Decision and Reasons for Decision

Administrative Review Tribunal

Applicant/s:	**Dennis McClements**
Respondent:	**Minister for Immigration and Citizenship**
Tribunal Number:	**2026/0006**
Tribunal:	**General Member S Evans**
Place:	**Sydney**
Date:	**5 May 2026**
Decision:	The reviewable decision is set aside, and the matter is remitted to the Respondent with the direction that the discretion provided in s 501(1) to refuse to grant the visa is not exercised.

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

General Member S Evans

Catchwords

MIGRATION – *Application for provisional partner visa – intention to reside indefinitely - where applicant does not pass the character test - refusal to grant visa on character grounds –whether to exercise discretion to refuse to grant visa – citizen of the United Kingdom – Australian citizen spouse – permanent resident of New Zealand - provision of false or misleading information to the Australian government – ties to the Australian community - decision under review set aside*

Legislation

Migration Act 1958 (Cth)

Cases

Arachchi v Minister for Immigration, Citizenship and Multicultural Affairs [2022] FCA 1311
FYBR v Minister for Home Affairs [2019] FCAFC 185
R v Cummins [2005] NILST 1

Secondary Materials

Direction no. 110 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA
Migration Regulations 1994 (Cth)

Statement of Reasons

INTRODUCTION

1. Dennis McClements ('the Applicant') seeks review of a decision of a delegate of the Minister for Immigration and Citizenship ('the Respondent') made on 10 December 2025 refusing to grant the Applicant a Partner (Provisional) (UF-309) visa ('the visa') under s 501 of the *Migration Act 1958* ('the Act').

BACKGROUND AND EVIDENCE

2. The Applicant is a 46-year-old citizen of the United Kingdom ('UK') who has never travelled to Australia and currently resides in New Zealand with his wife, Mrs McClements.

3. On 29 June 2001 the Applicant was convicted in the Antrim Crown Court in Northern Ireland *grievous bodily harm with intent* ('the GBH offence'). The conviction related to offending which occurred on 30 March 2000 for which he was sentenced to 3 years imprisonment and 18 months' probation. The Applicant also has two drink driving convictions – one in 2000 and another in 2008.

4. On 20 December 2023 the Applicant made a combined application for the visa and a Partner (Migrant) (BC-100) visa.[1] On 9 May 2025 notice of intention to consider refusal was sent to the Applicant to which he provided further information. On 10 December 2025 the delegate decided to refuse to grant the Applicant the visa. The Applicant applied to the Tribunal for merits review of the delegate's decision on 6 January 2026.

5. The Applicant and his wife met in 2018 through mutual friends, and they married in November 2021.[2] They currently reside in New Zealand, where the Applicant is a permanent resident. His family members in Australia include his adult stepdaughters DT and DS, and their minor children HY and AY.

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[1] Hearing Book ('HB') 358.
[2] HB 142.

6. The Applicant has provided statements and gave evidence at the hearing. He acknowledges his offending and says he is no longer the person he was when he committed the GBH offence. He deeply regrets his offending and the shame and stigma have deeply affected him.

7. After the GBH offence in 2000, the Applicant attended church and publicly acknowledged his remorse before his community. He sought forgiveness before moving away from Northern Ireland to start a new life and leave the stigma of his past behind.

8. He stated that he now has a wife, stepchildren, grandchildren, business responsibilities and a different outlook on life. He has worked hard, has not reoffended and built a stable and honest life.

9. The Applicant expects refusal of the visa will have severe consequences for the Applicant and his family. His wife will face the difficult choice of living with her husband or her children and grandchildren, and it will deprive his stepdaughters and step-grandchildren of a loving and supportive adult. It will limit the practical, emotional and financial support that he and his wife can provide to his stepdaughters and step-grandchildren.

10. The Applicant claims to have been offered work through friends in Australia and understands there may be an opportunity to work towards a business partnership in the future. At a minimum he is confident he will be able to obtain work as a plasterer. [3]

11. The Applicant has provided character references and statements from family members, professional colleagues and others - some of whom have known him for more than 30 years. The following are indicative of the references from those who are not related to the Applicant.

12. In a handwritten statement dated 24 June 2019, John Boyd writes that he arrested the Applicant following the GBH offence and that he admitted his involvement in the crime. He believes that the evidence of the Applicant and his sister went ‘a long way to assisting the jury to find one of the individuals guilty of murder’.[4] According to Mr Boyd, the Applicant

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[3] HB 483.
[4] HB 246-248.

subsequently turned his life around and worked hard after his release from prison. Mr Boyd was not made available to provide evidence at the hearing.

