)(aa) of the Act with respect to Zimbabwe, but found that the Applicant failed to satisfy the criterion in s 36(1C) and s 36(2C)(b)(ii) of the Act.[9]

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[2] R1/200-5.
[3] R1/183.
[4] R1/186-198.
[5] R1/12-68.
[6] R1/102-111.
[7] R1/112-121.
[8] R1/146.
[9] R1/304-335.

13. On 23 June 2022, the Applicant applied to the Tribunal for review of the delegate's decision.[10]

THE HEARING AND THE EVIDENCE

14. The application was heard on 2 and 3 May 2023. The Applicant was represented by Dr J Donnelly with Mr S Z Stagliorio. The Minister was represented by Mr A Chan. The following documents were admitted into evidence:

    (a) Section 37 T Documents (**R1**);

    (b) Supplementary T documents (**R2**); and

    (c) Supplementary bundle (**R3**).

15. The following witnesses gave evidence at the hearing:

    (a) The Applicant;

    (b) YN;

    (c) MS; and

    (d) MM.

LEGISLATIVE FRAMEWORK

16. Under s 500(1)(c)(i) of the Act, the General Division of the Tribunal has jurisdiction to review a decision to refuse to grant a protection visa relying on s 36(1C) of the Act. That is the case in this matter (see [3] above) and I am satisfied that this application for review was made validly and within the prescribed time.

17. Section 65(1) of the Act relevantly provides:

> *(1) Subject to sections 84 and 86, after considering a valid application for a visa, the Minister:*
>
> *(a) if satisfied that:*

[10] R1/4-10.

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 91W (evidence of identity and bogus documents), 91WA (bogus documents and destroying identity documents), 91WB (applications for protection visas by members of same family unit), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa.

18. Section 36(1C) was inserted into the Act by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (**Amending Act**) and was intended to codify art 33(2) of the *1951 Convention Relating to the Status of Refugees* (**Refugees Convention**).[11]

19. Article 33 of the Refugees Convention is as follows:

Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

(Original emphasis.)

20. Section 36(1C) of the Act provides:

A criterion for a protection visa is that the applicant is not a person whom the Minister considers, on reasonable grounds:

(a) is a danger to Australia's security; or

[11] (*Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954); see See sch 5, pt 2, item 9 of the Amending Act and Explanatory Memorandum to the Amending Act).

(b) having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community.

21. Section 5M of the Act provides:

> ***5M Particularly serious crime***
>
> *For the purposes 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 particularly 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.*
>
> (Original emphasis.)

22. Section 5 of the Act defines "*serious Australian offence*" as follows:

> ***serious Australian offence*** *means an offence against a law in force in Australia, where:*
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> *(a) the offence:*
>
> *(i) involves violence against a person; or*
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> *(ii) is a serious drug offence; or*
>
> *(iii) involves serious damage to property; or*
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> *(iv) is an offence against section 197A or 197B (offences relating to immigration detention); and*
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> *(b) the offence is punishable by:*
>
> *(i) imprisonment for life; or*
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> *(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.*
>
> (Original emphasis.)

23. The Refugee Law Guidelines,[12] at para 3.26.3, relevantly provide:

> *Danger to the community*
>
> *The Australian courts have determined that the approach to the assessment of whether an applicant, having been convicted of a particularly serious crime, is a danger to the community has two distinct considerations:*
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> *1. whether, at some time in the past, the applicant has been convicted by a final judgment of a particularly serious crime (see 3.26.1 Convicted by a final judgment and 3.26.2 Particularly serious crime), and*

[12] Department of Home Affairs, Refugee Law Guidelines (15 November 2022).

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, decision makers 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****...*

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 ...*

(Footnotes omitted.)

THE PARTIES' CASES

The Applicant

24. The Applicant's Statement of Facts, Issues and Contentions (**Applicant's SFIC**) contended as follows:[13]

(a) If the Applicant is not recognised as a danger to the community the Tribunal may refrain from making a finding as to whether the Applicant was convicted by final judgement of a particularly serious crime.

(b) The delegate placed weight on the premeditated nature of the Applicant's actions and the comments made by the sentencing judge in finding that the Applicant's substance abuse problems and post-traumatic stress disorder neither contributed to nor mitigated the Applicant's culpability and the sentencing judge's finding that "*there is nothing in the report of Dr. Allnutt to justify a finding of reduced moral culpability in connection with the offences because of his post-traumatic stress disorder*"

(c) The report of 11th July 2021 by Consultant Psychiatrist Dr. Yvonne Skarbek[14] recognises that, as a result of the Applicant suffering severe trauma and resultant psychological injury from sexual abuse at Cobham Juvenile Detention Centre (during his admission there from 12th December 2007 to 30th January 2008), he suffers from chronic post-traumatic stress disorder, which may properly be considered as an aggravating circumstance to the offences of which he was convicted on 29th June 2015. This medical report was obviously not available as at the time of the delegate's decision nor final sentencing.

(d) The Applicant's mental health as at time of primary offences should be viewed as a mitigating factor, given the abuse recognised from his period of imprisonment during 2007.

(e) The Applicant contends that at the time of his offending he was suffering from chronic post-traumatic stress disorder (**PTSD**) and severe psychological disturbance citing the report of Dr Skarbek.

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[13] Applicant's SFIC paras [19]-[27].

[14] Attached to the Applicant's statutory declaration dated 21 August 2022.

(f) The immediate effect of rejection of the protection visa claim is to indefinitely detain the Applicant; that is, ongoing exposure to Immigration Detention.

(g) The Applicant would not have any access to a comparable ongoing medical plan in Zimbabwe.

(h) The Psychiatrist's Report (presumably Dr Skarbek's) outlines a programme of fortnightly psychiatric review for a period of up to three years, anti-depressant medication and continuing counselling. Such programme particularises risk management strategies. The Applicant will have access to a sophisticated medical programme, which has apparently not previously been available.

(i) The effect of the programme concurrent with factors referred to above means that the Applicant should not be regarded as a serious risk of reoffending with sound prospect of rehabilitation.

(j) The provision of accommodation and continuous care by family unit members and girlfriend supported by a treatment programme, which the Applicant is now able to afford are relevant factors. The Applicant's attitude to his offending reveals insight and determination to accept responsibility, as evidenced by a number of behavioural programmes completed whilst in detention.

(k) Disciplinary issues may to some extent be considered in the context of mental illness and allegations of the Applicant's claims of bullying and violence, recently recognised on a formal basis by the Department of Communities and Justice.

(l) The Applicant facing the prospect of indefinite incarceration, although not directly relevant to the application of s 36(1C) provides a reason for never reoffending.

The Minister

25. The Minister's Statement of Facts, Issues and Contentions (**Minister's SFIC**) made the following contentions:[15]

[15] Minister's SFIC paras [27]; [34]-[35]; [39]-[51].

(a) It cannot be disputed that the Applicant has been convicted by a final judgment of a particularly serious crime. The Applicant has been convicted of take/detain person with intent to obtain advantage and specially aggravated break and enter and commit serious indictable offence with weapon. Each of those offences is punishable by a maximum penalty of 25 years.

(b) The Applicant has an extensive criminal history in Australia. His offending primarily relates to taking/detaining a person, assault, driving offences, dishonesty offences, breach of court orders and hindering/resisting officers. Fifteen of those offences have resulted in the imposition of terms of imprisonment. Sentences involving terms of imprisonment are the last resort in the sentencing hierarchy.[16] Where a Court has sentenced an offender to a term of custodial imprisonment, this should be viewed as a reflection of the objective seriousness of the offences involved

(c) In addition to the above offences, the Applicant has a long history of violent offending, crimes of dishonesty and driving offences. The Applicant also has a record of poor behaviour in immigration detention. The picture that emerges from the Applicant's criminal history is that of a disdain for authority and the propensity to offend when faced with any inconvenience or adversity.

(d) Mitigating circumstances include the Applicant's drug abuse, the abuse that he suffered at the hands of his father before coming to Australia and witnessing combat, killing and cannibalism[17] and racial abuse in school and sexual abuse while in juvenile detention.

(e) There is limited evidence in relation to the Applicant's mental health and the effect it had on his offending. The sentencing judge particularly did not find anything in the report of Dr Allnut to justify a finding of reducing the moral culpability. Dr Skarbek does not appear to have been provided with the report of Dr Allnut and at no point does Dr Skarbek state that the Applicant's criminal offending is attributable to any mental condition.

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[16] Citing *PNLB and Minister for Immigration and Border Protection* [2018] AATA 162 at [22].

[17] Citing the sentencing judge's remarks: R1/214.

(f) Although the Applicant's drug use and mental health issues appear to be longstanding, there is a lack of evidence to suggest that he has taken any meaningful steps to address those issues. The Applicant presents a serious risk of reoffending and his prospects of rehabilitation are limited such that he is a clear and persistent danger to the Australian community. The Minister points to the following:

(i) the Applicant was assessed in July 2019 as presenting a medium to high risk of reoffending and a high risk of violent reoffending[18] and as having "*a high number of criminogenic needs which, if they remain unaddressed, are likely to affect his risk of reoffending*". It was subsequently reported that his behaviour evidences poor insight into his violence and interpersonal behaviour[19]

(ii) The Applicant accepts that he has a history of abuse of alcohol and other substances which impacted on his criminality. He started "experimenting" with drugs at the age of 12. He smoked one or two joints a day which increased when he came to Australia when he also started drinking alcohol.

(iii) Any drug rehabilitation has not been tested in the community and it is relevant that the Applicant was punished in prison for possessing drugs and obtaining same from a visitor.

(iv) The Applicant has also acknowledged that he has a problem with anger management,[20] yet there is little to no evidence of any steps having been taken to address that issue. The only evidence of any formal courses having been completed are the Equips Foundations and Equips Aggression courses. The Applicant has not had the opportunity to demonstrate any meaningful rehabilitation outside the supervised environment and has continued to display aggressive behaviour in both immigration detention and prison despite having completed those courses.

