

CRIMMIGRATION AT THE CROSSROADS: REFORMING AUSTRALIA'S TWO-TIER CHARACTER REGIME FOR REFUGEES

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ABSTRACT

This article contends that Australia's migration law has created a two-tier 'cimmigration' architecture that allows the broad, discretionary character power in s 501 to eclipse the narrow Refugee Convention-aligned exclusions codified in s 36(1C). Tracing the statutory history and the jurisprudential shift from Rares J's approach in *BALI19* to the Full Federal Court's contrary ruling in *BFW20*, it shows how cumulative application of s 501 sidelines the Convention threshold, entrenches prolonged detention and heightens refolement pressure without demonstrable public-safety gains.

It situates this critique within post-*NZYQ* legislative responses (enhanced Bridging Visa R (Removal Pending) ('BVR'), BVR conditions, 'removal-pathway' directions) and the Home Affairs Legislation Amendment (2025 Measures No. 1) Bill's 2025 curtailment of procedural fairness at critical removal stages, arguing these developments further normalise exclusionary, low-transparency risk management.

The article proposes a targeted reform package: a statutory carve-out that 'switches off' s 501 once s 36(1C) is met; failing that, legislated proportionality and least-restrictive-means tests, mandatory human-rights compatibility statements and sunset/reporting requirements, and extension of the Administrative Review Tribunal ('the ART') hard 84-day limit in s 500(6L) to 140 days. Restoring primacy to s 36(1C) would realign domestic law with Article 33(2) of the United Nations Convention Relating to the Status of Refugees ('the Refugee Convention'), reduce indefinite-detention churn, and preserve community safety through ordinary criminal-law tools rather than blunt migration penalties.

I INTRODUCTION

Australia's refugee protection regime faces a tension between specific protection visa criteria and the general visa 'character test.' Section 36 of the *Migration Act 1958* (Cth) ('the Act') sets out criteria for a protection visa, including stringent exclusions for individuals considered dangers to security or the community.¹

In particular, s 36(1C) was introduced to codify the narrow exceptions to refugee non-

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¹ The Commercial Bar Association of Victoria, 'Protection visas can be refused under s 501 on character grounds' (*Lexology*, 2 September 2020):

<<https://www.lexology.com/library/detail.aspx?g=8ba89f81-eccc-4819-9e89-3ba1244e2175>>

refoulement obligations found in Article 33(2) of the Refugee Convention.² By contrast, s 501 of the Act provides a broad, discretionary power to refuse or cancel *any* visa, including a protection visa, if the applicant fails the ‘character test’ – a test encompassing a wide range of criminal conduct and other risk factors.³ This overlap has prompted debate and litigation about whether a refugee who meets the specific criteria (including s 36(1C)) for protection should nonetheless be subject to an additional character assessment under s 501.⁴

Recent case law revealed a stark divide on this question: a single Federal Court judge concluded that applying s 501 to protection visas would undermine s 36(1C),⁵ while a subsequent Full Federal Court emphatically disagreed.⁶ This article provides a detailed analysis of the statutory interpretation and case law on this issue, and critiques the policy implications of subjecting protection visa applicants to the general character test despite their satisfaction of the tailored protection visa criteria.

II PROTECTION VISA CRITERIA AND SECTION 36(1C)

Australian law incorporates its protection obligations through the granting of protection visas to refugees and others in need of complementary protection.⁷ Section 36(2) of the *Migration Act* defines the substantive grounds for protection visas, aligning with the Refugee Convention’s definition of a refugee (s 36(2)(a)) and extending to other significant harm (complementary protection, s 36(2)(aa)). However, not every person who meets these refugee or complementary protection definitions will be granted a visa. Parliament has imposed additional threshold criteria in s 36(1B) and (1C) to exclude those deemed undesirable on security or criminal grounds.

Section 36(1C) provides that 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 (b) having been convicted by final judgment of a particularly serious crime, is a danger to the Australian community.⁸ In other words, even a genuine refugee will be ineligible for a protection visa if the intelligence authorities assess them as a security risk (paralleling Article 33(2) regarding dangers to the country’s security) or if they have a conviction for a ‘particularly serious crime’ and pose a danger to the

² Law Council of Australia, *Submission to Senate Legal and Constitutional Affairs Legislation Committee, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (5 November 2014): <<https://lawcouncil.au/publicassets/2a565143-e1d6-e611-80d2-005056be66b1/141105-Submission-2898-Migration-Maritime-Powers-Legislation-Amendment-bill-2014.pdf>>

³ The Commercial Bar Association of Victoria, above n 1.

⁴ *BAL19 v Minister for Home Affairs* (2019) 168 ALD 276.

⁵ *Ibid.*

⁶ *Minister for Immigration v BFW20* (2020) 279 FCR 475.

⁷ *DQU16 v Minister for Home Affairs* (2021) 273 CLR 1.

⁸ Department of Home Affairs, *Legal Framework for Protection Processing (Refugee Law and Complementary Protection) – February 2024* (Freedom of Information release, February 2024) 119–21.

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community (paralleling Article 33(2)'s serious crime exception).⁹

The term 'particularly serious crime' is defined in the Act (s 5M) to include serious categories of offences such as serious violence or drug trafficking, ensuring that only the gravest crimes trigger this exclusion.¹⁰ This codification, introduced by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), was explicitly aimed at mirroring the Refugee Convention's Article 33(2) exceptions to non-refoulement.¹¹

Importantly, s 36(1C) sets a high threshold. The Minister must have *reasonable grounds* for regarding the applicant as a danger, and in the case of criminality, the crime must be 'particularly serious'.¹² The legislative intent was to limit protection only in exceptional cases: those refugees who, despite facing persecution, have jeopardised the safety of the Australian community or security through extremely serious misconduct.¹³

If an applicant falls afoul of s 36(1C), they cannot be granted a protection visa at all.¹⁴ Conversely, if they satisfy s 36(1C) – meaning they are not considered a sufficiently serious danger under those strict criteria – then by the statute's own terms they have passed the necessary character/safety hurdle built into the protection visa framework.¹⁵

III SECTION 501 AND THE GENERAL CHARACTER TEST

Section 501 of the *Migration Act* is a general provision applying to all visas.¹⁶ It authorises the Minister (or their delegate) to refuse to grant a visa, or to cancel an existing visa, if the person does not pass the 'character test' (s 501(1) and (2)).¹⁷ The character test, set out in s 501(6), is broadly framed and captures a wide array of circumstances.¹⁸ An applicant will fail the test, for example, if they have a 'substantial criminal record' (such as a sentence to imprisonment of 12 months or more) or if they have any association with persons or groups involved in criminal conduct.¹⁹

⁹ Administrative Review Tribunal, *A Guide to Refugee Law in Australia – Chapter 7: Exclusion and Cessation* (October 2024) 6–7.

¹⁰ *Migration Act 1958* (Cth) s 5M.

¹¹ Explanatory Memorandum, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Cth) 11.

¹² *FSKY v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 295 FCR 625.