13. In an email dated 7 January 2026, Alex Brown, a retired police inspector at the Royal Ulster Constabulary, writes he first met the Applicant after his release from prison and also knows Mr Boyd.[5] He reflected on the Applicant's remorse, accountability and determination to be a constructive member of society.

14. Andrew McFarlane has known the Applicant since he was 15 years old and said the GBH offence and circumstances were well known in the local area. He wrote that the Applicant has maintained strong relations with his family and strong ties within the community, despite having lived away from the area for many years.[6] He, like others, notes the Applicant's generous sponsorship of the local football team.

15. The Applicant's family including his wife, mother-in-law and step-daughters also provided statements.

16. Mrs McClements is an Australian citizen, and refusal of the visa would cause her severe emotional, financial and physical hardship. She explained that residing in New Zealand has reduced her and the Applicant's combined income and placed them under significant financial stress. She owns a property in Australia and fears she will not be able to pay off the mortgage before she retires if she remains in New Zealand. She wishes to bring her elderly mother to live in Australia with her and the Applicant so she can be closer to her granddaughters.

17. The Applicant's stepdaughters both speak to the close relationship they enjoy with him and his importance to their family. They lack family support in Australia and have strong emotional and practical reasons for wanting their mother and the Applicant to return from New Zealand.

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[5] HB 437-438.
[6] HB 442-443.

RELEVANT LAW AND MINISTERIAL DIRECTION

18. Subsection 501(1) of the Act provides that the Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

19. Paragraph 501(6)(a) of the Act provides that a person does not pass the character test if they have a 'substantial criminal record'. Paragraph 501(7)(c) of the Act provides that a person has a substantial criminal record if the person has been sentenced to a term of imprisonment of 12 months or more.

20. As the Applicant was sentenced to a custody probation order with 3 years' imprisonment and 18 months' probation in June 2001, I am satisfied he does not pass the character test on the basis of s 501(6)(a) and s 501(7)(c) of the Act.[7]

21. As the Applicant does not pass the character test, the discretion in s 501(1) to refuse the Applicant's visa application is enlivened.

22. Subsection 499(1) of the Act provides that the Minister may give written directions about the exercise of functions or powers under the Act. The relevant direction is *Direction no. 110 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* ('the Direction' or 'Direction 110').[8]

23. Paragraph 5.2 of Direction 110 provides overarching principles which I am to consider when deciding whether to refuse a non-citizen's visa under section 501.

> *(1) Australia has a sovereign right to determine whether non-citizens who are of character concern are allowed to enter and/or remain in Australia. Being able to come to or remain in Australia is a privilege Australia confers on non-citizens in the expectation that they are, and have been, law-abiding, will respect important institutions, such as Australia's law enforcement framework, and will not cause or threaten harm to individuals or the Australian community.*
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> *(2) The safety of the Australian Community is the highest priority of the Australian Government.*

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[7] HB 42-43.

[8] *Direction no. 110 – Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA* (7 June 2024).

(3) Non-citizens who engage or have engaged in criminal or other serious conduct should expect to be denied the privilege of coming to, or to forfeit the privilege of staying in, Australia.

(4) The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they engaged in conduct, in Australia or elsewhere, that raises serious character concerns. This expectation of the Australian community applies regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.

(5) Australia has a low tolerance of any criminal or other serious conduct by visa applicants or those holding a limited stay visa, or by other non-citizens who have been participating in, and contributing to, the Australian community only for a short period of time.

(6) With respect to decisions to refuse, cancel, and revoke cancellation of a visa, Australia may afford a higher level of tolerance of criminal or other serious conduct by non-citizens who have lived in the Australian community for most of their life, or from a very young age.

(7) Decision-makers must take into account the primary and other considerations relevant to the individual case. In some circumstances, the nature of the non-citizen's conduct, or the harm that would be caused if the conduct were to be repeated, may be so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation.

(8) The inherent nature of certain conduct such as family violence is so serious that even strong countervailing considerations may be insufficient to justify not cancelling or refusing the visa, or revoking a mandatory cancellation, even if the information available at the time of consideration suggests that the non-citizen does not pose a measurable risk of causing physical harm to the Australian community.

24. Part 2 of Direction 110 identifies the considerations the Tribunal must take into account where relevant to a decision.[9] In applying the considerations, information and evidence from independent and authoritative sources should be given appropriate weight. The primary consideration of the protection of the Australian community is generally to be given greater weight than other primary considerations. Otherwise, primary considerations should generally be given greater weight than the other considerations. One or more primary considerations may outweigh other primary considerations.

25. The primary considerations in the Direction are:

(1) protection of the Australian community from criminal or other serious conduct;

(2) whether the conduct engaged in constituted family violence;

[9] Ibid part 2.