(v) In relation to the Applicant's PTSD, Dr Skarbek's report was not prepared in the context of assessing the Applicant's risk of reoffending but in the context

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[18] Citing the Violent Offenders Therapeutic Program (**VOTB**) Discharge Report; R2/14.
[19] Citing VOTB Treatment Progress Notes; R2/109-10.
[20] R1/217-8.

of "*seeking damages for personal injury arising from his detention at Cobham Juvenile Detention Centre*". Further that report appears to have been prepared following a single examination and upon review of only a file from the NSW Department of Communities and Justice dated 23 March 2021. Further, the proposition that that was the first time that the Applicant has had the opportunity of being provided with a medical programme is incorrect. The diagnosis is not new. The Applicant was diagnosed with PTSD in at least 2015 citing sentencing judge's remarks.[21] The Applicant received referrals for PTSD treatment in October 2013 and April 2014 and the Applicant received previous psychological treatment at least in 2013, June 2015 and June 2019 to February 2020. He was encouraged to seek support from a psychiatrist and it was identified as early as 2016 that he needed to address his PTSD.

(vi) To the extent that the Applicant's criminal conduct was affected by any mental condition, he continues to suffer from PTSD and Dr Skarbek has recommended extensive and long-term treatment.

(vii) Periods of incarceration have not previously had a salutary effect and the Tribunal can therefore have no confidence that the applicant is now a different person, particularly when the Applicant has continued to be violent in both prison and immigration detention.

(g) The Tribunal should have regard to all of the Applicant's offending, not just the crimes that constitute particularly serious crimes under s 5M of the Act (see ***WKCG v Minister for Immigration and Citizenship***[22] at [29] adopted by the Tribunal in ***MVLW and Minister for Immigration and Border Protection***[23] at [44])

26. The Applicant provided a response to the Minister's SFIC which made the following submissions:

(a) The Applicant's last serious offending was over 10 years ago in October 2012.

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[21] R1/218.

[22] [2009] AATA 512; (2009) 110 ALD 434.

[23] [2017] AATA 1557.

(b) The allegations of poor behaviour in prison and immigration detention have not been tested. Further, context is important and the Applicant has been the subject of prolonged immigration detention in a highly charged and difficult environment.

(c) If the Applicant were to be released it would be into a safer and more stable environment than immigration detention.

(d) The Applicant has been in sustained remission from illicit drugs for a considerable period. That fact itself, with respect, is evidence that the Applicant is no longer a user of illicit substances. Drugs are readily available in prison and immigration detention.

(e) The July 2019 assessment of the Applicant's risk of reoffending is "fairly dated"

(f) The submission that the Applicant's rehabilitation has not been tested in the community "is of no great moment" citing the observations of the Full Court in *CKL21 v Minister for Home Affairs* at [79].[24]

(g) Contrary to the Minister's submission that limited weight should be given to the statements provided in support of the Applicant because they do not demonstrate that the authors are aware of the Applicant's offending, the evidence of the Applicant's support network in the Australian community should be given due weight regardless of those persons not having full knowledge of the Applicant's prior criminal offending. They have provided evidence that they wish to support the Applicant in the Australian community.

(h) While the Applicant's previous periods of incarceration have not had a salutary effect on the Applicant the Applicant's circumstances are very different now and he appreciates that if he commits any criminal offences in the Australian community, he will be back in immigration detention.

[24] [2022] FCAFC 70.

The parties' closing submissions

The Applicant

27. Dr Donnelly's oral closing submission made on behalf of the Applicant were to the following effect:[25]

(a) The Applicant has shown remorse and taken "full responsibility for what happened". This is corroborated by the Applicant's mother's evidence and that of his partner at the hearing. The sentencing judge accepted that the Applicant was truly remorseful for his offending.[26] Statements of support by those close to the Applicant also confirmed that to be the case.[27]

(b) The Applicant has shown insight into his offending and "*was wiser as to the consequences of his criminal offending, particularly the impact not only on the victims*".[28] He now appreciates, as he said in evidence, that "*no one can keep me out of trouble but myself. People around can support me, but it's up to me, in effect, to do the job*" which shows that he has insight into his criminogenic propensity to engage in criminal offending.

(c) The Applicant has said that he would not engage with the people from his past who engaged in criminal behaviour. He now wants to help his mother, establish his own trucking business and "catch up on the years" lost as a result of his criminal behaviour.

(d) The Applicant has been in sustained remission from drugs and alcohol. The Applicant's evidence was that he had not taken drugs since about 2012. His last alcoholic drink was in 2014 shortly before he was taken into custody. While there were, according to the Applicant, a lot of drugs in prison, he "*did not want to go down that rabbit hole*".[29]

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[25] Transcript Day 2, pp 111-120.

[26] Citing comments by the judge at R1/207.

[27] Citing the statement of Mr CC at R1/263.

[28] Transcript at 112.

[29] A reference to the Applicant's evidence at Transcript Day 2 p 113.

(e) Addressing the fact that the Applicant had been found in possession of drugs on two occasions, the Applicant's evidence was that he was holding these drugs for another inmate. That, Dr Donnelly submitted, made sense because the drug in question was one used for people coming off heroin. The Applicant's abstinence is encouraging, however, as noted by the sentencing judge, the Applicant's criminality and criminogenic needs were not limited to drugs or alcohol.[30]

(f) The Applicant has completed the EQUIPS Foundation program, the EQUIPS Aggression program and the EQUIPS Addiction program. He has also has partially completed the Violent Offender Therapeutic Program. It must, however, be accepted that the Applicant was removed from that program. The Applicant has at least undertaken various forms of rehabilitation to assist him with what appears to be troubling, dysfunctional background, anger management issues, and the stressors of people in the detention and prison environment.

(g) The Applicant accepts that his rehabilitation is not complete and that if he were returned to the Australian community, he would need to continue to engage in psychological counselling, counselling for his PTSD, and medical treatment for that condition.

(h) The Applicant concedes that he has adverse incidents in prison and immigration detention. Dr Donnelly described it as being "*a troubling indictment on the Applicant's rehabilitation, the fact that he has had what can only be respectfully described as troubling and (indistinct) misconduct charges in both the prison and immigration detention environment*".[31] This is, according to the Applicant, the result of the high-pressure environment of prison and immigration detention. The Applicant described it in his evidence as "*a horrible place to be in*".[32] It is a place where it is hard to walk away from a problem, the problem does not go away. It is a hostile environment in which you have to watch your back all the time. This is made more difficult by the Applicant's PTSD, something that was recognised as a possibility by the sentencing judge.[33] Dr Donnelly posited that if the Applicant were to be taken

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[30] T18/223-224.
[31] Transcript Day 2 p 114.
[32] Transcript Day 1 p 10.
[33] R1/28.

out of the toxic physical environment, to a safe, stable, warm environment, with his family and his partner, the Tribunal could be satisfied that his misbehaviour and breaking rules as he has in a prison and detention environment would stop. The Applicant's PTSD exacerbates disruptive behaviour in those particular custodial environments.

(i) The Applicant's partner's evidence about the Applicant's psychological condition, his mood swings and his sleeping for extended periods support the Applicant's evidence as to the impact that immigration detention is having on him.

(j) The prospect of prolonged immigration detention and future visa cancellation are deterrents against future offending if the Applicant were to be granted the protection visa.

(k) The Applicant has said that he plans to address his PTSD in the community. He has not made those plans to date because he lives in Sydney, on the other side of the country, and does not know when he is going to be released. He has said that he would have emotional, financial and practical support from his mother, his half-brother and his partner, which was corroborated by those witnesses at the hearing. He would have a space, a safe and stable environment, he would have a roof over his head. His mother has a four-bedroom house. Her evidence was that he could live with her. She is a registered nurse in stable employment and will be able to provide financial support to the Applicant and assist the Applicant in obtaining employment in the disability support sector.

(l) The Applicant's partner's evidence was that their relationship was, according to Dr Donnelly, "pretty strong" and that she too could provide financial and emotional support to the Applicant. Her work commitments were flexible and she could provide support to him as and when needed including making sure that he attended medical appointments. Similarly, the Applicant's brother's evidence was that he could support the Applicant with a car if needed. The Applicant's brother was only very young when the Applicant was offending and was not in a position to provide support. He is now 24 years old, has a full-time job and is in a position to provide support to the Applicant.

(m) The Applicant has $15-17,000 left from a compensation payment made to him by the New South Wales Government in relation to an assault suffered by the Applicant

in prison. In any event, there is no reason to think the Applicant would not qualify for disability support services or perhaps more importantly, JobSeeker assisting with the Applicant's reintegration into the community.

(n) The Applicant was a frank and credible witness.

(o) In relation to the New South Wales Department of Communities and Justice Violent Offenders Therapeutic Program Discharge Report which said that the Applicant was "…*assessed using the Level of Service Inventory - Revised (LSI-R) as a medium/high risk of reoffending. He was assessed using the Violence Risk Scale at the commencement of treatment in VOTP (R. Wang, 30/07/2019), which placed him at high risk of violent reoffending*",[34] Dr Donnelly contended that report was done in 2019 which is "a fair while ago". Further, that report and assessment did not refer to the Applicant having a stable girlfriend, which is now the case. That report further does not reflect the other protective factors and supports identified by Dr Donnelly including the deterrent effect of the threat of visa cancellation if the Applicant were to reoffend.

(p) Grace Judith Maguire of the New South Wales Department of Corrective Services, in her report dated 20 March 2020,[35] assessed the Applicant at that time as "…*not considered to be an immediate risk of harm to self or others*". This report was made after the Applicant had been in prison. Dr Donnelly also referred to a 2016 New South Wales Department of Corrective Services case note report,[36] which "deemed" the Applicant to be "*low risk to to self or staff at the time of assessment*".

(q) The Applicant's age when he offended is also a relevant consideration. Much of his offending is from 2007 and occurred when he was a much younger man. He had the difficulties of coming from Zimbabwe in rather traumatic circumstances, and the transition was not easy for him. He did not have a father figure at the time and was quite young, and so he did not have a sufficient level of male support. He also had trouble fitting into school when he came to Australia.

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[34] R1/14.
[35] R2/253.
[36] R2/196.

The Minister

28. Mr Chan on behalf of the Minister made closing submissions to the following effect:[37]

(a) The decision of Tamberlin DP in *WKCG* lists the sorts of things that a decision-maker might consider in forming a view as to whether someone is a danger to the Australian community. The list is not an exhaustive checklist, but one of those important factors to consider is how serious someone's conduct or offending has been in the past.

