Administrative Appeals Tribunal

DECISION AND REASONS FOR DECISION

Division:	GENERAL DIVISION
File Number(s):	**2023/6874**
Re:	**LVMF**
	APPLICANT
And	**Minister for Immigration, Citizenship and Multicultural Affairs**
	RESPONDENT

DECISION

Tribunal:	**Mr Rob Reitano, Member**
Date:	**12 December 2023**
Place:	**Sydney**

I affirm the delegate's decision to exercise the discretion in s 501(1) of the *Migration Act 1958 (Cth*) to refuse to grant the visa.

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

Mr Rob Reitano, Member

CATCHWORDS

MIGRATION – discretion under s 501(1) of the Migration Act 1958 (Cth) – visa refusal – protection of the community – very serious criminal offending – risk of reoffending – expectations of the Australian community – best interests of children – nature duration and ties to community – legal consequence of decision – relevance of conditions of Bridging (Removal Pending) (subclass 070) – decision to refuse visa affirmed

LEGISLATION

Migration Act 1958 (Cth)

CASES

Al-Kateb v Godwin [2004] HCA 37
CRNL v Minister Immigration, Citizenship and Multicultural Affairs [2023] FCAFC 138
FYBR v Minister for Home Affairs [2019] FCAFC 185
NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs [2023] HCA 37
Pearson v Minister for Home Affairs [2022] FCAFC 203

SECONDARY MATERIALS

Minister for Citizenship, Citizenship and Multicultural Affairs, *Direction No 99: Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (23 January 2023)

REASONS FOR DECISION

Mr Rob Reitano, Member

12 December 2023

1. On 3 December 2008 the Applicant arrived in Australia as the holder of a Global Special Humanitarian (Class XB) (Subclass 202) visa. That visa was later cancelled as result of the Applicant's sentence to imprisonment for a term of nine years and nine months.

2. On 3 July 2020 the Applicant applied for a Protection (Class XA) (Subclass 866) visa (Protection Visa). On 15 September 2023 a delegate of the Minister for Immigration, Citizenship and Multicultural Affairs (Minister) exercising the discretion in s 501(1) of the *Migration Act 1958* (Act) refused to grant the Applicant that visa.

3. On 20 November 2023 the Applicant was granted a Bridging (Removal Pending) (subclass 070) visa (Bridging Visa) which allows him to live in the Australian community subject to conditions. I will return to the significance of that later.

4. The Applicant seeks a review of the delegate's decision to exercise the discretion in s 501(1) of the Act to refuse to grant him the Protection Visa.

5. I have reviewed that decision and have decided that the discretion in s 501(1) should be exercised to refuse the Applicant the visa. These are reasons for that decision.

What is the issue?

6. The Minister may under s 501(1) of the Act refuse to grant a visa to an applicant if the applicant does not satisfy the Minister that she or he passes 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 in her or his discretion grant a visa even where a person fails the character test.

7. In this case the Applicant fails the character test because he has a substantial criminal record following his being 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 grant of the visa.

What is relevant to the discretion?

8. 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. The Direction provides guidance to decision-makers such as the Tribunal when dealing with refusals to grant visas under s 501(1).

9. The Direction contains 'principles' and 'considerations' to be applied in making decisions. 'Considerations' are matters or things that a decision-maker is to consider when making decisions. The application of the principles and deliberation over the considerations have as their objective assisting decision-makers in making evaluative judgments like that involved in the exercise of the discretion in s 501(1) concerning decisions about visas.

10. There are two types of 'considerations': '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 other 'primary consideration'. No single 'primary consideration' or 'other consideration' is required to be given greater importance than any other: the importance attaching to each consideration is left to the decision-maker.

11. The process of weighing the 'considerations' involves considering them and the matters to which the Direction refers and giving them importance. It is also necessary to engage in a process of comparing them one to the other to determine which of them is of greater or lesser importance to the decision to be made. The process of weighing considerations is directed to arriving at a conclusion about whether the discretion in s 501(1) should be exercised in much the same way as applies to the words 'another reason' in s 501CA(4) of the Act.[1] The process involves the making of an assessment of the quality and significance of each consideration as well when compared to the other considerations.

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[1] *CRNL v Minister Immigration, Citizenship and Multicultural Affairs* [2023] FCAFC 138, [34].