(3) the strength, nature and duration of ties to Australia;

(4) the best interests of minor children in Australia; and

(5) expectations of the Australian community.

26. The other considerations set out in Direction 110 which must be taken into account where relevant include, but are not limited to:

a) legal consequences of the decision;

b) extent of impediments if removed;

c) impact on Australian business interests.

ISSUE

27. As I am satisfied that the Applicant does not pass the character test by virtue of having a substantial criminal record, the issue to be determined is whether to exercise the discretion to refuse to grant the Applicant the visa.

CONSIDERATION

Primary Consideration 1: Protection of the Australian Community

28. The Direction requires me to have regard to the protection of the Australia community from criminal or other serious conduct. Relevantly, paragraph 8.1.1 of the Direction states:[10]

> *When considering protection of the Australian community, decision-makers should keep in mind that the safety of the Australian community is the highest priority of the Australian Government. To that end, the Government is committed to protecting the Australian community from harm as a result of criminal activity or other serious conduct by non-citizens. In this respect, decision-makers should have particular regard to the principle that entering or remaining in Australia is a privilege that Australia confers on non-citizens in the expectation that they are, and have been, law abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.*

29. Paragraph 8.1.1. provides that decision-makers should also give consideration to the nature and seriousness of the non-citizen's conduct to date and identifies a range of factors that the Tribunal should have regard to. The factors include the type of conduct, the sentences imposed by the courts and whether the non-citizen has provided false or misleading information to the Department, including by not disclosing prior criminal offending.

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[10] Direction paragraph 8.1.1.

The nature and seriousness of the Applicant's conduct

Grievous bodily harm with intent

30. On 29 June 2001 the Applicant was convicted in the Antrim Crown Court in Northern Ireland of *grievous bodily harm with intent*. The conviction related to offending which occurred on 30 March 2000, and he was sentenced to 3 years imprisonment and 18 months' probation.

31. The Applicant does not dispute the conviction or the sentence imposed upon him as recorded in the UK police certificate. I do not have the benefit of the Applicant's court file, police facts or the judge's sentencing remarks in Antrim Crown Court. However, in evidence is the decision of the *Queen v Samuel David Jospeh Cummins – Decision on Tariff* ('the Cummins decision').[11] Mr Cummins was one of the Applicant's co-offenders and the sentencing arose from the same incident from which the Applicant's conviction arose. Also in evidence are BBC News and Belfast Telegraph articles reporting the offence, trial and convictions.

32. The Cummins decision sets out the basic facts of the incident which led to the conviction, albeit with the focus on the role of Mr Cummins, who was the principal perpetrator of the attack and convicted of murder:[12]

> *On 29 June 2001 the prisoner, Samuel David Joseph Cummins, was found guilty of the murder of Guy Benson Harper on 30 March 2000. Mr Harper was just three days short of his twenty-sixth birthday…*
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> *…*
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> *At around midnight on the morning of 30 March 2000 the deceased went with a friend to Kelly's Nightclub, Portrush. He was known to the staff of the club and was considered to be an affable and peaceable customer. One staff member described him as "a model patron, a perfect gentleman". At around 2.15am he left the premises in what one witness described as "his usual good form". Outside the club the deceased met up with an acquaintance, Ryan Simmonds, and they started walking home. As they walked along the Bushmills Road the deceased stopped to relieve himself. Mr Simmonds proceeded a short distance and then turned round to wait for the deceased. He saw a crowd fighting on the road and ran back to see what was happening, but as he reached it he was punched in the face and knocked to the ground by the prisoner. He left the scene and walked home without again seeing the deceased. (The prisoner was prosecuted for the assault on Mr Simmonds and sentenced to 6 months' imprisonment.)*

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[11] *R v Cummins* [2005] NILST 1.

[12] HB 44-51.

Witnesses observed the deceased in a confrontation with a number of other men. He was seen to be punched to the ground. A taxi driver who passed the affray noticed a number of men taking turns to kick the deceased as he lay on the road. In his statement to the police he said they were kicking very hard, in a "vicious manner…like a pack of animals trying to outdo each other…it was frightening to watch". He then saw the prisoner bend over the deceased, grab him by the hair and, with all his force, smash his face into the road around three times while others continued to kick him. After a brief respite the prisoner is said to have returned to the deceased and stamped "as hard as he could" three times on his head. The witness telephoned the police. He estimated that the assault lasted 3 to 4 minutes.

Another witness noticed (in the context of violent assaults by others) the prisoner kick the deceased repeatedly on the head and stamping on it 3 times before kneeling down, grabbing the deceased's hair and banging his head off the road 3 times. A number of witnesses said that the prisoner seemed to be doing the most of the kicking. One said that he continued to kick the deceased for 15 seconds after the others had stopped, and that his blows were to the head while the others kicked the body. Another said that he specifically kept watch on the prisoner as he "was doing more harm to the fella on the ground". After the assault on the deceased the prisoner was then seen to assault Mr Simmonds. A number of witnesses noticed Carrie McClements with the assailants. She was seen trying to stop the assault.