¹³ Explanatory Memorandum, above n 11, [1234]–[1237].

¹⁴ *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1.

¹⁵ See further Khanh Hoang and Sudrishti Reich, 'Managing Crime Through Migration Law in Australia and the United States: A Comparative Analysis' (2017) 5(1) *Comparative Migration Studies* 1.

¹⁶ *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20* (2020) 279 FCR 475.

¹⁷ Jason Donnelly, 'Challenging Huynh: Incorrect Importation of the National Interest Term via the Back Door' (2017) 24 *Australian Journal of Administrative Law* 99, 100–101.

¹⁸ See *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2024) 94 ALJR 594.

¹⁹ *Fitzpatrick and Minister for Immigration and Multicultural Affairs (Migration)* [2025] ARTA 708.

The test also includes forward-looking risk-based criteria: even without a particularly serious conviction, a person can fail if there is a risk that they would engage in future criminal conduct, harass or molest others, vilify segments of the community, or incite discord.²⁰ Notably, one ground in s 501(6)(d) stipulates that a person does not pass the character test if ‘there is a risk’ – even a relatively low-level risk – that the person would represent a danger to the community or a segment of it (for example, by harassing someone).²¹ This stands in contrast to the s 36(1C) standard, which requires a high degree of danger and a conviction for a *particularly serious* crime before a refugee can be excluded from protection.²²

Section 501 is thus a potent and discretionary tool.²³ The Minister ‘may refuse’ a visa under s 501(1) if any character test ground is not met²⁴ and similarly may cancel a visa under s 501(2).²⁵ In certain cases, cancellation is mandatory (s 501(3A), for instance, mandates cancellation of a visa if the person is serving a prison sentence and has a substantial criminal record).²⁶ For present purposes – the context of an *application* for a protection visa – the relevant power is s 501(1): it allows refusal of a visa even if all other criteria are met, purely on character grounds.²⁷

Crucially, the Act links these two regimes. Section 65 of the *Migration Act*, which governs decision-making on visa applications, provides that the Minister must grant the visa if satisfied that *all* criteria are met and that ‘the grant of the visa is not prevented by... section 501’.²⁸ In addition, s 501 itself contains a note clarifying that ‘visa’ in that section includes a protection visa.²⁹

On its face, then, the statute envisages that even a protection visa applicant, after meeting the refugee definition and not being excluded by s 36(1C), could still be screened under the general character test before the visa is issued.³⁰ The breadth of s 501’s language – an ‘unqualified’ discretion to refuse any visa – suggests no categorical exemption for refugees.³¹ This overlapping statutory scheme set the stage

²⁰ *Smith v Minister for Immigration, Citizenship and Multicultural Affairs* [2025] FCAFC 78 [7].

²¹ *Kiad v Minister for Immigration and Citizenship* [2025] FCA 703 [20].

²² *TVGC and Minister for Immigration and Citizenship (Migration)* [2025] ARTA 848.

²³ *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430.

²⁴ *Navarro and Minister for Immigration and Citizenship (Migration)* [2025] ARTA 867.

²⁵ *Minister for Home Affairs v Brown* (2020) 275 FCR 188.

²⁶ *XJLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2022) 289 FCR 256.

²⁷ *LAL and Minister for Immigration and Citizenship (Migration)* [2025] ARTA 837.

²⁸ Frances Simmons and Chantal Bostock, ‘Administrative Review in Refugee Cases: The Vulnerable Persons Guidelines and the Role of Legal Representatives’ (2024) 47(2) *UNSW Law Journal* 448, 458.

²⁹ See Peter Billings and Khanh Hoang, ‘Characters of Concern, or Concerning Character Tests? Regulating Risk through Visa Cancellation, Containment and Removal from Australia’ in Peter Billings (ed), *Crimmigration in Australia: Law, Politics and Society* (Springer, 2019) 119.

³⁰ *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* (2021) 284 FCR 1.

³¹ *EBD20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 334.

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for a conflict: does applying s 501 to a protection visa applicant effectively override the more specific protection visa provisions, or did Parliament intend both provisions to apply cumulatively?

IV CONFLICT AND OVERLAP: LITIGATION ON SECTIONS 36(1C) AND 501

The potential contradiction inherent in requiring refugees to satisfy both s 36(1C) and the broader s 501-character test eventually gave rise to litigation. The central question was whether a non-citizen who has met the tailored protection visa criteria (including not being a danger under s 36(1C)) must also pass the general character test in s 501, or whether s 36(1C) was intended to be an exhaustive statement of the character-related requirements for a protection visa.

This issue came to a head in the case known as *BAL19*.³² The applicant 'BAL19' was a Sri Lankan Tamil man who had been found to engage Australia's protection obligations (his refugee claims were substantiated) but was refused a protection visa because the Minister, exercising the s 501 power, found that he failed the character test.³³

Notably, BAL19 had a history of criminal charges and convictions, though not for what the law terms 'particularly serious' crimes, and he suffered from significant health issues (including legal blindness) after years in immigration detention.³⁴ He had *not* been excluded by s 36(1C) – in other words, despite his criminal history, officials had apparently accepted that he was not such a serious danger to the community as to trigger the s 36(1C)(b) bar.³⁵ Nonetheless, under the broader s 501 character test, the Minister deemed him undesirable and refused to grant the visa, leaving him in indefinite detention as a refugee whom Australia would not protect but could also not deport without breaching international law.³⁶

Justice Steven Rares, sitting alone in the Federal Court, allowed BAL19's application for judicial review on two principal grounds. First, Rares J found the Minister's decision unreasonable for failing to grapple with its 'legal or practical consequences'.³⁷ The Minister had created a *Catch-22* situation: BAL19 was denied a protection visa and thus barred by s 48A of the Act from making any further protection applications, yet by virtue of that refusal (and s 197C of the Act) he faced removal to Sri Lanka as soon as practicable, despite the acknowledged risk of persecution.³⁸

If removal proved impermissible (because of non-refoulement obligations under international law), BAL19 could remain in detention potentially forever.³⁹ Rares J was

³² *BAL19 v Minister for Home Affairs* (2019) 168 ALD 276.

³³ *Ibid* [14].

³⁴ *Ibid* [17].

³⁵ *Ibid* [37].

³⁶ *Ibid* [42].

³⁷ *Ibid* [54]-[55].

³⁸ *Ibid* [43].