12. The obligation to consider recognises that there are real and practical consequences for people and the community resulting from the exercise of the discretion. The obligation to consider does not involve the completion of a checklist, and nor is it formulaic.[2] The decision will have a real impact on many people other than an applicant such as an applicant's children, immediate and extended family, friends and potentially others. There are also potential serious ramifications for the Australian 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. Also, there is a need to pay regard to important community expectations about what should result from a non-citizen's offending.

13. All this points to the need to consider very carefully everything that is potentially relevant to the decision, weighing up the importance of the 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 focussed which when applied ensures that all relevant interests are considered and weighed, that is given their respective importance, properly and appropriately.

14. The 'primary considerations' relevant here 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 in this case is the 'legal consequences of the decision' although the matters I consider under that heading may strictly speaking be another 'other consideration', a technicality which really has no consequence. Both parties were agreed about the considerations I needed to address. I will deal with each of the considerations in turn, and ascribe them weight, before weighing and balancing them against each other to determine whether the discretion in s 501(1) to refuse the Applicant a visa should be exercised.

Protection of the Australian community

15. This consideration is directed to the fact that the Australian Government is committed to protecting the Australian community from harm that is the consequence of criminal or other

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[2] Ibid, [38].

[3] Paragraph 8 of the Direction.

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 of harm to the Australian community should the Applicant reoffend or engage in other serious conduct and to balance it in the evaluation to be made.

16. On 19 November 2015 the Applicant was convicted and sentenced, after entering a plea a guilty, in relation to three criminal offences in the District Court of New South Wales. The offences were: firstly, indecent assault; secondly, indecently assaulting a person under the age of 16 years, namely 13 years old; and thirdly, aggravated sexual intercourse without consent, the circumstance of aggravation being that the person was under his authority. Further, when he was sentenced two other offences were considered: one being a further count of indecent assault and the other being a further count of aggravated sexual assault of a person under authority.

17. The facts underlying each offence were recorded in the sentencing judge's remarks on sentence and were recorded on an exhibit tendered to the sentencing judge. The more important of those facts are as follows.

18. The first offence of indecent assault involved a victim who was 18 years of age who was known to the Applicant because they were doing the same TAFE course. The incident happened in a car when the victim was driving the Applicant home and the Applicant was giving her directions to his house. He directed her to drive into dense bushland. As they were driving the Applicant tried to kiss the victim and then began fondling her breasts, rubbing her groin and trying to remove her pants. The victim made it obvious that his behaviour was unwanted by pushing the Applicant away and saying 'No', 'Stop' and 'Fuck off.' The other offence involving indecent assault considered in sentencing, but for which no conviction was recorded, involved the Applicant placing his hand around the victim's neck and pulling her face towards his groin saying, 'Do it' and 'Come on.' The victim, unsurprisingly, believed the Applicant was trying to force him to perform fellatio on him. She pushed him away, drove off and eventually dropped him off.

19. The second offence happened about five weeks later. Again, it is not necessary to set out the detail of everything that happened. The Applicant and another man were working as security guards at a shopping centre in western Sydney. They wore uniforms that indicated they were security guards. Late in the afternoon the man who was working with the

Applicant approached two young girls aged 13 and 17 years. At some point the Applicant showed them his security badge and told them they were being banned from the shopping centre. The Applicant and the other security guard directed the girls to accompany them out of the centre. The two girls were directed to an old disused cinema where they were asked to go inside. They went inside. It was dark as the electricity had been disconnected.

20. At one point the Applicant tried to remove the younger girl's jacket by undoing its buttons. She punched him in the face. That was the offence of indecent assault against a person who was under 16 years of age, namely 13 years of age.

21. At another point the Applicant forced the older girl's 'head down to his groin and shoved his penis in her mouth.' The Applicant 'kept pushing her head back' but eventually she was able to push him away. That was the offending conduct that gave rise to the offence of aggravated sexual intercourse without consent. The other offence involving aggravated sexual assault of a person under authority considered in the sentencing involved the Applicant, after doing that, sliding his hand down her skirt and into her underpants pushing his fingers into her vagina causing pain to her.

22. The Applicant was sentenced to an aggregate sentence of nine years and nine months imprisonment with a non-parole period of six years. The indicative sentences for each of the offences was 28 months for the first indecent assault which also took into account the second indecent assault on the same day; 27 months for the indecent assault against the 13-year-old; and 87 months for the aggravated sexual intercourse without consent which also took into account the further count of aggravated sexual assault of a person under authority.