Police officers who arrived at the scene at around 2.30am found that bystanders had moved the deceased to the pavement. They tried to locate a pulse but were unsuccessful. Resuscitation was attempted. An ambulance arrived at 2.34am and further attempts were made to resuscitate the deceased, who was then taken to Coleraine Hospital. Brain stem tests were administered at 4pm on 30 March 2000 when life was formally pronounced extinct. Support systems were removed at 7.20pm. His father formally identified the deceased's body.

A post mortem examination was performed by Professor Jack State Pathologist, on the morning of Thursday 30 March 2000. Professor Crane concluded that the cause of death was subarachnoid haemorrhage, bruising and oedema of the brain due to blows to the head…

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It was suggested that this was a case that fell within the normal starting point of twelve years. We do not accept that claim. This was not a quarrel between two people known to each other where there was a sudden loss of control. On the contrary, this was a concerted savage merciless attack on a young man who throughout most of the attack, and certainly when he sustained the fatal injuries, was utterly incapable of offering any defence whatever to the brutal assault on him.

The prisoner was the principal perpetrator of the attack and he it was who grasped the hair of the senseless victim and smashed his face into the ground. This gratuitous act alone makes this a case that merits condign punishment. The case is clearly within the higher starting point category but, quite apart from that consideration, it is one where a substantial sentence for the retribution and deterrence aspects of punishment must be imposed. Society expects that its abhorrence of such behaviour is marked with a severe penalty. Furthermore, so that those who carry out these all too prevalent attacks are aware that they will be dealt with rigorously a strong deterrent element must also be present.

It is conceivable that the prisoner did not intend to kill and that must be taken into account in his favour as must his youth. Other mitigating features are hard to detect.

> *There is certainly no tangible evidence of genuine remorse. The manner in which he met the charge, particularly his attempts to blame his co-accused, give the lie to claims that he is genuinely contrite about the enormous grief that he has inflicted on the family of the deceased or that he has brought about the untimely death of a fine young man.*
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> *We have learned that the deceased's father took his own life some time after the trial of the prisoner. We cannot be entirely sure that this was directly and entirely due to the killing of his son but the tenor of the representation that he made (and which we have referred to above) suggests that the two were not unrelated. If so, this dreadful development provides eloquent testimony to the devastation that a wanton act of barbarity such as the prisoner was guilty of can wreak on the lives of those bereaved. Yet, as we have said, the prisoner appears oblivious to the tragedy that he has caused and immune to the feelings of remorse that ought to have preoccupied him since his awful crime.*
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> *Taking all these factors into account and having regard to all that has been said on his behalf we consider that the appropriate tariff in this case is fifteen years…*

33. The Applicant was not convicted of murder, but Mr Cummins was. In a statutory declaration the Applicant claimed 'limited involvement' in the offending, and in earlier submissions he took issue with the facts as reported in the media articles which are in evidence, which he said unfairly exaggerate his culpability.[13] He attempted to obtain probation reports, pre-sentencing reports, and court transcripts through Conal Nolan, a solicitor in Northern Ireland. Mr Nolan was unsuccessful owing to privacy laws and the passage of time, but confirmed the Applicant served part of his sentence in a young offenders' centre and the remainder in prison:[14]

> *Mr McClements was acquitted of any involvement in the murder of Mr Harper and was also found to be innocent of manslaughter. He was convicted of the lesser charge of Section 18 Assault, and this was reflected in the relatively short sentence he served both in the Young Offenders ' Centre and adult prison in HMP Maghaberry and HMP Magilligan.*
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> *Mr McClements has provided me with the Notice of Intention to Refuse his Visa Application from the Department of Home Affairs in Australia and it would appear one of the reasons for this is that he fails the good character test which seems to be predicated on the misconception that he spent 3 years in prison which is clearly untrue. It was exactly half that tariff, namely, 18 months and it should be taken into consideration that 7½ months more than a third of this sentence was spent in the Hydebank Wood Young Offenders' Centre as Mr McClements was of a tender age and was a young man at this time.*

Drink driving offences

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[13] HB 70.

[14] HB 214-216.