(b) The assault on Mr M, which gave rise to the Applicant's convictions for take/detain person with intent to obtain advantage and the aggravated break and enter and commit serious indictable offence with weapon, was a "graphic assault" and it's self-evident how serious it was. It involved continued and brutal beating of Mr M, stripping him of clothes, hitting him in the face with a makeshift knuckle-duster (through a watch tied to the Applicant's fist), tying him up and making him go into a river, pouring oil (the evidence was that it was whiskey, not oil) on him and threatening to set him on fire, pushing condoms into his mouth and trying to push the victim into the boot of a car. It was a graphic and savage assault on a person that also involved humiliation.

(c) A couple of days after those incidents the Applicant broke into Mr M's house where his wife and children were present. The Applicant, who was carrying a gun, pressed the gun into the neck of Mr M's wife and threatened to kill her and the children unless she paid money to the Applicant.

(d) The Applicant was sentenced to terms of imprisonment totalling nine years with a non-parole period of six years which shows how objectively serious that offending was.

(e) The Applicant also has multiple convictions for other serious offences including offences against police officers (spitting on an officer, jumping at an officer, verbally abusing an officer and resisting arrest). The Applicant also has numerous offences of dishonesty (taking a phone, taking credit cards and trying to use the cards). He has also been convicted of assaulting a young person with whom he had a verbal

[37] Transcript Day 2 pp 120-131.

altercation. He followed that person home and beat him. He also has a conviction for break and enter when a minor. The Applicant has also repeatedly disobeyed traffic laws. The Applicant has a general disregard for Australian laws.

(f) The Applicant has also engaged in serious conduct while in gaol and immigration detention. Even whilst in a highly controlled environment, he was found to have possessed contraband, threatened officers, lunged at officers and called them by certain names. He has also intimidated and been in fights with other prisoners or detainees.

(g) The Minister accepts that the Applicant has PTSD. That, however, is not a mitigating factor referring to the sentencing judge's remarks in that regard that "*Despite the PTSD, there is no evidence about reduced moral culpability in relation to the Applicant's kidnapping and breaking and entering*".[38] The Applicant knew that what he was doing was wrong.

(h) The Applicant's criminal behaviour is long-standing and deeply entrenched. The Applicant said to a psychiatrist that his favourite weapon was "*'knuckle dusters'. The rationale for him choosing this particular weapon was because they were considered by him to be 'close and personal'. 'you can bang someone up pretty good', 'you can see the splatter' and they're 'artistic like Picasso on their face'*"[39]

(i) The Applicant's anger management issues have shown themselves over many years. That issue has also manifested even in gaol and immigration detention. He has also been abusive towards the psychologist in the VOTP.

(j) The detailed report as part of the VOTP should overtake any remarks or comments in the case notes about the Applicant being a low risk of harm to himself and to other prisoners. The VOTP report assessed the Applicant as being of a medium high risk of reoffending, and also a high risk of violent offending. That report states that as the Applicant did not complete VOTP, that risk likely has not changed.

(k) The Applicant has only a very limited support network. His mother knew very little of his criminal offending, very little of his drug use, and she agreed that he was able to

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[38] R1/218.

[39] From the Violence Risk Scale: Item Evidence Recording Sheet dated 30 July 2019; R2/137.

hide it very well from her. The Applicant's mother is a very busy person, working many night shifts, and in the past, she was not able to stop the Applicant from reoffending.

(l) Similarly, the Applicant's brother did not know much about the Applicant's offending and was not able to do much in terms of observing the Applicant taking drugs or alcohol. He is a young man and busy with his own life.

(m) The Applicant's girlfriend knew little detail of the Applicant's offending. When pressed to comment on the facts of the kidnapping and the breaking and entering, what she described is nowhere near as serious as the reality and she knew little about the other violent crimes committed by the Applicant. If a long-standing partner did not know something as basic as the details of her partner's offending, there is no realistic prospect that she would be much of a support to him in terms of persuading him against committing further violent offending or abusing drugs or alcohol. It should also be noted that the Applicant had a girlfriend at the time of his violent offending and drug and alcohol abuse and that this not stop him from engaging in that behaviour.

(n) In relation to employment, the Applicant has not had stable employment and assaulted a work colleague which resulted in his employment being terminated.

(o) The Applicant is at, at least, a medium or high risk of reoffending, and couple that with the lack of insight, his resistance to treatment in the past, including abusing psychologists who were just trying to assess him, his lengthy criminal record which dates back to when he was a juvenile, and his attitude towards law enforcement in the past and at present, show that his rehabilitation prospects are poor. Accordingly, the risk of him reoffending remains high.

THE EVIDENCE

29. A number of statements and the other material provided by the Applicant and material included in the T Documents and supplementary bundles,[40] were prepared for the Applicant's application for the protection visa or for the Applicant's request for revocation of

[40] R1, R2 and R3.

the cancellation of his visa under s 501(3A) (see [8]-[9] above) and, it would appear, for his application for compensation from the New South Wales Government for the abuse suffered in the Cobham Juvenile Detention Centre. As a result, a significant portion of those statements and that material in the T Documents and supplementary bundles deal with issues which are not relevant to the issues to be determined in this application as identified in [4] above.

30. In his statutory declaration dated 21 August 2022, the Applicant referred to his being diagnosed as having PTSD by Dr Yvonne Skarbek in her report dated 11 July 2021 (copy attached to his statutory declaration). At page 8 of 16 of her report, Dr Skarbek, assessed that "*The abuse at Cobham has led to the development of chronic Post Traumatic Stress Disorder (DSM 5 code 300.6) and Substance Use Disorder in remission (DSM 5 Code 305, 303.9, 305.7)"*

31. At page 12 of 16 of her report, Dr Skarbek stated that:

> *In the future* [the Applicant] *is likely to experience significant interpersonal difficulties in a working environment with other men in particular authority figures. He is likely to react to triggers and environmental cues that remind him of the abuse and to be emotionally unregulated.*

32. Asked to comment on the Applicant's ability, at that stage, to obtain work, Dr Skarbek advised that:

> *He currently has no capacity to work due to his psychological condition*
>
> and
>
> *He is unfit for work and would be unable to sustain regular employment.*
>
> and
>
> *He has no formal work qualifications. It is likely that even in unskilled position* [sic] *he would not be able to maintain employment.*

33. In the statutory declaration of 21 August 2022, the Applicant said:

> *I believe that my inexcusable criminal behaviour, which has been so totally self-destructive and has caused such sadness to my mother and harm to my victims, was caused at least in significant part by chronic post-traumatic stress. I do not excuse my behaviour, it is my responsibility.*
>
> *…*
>
> *I know that I have a bad prison record and I have been in conflict with some of the officers. I accept responsibility but I do feel that on some occasions I have been*

bullied in a similar way that I encountered at Cobham. I have made complaints to the Commonwealth Ombudsman, which I think has made things worse.

I do hope the seriousness of my post-traumatic stress condition, may at least in some way be seen to have influenced the irrational and offensive nature of the crimes that I committed, which as I said, were so self-destructive. I believe that I can confidently say there isn't a risk of me relapsing into crime. I have effectively done ten years in prison and lost the best part of my life and I realise the enormity of what I did and what might happen if I get a second chance. With the medical programme, family and friends supporting me and knowing the consequences of further criminal activity, I know I will not reoffend. My previous behaviour disgusts me.

34. Statements and statutory declarations were also provided by friends and associates of the Applicant as well as the Applicant's mother and father. As far as relevant to the matters that I have to consider, these statements and statutory declarations attest to the Applicant being remorseful for his offending behaviour, his struggles with mental health issues and the impact that imprisonment and immigration detention has had on him. The Applicant's parents' statements also go into some detail about the Applicant's early life in Zimbabwe and in Australia.

35. The Applicant's girlfriend also provided a statement made in August 2022, in which she referred to the Applicant being remorseful for his offending, wishing that he could apologise directly to his victims and her and the Applicant's desire to live together.

36. The Applicant's stepbrother also provided a statement which, relevantly, stated that the Applicant had said to him that he knew that he needed medical and psychological treatment and that he would do everything that he could to support the Applicant.

37. In an unsigned and undated form of statutory declaration,[41] the Applicant stated that he did not think that he was a danger to the community. He said:

I look back on my criminal behaviour, particularly the later offences against a person who was part of my social group, with absolute disgust. I have been aware that my behaviour, both in Zimbabwe as a child and then in Australia has shown a level of turmoil and self-destruction.

I know that my mother has sacrificed so much to provide my brother with a good life in Zimbabwe and a better life in Australia. During the years in prison I have come to realise why my life has been so self-destructive. I think I can and have overcome this.

…

[41] R1/293-4 and 298-300.

Prison has made me realise how damaged I had become.

I have been made aware a recent incident report at Christmas Island that was given to me to comment on. I do not want to trivialise such events as described, but what took place was as a result of a disagreement in a high-pressure place where I thought I was going to be attacked. Unfortunately, sometimes these things happen in a remote location detention centre. I do not excuse it.

…

I have been able to recognise who and what I am during the years in prison and detention. I have tried to learn to accept that my life cannot be destroyed by past events and not accepting that my father is not interested in me. I can try to accept the horrible things I witnessed with the soldiers and the lasting impact of sexual assaults in Australia. I believe that these are the factors that could have been the reason why I could not be grateful and accept the benefits of my mother's love and hard work. The benefits I could have obtained already from accepting the opportunities that were offered, I now realise are there for me still.

I do not believe I am now a danger to the community. I recognise who I am, and I believe I can overcome the issues that have crippled me, particularly with my mother's love and support.

38. At the hearing, Dr Donnelly took the Applicant to this statement, the contents of which the Applicant confirmed were true and correct.[42] Dr Donnelly then asked the Applicant about the records of incidents in immigration detention and gaol. The Applicant agreed that the incident reports were correct, but explained that, in the majority of cases "*prisoners have no choice but to plead guilty to these things even with the information in there is inaccurate*". The Applicant did, however, accept that he had engaged in the conduct described in the incident reports.[43]

39. The Applicant outlined the incidents of violence that he had witnessed in gaol including a stabbing and people dying. His evidence was that:

> *I am fully aware - I know that if I was to offend again, I'll go back to gaol. That's 100 per cent. My visa will be cancelled again. I'll be taken away from my family again, you know, and after spending so much time incarcerated, I have no interest in doing crime or being involved in any criminal activity whatsoever.*

And, asked whether his time in immigration detention had caused him to reflect:

> *Yes, it definitely has, because I do not ever want to see myself in a place like this. I'd never wish it upon anyone either.*

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[42] Transcript Day 1 p 8.