23. The first offence was of a violent and sexual nature and was committed against a young woman. The second and third offences were of a violent and sexual kind and were committed against two young children, one of whom was only 13 years of age. All the offences are very serious. The sentence of nine years and nine months imprisonment reflects the fact that the offending is to be considered as very serious.

24. The two sets of offences were separated by about five weeks. There was an escalation in the seriousness of the offending evidenced by the fact that the first offence involved a young

woman and the second offence involved two children. The conduct was objectively more serious as well.

25. The nature and seriousness of the Applicant's criminal offending is at the very high end of seriousness and needs to be viewed as such. There was no issue about that.

26. The harm likely to be done to women and children in the Australian community should the Applicant reoffend is significant and should not be understated. The physical, psychological and emotional impact of sexual assault against young children and young women can be significant, impacting upon their wellbeing on an ongoing and prolonged basis and manifesting itself in things like depression, insomnia, high risk of suicide and serious conditions like post-traumatic stress disorder. The harm done by such offending can be lifelong. That harm to the community is amongst the most serious of harms that result from criminal offending and that is without consideration of the likely drastic impact upon other members of the community such as a victim's family and friends.

27. Next, it is necessary to assess the Applicant's likelihood of reoffending. The issue is not without difficulty especially given the extensive material referred to and relied upon.

28. The Applicant referred to some matters that were said to suggest that the risk of reoffending was low. First, the Applicant referred to his disadvantaged background involving his exposure to and experiences of violence and trauma, purported or actual childhood sexual abuse and his status as a refugee who faced uncertainty and fear which accompanied his father's early departure from Iraq and saw his mother left to raise seven children on her own. His allegations of sexual abuse appear to have first surfaced in late 2019 when he disclosed them to a Community Corrections Officer and a forensic psychologist.

29. Second, the Applicant referred to 'the applicant's narrative' pertaining to his offending which involved the Applicant originally pleading guilty to all offences, then seeking through the process of appeal to the Court of Criminal Appeal to have his pleas withdrawn which was unsuccessful and then seeking a pardon from the Governor of New South Wales which also failed. The appeal to the Court of Criminal Appeal is significant for several reasons. It involved the Applicant denying his guilt by seeking to withdraw his pleas. It also involved the Court of Criminal Appeal making some significant adverse comments about the Applicant to which I will return in a moment.

30. Third, it is suggested that the Applicant's original plea of guilty was not informed by 'comprehensive, accurate and pertinent advice.'

31. It was not clear why these matters were said to lead to the conclusion that the Applicant's risk of reoffending was low. On the contrary the Applicant's later withdrawal of his plea and continued denials of offending in the face of his own original plea which the Court of Criminal Appeal saw no reason to disturb suggest that he fails, or at least at one time failed, to appreciate that what he did was wrong and was something for which he was responsible. These things together with what the sentencing Judge observed about the Applicant's remorse, namely that he 'clearly lacks full insight into the enormity of his offending conduct', might at least on the face of things be considered to point to an increased rather than decreased risk of reoffending. This, as one of the experts to whom I will turn in a moment suggested, arises because if the Applicant was not reporting his wrongdoing accurately it might adversely affect any counselling directed towards rehabilitation that was directed to reducing his risk of reoffending so that it might not be effective.

32. It is necessary before going further to say something about the Applicant's statements about remorse and contrition. It is not possible to accept the Applicant's statements of the acceptance of responsibility for his offending, which accompany his suggestion that he is now remorseful and contrite. Although at the outset of his evidence the Applicant said that he took *'*full responsibility for my actions*'* and that *'*now I accept my guilt', this was not supported by his later evidence. For one thing, so far as the second incident was concerned, the sentencing Judge found that there was no room for the Applicant to believe that the 13-year-old girl was not a child. The sentencing judge rejected the Applicant's evidence that he believed she was not a child. Despite that the Applicant maintained in his evidence before me that he still believed that she was not a child. That does not sit at all with the statement that the Applicant accepts 'full responsibility' for his actions and accepts his guilt. Likewise, with the incident in the cinema, the Applicant in evidence before me denied that he placed his fingers in the older girl's vagina. Again, that was a central element to the offence against her that was taken into consideration in the sentencing.

