Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number(s):	2023/6891
Re:	**JNMQ**
	APPLICANT
And	**Minister for Immigration, Citizenship and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Mr Rob Reitano, Member**
Final date submissions were received	**24 November 2023**
Date of decision:	7 **December 2023**
Place:	**Sydney**

I set aside the delegate's decision and remit the matter for reconsideration with a direction that the discretion in s.501(1) of the *Migration Act 1958 (Cth*) to refuse to grant the visa is not to be exercised.

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

Mr Rob Reitano, Member

CATCHWORDS

MIGRATION – discretion under s.501(1) – visa refusal – effect of past periods of prolonged detention - protection of the Australian community – expectations of the Australian community – relevance of personal circumstances to weight to be given to expectations of Australian community – relevance of two periods of prolonger detention - best interests of children – child with limited life expectancy - nature duration and ties to community – legal consequence of decision where applicant holds Bridging (Removal Pending) (subclass 070) visa – monitoring – curfew – exposure to imprisonment for breach of conditions – onerous conditions – restrictions n freedom - invasion of privacy - decision set aside with direction not to exercise discretion

LEGISLATION

Migration Act 1958 (Cth)

Criminal Code 1899 (Qld)

CASES

NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor [2023] HCA 37

Ali v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 55

RRFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 27

WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 25

MNLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 35

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

FYBR v Minister for Home Affairs [2019] FCAFC 185

Ali v Minister for Immigration and Border Protection [2018] FCA 650

REASONS FOR DECISION

7 December 2023

Mr Rob Reitano, Member

1. On 14 December 2012 the Applicant arrived in Australia with his two year old daughter who was afflicted by spina bifida and some other serious medical conditions. Neither had a lawful right to be in Australia, so they were first sent to immigration detention and then, after several months, were placed in community detention. About three and half years later, on 27 September 2016, they were both granted temporary protection visas.

2. On 25 September 2019, the Applicant lodged an application for a Safe Haven Enterprise (Class XE) visa (Safe Haven Visa). It is that application that is the subject of this decision.

3. On 16 December 2019, the Applicant was found guilty of two very serious criminal offences and went to prison whilst he awaited sentencing.

4. On 16 March 2020, the Applicant was sentenced to four years imprisonment, but he was only required to serve 16 months of the sentence in prison on condition that he did not commit any serious offences for five years following his release. The length of the sentence meant that his temporary protection visa was cancelled so that by 15 April 2021, when he was released from prison, he did not have a visa. Consequently, the Applicant was sent to immigration detention where he remained until he was recently released because of the orders in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37 (*NZYQ*).

5. The Applicant's seriously ill daughter was in community care from 16 December 2019 until her mother arrived in Australia on 26 August 2022.

6. On 12 September 2022 a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs (Minister) exercised the discretion under s.501(1) of the *Migration Act 1958 (Cth)* (Act) to refuse to grant the Safe Haven Visa.

7. The Applicant has asked the Tribunal to review the delegate's decision exercising the discretion in s.501(1) of the Act to refuse to grant the Applicant the Safe Haven Visa.

WHAT IS THE ISSUE?

8. The Minister was permitted under s.501(1) of the Act to refuse to grant a visa if the Applicant did not satisfy the Minister that he passed the character test. The section does not require

the Minister to refuse to grant a visa to a person who does not pass the character test; the effect of which is that the Minister may under the sub-section, in her or his discretion, grant a visa even though a person fails the character test.

9. The Applicant fails the character test because he has a substantial criminal record given that he has been sentenced to a period of imprisonment of more than 12 months. The only issue then is whether the Tribunal, standing in the Minister's shoes, should exercise the discretion in s.501 to refuse the granting of the visa.

WHAT IS RELEVANT TO THE DISCRETON?

10. The exercise of the discretion in s.501(1) of the Act is regulated by *Direction No. 99 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (Direction) which the Tribunal is required, by s.499 of the Act, to comply with when exercising its function or powers. The Direction provides guidance to decision makers dealing with refusals to grant visas under s.501(1).

11. The Direction contains 'principles' to be applied in making decisions and 'considerations'. 'Principles' reflect the values that are to be applied in making decisions. 'Considerations' are subject matters to be considered when making decisions. The 'principles' and 'considerations' are directed to assisting decision makers in making what are generally regarded as evaluative judgments concerning decisions about visas.