³⁹ *Ibid* [42].

critical that the Minister's reasons failed to confront this outcome.⁴⁰ In particular, the Minister noted only that he retained a personal non-compellable power to grant another visa in the public interest (under s 195A) or to allow a further application (under s 48B),⁴¹ without explaining how those hypothetical future interventions mitigated the *immediate* legal effect of the refusal – namely, that BAL19 'had to be refoiled as soon as reasonably practicable' under domestic law.⁴² Rares J held that such cursory reasoning was an attempt 'to lay the groundwork' for indefinite detention contrary to the statutory scheme,⁴³ and was legally unreasonable for ignoring mandatory relevant considerations (the prospect of refolement or indefinite detention).⁴⁴ This aspect of the judgment reinforced that even within domestic law, a decision-maker must consider the downstream consequences of refusing a refugee's visa on character grounds, given the strict removal obligations in ss 197C and 198 of the Act.⁴⁵

More controversially, Rares J went further to hold that s 501 should not have been applied at all to a protection visa assessment in the way it was.⁴⁶ In his view, protection visa applicants are not subject to the s 501 refusal power in the first place.⁴⁷ This conclusion rested on statutory interpretation principles, notably the presumption that Parliament does not intend to produce internally inconsistent or futile outcomes in legislation.⁴⁸

His Honour noted that the *Migration Act* contains a 'bespoke code' for assessing protection visa claims in s 36, including explicit criteria for when past criminal conduct will disqualify an applicant.⁴⁹ Those criteria (in s 36(1C)) are deliberately narrower and more specific than the general character test.⁵⁰ Indeed, Rares J compared the two standards and illustrated the disparity: for example, under s 501(6)(d) a person can be refused if there is *any risk at all* that they might in future pose a danger (even without a conviction), whereas s 36(1C) demands a past conviction for a particularly serious crime and a judgment that the person *is* (not merely might be) a danger.⁵¹

Parliament's evident intent in enacting s 36(1C) in 2014 was to set a high bar and thereby give effect to Australia's interpretation of its Refugee Convention obligations.⁵² Allowing the Minister to invoke s 501 to refuse a protection visa on character grounds

⁴⁰ Ibid [43].

⁴¹ Ibid [29].

⁴² Ibid [36].

⁴³ Ibid [46].

⁴⁴ Ibid [42].

⁴⁵ Ibid [54]-[55].

⁴⁶ Ibid [88].

⁴⁷ Ibid [87].

⁴⁸ Ibid [83].

⁴⁹ Ibid [82].

⁵⁰ Ibid [61].

⁵¹ Ibid [62].

⁵² Ibid [53].

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that fell short of s 36(1C) would, in Rares J's words, leave 'no intelligible statutory purpose' for the carefully crafted criterion in s 36(1C).⁵³

Why would the Act explicitly forbid granting a protection visa to (only) a very narrowly defined group of dangerous offenders, if the Minister remained free to deny protection to a much broader group of people based on a 'less stringent' test at his discretion?⁵⁴ His Honour reasoned that s 36(1C) would be rendered effectively nugatory if s 501 could simply be used as an alternative, wider ground to refuse refugees.⁵⁵ On that basis, he concluded that the two provisions could not logically operate together in the context of an initial protection visa grant.⁵⁶

Either s 36(1C) is the exclusive yardstick for criminality and security in assessing a protection visa, or it serves little purpose at all. He chose the former interpretation, holding that the character test in s 501 'does not apply' to an assessment of a protection visa application.⁵⁷ In practical terms, this meant the Minister had no lawful authority to refuse BAL19's visa under s 501 given that BAL19 met all the criteria in s 36 (including not being a serious danger under s 36(1C)).⁵⁸

As a corollary to this holding, Rares J also addressed the *Migration Regulations* which, at that time, required protection visa applicants to satisfy Public Interest Criterion (PIC) 4001 – a criterion essentially importing the general character test into visa grant requirements.⁵⁹ He found that to the extent the regulations imposed a character test broader than s 36(1C) for protection visas, they were inconsistent with the Act and therefore invalid.⁶⁰ In particular, Regulation 866.226 (for permanent protection visas) and its temporary protection visa equivalents, which mandated that applicants meet PIC 4001, could not stand alongside s 36(1C) as valid law.⁶¹ This was a significant declaration, suggesting that only the Act's own criteria (especially s 36(1C)) could be used to judge a protection visa applicant's character or risk to the community.⁶²

The *BAL19* decision was a bold assertion of the primacy of the specific refugee provisions over the general character power. It immediately called into question the Department of Home Affairs' established practice of subjecting protection visa applicants to s 501 screening.⁶³ That said, nothing in the foregoing should be read as endorsing Rares J's judgment in *BAL19*; as explained below, *BAL19* was emphatically

⁵³ Ibid [67].

⁵⁴ Ibid [71].

⁵⁵ Ibid [88].

⁵⁶ Ibid [91].

⁵⁷ Ibid [88].

⁵⁸ Ibid [91].

⁵⁹ Ibid [89]-[90].

⁶⁰ Ibid [90].

⁶¹ Ibid [89]-[90].

⁶² Ibid [91].

⁶³ *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CPJ16* [2019] FCA 2033.

overruled by the Full Federal Court.⁶⁴ The analysis above is descriptive, not a legal endorsement.

In theory, after December 2019 (when *BAL19* was decided), any protection visa applicant who was found to meet the refugee criteria and not be excluded by s 36(1C) should have been granted the visa, without a further s 501 vetting step. However, in reality the Government did not readily accept this outcome. Instead, the Minister pursued an appeal, and in the interim months the Department reportedly avoided granting any protection visas in cases involving character concerns.⁶⁵

Evidence later emerged that not a single applicant with potential character issues was granted protection in the period between Rares J's judgment and the appellate decisions overturning it.⁶⁶ In some instances, Departmental decision-makers even revisited s 36(1C) itself – an 'apparent side effect' of *BAL19* was that officials started using the s 36(1C) exclusion more aggressively, sometimes reconsidering an applicant's danger to the community under s 36(1C) despite earlier clearance.⁶⁷ For example, in *EPUI9*,⁶⁸ a young refugee from Lebanon (whose protection claims were valid) had his application refused on the basis of s 36(1C) after initially being deemed not to pose a danger; the adverse finding was later overturned on review.⁶⁹

This trend suggested an attempt to circumvent Rares J's ruling by fitting cases into the s 36(1C) exclusion, since s 501 was, for the moment, unusable. Meanwhile, at least two Federal Court judges (including Flick J) grew frustrated with the Minister's apparent disregard for a binding court decision.⁷⁰ In one case, Flick J pointedly raised the prospect of initiating contempt of court proceedings against the Minister for failing to follow the *BAL19* precedent.⁷¹ The stage was set for clarification by a higher authority.

V FULL FEDERAL COURT REVERSAL: *MINISTER FOR IMMIGRATION v BFW20*

The Minister's appeal (and a related test case) was fast-tracked to a Full Court of the Federal Court. In *BFW20* (decided 24 June 2020),⁷² a bench of five judges (Allsop CJ, Kenny, Besanko, Mortimer and Moshinsky JJ) conclusively rejected Rares J's

⁶⁴ *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20 by his Litigation Representative BFW20A* (2020) 279 FCR 475.

⁶⁵ Department of Home Affairs, *Procedure for Statutory Protection Visa Decisions Following BAL19*, Team Border Announcement, Refugee, Humanitarian & Settlement Division, 28 February 2020, FOI release FA 20/06/01/063.

⁶⁶ Mary E Crock and Kate Bones, 'The Creeping Cruelty of Australian Crimmigration Law' (2022) 44(2) *Sydney Law Review* 169, 211.