33. It is not necessary to go further with the inconsistent position taken by the Applicant so far as important aspects of his offending are concerned but for completeness, I note that in earlier proceedings in the Tribunal in August 2022 the Applicant in fact denied pulling out his penis and putting it in the victim's mouth. He said he only accepted that sometime later

after speaking to a counsellor. He said that his reason for not admitting that was that he was scared of or feared the consequences.

34. There are other matters that cause me to reject the Applicant's claims about acceptance of full responsibility that include his admitting to telling 'false things' to a Community Corrections Officer completing pre-sentence report so he would get a more lenient sentence because it showed remorse and telling the Court of Criminal Appeal that he had lied to investigating police, the District Court and his employer about various matters. The matters concerned with the Applicant's credit were aptly summarised by the Court of Criminal Appeal when it said:

> *That level of deliberate falsehood, if it was falsehood, is such as to necessarily give strong pause to any court assessing the veracity of anything said by the applicant, particularly where what he says is said in support of a significant benefit [to] him. After all, as the applicant said in his affidavit, in the District Court, he was prepared to tell anyone whatever they needed to hear, if it meant he could "get out". How much more might that be the case where the applicant's assertions to this Court go to support his application for the convictions to be set aside and acquittals entered?*
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> *Those concerns were not allayed by seeing the applicant give his evidence before us. I judged him to be unreliable, a witness who would say whatever he regarded as necessary to advance his case. He was even prepared in evidence to implicate his father in, at least, making a false statement, if not perverting the course of justice, to serve his ends.*

35. My assessment of the Applicant's evidence was much the same such that I am unable to accept that the Applicant does in fact accept full responsibility for his offences and his guilt. As such it is not possible to find that the Applicant has complete remorse for his wrongdoing. It is true that the Applicant has now admitted many of his untruths such as lying to the police and his employer initially, swearing a false affidavit for use in his sentencing and misleading the Tribunal a little over a year ago when he sought revocation of the cancellation of his earlier visa. It is not necessary to untangle the web of untruths the Applicant has engaged in over time beyond suggesting that any one version at any one time has so obviously become incompatible with other versions given at other times such that this may have created the need to admit prior falsehoods. Given the difficulty of accepting the Applicant's word it is better to proceed with considerable caution in approaching his evidence generally.

36. There are some positive indicators that the Applicant has taken steps or has things in prospect that may operate to reduce his risk of offending: his engagement in the Moderate Intensity Sex Offender Program and other programs whilst in custody; his being granted

parole (whilst that only led to him moving to detention, the fact is the relevant authority considered it was appropriate to allow him to enter the community under supervision); his engagement in employment opportunities while imprisoned and upon release from detention; the relationship he has recently formed with his wife; the support that his large and extended family offers him; his good behaviour and adherence to parole conditions including reporting conditions whilst released into the community between 20 January 2023 and 20 March 2023. There is also the constant reminder of the offending and its consequences that will be with the Applicant for the next fifteen years by reason of the fact that he will remain on a register of sex offenders and will be required to report from time to time and will not be permitted to be unsupervised with children including any of his own, and more directly for now his fourteen nieces and nephews. I also accept the fact that the Applicant has served a significant period of imprisonment which is likely to have both a deterrent and a rehabilitative effect so that they would have some effect on reducing the likelihood of reoffending. These matters point in favour of the risk of repeat offending not being high.

37. Nonetheless the analysis of recidivism especially so far as sexual offences is concerned is a complex matter. The Applicant rightly pointed out 'long term assessments of risk are fraught with uncertainties and depend on numerous variables that can change over time' and the assessment the Tribunal must make 'should be grounded in current and concrete evidence rather than extended future projections.' Further, in my assessment the best evidence I have available is the evidence of three psychologists who all gave evidence about the Applicant's risk of reoffending albeit at different times in the past. Their assessments have an element of consistency about them.

38. Mr Sheehan, a forensic psychologist, furnished reports concerned with the Applicant' risk of reoffending in December 2019 and in June 2022 which I accept. Mr Sheehan had the opportunity of interviewing the Applicant on the first occasion over two hours in-person and on the second occasion for two hours through telehealth. In his more recent report, completed 18 months ago, Mr Sheehan expressed that he remained *'of the view that a moderate or medium risk estimate would better capture [the Applicant's] current risk, particularly now given the therapeutic gains made over the past two years and his example of enduring stability in difficult circumstances.*' Mr Sheehan's opinion was expressed against the background of what he described as '*favourable prognostic indicators that he has a genuine intent to adjust to lawful community life'* which were evidenced by efforts to organise

employment and the commencement of an intimate relationship. Mr Sheehan had regard to both static and dynamic factors. Mr Sheehan's report had the advantage that he assessed the Applicant on two separate occasions and was well aware of changes over the time between his two reports. Mr Sheehan's opinion is more recent than two reports that were prepared in October 2019 and January 2020 that identified the Applicant's risk of reoffending as being in the low range when assessed solely based on the Level of Service Inventory – Revised.