12. There are two types of 'considerations', namely 'primary considerations' and 'other considerations'. 'Primary considerations' are generally to be given greater weight than 'other considerations', and one or more 'primary consideration' can outweigh any other 'primary consideration'. No single 'primary consideration' or 'other consideration' is required to be given greater importance than any other: the importance or weight attaching to each of the considerations is left to the decision maker.

13. The process of weighing the 'considerations' involves engaging in a process of active thought or intellectual engagement about each of them, the matters which the Direction sets out as relevant to them and giving them importance. It is necessary to engage in a process of comparison between the various considerations to ascertain which of them are more or less important, to the decision to be made. The process of weighing considerations to arrive at a conclusion about whether the discretion in s.501(1) should be exercised is much like

that which is enlivened by the words 'another reason' in ss.501CA(4) of the Act.[1] The process is evaluative and involves the making of an assessment of the quality and significance of the considerations in themselves, as well as when compared to one another.

14. The obligation 'to consider' recognises the consequences for people and the community resulting from decisions about granting, refusing, or cancelling visas. The obligation 'to consider' does not involve the completion of a checklist, nor is the obligation to weigh things formulaic or mathematical.[2] The decision will often have a real impact on not just an applicant, but also those close to them like their children, family, and friends. There are also potentially serious ramifications for the community, which means it is necessary to consider the protection of the community against future criminal offending, especially where past criminal behaviour has been egregious. There is also a need to pay regard to important community expectations about what should flow from an applicant's offending.

15. All of this points to the need to consider very carefully everything that is potentially relevant to the decision, weighing up the importance of all relevant private and public interests that might or will be affected, and reaching a conclusion about their respective and relative importance. It is ultimately that to which the Direction is focused, which, when applied, ensures that all interests are considered and weighed appropriately.

16. The 'primary considerations' in this case involve 'the protection of the Australian community from criminal or other serious conduct', 'the strength, nature and duration of ties to Australia', 'the best interests of minor children in Australia' and 'the expectations of the Australian community'.[3] The only 'other consideration' that is relevant is the 'legal consequences of the decision'. Neither party raised any other primary or other consideration that I should address in deciding this matter. I will deal with each of the considerations, and ascribe them weight, before weighing and balancing them against each other to determine whether the discretion to refuse to grant the Applicant a visa should be exercised.

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[1] *CRNL v Minister Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 138 at [34].
[2] *CRNL v Minister Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 138 at [38].
[3] Paragraph 8 of the Direction.

PROTECTION OF THE AUSTRALIAN COMMUNITY

17. This consideration directs attention to the fact that the Australian Government is committed to protecting the Australian community from harm that is the consequence of criminal or other serious conduct by those who are not citizens. It is necessary to consider the nature and seriousness of the Applicant's criminal offending and the risk and harm to the Australian community and members of the community should the Applicant re-offend or engage in other serious conduct, and to balance it in the evaluation to be made.

18. The Applicant arrived in Australia in December 2012. Since then, he has committed two very serious criminal offences. The first was the offence of rape contrary to s.349 of the *Criminal Code 1899 (Qld)* (Code), and the second was the offence of unlawful and indecent assault contrary to s.352 of the Code. Both offences were linked in time and circumstance, with the second offence a precursor to the first.

19. On 16 December 2019, the Applicant was found guilty of both charges by a jury. The Applicant was sentenced on 16 March 2020 by Judge Barlow QC sitting in the District Court of Queensland. The sentence was to four years imprisonment for the offence of rape, but the balance of that sentence beyond 16 months was suspended, provided that, following the suspension, and for a period of 5 years, the Applicant did not commit any further offences punishable by imprisonment. The Applicant was sentenced to 16 months imprisonment for the unlawful and indecent assault offence. The sentences were to be served concurrently.

20. The circumstance of the offending was set out in the sentencing remarks. The Applicant had engaged a young woman to help with the care of his daughter who, as I have already said, suffered many serious medical disabilities including spina bifida. The young woman had been employed by the Applicant once a week over a period of about 10 weeks. One day, as she was leaving the Applicant's house, the Applicant 'tricked her' into returning to the house to check a calendar on the wall. The Applicant grabbed her and forced her onto a couch where he molested her by grabbing her breasts: the conduct relevant to the unlawful and indecent assault offence. The Applicant then forcefully put his penis in her mouth and moved it about until he ejaculated: the conduct relevant to the rape offence.