[43] Transcript Day 1 p 9.

40. The Applicant also gave evidence about the rehabilitation programs that he had completed in prison including Equips Foundation which ran over, according to the Applicant, "*a few weeks*" and the Equips Aggression program from which the Applicant said that he learnt "emotional management".[44] The Applicant also undertook the Equips Addiction program from which he "*learned about identifying the triggers that cause us to seek out drugs and what safeguards we could try to implement*". The Applicant also undertook a business course in prison which was aimed at teaching how to structure and safely run a business. The Applicant did not complete that course.[45] The Applicant's evidence was that he intended to get a licence for "*tipper trucks*" and start his own business.[46]

CONSIDERATION

Has the Applicant been convicted by a final judgment of a particularly serious crime?

41. In closing, Dr Donnelly accepted that the Applicant has been convicted by a final judgment of a particularly serious crime.[47] That is clearly the case. The Applicant has been convicted of, amongst other crimes, take/detain a person with intent to obtain advantage and specially aggravated break and enter and commit serious indictable offence with a weapon. Bother of these crimes have a maximum penalty of 25 years.[48] Those offences, as do other offences of which the Applicant has been convicted, come within the definition of particularly serious crime (see [21] and [22] above).

42. I find that the Applicant has been convicted by final judgment of a particularly serious crime.

Is the Applicant a danger to the Australian community?

43. There are two leading, and possibly conflicting, authorities on the interpretation of s 36(1C)(b) of the Act, namely *WKCG* and *DOB18*.[49] Deputy President Tamberlin's decision in *WKCG* is most often cited as the preferred statement of the meaning of "*danger to the*

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[44] Transcript Day 1 p 12.
[45] Transcript Day 1 pp 13-14.
[46] Transcript Day 1 pp 20, 75.
[47] Transcript Day 2 p 112.
[48] R1/206.
[49] *DOB18 v Minister for Home Affairs* [2019] FCAFC 63.

Australian community". I note that the Refugee Law Guidelines now refer to both *WKCG* and *DOB18* (see [23] above). Paragraph 3.26.3 of the Refugee Law Guidelines, citing [88] of *DOB18*, directs that "... *decision makers must determine whether the applicant is, at 'present and for the indefinite future', a danger to the Australian community*". The factors set out in *WKCG* for making that determination are also replicated in general terms in the Refugee Law Guidelines. DP Tamberlin said in *WKCG*:

> *[25] The question of whether a person constitutes a danger to the Australian community is one of fact and degree. It is not necessary to paraphrase the language of Article 33(2) of the Refugee Convention because the words used are plain and simple English. In deciding the question, regard must be had to all the circumstances of each individual case.*
>
> *[26] 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.*
>
> *The assessment to be made goes to the future conduct of the person and this involves a consideration of character and the possibility or probability of any threat, which could be posed to a member or members of the Australian community.*
>
> *…*
>
> *[31] The language of the Article directs attention to the expression "danger". This expression indicates that regard must be had to the future as well as the present, and includes a consideration of what may be foreseen to be the conduct of the person in the future. In assessing whether a danger exists, it will be sufficient if there is a real or significant risk or possibility of harm to one or [more] members of the Australian community. It is not necessary to establish that there is a probability of a real and immediate danger of present harm. The provision is designed to protect the community from both immediate harm and harm in the reasonably foreseeable future. The determination of this must be made by reference both to past circumstances and, as Brennan J pointed out (Salazar at ALR 38; ALD 100) it involves an assessment of the applicant's level of risk. It is too high a threshold to require that the possibility of harm must be established at the higher level of probability. In my view, the expression "danger" involves a lesser degree of satisfaction than that required by the expression "probable".*

44. Until the judgment in *DOB18,* the legal position was reasonably clear. As Logan J noted at [76] in *DOB18*:

> *In Australia, an influential case in relation to the subject of "danger" as used in Art 33(2) of the Refugee Convention and now in s 36(1C) of the Act has proved to be the Administrative Appeals Tribunal case, WKCG...*

45. As his Honour noted, various aspects of DP Tamberlin's approach in *WKCG* have been followed in subsequent cases. At [77] of *DOB18* Logan J noted that:

> *SZOQQ was determined by the Administrative Appeals Tribunal on the basis, promoted by the parties, that WKCG was correctly decided, as it was before the Full Court. But the Full Court expressly left open the correctness of WKCG.*

46. At [78] of *DOB18* Logan J observed that:

> *... it be accepted that considerations to which the Deputy President adverts at [26] are pertinent. In EWG17 v Minister for Immigration and Border Protection [2018] FCA 1536 (**EWG17**), Collier J referred to WKCG with apparent approval but her Honour's approval (at [52]) expressly related to the proposition (found in WKCG at [25]), that "danger" must be determined in the circumstances of a given case.*
>
> (Original emphasis.)

47. At [80] of *DOB18*, Logan J then noted:

> *My own further researches have disclosed that, also last year, WKCG was additionally referred to in this Court by Charlesworth J in AFY18 v Minister for Home Affairs [2018] FCA 1566 and by Siopis J in Applicant in WAD 531/2016 v Minister for Immigration and Border Protection [2018] FCA 27. In neither case was there any need to consider the correctness of all that was said in WKCG about "danger".*

48. As indicated by Logan J, the Tribunal has, on numerous occasions, adopted the approach taken by DP Tamberlin in *WKCG*.[50] That approach is also adopted in the Refugee Law Guidelines (see [23] above).

49. I read Logan J's judgment in *DOB18* as saying that the particular aspect of DP Tamberlin's decision with which his Honour had an issue, is the Deputy President's test for "danger" as set out in [31] of his decision, namely that "... *it will be sufficient if there is a real or significant risk or possibility of harm ... It is not necessary to establish that there is a probability of a real and immediate danger of present harm*".

(Original emphasis.)

50. Logan J's view at [83] and [85] of *DOB18* was that:

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[50] See *RWDX and Minister for Home Affairs* [2019] AATA 123; *MVLW and Minister for Immigration and Border Protection* [2017] AATA 1557*; HSCK and Minister for Home Affairs* [2019] AATA 4392; *SQDD and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] AATA 2980*; MQHN and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] AATA 119; *XFKR and Minister for Immigration, Citizenship and Multicultural Affairs* [2023] AATA 95; *CCYW and Minister for Immigration, Citizenship and Multicultural Affairs* [2022] AATA 4452)

> *In the context in which s 36(1C) of the Act and Art 33(2) of the Refugee Convention are found, it strikes me as inherently unlikely that it was intended that a person in respect of whom it is accepted a protection obligation is, prima facie, owed, because he is a refugee, might be returned to face persecution, perhaps death, on the basis of nothing more than a "risk", perhaps small. In my view, read in context, "danger" in s 36(1C) means present and serious risk. To the extent that what is stated in WKCG might be thought to suggest otherwise, I respectfully disagree with the observations made in that case about "danger". In my view, it carries a narrower and more restrictive meaning that [sic] just "risk".*
>
> *...*
>
> *Within the Act, s 5H(2) in the definition of "refugee" can be seen to be responsive to Art 1F in the same way that s 36(1C) can be seen to be responsive to Art 33(2). In Al-Sirri v Secretary of State for the Home Department [2012] UKSC 54; [2013] 1 AC 745, at [16], the United Kingdom's Supreme Court held that Art 1F of the Refugee Convention should be interpreted narrowly and restrictively, because of the potential consequences of excluding someone from the application of that convention. That same "potential consequences" rationale should, in my view, inform the construction of s 36(1C) of the Act.*

51. The potential conflict between *WKCG* and *DOB18* was considered by Collier J in ***DMQ20*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs.*[51] Her Honour said:

> *34. The applicant submitted that there is conflict in legal principle between the statements of Tamberlin DP in WKCG and Logan J in DOB18. The applicant also submitted that the Tribunal at [63] of its reasons misconceived a false equivalence and false coherence between these authorities...*
>
> *35. The applicant submitted that, to the extent that the Tribunal defined "danger to the community" by reference to the test articulated in WKCG rather than by Logan J in DOB18, the Tribunal erred as a matter of law.*

52. Her Honour then referred to Kerr J's analysis of the concept of "*danger to the Australian community*" for the purposes of s 36 (1C)(b) of the Migration Act in *EBD20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[52] at [28] in which his Honour said:

> *The expression "danger to the Australian community" is to be construed in its context, but has no technical meaning. The phrase is used in both s 36 and s 501(6)(d) of the Act, albeit in slightly different contexts. The language is that of ordinary English. Whether it is satisfied involves a close consideration of the whole of the relevant facts and circumstances as they present today. I am not sure that there is any one test as such. The view that a person is a danger to the Australian community can be held in a variety of circumstances. Prior criminal conduct is*

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[51] [2022] FCA 514.

[52] [2021] FCA 334.

obviously relevant. The degree of risk of recidivism is obviously relevant, and that requires attention to his motivation not to re-offend. What rehabilitation a person has undergone is obviously relevant. When his last offending occurred is relevant. The views of those who know him well can be relevant.