39. More recently on 24 October 2023 Dr Emily Kwok, a clinical and forensic psychologist, expressed the opinion that the Applicant is at a *'low-moderate'* risk of reoffending and is *'trending towards the low risk level'*. Ms Kwok explained that her reference to the '*low-moderate range'* was to be understood as a reference to the low end of the moderate range. There is some ambiguity in the phrase *'trending towards the low risk level'* both as to exactly where the risk currently lays and when the trend will result, if ever, in the low risk level being achieved. In any event the current risk level is at the lower end of the moderate range. Ms Kwok's based her opinion on dynamic factors but she had available to her Mr Sheehan's results from applying the relevant static tests. Ms Kwok interviewed the Applicant once for a period of one and half hours.

40. Ms Kwok's evidence was useful in another respect. Ms Kwok expressed the opinion that the Applicant's differing versions of his offending over time, evidenced by his various denials and admissions to which I have referred, were not in her opinion directly relevant to the risk of reoffending and may simply evidence the Applicant's shame or fear of consequences. Ms Kwok did add that the inconsistent versions '*would impact on his engagement and response to treatment*' with the suggestion being that the inconsistency may impact adversely on any treatment which had as its objective reducing the risk of re-offending. I note in passing that the Applicant was not presently in receipt of treatment or counselling regarding his offending.

41. There is also another opinion expressed by Mr Brabant, a psychologist, who assessed the Applicant as being at 'above average risk' of reoffending after the Applicant completed the Moderate Intensity Sex Offender Programme in early November 2020. Mr Brabent's opinion is a little dated now. Mr Sheehan adhered to his opinion despite Mr Brabant's opinion that suggested that the risk was much greater.

42. All of the psychologists placed the risk of reoffending in the moderate range albeit at different points in that part of the range. It is sufficient for present purposes that I accept that evidence although generally I have some preference for Mr Sheehan's opinion to that of the other experts mainly because of the advantage he enjoyed of interviewing the Applicant on two different occasions and was able to observe, comment and deal with the relevance of changes over that time, in particular the changes in the Applicant's attitude to his offending, his change in relationship status and his attempts to organise employment. His opinion is not so dated as to be unreliable. In any event, I consider on the material available the risk of the Applicant is somewhere in the medium range of likelihoods. I reject the suggestion that the risk of reoffending is in the low range. There is no reliable evidence that could safely support such a conclusion.

43. It was suggested that the psychologists did not consider the deterrent and rehabilitative effect of imprisonment and detention in making their assessments. I note that each of them had material available that concerned the Applicant's incarceration and time in detention and so had the opportunity to consider that matter. I would not be prepared to substitute my own opinion to that of qualified experts on such a matter without clear evidence that suggested that they did not take such a matter into account. Further, I do not consider that such a matter would materially alter my assessment of the risk of reoffending in any event.

44. 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, the serious harm that would be caused to members of the community if it were repeated and the risk of reoffending.

Expectations of the Australian community

45. This consideration requires regard to be had 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 is such that the Australian community would expect that the person 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 and children.

46. 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 those expectations in the evaluative process.[4]

47. As I have observed, the Applicant's offending is very serious involving violent and sexual crimes against a woman and children which suggests that the community expectation is firmly against non-refusal of the visa.

48. There are some circumstances in the Applicant's case that moderate that. Namely, his status as a refugee, the suffering he was exposed to before arriving in Australia, his statelessness, and the effect on him over a long period of potential removal. Further, the Applicant has been in Australia for fifteen years albeit he has spent ten of those years in prison and in detention. I am not prepared to make findings about other matters that rely solely on the Applicant's say so such as his own claims to sexual abuse, but even if I did accept those things it would not disturb to any considerable degree the conclusion I have come to about the weight to afford this consideration.

49. The things I have referred to cause me to give this consideration less weight than it might otherwise be given, but it nonetheless weighs in favour of exercising the discretion to refuse the visa.