⁶⁷ *Ibid.*

⁶⁸ *EPUI9 v Minister for Home Affairs* [2020] FCA 541.

⁶⁹ *Ibid* [13], [56].

⁷⁰ *AFX17 v Minister for Home Affairs (No 4)* (2020) 279 FCR 170, 173 [8]; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v PDWL* (2020) 171 ALD 608, 626–7 [74].

⁷¹ *AFX17 v Minister for Home Affairs (No 4)* (2020) 279 FCR 170.

⁷² *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20 by his Litigation Representative BFW20A* (2020) 279 FCR 475.

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approach. At the same time, in a second judgment (given in *KDSP*⁷³ around the same period), a three-judge Full Court similarly found that s 501 could validly be applied to refuse a protection visa. In substance, the Full Federal Court held that ss 36 and 501 are not inconsistent and can operate cumulatively.⁷⁴

The Full Court acknowledged that there is an overlap between the provisions, but it drew a distinction in their operation.⁷⁵ Section 36(1C) imposes a mandatory refusal criterion: if its conditions are not met (for example, the applicant is deemed a particularly serious criminal who is dangerous), the decision-maker *must* refuse the visa.⁷⁶ By contrast, s 501 is a discretionary power: if its conditions are triggered (if the person fails the character test), the Minister *may* refuse the visa.⁷⁷ In the Court's view, this difference means the two provisions can coexist.⁷⁸

A refugee with extremely serious convictions *cannot* get a visa due to s 36(1C); whereas a refugee with lesser character concerns *might* be denied a visa under s 501, but that is left to the Minister's judgment. The Court saw no direct contradiction in allowing both layers – one mandatory, one discretionary – of character-related filtering to apply.⁷⁹

Central to the Full Court's reasoning was the statutory text and structure, which they found strongly favoured the Minister's position that s 501 remains applicable to protection visas.⁸⁰ The judges noted that s 501(1) is phrased in broad, 'unqualified' terms, and nothing in Part 2 of the Act (where s 36 resides) explicitly displaces the Part 9 general powers in s 501.⁸¹ In fact, as mentioned earlier, s 65 explicitly conditions the grant of *any* visa on there being no bar under s 501.⁸²

The inclusion of the note in s 501 confirming that it applies to protection visas was given considerable weight as a clear indication of Parliament's intent.⁸³ The Court also considered the 2014 amendments and found no evidence of an intention to carve out a self-contained code for protection visas that would implicitly exclude s 501.⁸⁴ The legislative changes in 2014 (which inserted s 36(1C) and related provisions) were primarily about codifying refugee law concepts and fast-track procedures; they did not expressly amend or repeal any part of s 501.⁸⁵

⁷³ *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1.

⁷⁴ *Ibid* [302].

⁷⁵ *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20 by his Litigation Representative BFW20A* (2020) 279 FCR 475 [129]-[131].

⁷⁶ *Ibid* [68].

⁷⁷ *Ibid* [130].

⁷⁸ *Ibid* [160].

⁷⁹ *Ibid* [158].

⁸⁰ *Ibid* [64].

⁸¹ *Ibid* [121].

⁸² *Ibid* [125]-[126].

⁸³ *Ibid* [133].

⁸⁴ *Ibid* [142].

⁸⁵ *Ibid* [72].

Absent a clear inconsistency or repugnancy between the two sections, the Full Court was unwilling to infer that the introduction of s 36(1C) partially disempowered the long-standing character test provisions.⁸⁶ The Court pointed out, for example, that it is entirely possible for both provisions to apply sequentially: *first*, consider s 36(1C) (if the applicant fails that, the visa must be refused immediately under s 36 and s 65); *if* the applicant passes s 36(1C), then consider s 501 (if they fail the broader character test, the visa may be refused under s 501(1)).⁸⁷ In this layered approach, each provision has a ‘useful function’ – s 36(1C) screens out the most serious cases as a mandatory bar, and s 501 addresses other character concerns on a discretionary, case-by-case basis.

The Full Court specifically disagreed with Justice Rares’ view that allowing s 501 to be applied would rob s 36(1C) of meaningful effect.⁸⁸ On the contrary, they held that s 36(1C) continues to serve a distinct purpose: it sets a floor of sorts, ensuring that certain particularly dangerous individuals *must not* receive protection visas under any circumstances.⁸⁹ That remains operative even if the Minister of the day were inclined to grant a visa (since s 36(1C) leaves no discretion in such cases). Section 501, by contrast, allows (but does not require) the refusal of those who pose lesser risks – for example, someone with a substantial criminal record that doesn’t meet the ‘particularly serious’ threshold, or someone suspected of future misbehaviour without any major conviction.⁹⁰ The Court saw this as a policy choice for Parliament: a two-tiered character assessment for refugees, with a strict rule for the worst offenders and a broad discretion for others. They noted that if Parliament had intended to remove that second tier when enacting s 36(1C), it could have done so explicitly, but it did not.⁹¹

Additionally, the Full Court addressed arguments about Australia’s international obligations and the consequences of refusals. Rares J had been influenced by the fact that refusing a refugee’s visa under s 501 could lead to breaches of non-refoulement (due to s 197C mandating removal regardless of protection obligations).⁹² The Full Court acknowledged this concern but ultimately found it was not a sufficient reason to reinterpret the Act.⁹³

The judges observed that *non-refoulement* obligations (under treaties like the Refugee Convention or Convention Against Torture) are not directly enforceable in Australian law unless incorporated by statute. Section 197C, inserted in 2014, pointedly declares that for the purposes of removal powers ‘it is irrelevant whether Australia has non-refoulement obligations’ to an unlawful non-citizen – a clear sign that Parliament contemplated adverse outcomes for individuals owed protection under international

⁸⁶ Ibid [120].

⁸⁷ Ibid [129]-[130].

⁸⁸ Ibid [120].

⁸⁹ Ibid [130].

⁹⁰ Ibid [160].

⁹¹ Ibid [158].

⁹² Ibid [35].

⁹³ Ibid [143]-[144].

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law.⁹⁴ The Court was ‘not persuaded’ that the introduction of s 197C (which deals with removal) implied any limitation on s 501’s operation in the *visa grant* context.⁹⁵

In other words, Parliament knowingly created a situation where a refugee could be refused a visa and subjected to removal even if that would breach international law, effectively leaving it to executive discretion (via ministerial intervention powers) to prevent actual refoulement in deserving cases.

The Full Court’s role, as it saw it, was not to rewrite the statute to better align with international law, but to give effect to the domestic law’s clear terms – even if that results in Australia not fully adhering to the Refugee Convention’s spirit.⁹⁶

In light of these findings, the Full Federal Court answered the ‘reserved question’ put before it in the affirmative: yes, even if an asylum seeker satisfies all the criteria in s 36 (including that they are not a particularly serious criminal or security risk), the Minister can still rely on s 501(1) to refuse the protection visa.⁹⁷

Following the Full Court’s decision in *BFW20* (and *KDSP*), any doubt about the applicability of s 501 to protection visa applicants was removed – at least as a matter of black-letter law. Attempts to challenge this higher court ruling were unsuccessful. The refugee applicant in one of the cases reportedly sought special leave to appeal to the High Court, but the High Court declined to hear the case, leaving the Full Federal Court’s interpretation as the final word.⁹⁸

As of the time of writing, the law in Australia is that a non-citizen who meets the refugee definition and is not excluded by s 36(1C) must still satisfy the s 501 character test, and a failure to do so permits (but does not compel) the refusal of the protection visa.