53. Having cited Kerr J's above comments, Collier J said:

> *37. In my view there is considerable force to the observations of Kerr J in respect of the concept of "danger to the Australian community" for the purposes of s 36 (1C)(b) of the Migration Act. As his Honour said, the language is that of ordinary English, has no technical meaning, and ought to be construed in its context.*
>
> *38. Notwithstanding the detailed submissions of both Counsel in the present application, I respectfully note that relevant observations in WKCG and DOB18 were both dicta, could not be said to conclusively define the meaning of "danger to the Australian community" for the purposes of s 36 (1C)(b), and in my view do no more than provide guidance in respect of the ordinary meaning of the words in that section.*

54. Her Honour then referred to dictionary definitions of danger and said:

> *41. Section 36 (1C)(b) of the Migration Act refers to danger "to the Australian community". The section does not require there to be any specific level of danger to the Australian community from the visa applicant. The fact that s36(1C)(b) is referable to the visa applicant having been convicted by a final judgment of a particularly serious crime suggests however that, in order for s 36 (1C)(b) to be enlivened:*
>
> - *there must be a real risk of exposure to harm in the Australian community from the visa applicant;*
> - *the harm the Australian community would be exposed to by the visa applicant would be proportionate or referable to the "particularly serious crime" for which the visa applicant had been convicted; and*
> - *the Minister must have reasonable grounds for forming that view*
>
> *42. As Tamberlin DP observed in WKCG at [25], the question whether a person constitutes a danger to the Australian community is one of fact and degree. This proposition is not in dispute. However at [31] it was further observed that in assessing whether a danger exists, it will be sufficient if there is a real or significant risk or possibility of harm to one or members of the Australian community.*
>
> *43. Justice Logan in DOB18 at [83] opined that, read in context, "'danger' in s 36 (1C)(b) means a risk that is present and serious". His Honour continued:*
>
> > *83. ... To the extent that what is stated in WKCG might be thought to suggest otherwise, I respectfully disagree with the observations made in that case about "danger". In my view, it carries a narrower and more restrictive meaning that just "risk"*
>
> *44. In the present case after referring to both WKCG and DOB18, the Tribunal at [64] found that in order for a person to be a "danger" there must exist, at the time of the decision of the Minister, a present risk which is "real" or "significant" or "serious",*

and which is neither remote nor fanciful, that the person will cause harm of a sufficiently serious nature in the present or future.

...

46. I agree with the Tribunal's articulation of principle at [64] in respect of whether the applicant was a "danger to the Australian community". I do not consider it to be inconsistent with comments of Logan J in DOB18, rather I consider the Tribunal's statement to be an accurate statement of the law. I do not consider that there is any material conflict between the legal principles as explained in WKCG and Logan J in DOB18. ....

55. In dismissing the appeal from her Honour's judgment, the Full Court,[53] per Rares J said:

54. Thus, the word "danger" connotes that there are reasonable grounds to perceive a threat of serious, or potentially serious, consequences if the situation said to pose the danger were ignored…

55. Moreover, as used in s 36(1C)(b), "a danger" can relate to the particularly serious crime for which the person has been convicted as that might bear on what will occur if he or she were admitted into, or allowed to remain within, the Australian community.

56. Of course, the second limb in Art 33(2) and s 36(1C)(b) does not require that there be a causal link between the refugee's conviction and the danger. But, neither provision excludes an evaluation of the present or future danger to the community having regard to past crime. Both provisions require, as a precondition of consideration of whether a person is a danger to the community, that he or she has been convicted of a particularly serious crime (here or abroad): A v Minister for Immigration and Multicultural Affairs [1999] FCA 227 at [3] per Burchett and Lee JJ and [41]-[43] per Katz J. And, as Stanley Burnton LJ said of Art 33(2) in EN (Serbia) [2010] QB at 655 [46]: "normally the danger is demonstrated by proof of the particularly serious offence and the risk of its recurrence, or the recurrence of a similar offence". He added that, in his view, "a disregard for the law, demonstrated by the conviction, would be sufficient to establish a connection between the conviction and the danger". However, he held that Art 33(2) did not require there to be any causal link between the conviction and the danger.

56. Thomas and Snaden JJ in *DMQ20 FC,* said:

109. With respect, there was an air of unreality to what was advanced. At least for present purposes, "risk", "possibility" and "probability" are synonyms. They serve as means by which to measure the quantitative dimension inherent in the concept of "danger". In other words, there exists a "danger" if there exists a sufficient risk, possibility or probability of sufficient harm. Attempts to distinguish those synonymous concepts—"risk", "possibility" and "probability" (real, significant, substantial or otherwise)—are, at least for present purposes, misconceived.

110. Similarly, it is artificial—or, at the very least, difficult—to distinguish the existence of danger from the possibility that danger exists. Necessarily, to perceive

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[53] *DMQ20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] FCAFC 84 ***DMQ20 FC***

"danger" is to embark upon a process of speculation. Such processes may be informed by historical and other assessments (for example, as to a visa applicant's criminal history and the measures that he or she has taken to rehabilitate); but they remain speculative and are inherently immune to precise quantification. "Danger", then, is a binary proposition: a person, circumstance or thing that presents a sufficient likelihood of sufficient harm will bespeak the presence of danger, even though there remains a prospect—and perhaps, in some cases, a likelihood—that that harm might never be realised. There may well be no relevant distinction to be drawn between a person who is a danger to others and a person who might be such a danger.

111. Qualitatively, it is clear enough that the reference in s 36(1C)(b) of the Act to "danger" was intended to denote a prospect of harm. Given the statutory context—involving, as it does, an exception to the expectation that Australia will afford protection to refugees and others in need of it—it is likely that the Parliament intended that it should involve harm of non-trivial kinds….

…

113. When assessing the presence of danger (in the sense that the natural and ordinary meaning of that word imports), the required analysis is both quantitative (what is the level of probability that something might happen?) and qualitative (what are the consequences if it does?). They are related inquiries: a high probability of mid-level personal injury, for example, might bespeak the presence of danger no more tellingly as would a moderate or even low probability of serious injury or death.

…

116. In its human form, then, "danger" presupposes that there should be something about a person's character or proclivities (or both) that suggests a probability and quality of harm to others that is beyond the typical consequences of routine interaction. Ordinarily, that would fall to be assessed by reference to the person's prior conduct and the likelihood that it might be repeated. A person with no history of violent offending would ordinarily be thought not to pose any danger to others, no matter that he or she might possess some real capability to inflict harm. A person with an appetite for and history of violence, on the other hand, might well be thought otherwise.

57. The issue was further considered by the Full Court in ***SLGS*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* wherein Feutrill J analysed the Full Court's judgment in *DMQ20 FC* J and said:[54]

> *82. To the extent that there are differences between the construction of s 36(1C)(b) of the Migration Act favoured by Rares J in DMQ20 and the construction favoured by Thomas and Snaden JJ, it is the approach of the plurality that must be followed. In my view, their Honours held 'danger', as used in s 36(1C)(b), to be a word of ordinary English which is to be applied to all the facts and circumstances of the case and which is not susceptible of more precise definition. It would be consistent with their Honours' approach for the decision maker to consider whether the harm that will eventuate if the danger becomes a reality is non-trivial and whether it would be*

[54] [2023] FCAFC 104.

harm of a physical or psychological kind. It would also be consistent with that approach to consider whether the risk that the harm will eventuate goes beyond that which is contemplated in ordinary personal interactions. Both the plurality and Rares J endorsed a concept of danger that combines an assessment of how probable harm is with an assessment of the severity or seriousness if the probability eventuates.

…

84. On any view, in assessing these matters, the decision maker may consider the particularly serious crime of which the visa applicant has been convicted and the risk that he or she will offend in that way in the future. More broadly, the risk of repetition of other past conduct may also be considered.

85. In my respectful view, none of this is inconsistent with the approach that Tamberlin DP took in WKCG. The list of factors which the Deputy President set out in that decision remains useful, provided it is approached, not as a 'test' or a mechanical checklist, but as a guide to assessing the fundamental question of fact.

58. I also note Jackson J's statement in ***LKQD*** *v Minister for Immigration* at [62] that:[55]

> *To the extent that Art 33(2) is an exception to the principle of refoulement, s 36(1C) can similarly be characterised as an exception to the principles of protection reflected in s 36(2). None of that requires any departure from the explanation of the ordinary meaning of s 36(1C) which Deputy President Tamberlin gave in WKCG. I note that Logan J, sitting on the Full Court, has recently held that, read in context, 'danger' in s 36(1C) means 'present and serious risk' and has suggested that may be inconsistent with WKCG: DOB18 v Minister for Home Affairs [2019] FCAFC 63 at [83]. But even the standard suggested by his Honour does not rise to the level of 'very serious danger' urged on behalf of the applicant.*

59. In relation to whether consideration of s 36(1C) of the Act requires a balancing exercise, at [63] of *LKQD.* Jackson J found that:

> *... the decision in SZOQQ is authority for the proposition that Art 33 requires no balancing between the undesirability of refoulement and the danger to the Australian community that an applicant may pose. SZOQQ was overturned in the High Court, but on a different ground that had not been put to the Full Court: see SZOQQ v Minister for Immigration and Citizenship [2013] HCA 12; (2013) 251 CLR 577 at [16]. The Tribunal in the present case committed no error in following the Full Court in SZOQQ. The published opinion of the UNHCR in the note referred to cannot change that.*

60. I am satisfied that the relevant considerations in assessing whether the Applicant is a danger to the community are those identified in [26] of DP Tamberlin's decision in *WKCG* (see [43] above), which are adopted by the Refugee Law Guidelines and referred to in *DOB18* as being pertinent. This is consistent with Collier J's comments in *DMQ20*, the Full

[55] ([2019] FCA 1591; (2019) 167 ALD 17)

Court's judgments in *DMQ20 FC* and *SLGS* and Jackson J's judgment in *LKQD*. Each of the factors identified by DP Tamberlin in *WKCG* is considered below.

Nature and seriousness of the crimes committed

61. The most serious of the Applicant's crimes were those of which he was convicted and sentenced on 29 June 2015. In sentencing the Applicant, Judge Sides made the following observations and findings:[56]

> [The Applicant] *appears for sentence consequent upon his pleading guilty on 26 February 2014 to the following two offences committed at Liverpool in 2012:*
>
> *count 1, a specially aggravated kidnapping committed upon the victim* [V] *on 29 September 2012; and*
>
> *count 2, a specially aggravated break enter and commit a serious indictable offence of robbery on 4 October 2012 at the victim's home.*
>
> *Both offences have a maximum penalty of 25 years imprisonment.*
>
> *…*
>
> *When considering deterrence and retribution in connection with count 2, the Court took into account two offences committed on 4 October on a form 1 schedule. They are: demand money with menaces whilst in company, which on indictment has a maximum penalty of 14 years imprisonment; and larceny, which on indictment has a maximum penalty of five years imprisonment.*
>
> *As he pleaded guilty the day his trial was due to begin, the Court indicates that it reduced the indicative sentences by about 10%...*
>
> *…The Court accepts the conditions referred to in sub-par 21A(3)(i) have been proved based on the material before it and* [the Applicant] *is genuinely remorseful. The Court has reflected that remorse in the sentences to be imposed.*
>
> *…*
>
> *At about 7.30pm on Friday 28 September the victim met with his friend the co-offender [M] and* [the Applicant] *near the Glenfield Railway Station. The co-offender and the victim were friends. All three drove to a supermarket, purchased a carton of beer and meat to have a barbecue. They then went to the Lighthouse Park situated at River Park Drive Liverpool where they drank several bottles of beer. Whilst there the co-offender [M] rang the co-offender [M2] and made arrangements to pick him up at the Liverpool Railway Station. The three went from the park, picked up the co-offender [M3] and all four of them returned to the park where they consumed more beer.*
>
> *They left at about 11pm and went to a club in Parramatta. The victim drove his car accompanied by the offender [M].* [The Applicant] *and his girlfriend, along with the co-offender [M2], travelled in a car belonging to the offender's girlfriend.*

[56] R1/206-13.