Best interests of minor children

50. This consideration directs my attention to whether the refusal of the visa is in the best interests of minor children affected by the decision. The Direction lays down a number of matters that I should take into account.

51. The Applicant has fourteen nieces and nephews in Australia who are aged between 1 and 10 years of age. The relationship between the children and the Applicant is non-parental: it is the relation of uncle and niece and nephew. There has not been any meaningful ongoing

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[4] *FYBR v Minister for Home Affairs* [2019] FCAFC 185, [77] (Charlesworth J).

contact with the children although the Applicant has remained in contact with them whilst in prison and in detention. It is not possible to assess whether the Applicant will have a positive or negative impact upon them in the future because much will depend upon whether he reoffends or not. I consider that the fact that the children might be separated from their uncle would not be in their best interests.

52. This consideration weighs in favour of non-refusal, despite the non-parental role of the Applicant and despite the Applicant's lack of any significant relationship with the children because all of them except one were born whilst the Applicant was in prison or detention, mainly because he is the children's uncle and that is in such an extended family a significant person in their lives.

Strength, nature and duration of ties to Australia

53. 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, 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 the Applicant has spent here and any positive contribution the Applicant has made.

54. The Applicant has a considerable family network who are all Australian citizens and permanent residents. They include his mother and father, six siblings, fourteen nieces and nephews and his wife and two stepsons. The Applicant has remained in contact with his family despite his imprisonment and detention. It is reasonably obvious that the family, immediate and extended, is closeknit. All of his family have undoubtedly suffered emotionally and mentally as result of their son, brother's and uncle's incarceration and subsequent detention, and would no doubt suffer even more if the Applicant were removed from Australia but, as I will refer to in moment, that is unlikely in the foreseeable future.

55. The Applicant met his wife, a permanent resident of Australia, through a social media platform in October 2021. They subsequently married in February 2023. The Applicant's wife has two sons aged 21 and 19 years of age. The Applicant's wife would suffer significant hardship, emotional and financial, should the Applicant be removed from Australia. The evidence suggests she has suffered from major depressive disorder and generalised anxiety since the Applicant was returned to detention after being released because of the

Judgment in *Pearson v Minister for Home Affairs*.[5] Again, the Applicant will not as a result of this decision be unable to live with his wife for the foreseeable future.

56. The Applicant has several other significant ties to the community that resulted from his time in the community before his imprisonment. A number of them have provided references. The Applicant contributed to the community before his imprisonment by participating in a refugee soccer development program, representing Australia in the 2010 FIFA World Cup Football for Hope Festival in South Africa, and by his work with the Al Ghadir Youth Association. He was employed as a security guard, a soccer coach and in a local supermarket in the years before he went to prison. He has since his release obtained employment in a car wreckers' yard as a labourer.

57. The Applicant's strong family and other ties to community and his contribution to the community over a period of only five years mean that I should give this consideration moderate weight in favour of not exercising the discretion to refuse the visa.

The legal consequences of the decision or an 'other consideration'

58. 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. That simply can not happen in the reasonably foreseeable future.

59. 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. 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.

60. After the orders in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37, the Applicant was released from immigration detention and granted the Bridging Visa. The effect of that is that, if because of this review, the delegate's decision is set aside, and there is a direction not to exercise the discretion in s 501(1) of the Act, the

[5] *Pearson v Minister for Home Affairs* [2022] FCAFC 203.

Applicant will remain living in the community in Australia until his application for a Protection Visa is processed. A decision to set aside the delegate's decision does not mean that the Applicant will be granted the Protection Visa, but if he is that will mean the Applicant may stay in Australia subject to the prospect of cancellation should it arise for the future. If for some reason the Protection Visa is not granted to the Applicant or, as the Minister submitted, if the delegate's decision is affirmed, the Applicant will remain living in the community in Australia on the Bridging Visa '(until it becomes reasonably foreseeable in the future that he can be removed)'.

61. There are significant conditions attaching to the Bridging Visa which have as their objective the ongoing protection of the Australian community against the Applicant reoffending. The conditions are onerous for any Applicant, but they represent the legislature's measured response to the judgment in *NZYQ* which found that administrative indefinite detention was unconstitutional contrary to the earlier judgment in *Al-Kateb v Godwin* [2004] HCA 37.