21. The consequence of the offending to the victim involved physical injuries to her mouth and throat and bruising. She suffered 'considerable psychological, emotional, social, physical and financial harm'. I will say a little more about the harm to her in a moment.

22. The offences were of a violent and sexual kind and were committed against a young woman. Offences of this kind are regarded by the Australian Government and community as very serious because they involve violent and sexual acts perpetrated against a woman. They are also objectively very serious offences as evidenced by the maximum sentences, and sentence imposed: the maximum sentence for rape was life imprisonment and the maximum sentence for the unlawful and indecent assault was 10 years imprisonment. The Applicant's criminal offending is at the very high end of serious criminal conduct such that it can only be characterised as being very serious.

23. As the offences were committed at the same time, and involve the Applicant's only criminal offending, there is no trend of increasing seriousness in his criminal offences nor any increased frequency of criminal offending. The cumulative effect of the offending is the same, again because they are offences that were committed at the same time.

24. The Applicant has been involved in several incidents in detention in 2021 and 2022 that, according to some records produced under summons, involve alleged assaults and destruction of property by him. The Applicant denied in each case the version of events set out in the records. The first incident involved an allegation that the Applicant punched some officers in the head. The Applicant denied that allegation and recounted that he had been upset at the time because he was detained, and he knew his older daughter was in hospital and his wife and younger daughter were ill with Covid. He had asked to see a manager, but nothing was apparently done about his request. He was then confronted by several officers who he said eventually struck him. The second incident occurred, on his version of events, because he asked to be moved from a room he was in, and the other detainees did not like that he had complained about them so that he was eventually struck and choked. Again, his version was different to what the documentary record said had happened.

25. I am not prepared to make serious findings about the Applicant's conduct in the absence of direct evidence concerning those incidents, especially having regard to the serious consequences that are at stake, where some of it is double hearsay and draws conclusions from what 'witnesses' are alleged to have said, and significantly, because the Applicant's

version of events was so obviously at odds with the documents, I have no reason to doubt his word about what he says happened.

26. It is next necessary to consider the harm to the community should the Applicant re-offend. If the Applicant were to re-offend, given his resort to violence as well as the sexual nature of the offending, it is probable re-offending would involve serious physical, emotional, and psychological harm to members of the community similar to his past offending. That is, the same kind of drastic impact upon the victim of the Applicant's offending which is confrontingly described in her victim impact statement is the sentencing proceeding. That is because the harm caused by his past offending is rationally probative of what might happen next time, if, of course, there is a next time.

27. There is also the cost to the community of investigation and enforcement of laws and the consequent diversion of resources from elsewhere, but that pales when compared to the significant harm that would potentially be inflicted upon members of the community. The likely harm to members of the Australian community should the Applicant re-offend in future if the visa were granted is also to be regarded as very serious.

28. It is next necessary to consider the likelihood of the Applicant re-offending, which is in this case, like in many other cases, a difficult matter to assess. There are several matters that suggest that the likelihood of re-offending is not high.

29. First, the Applicant does not have any history of criminal offending before or after the rape and unlawful and indecent assault offences. That is, he has no criminal record including any other offences other than the two I have referred to.

30. Second, the Applicant was 42 years of age when he offended, which is generally regarded as an advanced age for commencing criminal offending and is suggestive that repeat offending may be less likely.

31. Third, the Applicant has expressed regret and remorse for his conduct, although perhaps belatedly. He said in the hearing before me that he was sorry for what he had done and that he feels ashamed. I consider his remorse is genuine. I also accept as genuine his statement that he accepts full responsibility for his wrongdoing. His demeanour in giving evidence and his statements that he would not offend again had more than an air believability about them,

especially because of what was at stake for him insofar as his wife and two daughters were concerned. I will say something more about his denials of wrongdoing in a moment.

32. Fourth, there are several references that attest to the Applicant's past good conduct and character which is consistent with Judge Barlow QC's observation that the Applicant's offending was out of character. In fact, Judge Barlow QC referred to the references as attesting to 'your very good character, trustworthiness, your helpfulness, and the love with which you gave care to your daughter in very difficult circumstances'.

33. Fifth, the Applicant, if released into the community, will be reunited with his wife, who came to Australia in 2022. She now lives here as a visa holder with her two daughters, which compares more favourably to his position at the time of his offending, where he had been separated from his wife and one of his daughters for almost seven years. The strong and obvious loving relationship he has with his family is a significant factor that points against re-offending. His wife's evidence about her love for her husband was as genuine as it was persuasive about her being something of a protective factor in her husband's future.