They remained at the club for about two and a half hours drinking and socialising. They left the club travelling in the same cars as previously.

They returned to the townhouse, which the Court will refer to as the townhouse, occupied by the girlfriend of [the Applicant]*,.. The co-offender [M] got into the car with* [the Applicant]*. The victim told the co-offender [M] that he was tired and wanted to go home. The co-offender [M2] told the victim to tell the other two about his wish to go home. As the victim approached the car, the co-offender [M] got out and told the victim that* [the Applicant] *was angry with him and wanted to talk to him and they had to go for a drive.*

The victim and the co-offenders [M] and [M2] then got into the victim's car and the co-offender [M] drove them all to the grassed area near the Georges River in the Lighthouse Park. Shortly after they got out of the car, the co-offender [M] broke a glass beer bottle that he threw towards the river. Having done so, he commenced to punch the victim about the face while the co-offender [M2] was standing a metre or two away. The co-offender [M] told the victim to get into the river, but the victim refused. The co-offender [M] then tripped the victim and, after the victim fell to the grass, the co-offender [M] kicked him in the face. As a result of the assault, the victim suffered a minor graze to the right side of his forehead and extensive bruising and swelling to the left side of his face.

After the assault upon the victim, the trio returned to the townhouse. Before they arrived, the co-offender [M] apologised to the victim for beating him up. When they got to the townhouse, the co-offender [M] called [the Applicant] *who came out and sat in the back of the victim's car so the victim was now sitting between him and the co-offender [M2]. The co-offender [M] remained in the driver's seat and drove to the Commonwealth Bank ATM, which was located nearby. Once there, the co-offender [M] and* [the Applicant] *asked the victim to provide the PIN number for his debit card. The victim handed the debit card to the co-offender [M] and told him the correct PIN.* [The Applicant] *threatened the victim saying that, if they found out he had money when he told them he did not have any money, he would kill him. When the victim tried to get out of the car,* [the Applicant] *stopped him by holding the door closed from the outside.*

The co-offender [M] went to the ATM and the victim managed to get out of the car and run up George Street. The co-offender [M] and [the Applicant] *chased him and assaulted him. The victim then ran and sat outside the police station doors.* [The Applicant] *told him to come back and take his car, but the victim told* [the Applicant] *to leave the car where it was. The co-offender [M] then drove the car containing the co-offender [M2] a short distance and then left it near some traffic lights at the intersection of George and Moore Streets in Liverpool. The co-offenders then walked back to the victim and asked about* [the Applicant]'s *whereabouts. The victim told them* [the Applicant] *had told him he was going home, so they left.*

About 20 minutes later, the victim went to his car, drove it to Westfield and parked it near Woolworths. When he got out of the car, [the Applicant] *jumped out of the boot and commenced to assault him by punching him and choking him, trying to get him into the boot. He was not successful and told the victim to drive the car back to Liverpool. With* [the Applicant] *as his passenger, the victim drove to his home address.*

When they arrived, he received a call from his wife. She told him the two co-offenders had knocked on the door of their flat and, after she let them in, they had taken the house keys. Shortly afterwards the two co-offenders came down to the car

park where the victim and [the Applicant] *were sitting in the victim's car. The victim got out of the car followed by* [the Applicant] *who poured a bottle of whiskey onto the victim and said: "do you want to see somebody burning?" The Offender asked the co-offender [M2] for a cigarette lighter and he handed him one. The victim was screaming and the co-offender [M] hit him in the head. The co-offender [M] and the offender then made the victim get back into the car and they drove back to the Lighthouse Park. During the journey the victim was on the back seat between the offender and the co-offender [M2].* [The Applicant] *placed a coat over his head. The co-offender [M] drove the car.*

When they got to the park, they all got out of the vehicle and the victim was taken to a grassed area next to the Georges River. Somebody hit him on the head with a bottle and then [the Applicant] *wrapped his watch around his fist and punched the victim to the head. They forced the victim to remove his clothes. Somebody went through the victim's clothes and took his wallet, along with a number of condoms. He was told to eat the condoms and they were placed in his mouth, but he spat them out*.

[The Applicant] *told the co-offender [M2] to remove his belt, which* [the Applicant] *and the co-offender [M2] then used to tie the victim's hands behind his back.*

After the victim's debit card was taken from his wallet, [the Applicant] *demanded the victim to tell him his PIN. The victim was repeatedly kicked and punched whilst tied up naked. He gave* [the Applicant] *his PIN and* [the Applicant] *left the area, returning shortly afterwards. When he returned, the co-offender [M] asked how much money was in the victim's account.* [The Applicant] *said there was $300 in the account and he did not withdraw any because it was evidence. Further threats were made to the victim. He told them he had another account with $10,000 in it.*

After the victim was untied, he was told to jump into the water. He did so and, whilst in the water, the co-offender [M] kicked his hands whilst he hung onto the boat landing. During this time, the co-offender [M2] was standing within a metre or two. After a while [the Applicant] *told the co-offender [M] to get the victim out of the water and that was done.* [The Applicant] *then made threats to the victim that he was to obtain the $10,000 and give it to him.*

They then all got back into the victim's car and the co-offender [M] drove them to the townhouse and dropped [the Applicant] *off there. After doing this, the other three went to a pub near Liverpool and had some drinks together. After that the victim withdrew $100 from an ATM at the pub and gave it to the co-offender [M] and asked him to give it to* [the Applicant] *to cover the cannabis they smoked together at Parramatta.*

…

Between 30 September and 12 October the victim had been in contact with [the Applicant] *and the co-offender [M2] and each told him* [the Applicant] *wanted his money.*

…

…[the victim] received a phone call from the co-offender [M] who told him he needed to come up with the money, but the victim told him that he did not have any. Shortly afterwards there was a knock on the door of the victim's unit. His wife looked through the viewing hole and only saw the co-offender [M]. She recognised him. The victim called triple-0 and called out that he was calling the police. After calling the police the victim received a call from the offender who said:

> *"come downstairs, I will give you five minutes and then I will shoot the door. Do you think I'm stupid, I know you are calling the police".*
>
> *…Whilst he [the victim] was at the police station a home invasion was committed at his unit.*
>
> *Sometime before the home invasion* [the Applicant] *, an unidentified friend and the two co-offenders consumed liquor together. They then drove towards the victim's flat. On the way,* [the Applicant] *talked about breaking into the premises and threating those present in an attempt to get the money previously demanded from the victim. He took a gun from the front of his pants and loaded it with a bullet. When they arrived at the victim's apartment, the two co-offenders went upstairs to the front door, but it seems the victim's wife only saw the co-offender [M]. As already noted the victim refused to let them in and told them he was calling the police. They returned to the car and all four drove away. As already noted the police arrived shortly afterwards and took the victim to the police station. This left his wife, their son and [friend], a friend of their son, in their flat.*
>
> *At about 12.45am the same four people drove back to the victim's flat by which time the three occupants were asleep inside. The victim's wife and his son were sleeping in one room and [friend] was sleeping in another room. On this occasion* [the Applicant] *and his three co-offenders went up to the victim's unit and* [the Applicant] *kicked the door open and all four entered. The victim's wife woke up when her bedroom light came on and observed* [the Applicant] *with a brown coloured firearm in his right hand. She remained in bed and* [the Applicant] *demanded money and wanted to know the victim's whereabouts. He continued to tell the victim's wife to cover her face and not look at him. The victim's wife could hear other males in the unit. Her eight year old son woke up whilst the offenders were inside the flat. They were in the flat for a period of about five minutes during which they requested money and demanded the victim's wife hand over her wallet and credit cards, which she did, giving rise to the offence of demand money with menaces in company. During the whole incident* [the Applicant] *was pushing the firearm into the neck of the victim's wife causing her great fear.*
>
> [The Applicant] *and one of the other men went into the bedroom where Anthony [friend] was asleep. They stole his mobile phone and a sports bag that contained his wallet, driver's licence, credit cards, eight or nine baseball caps, a PlayStation 3, boxing gloves and a computer. The theft of these items gives rise to the offence on the form 1 schedule.*
>
> [The Applicant] *told the victim's wife to tell her husband to get the $10,000 and if he did not get it he would kill their son and kill her. All four left the apartment.*
>
> *…*

62. Judge Sides summarised the Applicant's prior offending as follows:[57]

> [The Applicant] *started abusing cannabis at an early age when he was too young to appreciate the long-term consequences of that abuse. He also used this drug to self-medicate.* [The Applicant] *also had a problem with abusing alcohol and methyl-amphetamine. During his evidence he said that he had sought to enrol in programs*

[57] R1/214-7.

to address his substance abuse issues but, because he was on remand and moved to different gaols, he could not commence any such program.

[The Applicant] *cannot claim the benefit of prior good character. On 3 September 2007 he was given 100 hours community service for an aggravated break enter and commit serious indictable offence. At the same time he was cautioned for traffic offences. On 16 April 2008 he was placed on probation for 12 months for assault occasioning actual bodily harm, intimidation and larceny.*

In April 2010 he was dealt with for some traffic offences. On 7 July 2010 he was placed on a bond for 12 months for dishonestly obtaining by deception, using a false document and possession of a false document. The bond was revoked on 27 July 2011 and, on appeal, he was ordered to perform 150 hours community service. On 1 November 2012 the community service orders were revoked and he received sentences of six months' imprisonment commencing 1 November 2012.