VI POLICY ANALYSIS: DUPLICATION, PURPOSE, AND CONSEQUENCES

General. The resolution of the legal question – in favour of s 501’s continued application – does not dispose of the deeper policy issues raised by this duplicative character testing. The scenario of refugees being denied visas on character grounds, despite posing no *serious* danger as per s 36(1C), remains highly controversial.⁹⁹ It is worth examining whether the Full Court’s interpretation, though legally orthodox, creates outcomes that are difficult to reconcile with the overall purpose of protection visas and Australia’s international commitments. Moreover, the very need for two layers of character assessment can be critiqued from a rule of law and policy efficiency standpoint.

⁹⁴ Ibid [19].

⁹⁵ Ibid [146].

⁹⁶ Ibid [109]-[161].

⁹⁷ Ibid [160].

⁹⁸ *KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] HCATrans 20.

⁹⁹ Crock and Bones, above n 66, 190–192.

Undermining the Refugee Framework. Section 36(1C) was crafted as a precise expression of when refugees can justifiably be denied protection – essentially transplanting the Refugee Convention’s Article 33(2) exceptions into Australian law.¹⁰⁰ By making those exclusions part of the visa criteria, Parliament signalled that only national security threats and particularly serious criminals who are dangers should be refused protection visas.¹⁰¹

However, under the Full Court’s reading, s 501 can operate to refuse many individuals who fall *outside* those categories – for example, people with moderate criminal histories or mere suspicions of bad character that do not amount to a serious danger.¹⁰² This considerably broadens the category of asylum seekers who may be denied visas and potentially expelled or detained.¹⁰³

In effect, the general character test eclipses the narrow s 36(1C) standard. From a policy perspective, this calls into question why Australia bothered to legislatively codify the Article 33(2) standard at all, if a far more expansive, open-ended discretion was always available to achieve the same result (refusing a visa).¹⁰⁴

Justice Rares’ critique that such an approach leaves s 36(1C) with ‘no intelligible statutory purpose’¹⁰⁵ resonates as a policy criticism: it suggests either a legislative redundancy or a half-hearted commitment to the Refugee Convention limits. The Full Court answered that s 36(1C) still has work to do (as a mandatory bar on the worst offenders).

Yet in practice, a Minister who is hostile to granting protection could simply use s 501 to refuse many applicants with any negative record,¹⁰⁶ rendering s 36(1C) largely academic in the run of cases. However, if this approach is taken, it is likely to face close scrutiny by the Federal Court of Australia.

The only scenario in which s 36(1C) uniquely operates is if a decision-maker for some reason wanted to grant a visa to someone with a particularly serious crime – a situation likely to be vanishingly rare. Thus, as a matter of legislative design, having both provisions cover similar ground appears duplicative and perhaps indicative of a *belt-and-braces* approach that errs on the side of exclusion. This duplication can undermine the clarity and integrity of the refugee status determination process.

Ministerial Discretion as a Safeguard. Defenders of the status quo might argue that the Minister’s personal powers (to grant visas in certain circumstances or to set aside

¹⁰⁰ Law Council of Australia, above n 2.

¹⁰¹ See further Michelle Foster, ‘An ‘Alien’ by the Barest of Threads’: The Legality of the Deportation of Long-Term Residents from Australia’ (2009) 33(2) *Melbourne University Law Review* 483.

¹⁰² The Commercial Bar Association of Victoria, above n 1.

¹⁰³ *Dobrosavljevic and Minister for Immigration, Citizenship and Multicultural Affairs (Migration)* [2024] AATA 775.

¹⁰⁴ Samuel C Duckett White, ‘God-Like Powers: The Character Test and Unfettered Ministerial Discretion’ (2020) 41(1) *Adelaide Law Review* 1, 9–10.

¹⁰⁵ *BAL19 v Minister for Home Affairs* (2019) 168 ALD 276 [67].

¹⁰⁶ Crock and Bones, above n 66, 190–191.

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barriers to re-application) and executive policy provide a safety valve. For instance, Ministerial Directions (such as Direction 110, currently) guide delegates to consider non-refoulement obligations when deciding character cases, and the Minister can intervene to grant a temporary visa if removal is not appropriate.¹⁰⁷

Paragraph 9.1 of Direction 110 directs decision-makers that unlawful non-citizens are liable to removal under s 198 and detention under s 189, explains Australia's non-refoulement obligations, and notes they are generally considered only when raised. Where a protection finding exists, s 197C(3) means the person cannot be removed to the country of risk even after an adverse s 501/501CA decision; they remain unlawful non-citizens unless granted another visa or removed to a different country, and are largely barred from further visa applications (save a Bridging R). Where no protection finding exists, non-refoulement claims must be considered but detailed assessment can be deferred to the protection-visa process; prior non-refoulement assessments outside that process do not engage s 197C(3), and adverse s 501/501CA decisions may still be made, with alternatives such as third-country removal, a s 195A grant, or a residence determination.

The Full Court in *WKMZ*¹⁰⁸ upheld an Administrative Appeals Tribunal decision that took at 'face value' the government's policy that people will not be removed in breach of non-refoulement obligations, noting that individuals still have the opportunity to seek Ministerial intervention to prevent removal to a third country. However, as a policy matter, this reliance on non-compellable, behind-the-scenes discretion is far from satisfactory.

The Law Council of Australia and others have consistently argued that fundamental protection against refoulement should not hinge on ministerial grace – it should be embedded in the law.¹⁰⁹ The period between *BAL19* and the Full Court decision illustrated the uncertainty: the Department effectively stalled and resorted to work around measures (like invoking s 36(1C) more) rather than promptly resolving the fate of those with character issues.¹¹⁰

Even after the law was settled, the 'solution' for refugees who fail s 501 has often been prolonged detention while the Minister deliberates over possible visas or third-country resettlement options that rarely eventuate.¹¹¹ This system lacks transparency, and individuals have limited rights to review or challenge a Minister's inaction or refusal to exercise discretion.¹¹²

The upshot is a policy that prioritises governmental flexibility and risk aversion over

¹⁰⁷ See, for example, *Migration Act 1958* (Cth), s 195A.

¹⁰⁸ *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2021) 285 FCR 463.

¹⁰⁹ Law Council of Australia, above n 2.

¹¹⁰ Crock and Bones, above n 66, 190.

¹¹¹ Compare *TCXM v Minister for Immigration and Multicultural Affairs* [2025] FCA 540.