34. Sixth, there are an array of friends, health care professionals, counsellors and others who have offered or committed their support to the Applicant in his rehabilitative efforts should he be released into the community. Further, at least while in detention, the Applicant met with various mental health professionals and spoke to them about his sense of remorse for his criminal offending, his experience in Iraq seeing his mother, father and brother killed and having been himself kidnapped. His evidence was that he has seen mental health professionals on multiple occasions since he has been in detention. For his part, the Applicant has committed himself to seeking support from many of those people. I consider his pursuit of, and commitment to, rehabilitation to be genuine.

35. Seventh, is the fact that there is likely to have been some deterrent effect associated with the Applicant's imprisonment for 16 months, and since then his more than two and half years in detention. Judge Barlow QC referred to deterrence as one of the objects of the sentence imposed. Another is rehabilitation which follows from the fact of incarceration and not simply from 'doing courses' whilst incarcerated. The deterrent and rehabilitative impact of actual incarceration should not be presumed to be ineffective as factors that will operate to mitigate or prevent future offending given that deterrence and rehabilitation are two of the primary objectives associated with imprisonment.

36. Eighth, is the fact that the Applicant's period of good behaviour associated with his suspended sentence remains in effect for another two years, and the prospect of condign punishment remains an ever-present reality should he reoffend.

37. Against these factors is that, early on, the Applicant lacked a meaningful understanding of his wrongdoing, lacked remorse, and failed to accept responsibility for it by defending the charges and continuing to suggest at times that he believed the victim had consented to what he had done. The fact that the Applicant has not undertaken any rehabilitative courses is also of concern although his evidence was that he was told by other inmates that no courses were available. There is also the fact that the offences are sexual in nature and so past good character may not be as an important indicator as it might otherwise be, given that such offences often go undetected or unreported.

38. The task is not a straightforward one and is in the absence of expert opinion, but based on the matters I have referred to, I consider that the likelihood of the Applicant re-offending is, nonetheless, low. I reject the suggestion that the risk is remote. Nor do I accept that the evidence supports a conclusion that it is high. However, the nature of the harm is so serious that even the low likelihood that I have ascribed to his risk of reoffending is nevertheless unacceptable.

39. The protection of the Australian community is a significant and weighty factor against granting the visa, having regard to the very serious nature of the criminal offending and the serious harm that would be caused to members of the community if it were repeated. The importance of this consideration is reduced by the low risk of re-offending given that the likely harm renders the risk of reoffending unacceptable.

EXPECTATIONS OF THE AUSTRALIAN COMMUNITY

40. This consideration requires weight to be attributed to the normative expectations of the Australian community that people who are allowed to live in Australia will obey Australian laws and that where someone who has been permitted to stay in Australia *'has engaged in serious conduct in breach of this expectation, or where there is an unacceptable risk that they may do so, the Australian community, as a norm, expects the Government to not allow such a non-citizen to enter or remain in Australia*'. This means that '*visa refusal . . . may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the non-citizen should not be granted … a visa'*.

In this case the expectations of the community are particularly taken to favour visa refusal because the offences involve violence and sexual offending against a woman.

41. The issue I must consider is not what the community expectation is, as that is set in stone and weighs against granting a visa, but rather what weight should be given to that expectation in the evaluative process.[4]

42. The offending is very serious and so points to giving the expectations of the Australian community greater weight.

43. The Applicant relied upon his personal circumstances in suggesting that I should give this consideration less weight.[5] Those circumstances included that the Applicant has a significant history of trauma and abuse resulting from the murder of his mother, father, brother and sister in law in Iraq in around 2006 and 2007, as well as his own kidnapping and torture by armed militia in Iraq which was a motivating factor for him leaving Iraq; that he has a young child who is likely to only live for a few more years; that his wife is suffering considerable hardship caring for her two young children including the child who's life expectancy is only a few years; that he has been in immigration detention for over two years until recently; that he has a limited criminal history; and that he has lived in Australia for ten years.

44. I should observe that some of those circumstances have at least in part, if not entirely, been considered elsewhere in these reasons: his time in prison and in detention and limited criminal history when dealing with protection of the community and his length of time in Australia when dealing with his ties to the Australian community. I should take care to not weigh them more than once. Further, to some extent, his wife's circumstances and that of his children are considered elsewhere when dealing with ties to the community and the best interests of the children. Those things will be dealt with when I compare the various considerations with each other. It will be seen that I consider them important matters when weighed against this consideration.