On 29 June 2011 he was placed on a bond for 12 months for possession of an unauthorised prohibited firearm. On 27 July 2011 he was sentenced to 12 months with nine months non-parole for dishonestly obtaining property by deception and possession of identity information with intent to commit an indictable offence. At the same time he received a sentence of six months imprisonment for goods in custody, however, on 24 October 2011 on appeal he received community service orders of 250 hours. Those community service orders were revoked on 1 November 2012 and he received sentences of 12 months with nine months non-parole for two matters, the sentences commencing 1 November 2012. For goods in custody he received a concurrent sentence of six months imprisonment.

On 2 February 2012 he was fined for drive whilst suspended. On 8 February 2012 he was fined for drive whilst suspended and disobeying a turn sign. On 12 April 2012 he was fined for exceeding the speed limit by more than 30 kilometres per hour. On 13 June 2012 he was fined for driving whilst suspended. On 22 August 2012 he was fined for offensive language. On 24 October 2012 he was fined for remaining in licensed premises when excluded. On 30 November 2012 he was placed on a bond for 12 months for assault police and resisting arrest. At the same time he was convicted for failing to appear but no punishment was imposed under s 10A. On the same day he was fined for resisting police and received a sentence of one-month imprisonment for two counts of drive whilst suspended.

On 1 August 2014 he was fined for assaulting an officer and resisting police. These offences were committed on 26 January 2014 after the matters before the Court. They are relevant to his prospects of rehabilitation. On 28 April 2015 the offender was sentenced to 14 days imprisonment for possession of a mobile phone in custody.

…

The dates of some of the offences on his criminal history tend to suggest that he might have been on bail when he committed the matters before the Court.

63. His Honour commented on the Applicant's record while in custody:[58]

[58] R1/217.

> [The Applicant] *has been in custody since 28 February 2014. Since then he has incurred six breaches of prison discipline, three of which involved intimidation on 1 November 2014, 1 December 2014 and 19 March 2015. During his evidence* [the Applicant] *said that these events arose when he became verbally aggressive in response to provocative acts by prison officers. The other breaches of his prison discipline were involvement in a fight or combat, failing to attend muster and avoiding correctional centre routine.*
>
> [The Applicant] *claims that he has come to a realisation that his behaviour is counterproductive and he has changed his response to provocative situations. However, in this context, the Court notes that the most recent incident involving intimidation was less than three months ago. It also notes that the Offender acknowledged to the probation officer that he has a problem with anger management. There is no evidence that he has undertaken any programs to address this issue.*

64. The offences of which the Applicant was convicted in June 2015, for which he received terms of imprisonment totalling nine years with a non-parole period of six years, were savage, sustained and pre-meditated. The balance of the Applicant's criminal record is also of extreme concern. In a period of some eight years from 2007 to 2015, the Applicant was convicted of 33 offences. In addition to the repeated and frequent driving offences (12 in total), the Applicant has been convicted of:

- aggravated break and enter;
- assault occasioning bodily harm
- stalk/intimidate;
- larceny;
- possession of an unauthorised firearm;
- use offensive language;
- remaining in vicinity of licensed premises as an excluded person;
- breach of bail/fail to appear;
- resist or assault police officer on five occasions;
- possession of identity information to commit indictable offence;
- possession of suspected stolen goods;
- dishonestly obtain property by deception;
- possession/use of false documents to obtain property on two occasions; and

- possession of a prohibited mobile phone/sim card,

as well as the two extremely serious offences for which he was convicted in June 2015. The Applicant's record is permeated with acts of violence and dishonesty and evidences a disregard for the law.

65. The Applicant says that his last "serious offending" was in October 2012 (see [26] above). There are two observations to be made about that claim. The first is that the Applicant has been in prison or immigration detention since 28 February 2014[59] and the second is that, on his own admission, he "*has a bad prison record and has been in conflict with some of the officers*".[60]

66. While there are undoubtedly factors behind the Applicant's offending including his traumatic and dysfunctional upbringing, his substance abuse, PTSD and psychological disturbance as identified by Judge Sides in sentencing the Applicant (see paras [71-2] below), by any criterion, the Applicant's criminal record is objectively extremely serious.

The length of the sentences imposed

67. The terms of imprisonment to which the Applicant has been sentenced are set out in Annexure 1.

68. The Applicant has received a number of sentences involving terms of imprisonment, some overturned on review. With the exception of the sentences imposed on 29 June 2015 for the take/detain person with intent to obtain advantage and specially aggravated break and enter and commit serious indictable offence with weapon charges, the terms of imprisonment imposed by the courts have been at the low end. The term of imprisonment of nine years with a non-parole period of six years is obviously very substantial and reflective of the court's view of the seriousness of the Applicant's offending. Even the earlier shorter terms of imprisonment imposed by the courts, while at the lower end of possible terms of imprisonment, are still indicative of the seriousness of the Applicant's repeated offending given that imprisonment is the last resort in the criminal penalty regime.

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[59] Transcript Day 1 p 5 and sentencing remarks; see para [63] above.
[60] Applicant's statutory declaration dated 21 August 2022.

Mitigating or aggravating factors

69. While DP Tamberlin at [26] of *WKCG* identified "mitigating or aggravating circumstances" as being a potentially relevant consideration, it is not clear to what factor or factors the mitigating or aggravating considerations are to be applied. The concept of mitigation, that is the lessening of force or intensity or moderation of severity[61] is readily understandable in the context of assessing the offender's moral and criminal culpability for the purposes of sentencing. However, how principles of mitigation would apply in assessing whether an individual is a danger to the Australian community is less obvious, particularly when DP Tamberlin identified the length of the sentences imposed (which would take into account the mitigating and aggravating factors of an applicant's offending) and the likelihood of relapsing into crime as separate considerations.[62] As the role of the Tribunal is to assess whether the Applicant is a danger to the Australian community, not the Applicant's criminal or moral culpability for his offending, I take DP Tamberlin's reference to mitigating circumstances to be a reference to circumstances which are likely to lessen the severity of the Applicant's offending as it impacts or could impact the community or which are likely to reduce the likelihood of the Applicant re-offending.

70. In that regard, in sentencing the Applicant, Judge Sides made the observation referred to in [24(b)] above. His Honour recounted the Applicant's traumatic upbringing and young life in Zimbabwe,[63] concluding that the Applicant "*has the disadvantage of a dysfunctional upbringing*". The judge also noted that Applicant "*started abusing cannabis at an early age when he was too young to appreciate the long-term consequences of that abuse. He also used this drug to self-medicate.* [The Applicant] *also had a problem with abusing alcohol and methyl-amphetamine*".[64]

71. While Judge Sides made the observation quoted at [24(b)] above, he did go on to observe that:[65]

> *However, he* [Dr Allnutt] *did express the opinion that the onset of post-traumatic stress disorder at the age of 13, combined with the use of cannabis to assist him to sleep would have increased the Offender's vulnerability to engage in significant*

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[61] Macquarie Dictionary (online at 15 May 2023) '*mitigate*'.
[62] *WKCG* at [26]; see [43] above.
[63] R1/213-4.
[64] R1/215.
[65] R1/218-9.

substance abuse. That is certainly what the Offender reported in the period leading up to the offences. The Court accepts that the Offender would have been uninhibited as a consequence of intoxication and that he experienced a sense of invincibility and reduced concern for the consequences of his actions because of the consumption of methyl-amphetamine. However, the Court is not persuaded that, because of his intoxication at the time of the offences, the Offender did not appreciate what he was doing was wrong and did not have some understanding of the consequences of his conduct.

…

The Court is not satisfied that it is appropriate to make a finding of reduced moral culpability because of the offender's intoxication at the time of these offences. However, the Court is persuaded that it is appropriate to make a finding of reduced moral culpability because of his dysfunctional upbringing.

72. The Applicant contends[66] that his mental health at time of the primary offences should be viewed as mitigating factors, given the abuse recognised from his period of imprisonment during 2007. The Applicant refers to Dr Skarbek as having recognised symptoms of the Applicant's chronic post-traumatic stress disorder are his chronic PTSD and severe psychological disturbance. The Applicant contends that at the time of his offending he was suffering from such conditions.

73. I am conscious of what could be considered mitigating and aggravating circumstances relating to the Applicant's history and his offending. The approach that I have taken is to take those factors into account in assessing the seriousness of the Applicant's offending and the risk of the Applicant offending in the future.

Risk of re-offending/likelihood of relapsing into crime and prospects of rehabilitation

74. Having made the observations at [26] of *WKCG* (see [43] above), Deputy President Tamberlin at [27] observed:

> *The person's previous general conduct and total criminal history are highly relevant to assessing the risk of recidivism. In Re Salazar Arbelaez v Minister for Immigration and Ethnic Affairs [1977] AATA 35; (1977) 1 ALD 98, Brennan J said at 100:*
>
> > *Rehabilitation is never certain. One cannot predict 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.*

[66] Applicant's SFIC para 22.

75. It is not disputed by the Applicant, as found by Judge Sides, that the primary contributing factors to the Applicant's offending are his traumatic and dysfunctional early childhood giving rise to chronic PTSD and severe psychological disturbances and his long-standing drug and alcohol abuse.

76. The Applicant's SFIC refers to Dr Skarbek's program of fortnightly psychiatric review for a period of up to three years, anti-depressant medication and continuing counselling.[67] The Applicant contends that provided the Applicant has access to "*a sophisticated medical programme, which has apparently not previously been available*", the Applicant should not be regarded as a serious risk of reoffending, with sound prospects of rehabilitation. The Applicant also refers to the provision of accommodation and continuous care by family unit members and his girlfriend, supported by a treatment program, the Applicant's acceptance of responsibility and insight and the programs undertaken since being in detention as being relevant factors. The Applicant facing indefinite detention is also cited by the Applicant as being a deterrent against future offending.

77. It is clear on the evidence, including that of the Applicant, that his offending is closely linked to his drug and alcohol abuse and, either directly or indirectly, to his chronic PTSD and severe psychological disturbance. Unfortunately, there is no recent psychological evidence or evidence from any appropriately qualified health professional relating to or assessing the Applicant's risk of re-offending. As noted by the Minister, while thorough, Dr Skarbek's report was primarily looking at the Applicant's background and the causes of the Applicant's psychiatric conditions and potential treatment, rather than as an assessment of the Applicant's risk of reoffending.