¹¹² See generally *Migration Act 1958* (Cth), ss 48B, 76AAA, 189, 197C, 198, 198AAA, 198AHA, 198AHB, 501.

the rights and certainty of refugees. It is debatable whether community safety genuinely demands such an expansive character power in the refugee context, given that s 36(1C) already filters out those who pose a serious danger. Moreover, ordinary criminal law mechanisms exist to address any risk a refugee might pose (such as prosecution, control orders, or monitoring), without needing to deny them immigration status altogether.¹¹³ The additional sweep of s 501 may thus be seen as a political tool – a message that ‘undesirable’ non-citizens are not welcome – rather than a carefully calibrated safety measure.¹¹⁴

Rule of Law and Duplicative Penalties. There is also a rule of law angle to consider.¹¹⁵ Refugees who commit crimes are punished through the criminal justice system (sentences, etc.), but migration law overlays a second penalty: the prospect of visa refusal or cancellation and expulsion. This intersection of criminal law and immigration law, termed ‘crimmigration,’ has been described by scholars as a creeping expansion of executive power over non-citizens’ lives.¹¹⁶

The character test in s 501 is a prime example of crimmigration logic, allowing what is effectively banishment or exile based on conduct.¹¹⁷ While expulsion of non-citizens with criminal history is not unusual internationally,¹¹⁸ applying it to refugees is where it conflicts with humanitarian principles.

The Refugee Convention allows expulsion of refugees only for the gravest crimes or security threats.¹¹⁹ Australia’s use of s 501 to reach beyond those limits can be viewed as undermining the Convention’s balance between protecting refugees and protecting the host community. Furthermore, the inconsistency between domestic law and international obligation can damage Australia’s reputation and moral authority on human rights issues.¹²⁰ It has been pointed out that Australia’s *Migration Act* ‘does not

¹¹³ See Ben Saul, ‘Dark Justice: Australia’s Indefinite Detention of Refugees on Security Grounds under International Human Rights Law’ (2012) 13(2) *Melbourne Journal of International Law* 685, 715-17.

¹¹⁴ Peter Billings, ‘Regulating crimmigrants through the ‘character test’: exploring the consequences of mandatory visa cancellation for the fundamental rights of non-citizens in Australia’ (2019) 71 *Crime, Law & Social Change* 1, 3-4.

¹¹⁵ See Jason Donnelly, ‘Utilisation of National Interest Criteria in the *Migration Act* 1958 (Cth) – A Threat to Rule of Law Values?’ (2017) 7(1) *Victoria University Law and Justice Journal* 94.

¹¹⁶ Popularisation of the term crimmigration law has been attributed to United States academic Juliet Stumpf: see Juliet Stumpf, ‘The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power’ (2006) 56(2) *American University Law Review* 367; Juliet Stumpf, ‘The Process is the Punishment in Crimmigration Law’ in Katja Franko Aas and Mary Bosworth, (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press, 2013) 59.

¹¹⁷ See Schedule 5 of the *Migration Regulations 1994* (Cth).

¹¹⁸ Walter Kälin, ‘Aliens, Expulsion and Deportation’ in Max Planck Encyclopedia of Public International Law (online, 2010) <<https://doi.org/10.1093/law:epil/9780199231690/e745>>

¹¹⁹ Başak Çalı, Cathryn Costello and Stewart Cunningham, ‘Hard Protection through Soft Courts? Non-Refoulement before the United Nations Treaty Bodies’ (2020) 21(3) *German Law Journal* 355.

¹²⁰ Australian Human Rights Commission, ‘Australia’s Human Rights Obligations’ (Web Page, 2004) <<https://humanrights.gov.au/our-work/4-australias-human-rights-obligations/>>

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necessarily conform with international law' in this arena¹²¹ – a conscious legislative choice that draws criticism from the United Nations and civil society.

If Australia were to align more closely with global standards, it might confine its exclusion of refugees to the terms of Article 33(2) (essentially what s 36(1C) already does) and not go further. The current dual-test regime arguably represents a *policy overshoot*, catching people who international law would still protect.

Cases like *BAL19* put a human face on this issue: a blind, mentally unwell refugee with a relatively modest criminal profile ended up detained for years because of the ultra-strict approach. In the end, after lengthy litigation, *BAL19* was released into the community – but only because he won in court on other grounds, and then the Minister chose not to pursue removal.¹²² Many others in similar predicaments have not been as fortunate.¹²³

VII RECENT DEVELOPMENTS

This field has evolved rapidly and remains subject to continual revision, driven both by the jurisprudence of the Federal Court of Australia and by swiftly enacted legislation of the Commonwealth Parliament. Accordingly, before turning to proposed reforms, it is necessary to situate the analysis within the most recent developments in Australian refugee law.

Perhaps one of the most important constitutional and immigration cases in Australian history was decided on 28 November 2023. In *NZYQ*,¹²⁴ the High Court of Australia held that although ss 189(1) and 196(1) of the *Migration Act 1958* (Cth) authorise detention, they are unconstitutional as applied where there is no real prospect of removal in the reasonably foreseeable future; executive detention must be limited to what is reasonably necessary to effect removal.

Overruling *Al-Kateb*'s¹²⁵ constitutional holding, the Court found the plaintiff's detention unlawful since 30 May 2023, issued habeas corpus, and noted this did not confer a right to remain or preclude re-detention if removal later becomes practicable. The effect of *NZYQ* was that various non-citizens with serious criminal records were required to be released.

In response, the Commonwealth progressively introduced a suite of laws to address the implications of the decision in *NZYQ*. For example, on 16 November 2023, the Government introduced the Migration Amendment (Bridging Visa Conditions) Bill

¹²¹ *Minister for Immigration v BFW20* (2020) 279 FCR 475 [149]–[150], [154]. See further *ENT19 v Minister for Home Affairs* (2023) 278 CLR 75 [39].

¹²² See further *FRVT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] AATA 294.

¹²³ Compare *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398.

¹²⁴ *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137.

¹²⁵ *Al-Kateb v Godwin* (2004) 219 CLR 562.

2023. The Bill tightens management of the post-*NZYQ* cohort by replacing existing Bridging (Removal Pending) visas with a new BVR carrying mandatory conditions—reporting, attendance, disclosure, curfew and electronic monitoring—enforced by new criminal offences for breaches. It deems affected non-citizens eligible for grant without natural justice at grant, requires post-grant notice, and allows applications to vary conditions (with merits review on refusal) while removal remains impracticable.

On 27 November 2023, the Government introduced the Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023. This bill introduced stronger Subclass 070 BVR controls: new offences (mandatory minimum 1 year; maximum 5 years/300 penalty units) for breaching conditions barring work/activities with children or vulnerable people, entering set school/childcare exclusion zones (eg 200 metres), or contacting victims; expanded powers to fit/run electronic monitoring and share data; a stricter test for varying conditions ('reasonably necessary' to protect the community); and a new s 76F detailing monitoring powers. The offences apply to BVRs granted after commencement and to post-commencement conduct by existing holders, with the measures asserted as human-rights compatible.