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[4] *FYBR v Minister for Home Affairs* [2019] FCAFC 185, [77] (Charlesworth J).
[5] *Ali v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 559, [73]–[93].

45. I do consider that the Applicant's personal circumstances, his suffering arising from his time in Iraq and the impact on him of separation from his seriously ill daughter, are matters that are relevant in giving this consideration less importance. Those things focus not on the effect on others or the effect on his seriously ill daughter, nor her best interest, but rather focus on the effect on the Applicant personally. There is no sound reason why humanitarian considerations like them should not account for giving this consideration less importance. Those things reflect much about the human aspects of the decision to be made.

46. There is another matter that I consider to be relevant which in part picks up the Applicant's suggestion that I should consider his most recent period in immigration detention as relevant here. The Applicant spent his first few months in Australia in immigration detention and then when he was released from prison spent another two and half years in immigration detention. That is a significant factor for someone who is a refugee, who suffered immensely in his home country, and who fled that country in fear of suffering. His time in immigration detention has affected his mental health. That is unsurprising given the period for which he has been detained. His period in immigration detention and resultant loss in his fundamental right to liberty[6] for a long period is a matter I should have regard to in giving this consideration less weight.

47. I accept the Minister's submission that picked up the principles to which I must have regard insofar as they suggest the Applicant is not entitled to the higher level of tolerance referred to in the principles because he has not lived in the community for a long time or from a young age, but it needs to be remembered that that is a general proposition. It also needs to be borne in mind that the Applicant lived in the Australian community for something like five and a half years before he offended which is not a short time.

48. In this case there are particular things that run contrary to giving this consideration significant weight. The importance of the expectations of the community only moderately weighs in favour of refusing the visa.

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[6] *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 25.

BEST INTERESTS OF MINOR CHILDREN

49. This consideration directs my attention to whether the refusal of the visa is in the best interests of minor children affected by the decision. I will address the matters that the Direction requires me to consider in turn.

50. The Applicant is the father of two children, two girls aged 12 and 14 years respectively who both live in Australia. They have six and four years respectively until they turn 18 years of age which is a lengthy and most likely important time in their development. The older child travelled to Australia with the Applicant in December 2012 when she was two years old. The younger child remained living with her mother in Turkey before coming to Australia with her mother in the middle of 2022. The evidence was that both children speak to their father four or five times a day and that the first thing they do every morning is call their father. The Applicant's wife gave evidence that both children love their father very much and, at the time of the hearing, missed him a great deal. I accept her evidence about that as I have about other things. She was a genuine and truthful witness who I believe even though she was invested in the outcome of the matter.

51. As I have said, the older daughter suffers from serious medical conditions, including spina bifida, which has resulted in her being paralysed from the waist down. Due to her health challenges, the older daughter has high care needs. Her current prognosis estimates her life expectancy as no greater than five years. She was cared for by the Applicant with assistance from others for seven years before his imprisonment in December 2019. After the Applicant's imprisonment she was in community care for approximately two and half years. In August 2022 when her mother arrived in Australia she was returned to the care of her mother.

52. In prison and in detention, the Applicant remained in daily contact with her by telephone and other electronic means such as by Facetime and WhatsApp. Although there has been some physical separation, the Applicant has maintained his relationship with her. I proceed on the basis that the Applicant has maintained a meaningful relationship with her which was undoubtedly forged in the years before he was incarcerated but continues today. It is fair to say, as Judge Barlow QC foresaw when sentencing the Applicant, she undoubtedly would have been significantly affected by separation from her father, more so than might generally

be the case given the absence of her mother in the years till, and immediately after, the Applicant went to prison and then to detention.

53. The close relationship the Applicant has with his oldest daughter suggests that he will have a positive impact on her life in the future if only for the few years that she has left to live. That depends on the likelihood of him not finding himself in prison again, but I have assessed that likelihood as low. His past offending is unlikely to affect her, albeit his time away from her while in prison and in detention could not have been good for her. Any further separation is unlikely to be in her best interests either. The Applicant's wife is available to fill the role of parent, but she confronts significant difficulties in doing that herself given her lack of a support network in Australia and her limited English. Also, the role of a mother is different to that of a father. I accept the Applicant's evidence that he wishes to and will in fact care for his older daughter. The best interests of the Applicant's older daughter strongly weighs against exercising the discretion to refuse the visa.