34. The Applicant's UK Police Certificate states that in January 2000 he was disqualified from driving for 12 months and fined £150 for *in charge of vehicle with excess alcohol in breath* – an offence that occurred in February 1999. In April 2008 he was disqualified from driving for two years and fined £300 after being convicted of the same offence a second time.[15]

Failure to declare his convictions

35. When applying for a visitor visa in 2017, the Applicant did not declare his convictions when asked. In the visa application lodged 20 June 2019, the Applicant declared his conviction, stating that in 1997 - when he was 18 years-old - he was charged with GBH after an altercation and 'eventually sentenced to 18 months in custody'.[16] He claimed not to have been convicted or charged with any offence since 1997, and did not declare the drink driving charges. He also said that until he travelled to the United States, he was not aware that he needed to declare his conviction as his travel agent had advised it was 'spent'.

36. The Applicant has provided an email from travel agent Jonny Fielding stating that he had booked holidays for the Applicant since 2016 and advised the Applicant that he 'would not ordinarily' need to declare any conviction that was over 10 years old. Mr Fielding was not made available to give evidence at the hearing and I afford his email very limited weight.[17]

37. I agree with the Respondent's contention that the wording of the requirement to include any convictions - *including any conviction which is now removed from official records* - is clear and makes the Applicant's explanation implausible. The Applicant's account of his conviction was also incorrect. The GBH offence occurred in June 2000 – not 1997, meaning he was 20 years old, not 18, at the time of the offence.

38. The Applicant has a limited criminal history. There is no evidence of his offending having a cumulative impact or a trend of increasing seriousness. However, the conviction for *grievous bodily harm with intent* was a violent offence and violent crimes are viewed very

[15] HB 42-43.
[16] HB 98-99.
[17] HB 471.

seriously in the Direction. The Applicant accepts the impact on the victim was 'severe in the extreme', and weighs heavily in the assessment of seriousness.[18]

39. Although the offending occurred in the UK, both the GBH and drink driving offences would be an offence in Australia. The court's imposition of a term of imprisonment for the GBH offence is reflective of the seriousness of the offending. I accept the Applicant's submission that the two drink driving offences for which he was fined and disqualified for a period are less serious. I have taken into account the provision of false information by not disclosing prior criminal offending, which is also considered to be serious.[19]

40. Overall, the Applicant's offending and other conduct is very serious.

The risk to the Australian community should the non-citizen commit further offences or engage in other serious conduct

41. I accept the Respondent's submission that should the Applicant commit further violent offences, the harm caused could include very serious physical and psychological harm to the victim, including possible life-threatening injuries. Having regard to paragraph 8.1.2(1) of the Direction, I consider that the risk of harm that would be caused should the conduct be repeated is so serious that any risk it may be repeated is unacceptable.

42. In assessing the likelihood of further offending by the Applicant, I am to have regard to information and evidence on the risk of reoffending, and evidence of rehabilitation achieved by the time of the decision. As I am considering whether to refuse to grant a visa, I am also required to give consideration to whether the risk of harm may be affected by the duration and purpose of the intended stay, the type of visa being applied for and whether there are strong or compassionate reasons for granting a short stay visa.[20]

43. The Applicant's most recent offence was a charge of drink driving 18 years ago. The GBH offence occurred more than 25 years ago. I accept that since the 2008 drink driving offence,

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[18] HB 423.
[19] Direction 110, paragraph 8.1.1(1)(f).
[20] Direction 110, paragraph 8.1.2(2)(c).

there is no evidence of any further offending in either the UK or New Zealand where he has resided, or in the countries he has visited as a tourist.

44. The Applicant has provided letters of support from individuals who speak to his reform and remorse. The letter from John Boyd, who claims to have arrested the Applicant following the GBH offence, states he made a full admission and notes his subsequent rehabilitation.

45. The Applicant stated that he would have completed rehabilitation as a condition of his probation following his release from prison. While there is no evidence of formal rehabilitation, the Applicant relies on his stable work history, community supports and the absence of subsequent offending to demonstrate his reform. He has shown insight into his offending, acknowledging the influence of negative peers and youthful misjudgement on his conduct.

46. In a statement made in December 2023, the Applicant claimed to have been 'inadvertently entangled in an altercation outside a nightclub due to an ill-fated association with an unsavoury crowd.'[21] He stated that 'despite my limited involvement, the repercussions were substantial, leaving a lingering sense of shame I have felt since the events occurred to this day'. The Cummins decision and media reports indicate that Applicant was one of four offenders. Mr Cummins was convicted of murder, while the Applicant and another man were convicted of causing grievous bodily harm with intent. A fourth man, who admitted to a charge of affray, was sentenced to community service and 12 months' probation.[22] While Mr Cummins was the principal perpetrator of the crime, in my view it is inaccurate to describe the Applicant's involvement in the murder as 'limited'.