On 26 March 2024, the Government introduced the Migration Amendment (Removal and Other Measures) Bill 2024. This post-*NZYQ* bill: (i) codifies cooperation duties and lets the Minister issue 'removal-pathway' directions to specified cohorts; (ii) creates a non-compliance offence (mandatory minimum 12 months; maximum 5 years/300 penalty units) with a limited reasonable-excuse defence and carve-outs (eg, children, pending protection applicants, no directions about courts/tribunals or Australian visa applications, and none relating to protection-finding countries); (iii) allows designation of 'removal concern countries' that generally bars offshore visa applications, subject to exceptions and a personal public-interest override; (iv) permits reconsideration of protection findings for specified lawful non-citizens (expanding s 197D); and (v) clarifies further BVRs may be granted without a fresh invitation—asserting low fiscal impact and human-rights compatibility.

Unsurprisingly, the preceding bills (which later became law) led to a suite of legal cases. For example, in *Plaintiff S22/2025*,¹²⁶ the High Court granted an extension of time under s 486A but otherwise rejected all grounds. The Court held the delegate's non-revocation decision under s 501CA(4) was not affected by jurisdictional error: the delegate adequately addressed the legal consequences (including post-*NZYQ* release to a BVR), correctly applied Direction 110 on community expectations, and did not deny procedural fairness or act unreasonably by referring to legal advice inadvertently provided (which merely quoted sentencing remarks). No relief was granted and costs were ordered against the plaintiff.

On 26 August 2025, the Government introduced the Home Affairs Legislation

¹²⁶ *Plaintiff S22-2025 v Minister for Immigration and Multicultural Affairs* [2025] HCA 36.

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Amendment (2025 Measures No. 1) Bill 2025.¹²⁷ This bill poses significant human-rights risks by disapplying procedural fairness at critical junctures of the removal pathway, including the making and use of third-country reception arrangements,¹²⁸ compulsory directions to non-citizens, and the collection, use and disclosure of personal and criminal-history information.

In practice, this facilitates offshore transfer without an opportunity to be heard on safety, health, family unity or non-refoulement concerns; expands privacy-intrusive data sharing absent proportionality checks; and narrows access to an effective pre-removal remedy. The Bill's retrospective validation of executive actions and wide classes of visa decisions further undermines legal certainty and extinguishes potential claims.

These measures disproportionately affect refugees and other vulnerable non-citizens at the 'final steps' of removal, heightening risks of arbitrary detention, unsafe transfer, and irreparable harm, while compressed parliamentary scrutiny compounds the likelihood of disproportionate interferences with fair hearing, privacy, liberty and protection obligations.

The impugned bill was a partial response to the decision in *TCXM*.¹²⁹ There, Moshinsky J dismissed an Iranian applicant's challenge to a s 76AAA notice and proposed removal to Nauru under a third-country reception arrangement, holding that the interim Australia–Nauru arrangement was an exercise of non-statutory executive power not conditioned by procedural fairness; the statutory application for a Nauru long-term stay visa under s 198AHB(2) likewise attracted no such obligation; the applicant held valid 'permission' to enter and remain in Nauru; the s 197C(3)¹³⁰ indirect-refoulement exception and s 198 'reasonable practicability' arguments (including medical/mental-health claims and Nauruan facilities) failed; leave to add a new ground was refused; and the application was dismissed with costs subject to short-term suppression/redaction orders.¹³¹

Recent developments confirm the thesis of this article: s 501's broad 'character test' continues to eclipse the narrow, Convention-based exclusions in s 36(1C). *NZYQ* curtailed indefinite detention, but Parliament quickly rebuilt control at liberty through post-*NZYQ* laws (enhanced BVR conditions, new offences, 'removal-pathway')

¹²⁷ The Bill passed both Houses of the Commonwealth Parliament on 4 September 2025.

¹²⁸ A 'third-country reception arrangement' is any (binding or non-binding) deal between Australia and another country to remove non-citizens from Australia and have that country accept/host them. It authorises Australian action and payments to implement it and covers the host country's reception functions (including, if it chooses, restraint of liberty): see *Migration Act 1958* (Cth), s 76AAA.

¹²⁹ *TCXM v Minister for Immigration and Multicultural Affairs* [2025] FCA 540.

¹³⁰ See further the Migration Amendment (Clarifying International Obligations for Removal) Bill 2021, which amended the *Migration Act 1958* (Cth) to: (i) clarify that an unlawful non-citizen with a protection finding cannot be removed unless the finding is set aside, the Minister is satisfied protection obligations no longer apply, or the person requests voluntary removal; and (ii) require protection obligations to be assessed in every protection-visa application, even where the applicant is otherwise ineligible due to criminal conduct or security risks.

¹³¹ See further *GNHW v Minister for Immigration and Multicultural Affairs* [2025] FCA 990.

directions). *Plaintiff S22/2025* shows decision-makers, via Direction 110, can weight ‘community expectations’ and treat BVR release as the consequence—leaving the s 501 override intact. The 2025 Measures No. 1 Bill disapplies procedural fairness and validates past executive action, while *TCXM* accepts third-country transfers without fairness safeguards. Together they entrench a two-layer filter, intensify refolement pressure, and strengthen the case to disable s 501 once s 36(1C) is met or, failing that, impose proportionality and rights safeguards.

VIII POSSIBLE REFORMS

In the current political climate, as the recent legislative changes demonstrate, government priorities are dominated by community safety—and by the appearance of taking all necessary measures to secure it. Correspondingly, the rights and legal certainty of refugees are relegated to a secondary concern. It is accepted that the proposed reforms outlined below will face considerable legislative difficulty under the current Commonwealth Government.

A statutory carve-out for protection claims. The cleanest fix is to amend s 501 so that it simply ‘switches off’ once an applicant has been found to engage Australia’s protection obligations. The amendment could track the language of s 36(1C): a protection visa could only be refused or cancelled on the narrow grounds that (a) the person is a danger to Australia’s security, or (b) they have a final conviction for a ‘particularly serious crime’ and constitute a present danger to the community.

Everything else—drug offences with no continuing risk, long-ago minor assaults, traffic crimes—would fall outside refusal power. This would realign the *Migration Act* with art 33(2) of the Refugee Convention and the parallel provision in the ICCPR and CAT, while removing an incentive to stretch s 501 for essentially symbolic or political purposes.

Proportionality and ‘least-restrictive-means’ tests. If Parliament is unwilling to jettison s 501 for refugees altogether, it could require decision-makers to apply a proportionality framework modelled on human-rights statutes overseas. The Minister (or delegate) would have to show that refusing or cancelling the visa is necessary and the least restrictive means of protecting the Australian community. A statutory list of alternative risk-mitigation measures (criminal prosecution, control orders, electronic monitoring, parole conditions, etc) would force the decision-maker to justify why ordinary criminal-law mechanisms are inadequate—mirroring approaches taken by the

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UK Supreme Court in *R (F) v Secretary of State for the Home Department*¹³² and by the CJEU in *H.T. v Land Baden-Württemberg*.¹³³

Mandatory human-rights compatibility statements and oversight. Parliament could make any use of s 501 against a person owed protection conditional on a public 'Human Rights Compatibility Statement' certified by the Minister and tabled in Parliament—similar to the Statement of Compatibility already required for Bills under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth). This transparency device would expose politically driven refusals to greater scrutiny and make it easier for the Senate Scrutiny of Delegated Legislation Committee (or a re-empowered Inspector-General of Immigration) to police overreach.