62. One 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. The reality is that that time is not in the reasonably foreseeable future. He will in the meantime be subject to a large number of conditions that affect his freedom, the most significant of which are 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 (which at present involves him making a phone call between 9.00am and 2.00pm each day), a condition requiring him to abide by specified curfews of not greater than eight hours (which at present is from 10.00pm to 6.00am each day) 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 Bridging Visa by 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.

63. The Applicant said that he would not be able to operate or set up his own business in the event that he remained on the Bridging Visa because, as he would not be a permanent resident, he would not be able to obtain an Australian Business Number (ABN) because he would be restricted in establishing a business.

64. The Minister acknowledged that the conditions imposed by the Bridging Visa are '*more onerous'* than that which would apply to his Protection Visa if he was granted it, noting that the Applicant can 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, if of course any are made, and I should not speculate about those things. It is sufficient to note that at present, both those and the other conditions apply to the Applicant.

65. 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 and nor can the fact that he will be unable to obtain an ABN should he wish to set up a business. 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. They are intrusive and, as the Applicant submitted, may create a sense of perpetual surveillance. There was no direct evidence about the effects of that, but it is reasonably a matter that may affect the Applicant. The limits on his employment and his inability to obtain an ABN are significant impositions on the Applicant.

66. The Applicant's own evidence was that he considered the conditions restrictive and that he feared the consequences of the 'bracelet breaking' or him for some reason disobeying his curfew or his not being able to get through on the telephone to report. All those things may be accepted, and they really highlight the care and vigilance the Applicant must take in complying with the conditions as inconvenient as he may find them and as onerous as they may be. I do not consider that they are impracticable or could not be complied with.

67. Nonetheless the conditions and impositions upon the Applicant are such that this consideration weighs moderately in favour of non-refusal.

The discretion should be exercised

68. I am satisfied that this is a case where the discretion to refuse the Applicant a visa should be exercised. I consider that the grave and very serious criminal offending against two young children and a young woman together with the damaging consequences of such conduct if repeated mean that any risk of reoffending is unacceptable to the community. In addition, I have found that the risk of reoffending is in the moderate range of likelihoods. It is a level of risk that the community should not have to accept. Those things loom large in

the exercise of the discretion given the importance of the need to protect the Australian community against further harm of the same or a similar kind. In my assessment the protection of the community is the most significant of the considerations to be given weight and it weighs very firmly in favour of exercising the discretion to refuse the visa. I also consider that the expectations of the community weigh fairly firmly against non-refusal albeit as I have observed that consideration is somewhat moderated by the fact that of the Applicant's circumstances, in particular as a refugee.

69. The Applicant's ties to the community and the best interest of his nieces and nephews are considerations that both have importance, and both individually weigh moderately in favour of non-refusal. The importance of each of those considerations is in turn moderated by the fact that in the event the Protection Visa is refused the Applicant will, subject to conditions, be permitted to remain in Australia with his family, nieces and nephews, wife and his stepsons for the reasonably foreseeable future. In a practical or real sense, the Applicant's removal is no more than speculative. That he will be able to maintain his relationships with his nieces and nephews and extended family despite not having a Protection Visa is a strong reason why I give these considerations less importance than they might otherwise have.

70. The primary considerations firmly weigh in favour of exercising the discretion to refuse the protection visa.

71. The other consideration involving the practical consequence to the Applicant of the conditions imposed by the Bridging Visa upon weighs against exercising the discretion to refuse the Protection Visa, but only moderately so as the conditions are not so onerous as to require more weight to be afforded to them especially when regard is had to the need to protect the community. The conditions imposed on the Applicant by the Bridging Visa are reasonably proportionate to the need to protect the community against the moderate risk of future serious harm. It must be remembered that that compliance with the conditions and refraining from further criminal or other offending will determine the Applicant's ongoing capacity to remain and participate in the community in the reasonably foreseeable future.

Decision

72. I affirm the delegate's decision to exercise the discretion in s 501(1) of the Act to refuse to grant the visa.

I certify that the preceding 72 (seventy-two) paragraphs are a true copy of the reasons for the decision herein of

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

Associate

Dated: 12 December 2023

Date(s) of hearing:	**7 & 8 December 2023**
Counsel for the Applicant:	**Dr J Donnelly**
Solicitors for the Applicant:	**Butter, Caldwell & Co**
Counsel for the Respondent:	**Mr N Swan**
Solicitors for the Respondent:	**Sparke Helmore Lawyers**