54. The position with the younger child is slightly different as the Applicant has not been in her life for most of her life, and she does not suffer the medical conditions that have afflicted her sister. The other considerations concerning his likely positive impact upon her till she is 18 years of age: the desirability of her having her father, a man who so obviously loves both his daughters, in her life on a day to day basis; the unlikely negative impact his past offending would have had on her; and her mother's difficulties of caring for her as a single parent in a community she does not know well are all much the same. Her best interest is also served by having her father in her life on a daily basis.

55. The Minister accepted that I could 'consider the effect of the *possibility* of the Applicant's future removal on the best interests of the Applicant's children', but that I should give this factor little weight. In particular, the Minister submitted that I should not speculate about the future circumstances that might accompany the *possibility* of removal in the future should that ever occur. I do not consider that the best interests of either child would be served having their father re-united with them, and being in their lives. with the risk, the possibility, that they again might be separated from him because of his removal before they turn 18 years of age. That will be a risk that confronts them until they turn 18 years of age. That possibility remains open because of his present visa status, a matter to which I will return later in these reasons. I should give that risk a little weight.

56. I consider that this consideration weighs very firmly in favour of non-refusal but particularly so in the case of the older daughter.

STRENTGH, NATURE AND DURATION OF TIES TO AUSTRALIA

57. This consideration directs attention to the impact that any decision will have on an Applicant's immediate family members, with more weight being given to children, who are Australian citizens, permanent residents or people who are entitled to remain in Australia indefinitely and other family and social links generally to Australia. It also involves an assessment of the strength, duration and nature of other ties to the Australian community through the time and any positive contribution the applicant has made.

58. The Applicant has ties to his immediate family members in Australia who are his wife and two children. They all hold visas and are entitled to remain in Australia indefinitely.

59. The Applicant's wife's evidence, which I accept, is that she has 'substantial emotional, financial, and practical struggles' because of her husband's absence and that her husbands 'participation in our family is crucial – not merely to help manage [her older daughter's] complex medical needs, but also to provide the emotional and mental support that [her younger daughter] and I are sorely missing'. Her evidence is that she has no substantial ties or established network in Australia which affects her access to practical and emotional support. Her arrival in Australia, only a little over 12 months ago, tends to support a conclusion that that is more likely the case. The impact upon her of a decision refusing the visa will be very significant practically and emotionally.

60. The impact upon the Applicant's children is something I have already considered to an extent because of the consideration of their best interests. Apart from their best interests I am required to give their position more weight under this consideration.

61. The Applicant has also made some contribution to others by helping them out such as his elderly and ill neighbour who has since passed away. That is relevant to the positive contribution, albeit limited, that the Applicant has made to the Australian community. The Applicant also has ties through his participation in, and contribution to, the Gateway Baptist Church and the Spina Bifida Foundation, as well as several other members of the community, although their citizenship and residency status were not identified. There was not much suggestion that they would be greatly impacted by the Applicant being refused a

visa other than by being upset. The Applicant also contributed to the community at least before his imprisonment by caring for his older daughter. The Applicant's time contributing to the community has been limited given his presence in prison or immigration detention for more than half of his ten years in Australia, but it counts for something.

62. The Applicant's familial ties to the Australian community through his wife and children are weighty considerations which, taken with his other ties and contributions to the Australian community, means that this consideration counts in favour of non-refusal of the visa.

THE LEGAL CONSEQUENCES OF THE DECISION

63. This consideration directs attention to the legal consequences of the decision having regard to Australia's international non-refoulement obligations, that is, the obligation in general terms not to forcibly return a non-citizen to a place where they will be at risk of certain serious kinds of harm.

64. The Applicant has been found to be owed protection obligations which was the finding within the meaning of s.197C(5)(a) of the Act on which his temporary protection visa was based. So, he will not be forcibly returned to Iraq. The Minister concedes that there is no real prospect of the Applicant being removed to another country. That means, as the Minister accepts, that there is no realistic prospect that the Applicant's removal from Australia either to Iraq or another country, will be practicable in the reasonably foreseeable future.

65. Following the orders in *NZYQ*, the Applicant has been released from immigration detention and granted a Bridging (Removal Pending) (subclass 070) visa (Bridging Visa). The effect of that is that, if because of this review, the delegates decision is set aside, and there is a direction not to exercise the discretion in s.501(1) of the Act, the Applicant will remain living in the community until his application for a Safe Haven Visa is processed. Significantly, as the Minister submitted, if the delegate's decision is affirmed, the Applicant will remain living in the community on the Bridging Visa '(until it becomes reasonably foreseeable in the future that he can be removed)'.