47. The Applicant now concedes he chose his words poorly. Considered in the context of his lack of candour regarding his criminal history in the visa applications, it is apparent he has sought to downplay his offending. That said, he was transparent about his past with Mrs McClements and his stepdaughters, and has acknowledged the gravity of the GBH offence in terms of the impact on the victim and community. The evidence supports a finding it was a major life event which changed the trajectory of his life.

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[21] HB 220.
[22] HB 55-58.

48. The Applicant did not plead guilty to the offence, and he was tried along with his co-accused. He gave oral evidence that the charges were contested, the trial was lengthy and critical evidence was contentious. I do not consider his failure to plead guilty indicates he sought to avoid responsibility for his conduct or indicates a lack of remorse on his part.

49. In relation to the 2000 drink driving conviction, the Applicant claims to have been asleep in his car with the ignition running as he had locked himself out of his house. He said the 2008 conviction was for driving the day after he had been drinking the night before. There is insufficient evidence to take the convictions as being anything other than drink driving, and I note the Applicant acknowledged alcohol was a factor in the GBH offence, meaning all his offending involved alcohol.

50. The Applicant has not sought or received rehabilitation in relation to alcohol or substance abuse. There is no indication that the Applicant has used illicit drugs. Outside the offending, there is no evidence of problematic alcohol consumption. The evidence since 2008 is consistent with his account of maintaining a healthy lifestyle and occasional, moderate drinking. This was consistent with the evidence of Mrs McClements and both her daughters. I am satisfied that his failure to obtain treatment for alcohol use does not increase the risk of further offending by the Applicant.

51. Having regard to the factors identified in the Direction, I consider the Applicant's violent offending was an isolated incident which occurred 25 years ago in the context of circumstances which no longer exist. The risk of further offending is remote.

Protection of the Australian community – conclusion

52. Paragraph 8.1.1.2(1) of the Direction provides that some conduct and the harm that would be caused, if it were to be repeated, is so serious that any risk it would be repeated is unacceptable. The Applicant's violent offending falls into this category and any material risk that it would be repeated is unacceptable.

53. As I am considering whether to refuse to grant a visa, I am also required to give consideration to whether the risk of harm may be affected by the duration and purpose of

the intended stay, the type of visa being applied for and whether there are strong or compassionate reasons for granting a short stay visa.[23]

54. The visa which is the subject of this review is a Partner (Provisional) (UF-309) visa, which is a temporary visa. The Applicant submits that to the extent that short stay is contemplated, any residual risk is inherently constrained by time and purpose. The Applicant and his wife have clearly stated their intention is to reside in Australia indefinitely, and have lodged a combined application for a Partner (Migrant) (BC-100) visa. I have taken this into consideration when assessing risk to the community.[24]

55. The Applicant's offending, notably the 2000 offence, is very serious. The Respondent concedes that the risk of reoffending is low. However, in the context of the passage of time and the absence of further similar offending, and the evidence of how he has conducted himself since, I am satisfied that the risk of further offending is negligible.

56. This primary consideration weighs moderately in favour of refusing the visa.

Primary consideration 2: Family violence committed by the non-citizen

57. As there is no evidence to suggest that the Applicant has committed acts of family violence, this primary consideration is not relevant and weighs neutrally.

Primary Consideration 3: The strength, nature and duration of ties to Australia

58. I am required to consider the impact of the decision on the Applicant's immediate family members in Australia, where those family members are Australian citizens, Australian permanent residents, or people who have a right to remain in Australia indefinitely. I am also required to consider the strength, nature and duration of any other ties that the visa applicant has to the Australian community having regard to:

> *(a) how long the non-citizen has resided in Australia, including whether the non-citizen arrived as a young child, noting that:*
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> *i. less weight should be given where the non-citizen began offending soon after arriving in Australia; and*

[23] Direction 110, paragraph 8.1.2(2)(c).
[24] HB 368.

ii. more weight should be given to time the non-citizen has spent contributing positively to the Australian community

(b) the strength, duration and nature of any family or social links with Australian citizens, Australian permanent residents and/or people who have an indefinite right to remain in Australia.

59. Although the Applicant has neither resided in or travelled to Australia, the decision has consequences for his Australian citizen family members in Australia, and Mrs McClements who currently resides in New Zealand. His family members in Australia include his stepdaughters DT and DS, and his step-grandson HY and step-granddaughter AY.

60. Mrs McClements owns a home in NSW which is currently being rented. She and the Applicant plan to live in the property if they can live in Australia. Mrs McClements gave evidence she is financially and emotionally dependent on the Applicant, and both need to work to pay for her mortgage, their bills and storage fees. Living in New Zealand has been financially very difficult for them due to low wages and limited opportunities in New Zealand.