78. Dr Skarbek's report did, however, identify issues of concern. As noted at [31] above, Dr Skarbek assessed the Applicant as "… *likely to experience significant interpersonal difficulties in a working environment with other men in particular authority figures*" and being "… *likely to react to triggers and environmental cues…".* Dr Skarbek's outlook for the Applicant's prospects of employment as cited in [32] above is also not encouraging, particularly in light of the Applicant citing his prospects of employment as being a stabilising factor against reoffending.

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[67] See para [24(i)] above.

79. I agree with the Minister's contention that the Applicant's criminal behaviour is long-standing and deeply entrenched. The Applicant's statement to the psychologist in the VOTP to the effect that his favourite weapon was knuckle dusters because '*you can see the splatter'* is particularly disconcerting.

80. It would also appear that, notwithstanding the Applicant having undertaken courses and programs, his anger management issues have continued as evidenced by his poor record in detention with the Applicant even being abusive towards the psychologist trying to assist him through the VOTP. It seems that Dr Skarbek's prognosis of the Applicant continuing to have significant interpersonal difficulties and being likely to react to triggers and environmental cues (see [78] above) has been shown to be accurate. While such behaviour may be ameliorated by Dr Skarbek's recommended extensive and long-term treatment program, the Applicant has been unable to complete programs in the past and insofar as he has, the results would indicate that they have either been unsuccessful, or of insufficient effect.

81. The VOTP report assessed the Applicant as being of a medium high risk of reoffending, and also a high risk of violent offending. That report noted that the Applicant did not complete the VOTP. The Applicant's counsel submitted that the July 2019 assessment of the Applicant's risk of reoffending is "fairly dated". That may be the case, however, there are no more recent risk assessments and the Applicant's poor behaviour in detention since those risk assessments were undertaken suggests that the underlying factors that caused the Applicant to offend in the past are still present.

82. I do not doubt the sincerity of those who have provided statements of support for the Applicant and who say that the Applicant is remorseful or his past criminal behaviour and that he has changed. Their views, while they may well be sincere, are not sufficient for me to be satisfied that the long-standing and deep-seated causes of the Applicant's violent criminal behaviour have been addressed. From the evidence presented, I cannot see that anything has changed to reduce the Applicant's risk of offending as he has in the past to any material degree. On my assessment the Applicant remains a medium to high risk of re-offending and a high risk of violent reoffending as he was assessed July 2019.

83. The medium to high risk of the Applicant reoffending, the clearly untreated psychological conditions from which the Applicant suffers and the extremely violent, premeditated and

sustained nature of the Applicant's most recent offending, albeit now several years ago, cause me to be satisfied that there is a real or significant risk or possibility of harm to one or more members of the Australian community if the Applicant were to be released into the community. I am satisfied that the Applicant meets the test in [31] of DP Tamberlin's decision in *WKCG*.

84. The Applicant poses an unacceptable level of risk of danger to the Australian community. In so finding, I am mindful of the statement of Brennan J (as he then was) sitting as President of the Tribunal in *Salazar*, as quoted by Goldberg J in *Vabaza* that:

> *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.*

85. Even if the comments made by Logan J in *DOB18* were to be taken to be setting a higher standard than that set out by DP Tamberlin in *WKCG*,[68] the standard set by Logan J is met in this case. At [83] of his judgment, Logan J stated that "*read in context, 'danger' in s 36(1C) means present and serious risk*". If that is to be taken as the standard rather than that stated by DP Tamberlin, then I find that if the Applicant were to be released into the Australian community, he would pose a present and serious risk.

86. Further, if one is to take Collier J's observations at [44]-[46] of *DMQ19* as being another statement of the meaning of danger to the Australian community, then I am satisfied that there is "*a present risk which is "real" or "significant" or "serious", and which is neither remote nor fanciful, that* [the Applicant] *will cause harm of a sufficiently serious nature in the present or future*."

[68] See above paras [49]-[50].

DECISION

87. I find that:

(a) the Applicant has been convicted by a final judgment of a particularly serious crime;

(b) the Applicant is a danger to the Australian community; and

(c) as a result, the Applicant does not satisfy the criterion in s 36(1C)(b) of the Act and is taken not to satisfy the criterion under s 36(2)(aa) by operation of s 36(2C)(b)(ii) of the Act.

88. Accordingly, the decision of the delegate of the Minister made on 16 June 2022 to refuse to grant the Applicant Class XA (subclass 866) Protection visa under s 65 of the Act is affirmed.

I certify that the preceding 88 (eighty-eight) paragraphs are a true copy of the reasons for the decision herein of Deputy President Boyle

.....[Sgd].....

Associate

Dated: 24 October 2023

Date of hearing:	**2-3 May 2023**
Solicitors for the Applicant:	**Mr A Joel, Adrien Joel & Co.**
Counsel for the Applicant:	**Dr J Donnelly, Latham Chambers** **Mr S Z Stagliorio, Castan Chambers**
Solicitors for the Respondent:	**Mr A Chan, Sparke Helmore**

Annexure 1

Court	Date Of Conviction	Offence	Result
Parramatta District Court	29/06/2015	*Take/detain person w/i to obtain advantage-SI* *Sp agg B&E & commit serious indictable offence-weapon-SI*	IMPRISONMENT Count 1: 90 months Count 2: 100 months (AGGREGATE): 9 YEARS
Bathurst Local Court	28/04/2015	*Inmate possess mobile phone/SIM card etc*	Imprisonment: 14 days commencing 28/04/2015 Concluding 11/05/2015
Burwood Local Court	01/08/2014	*Assault officer in execution of duty-T2*	Fine: $400
		Resist or hinder police officer in the execution of duty	Fine: $400
Parramatta District Court NOTE: these convictions were originally recorded on 30/11/2012 (Burwood Local Court)	12/02/2013	*Drive while disqualified from holding a licence*	**Conviction confirmed:** in lieu of imprisonment: 12 months suspended; 12 months disqualification
		Drive while disqualified from holding a licence	**Conviction confirmed:** in lieu of imprisonment: 12 months suspended; 12 months disqualification
Sydney District Court NOTE: these convictions were originally recorded on **27/07/2011** (Bankstown Local Court) and were subsequently reviewed on **24/10/2011** (Parramatta District Court) and **01/11/2012** (Kogarah District Court)	12/01/2013	*Use false document to obtain property-T1*	**Conviction confirmed:** imprisonment: 6 months commencing 01/11/2012 concluding 30/04/2013 (concurrent**)**
		Possess false document to obtain property-T1	**Conviction confirmed:** imprisonment: 6 months commencing 01/11/2012 concluding 30/04/2013 (concurrent**)**

Court	Date Of Conviction	Offence	Result
		Dishonestly obtain property by deception-T1	**Conviction confirmed**: imprisonment: 12 months commencing 01/11/2012 concluding 31/10/2013 Non parole period with conditions : 9 months Commencing 01/11/2012
Sydney District Court NOTE: this conviction was originally recorded on **27/07/2011** (Bankstown Local Court) and was subsequently reviewed on **24/10/2011** (Parramatta District Court) and **01/11/2012** (Kogarah District Court)	12/01/2013	*Goods in personal custody suspected being stolen (not m/v)*	**Conviction confirmed**: imprisonment: 6 months commencing 01/11/2012 concluding 30/04/2013 (concurrent)
		Possess identity info to commit etc indictable offence-T1	**Conviction confirmed**: imprisonment: 12 months commencing 01/11/2012 concluding 31/10/2013 Non parole period with conditions: 9 months Commencing 01/11/2012
Burwood Local Court	30/11/2012	*Fail to appear in accordance with bail undertaking*	**Conviction confirmed**: S10A conviction with no other penalty
		Assault officer in execution of duty-T2	Bond S9: 12 months
		Resist officer in the execution of duty	Bond S9: 9 months
		Resist or hinder police officer in the execution of duty	Fine: $600
Downing Centre Local Court	24/10/2012	*Excluded person remain in vicinity of licensed premises*	Fine: $1,100 costs Court: $83
Burwood Local Court NOTE: this conviction was originally recorded on **20/12/2011**	22/08/2012	*Use offensive language in/near public place/school*	Fine: $200 costs - Court: $81

Court	Date Of Conviction	Offence	Result
Hornsby Local Court	13/06/2012	*Drive when licence suspended under s 66 Fines Act-1st off*	Fine: $500 costs Court: $81 Disqualification: 2 years
Burwood Local Court	17/04/2012	*Class A m/v exceed speed > 30 km/h*	Fine: $400 Disqualification: 3 months commencing 17/04/2012; concluding 16/07/2012
Bankstown Local Court	08/02/2012	*Drive when licence suspended under s 66 Fines Act-1st off*	Fine: $200 Court: $81 Disqualification: 3 months
		Disobey no right turn sign-motor vehicle	Fine: $100 Court: $81
Campbelltown Local Court	02/02/2012	*Drive when licence suspended under s 66 Fines Act-1st off*	Fine: $300 costs - Court: $81 Disqualification: 3 months commencing 02/02/2012; concluding 01/05/2012
Downing Centre Local Court	24/10/2012	*Possess unauthorised prohibited firearm-T2*	Bond S9: 12 months Costs - court: $79
Burwood Local Court	27/04/2010	*Motor bike rider (alone) not wear/secure fit approved helmet*	Fine: $253
		Use unregistered registrable Class A motor vehicle	Fine: $350
		Use uninsured motor vehicle	Fine: $250
		Unlicensed for Class, Class C/R/LR/MR-1st offence	Fine: $250
		Negligent driving (not occasioning death/gbh)	Fine: $338 costs Court: $76

Court	Date Of Conviction	Offence	Result
Parramatta Childrens Court	16/04/2008	*Assault occasioning actual bodily harm-T2*	Probation S33(1)(E) : 12 months supv Juvenile Justice Supervision
		Stalk/intimidate intend fear of physical/mental harm-T2	
		Larceny value <=$2000-T2	
Parramatta Childrens Court	03/09/2007	*Aggravated B&E commit serious indictable offence-SI*	Community Service Order S33(1)(F): 100 hours