66. Further, the conditions that are imposed on both visas are different. The practical consequence for the Applicant of the exercise of the discretion to refuse him a visa is that he may, at some unknown time in the future, be liable to removal from Australia. He will in

the meantime be subject to a large number of conditions that affect his freedom, such as a condition that requires him to wear a monitoring device, a condition that requires him to report at times and places or in the manners specified by the Minister from time to time, a condition requiring him to abide by specified curfews of not greater than eight hours and a series of notification requirements concerning his private details such as who he lives with. There are many other conditions that attach to the visa which the Applicant must abide. Should he not do so, he is liable to the commission of an offence under the Act which potentially carries with it a minimum period of imprisonment of 12 months.

67. The Minister acknowledged that the conditions imposed by the Bridging Visa are '*more onerous'* than that which would apply to his Safe Haven Visa if he was granted it, noting that the Applicant has the opportunity to be heard on the continuation of the monitoring and curfew conditions. I do not know what the outcome of those representations will or would be and I should not speculate about those things. It is sufficient to note that at present, both conditions apply to the Applicant.

68. I do not consider that the conditions imposed on the Applicant can be disregarded in the assessment of the legal consequences of this decision for him. The conditions are a material imposition on the Applicant's freedom and his privacy, especially so far as monitoring and curfew are concerned, but also in relation to some of the other conditions which require him to attend interviews if required, and to give notice of various things such that I consider that this consideration weighs in favour of non-refusal.

THE DISCRETION SHOULD NOT BE EXERCIISED

69. It is next necessary to weigh the considerations that are relevant against each other remembering that I should have regard to the general proposition that primary considerations should be given more weight than other considerations.

70. I have found that the protection of the Australian community weighs heavily in favour of refusing the visa because of the Applicant's very serious offending, and the grave consequences for members of the community, should the same kind of offending be repeated. I have found that the risk of re-offending is low, but that, nonetheless, the very serious nature of the offence, and the very serious harm that might be caused to members of the community, means this consideration is important because the harm caused is likely to be so significant that even a low risk of reoffending is unacceptable.

71. I have found that the expectations of the community weigh only moderately in favour of exercising the discretion to refuse the visa because of the Applicant's circumstances as a refugee, the torture he suffered in Iraq and his lengthy periods in detention in Australia have involved significant suffering for him already. Those matters, when taken together with the other primary considerations below, mean that I do not give the expectations of the community a great deal of weight overall in the evaluation.

72. The best interests of the Applicant's children is a weighty consideration, especially having regard to the best interest of the older daughter and the relationship she had in her very early years with the Applicant. In my evaluation her best interests carry considerable weight in favour of non-refusal. The best interest of the Applicant's other daughter and his ties to his wife and both children are weighty matters favouring non-refusal. The ties that the Applicant has to the community, especially through his wife and two young children, as well as his contribution to the community in the time he was in the community, mean that this is a matter that is important so far as non-refusal is concerned.

73. The primary considerations weighed together slightly favour not exercising the discretion to refuse the visa. The legal consequence of refusing to grant the Safe Haven visa, the imposition upon the Applicant of conditions that restrict his freedom and invade his privacy, especially those that require him to observe a curfew, be subject to ongoing monitoring and provide what would otherwise be private and personal information to the Minister under pain of potential imprisonment for a minimum of 12 months are important. This consideration carries important weight in favour of non-refusal such that the considerations in favour of non-refusal clearly outweigh those favouring refusal.

74. This is case where the nature of the conduct or the harm that may be caused were it to be repeated whilst very serious is outweighed by the strong countervailing considerations. The discretion should not be exercised.

DECISION

75. I set aside the delegate's decision and remit the matter for reconsideration with a direction that the discretion in s.501(1) of the *Migration Act 1958 (Cth*) to refuse to grant the visa is not to be exercised.

I certify that the preceding seventy-five (75) paragraphs are a true copy of the reasons for the decision herein of Mr Rob Reitano, Member

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Associate

Dated: 7 December 2023

Date(s) of hearing:	8 November 2023
Counsel for the Applicant:	Mr J Donnelly
Solicitor for the Respondent:	Mathew Burnham, Sparkle Helmore Lawyers