61. Mrs McClements gave evidence it is impractical to have her daughters and grandchildren visit her in New Zealand for short periods, and financially not viable. Unless she and the Applicant can reside in Australia, they cannot provide the in-person, hands-on support her daughters need. She is particularly mindful that DS will need her support more now that DT has her own child to care for.

62. Although Mrs McClements is not currently residing in Australia, she is an Australian citizen who would be impacted by the decision. I consider it is in her best interests that the Applicant be granted the visa.

63. DT gave evidence that she regularly speaks to the Applicant and he is a very important part of her life. She looks to him as a father as she does not have contact with her biological father. If the Applicant is unable to come to Australia, it will have a significant impact on her. She said that the Applicant considers HY his own grandchild, and she looks forward to her daughter having a similar experience. DT is also close to her grandmother, who will return to Australia to live should the Applicant and Mrs McClements if they move to Australia.

64. DS also considers the Applicant a father figure and they communicate every day. She has raised her 3-year-old son HY without support from his biological father. She is currently

unemployed and experiencing financial difficulties. In a statement she wrote of the stress and anxiety she experienced owing to her financial situation and being separated from her mother and the Applicant. DS has a medical condition which has required hospitalisation, and recently she moved to be closer to be with her sister, who has provided her with support and assistance where she can. She hopes that the Applicant will be able to participate more in her and her son's lives when he relocates to Australia.

65. The Applicant has provided references from friends in Australia who have visited him in New Zealand, but his non-familial ties to Australia are limited.

66. The Applicant's family ties in Australia are strong. The evidence is that he is close to his stepdaughters who would benefit from his support. Mrs McClements' is unsure if she will remain in New Zealand with the Applicant or relocate to Australia should the visa be refused. The uncertainty is a cause of considerable distress for Mrs McClements and her daughters.

67. Overall, the Applicant's ties to his Australian citizen family members are significant and weigh strongly against exercising the discretion to refuse the visa.

Primary Consideration 4: Best interests of minor children affected by the decision

68. Paragraph 8.4 of the Direction requires decision-makers to decide whether the refusal is, or is not, in the best interests of minor children in Australia affected by the decision. This consideration applies only if the child is under 18 years old at the time of the decision. In considering the best interests of each child, the factors that must be considered where relevant include:[25]

> *(a) the nature and duration of the relationship between the child and the non-citizen. Less weight should generally be given where the relationship is non-parental, and/or there is no existing relationship and/or there have been long periods of absence, or limited meaningful contact (including whether an existing Court order restricts contact);*
>
> *(b) the extent to which the non-citizen is likely to play a positive parental role in the future, taking into account the length of time until the child turns 18, and including any Court orders relating to parental access and care arrangements;*
>
> *(c) the impact of the non-citizen's prior conduct, and any likely future conduct, and whether that conduct has, or will have a negative impact on the child;*

[25] Ibid.

(d) the likely effect that any separation from the non-citizen would have on the child, taking into account the child's or non-citizen's ability to maintain contact in other ways;

(e) whether there are other persons who already fulfil a parental role in relation to the child;

(f) any known views of the child (with those views being given due weight in accordance with the age and maturity of the child);

(g) evidence that the child has been, or is at risk of being, subject to, or exposed to, family violence perpetrated by the non-citizen, or has otherwise been abused or neglected by the non-citizen in any way, whether physically, sexually or mentally;

(h) evidence that the child has suffered or experienced any physical or emotional trauma arising from the non-citizen's conduct.

69. The Applicant's three-year-old step-grandson HY and his one-month-old step-granddaughter AY are in Australia. HY requires speech therapy and his mother said she would benefit from having the Applicant and her mother's support caring for him.

70. The Applicant has frequent interaction with HY and intends to do the same with AY. The Applicant and Mrs McClements have holidayed with HY and DS has taken HY to visit them in New Zealand. The Applicant and HY regularly interact through video calls and other electronic means. DT states that AY, like HY, will develop a strong bond with the Applicant.

71. The Applicant and Mrs McClements expect DS and HY will live with them should they return to Australia.

72. Although the Applicant does not have a parental role in the lives of his step-grandchildren, visa refusal would not be in their interests. It would reduce his capacity to build and maintain a positive role in their lives and curtail the practical, emotional and financial support that he can provide the children.

73. I consider it is in both HY and AY's best interests that the discretion to refuse the visa is not exercised. Given the Applicant does not have a parental role, and the limited physical contact he has had with the children, this consideration is afforded modest weight in favour of the Applicant.

Primary Consideration 5: Expectations of the Australian community

74. Paragraph 8.5 of the Direction provides that the Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen 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.

75. Paragraph 8.5(3) of Direction 110 states that these expectations apply regardless of whether the non-citizen poses a measurable risk of causing physical harm to the Australian community.