Ministerial Direction under s 499 as an interim measure. While awaiting legislative change, the government could issue a new Direction making non-refoulement obligations a primary factor that will generally outweigh subsidiary 'character' concerns where prosecution or other risk-management tools are available.¹³⁴ Directions are binding on delegates and the ART, ensuring consistent front-line decision-making without the delays of a full statutory amendment.

Further, s 500(6L) of the *Migration Act* sets a strict 84-day timeframe for the ART to decide reviews of decisions under s 501 or non-revocation decisions under s 501CA(4) concerning a person in the migration zone, counted from the date the person was notified under s 501G(1), by reference to the ART Act provisions listed in s 500(6M).

¹³² *R (F) v Secretary of State for the Home Department* [2010] UKSC 17; [2010] 2 AC 269. There, the UK Supreme Court unanimously held that imposing lifelong sex-offender notification requirements without any prospect of review breached the right to respect for private life under Article 8 of the *European Convention on Human Rights*. While accepting that initial registration served a legitimate public-safety aim, the Court found the regime disproportionate because it failed to account for the possibility that an offender's risk might diminish over time. Declaring the relevant provisions of the *Sexual Offences Act 2003* incompatible with the Convention, the Court obliged Parliament to introduce a mechanism—after a reasonable minimum period—by which offenders could demonstrate they no longer posed a threat, underscoring the principle that preventive measures must be subject to periodic reassessment.

¹³³ *H T v Land Baden-Württemberg* (Case C-373/13, Court of Justice of the European Union (Grand Chamber), 24 June 2015) ECLI:EU:C:2015:413. There, the Court held that a Member State may withdraw a refugee's status and residence permit under art 14(4)(b) of the Recast Qualification Directive where the person has been convicted of a 'particularly serious crime', but this does not lift the State's continuing duty of non-refoulement. Even after status is revoked, national authorities must carry out an individual, future-oriented assessment to determine whether the refugee now represents a genuine, present and sufficiently serious threat to public security; only if that test is met, and removal would not expose the person to persecution or other serious harm, may expulsion be pursued. The Court stressed that revocation does not automatically extinguish rights under art 21 of the Directive or art 33 of the Refugee Convention, and that Member States must respect proportionality and fundamental rights, potentially issuing an alternative legal status to ensure protection against refoulement.

¹³⁴ Non-refoulement obligations are generally relegated to 'other considerations' rather than 'primary considerations' in Direction No. 110.

Section 500(6L) is restrictive because it imposes a hard 84-day deadline for the ART to determine s 501 and s 501CA(4) reviews, after which the primary decision is effectively locked in. For applicants, that compressed timetable limits time to secure representation, gather evidence (eg, sentencing material, medical or risk reports), obtain interpreters, or respond to adverse information, and it curtails adjournments. For the Tribunal, it constrains case-management discretion, discourages fuller inquiry or awaiting related outcomes, and forces expedited hearings that risk thinner reasoning and reduced procedural flexibility.

Section 500(6L) should be amended to replace the hard 84-day deadline with 140 days—a more realistic period for the ART to determine reviews under s 500 of the *Migration Act*.

Sunset and reporting clauses for future-proofing. Any reform that leaves some role for s 501 could incorporate a five-year sunset clause plus an annual reporting duty on the number of refugees refused or cancelled under s 501, the nature of their offending, and the risk-mitigation alternatives considered. Empirical data would inform any future extension and guard against mission creep.

Benefits of the reform package. Taken together, these measures would shift the balance from a blunt, politically loaded migration penalty toward a targeted, rights-consistent public-safety framework—bringing the Act back into line with the spirit and text of the Refugee Convention while still allowing the government to protect the community when prosecution or other criminal-law tools are genuinely inadequate.

VIII CONCLUSION

The uneasy coexistence of s 36(1C) and s 501 exposes a structural flaw at the heart of Australia's refugee protection architecture. Parliament set out in s 36(1C) a carefully calibrated, Convention-consistent threshold for refusing protection to those who pose an exceptional danger; yet the retention of the far broader s 501-character test allows decision-makers to bypass that standard and refuse refugees for conduct or risk well short of the 'particularly serious crime' or national-security benchmarks.

The Full Federal Court's endorsement of this dual-test regime resolves the question of statutory interpretation but leaves undiminished the normative problem: a refugee who is not excluded by art 33(2) may nevertheless be denied status, detained for a prolonged period, and exposed to refolement pressures—in tension with Australia's treaty undertakings, rule-of-law values, and basic policy coherence.

This article has shown that the present framework produces duplicative decision-making, legal uncertainty, and significant human and fiscal cost without demonstrable public-safety gains. Ordinary criminal-law mechanisms—prosecution, control orders, parole conditions, monitoring—already provide proportionate tools to address any genuine risk. Section 501 therefore operates less as a finely tuned protective measure and more as a political signal of exclusion, disproportionately burdening a cohort whom international law regards as deserving of sanctuary except in the most egregious cases.

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Reform is both feasible and necessary. A statutory carve-out that ‘switches off’ s 501 once a refugee passes the s 36(1C) test would restore doctrinal clarity and fidelity to the Refugee Convention. Short of that, embedding proportionality requirements, mandatory human-rights statements, and sunset-and-reporting clauses would temper ministerial discretion and re-centre non-refoulement as a primary consideration.¹³⁵ These changes would not weaken community safety; they would channel risk-management into transparent, rights-respecting processes and reduce the likelihood of indefinite detention quagmires.

Ultimately, Australia’s credibility in global protection discourse—and the integrity of its own migration system—depends on aligning domestic law with the principled balance struck by art 33(2): offering refuge to those in need while reserving exclusion for the truly dangerous. The reforms canvassed here would replace a blunt, overlapping regime with a coherent, proportionate model fit for a liberal democracy committed to both security and human rights.¹³⁶

¹³⁵ Jason Donnelly, ‘The Impact of Ministerial Direction 110 on Australia’s International Law Obligations’ (2025) 8(1) *International Journal of Law and Society* 45.

¹³⁶ The author of this article was counsel in the following cases discussed in this article: *ENT19 v Minister for Home Affairs* (2023) 278 CLR 75; *FRVT and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (Migration) [2020] AATA 294; *Minister for Immigration, Citizenship and Multicultural Affairs v McQueen* (2024) 94 ALJR 594; *Minister for Immigration and Border Protection v Makasa* (2021) 270 CLR 430; *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 274 CLR 398; *TCXM v Minister for Immigration and Multicultural Affairs* [2025] FCA 540.