76. Paragraph 8.5(4) of the Direction provides that the expectations of the Australian community is about the expectations of the Australian community as a whole.[26] It is not for the Tribunal to determine for itself the expectations of the Australian community by reference to an applicant's circumstances or evidence about those expectations. Rather the Tribunal must give effect to the 'norm' stipulated in the Direction.

77. The expectation of the Australian community is that a visa would not be granted to the Applicant on account of his offending history. I afford this consideration moderate weight in favour of refusing the visa.

Other relevant considerations

Legal consequence of decision under section 501 or 501CA

78. Paragraph 9.1(1) of Direction 110 requires decision makers to be mindful of the legal consequences of a decision under section 501. As the Applicant is in New Zealand he is not in the migration zone. Australia's non-refoulement obligations are not engaged and he is not liable for removal from Australia or detention.

79. Without a valid visa, he would not be permitted to travel to Australia. However, he will not be prevented by s 501E of the Act nor any special return criteria in the *Migration Regulations 1994* (Cth) from making a further substantive visa application.

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[26] [2019] FCAFC 185.

80. I afford this consideration neutral weight.

Extent of impediments if removed

81. Paragraph 9.2 of the Direction provides that the Tribunal must consider the extent of any impediments that the Applicant may face if removed to his home country in establishing himself and maintaining basic living standards (in the context of what is generally available to other citizens of that country).

82. I am required to take into account the Applicant's age and health, whether there are substantial language or cultural barriers, and any social, medical, and/or economic support available to him in UK.

83. The Applicant is in New Zealand and he has a visa to remain there permanently. He will not be removed to the UK if he is refused the visa.

84. This consideration weighs neutrally.

Impact on Australian business interests

85. Paragraph 9.3 of the Direction requires that decision makers consider any impact on Australian business interests if a non-citizen is not allowed to enter or remain in Australia. The Direction provides that an employment link would generally only be given weight where the decision would significantly compromise the delivery of a major project, or delivery of an important service in Australia. However, the Tribunal is not precluded from giving weight to impacts on business interests in other circumstances.[27]

86. The Applicant is a plasterer and has provided evidence of practical experience in his trade, having operated his own business in the UK and claims to have a current employment opportunity in Australia. He also submits that his trade is on the skills shortage list and refusing him the visa would deprive Australia of an experienced tradesperson. He has provided character references from business associates and professional contacts in both

[27] *See Arachchi v Minister for Immigration, Citizenship and Multicultural Affairs* [2022] FCA 1311 at [69] – [70].

the UK and New Zealand who have worked with him over many years which speak to his professionalism and strong work ethic.

87. The Direction does not preclude giving weight to impact of a decision on business interests outside of major projects or important services. In recognition of the Applicant's in-demand skills and experience running his own business, I afford this other consideration limited weight against refusal.

CONCLUSION

88. The Applicant does not pass the character test and I must take into account and weigh the relevant considerations in the Direction and determine whether to exercise the discretion to the refuse the visa.

89. The Applicant's serious offending occurred in 2000. Except for a drink driving conviction, he has proven a lawful and productive member of the community for 25 years since and there is a negligible risk of reoffending, the primary consideration of the risk to the Australian community is afforded moderate weight in favour of refusal.

90. The expectations of the Australian community are that the Applicant would not hold a visa on account of his offending, and this primary consideration also weighs moderately in favour of exercising the discretion to refuse the visa.

91. The Applicant's ties to the Australian community are limited but significant. Refusal of the visa will have meaningful implications for his stepdaughters in Australia and his Australian citizen wife. The strength, nature and duration of his ties to Australia weigh strongly against exercising the discretion to refuse the visa.

92. The best interests of his two step-grandchildren weigh modestly in favour of not exercising the discretion. The impact on Australian business interests also weighs nominally against visa refusal.

93. Both parties agree that the primary considerations of family violence and other considerations of legal consequences and impediments if removed are not relevant to this decision.

94. I am not limited to taking into consideration the considerations identified in the Direction, and as noted it is in Mrs McClement's best interests that the visa is granted. I afford this significant weight against refusing the visa.

95. On balance, having regard to the primary and other considerations in the Direction, I find the correct and preferable decision is not to exercise the discretion to refuse the Applicant the visa.

DECISION

96. The reviewable decision is set aside, and the matter is remitted to the Respondent with the direction that the discretion provided in s 501(1) to refuse to grant the visa is not exercised.

Dates of hearing:	**21 and 22 April 2026**
Counsel for the Applicant	**Dr Jason Donnelly**
Solicitors for the Applicant:	**Ms Michelle Joyce, Kris Ahn Lawyers**
Solicitors for the Respondent:	**Mr Alexander Zhang, Sparke Helmore**