Federal Court of Australia

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

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| Appeal from: |  |
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| File number(s): |  |
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| Judgment of: | **RARES, THOMAS AND SNADEN JJ** |
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| Date of judgment: | 30 May 2023 |
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| Catchwords: | **MIGRATION** – appeal from decision of single judge of the Federal Court of Australia – where primary judge dismissed application for judicial review of decision of Administrative Appeals Tribunal – where delegate of the Minister refused protection visa application pursuant to s 36(1C)(b) of the *Migration Act 1958* (Cth) – where appellant convicted of domestic violence offences – whether primary judge applied wrong test under s 36(1C)(b) of the Act – whether Tribunal erred in finding appellant posed “a danger to the Australian community” – consideration of meaning of “danger” – whether “Australian community” interpreted narrowly – Held: appeal dismissed |
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| Legislation: | *Acts Interpretation Act 1901* (Cth),s 15AA  *Criminal Code Act 1995* (Cth), *Criminal Code* Divs 104-105A  *Migration Act 1958* (Cth), ss 5, 5M, 31, 36, 197C, 198, 500, 501  *Migration Amendment Act 2014* (Cth)  *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth)  *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld)  *Sentencing Act 1995* (WA), s 98  Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth)  *Convention Relating to the Status of Refugees*, opened for signature on 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954), Art 33(2)  *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Arts 31-32 |
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| Cases cited: | *A v Minister for Immigration and Multicultural Affairs* [1999] FCA 227  *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225  *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1  *BAL19 v Minister for Home Affairs* (2019) 168 ALD 276  *Coco v The Queen* (1994) 179 CLR 427  *Commissioner of Taxes (Vic) v Lennon* (1921) 29 CLR 579  *Comptroller-General of Customs v Pharma-Care Laboratories Pty Ltd* (2020) 270 CLR 494  *Construction, Forestry, Mining and Energy Union v Hadgkiss* (2007) 169 FCR 151  *DMQ20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 514  *DOB18 v Minister for Home Affairs* (2019) 269 FCR 636  *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309  *EN (Serbia) v Home Secretary* [2010] QB 633  *Fardon v Attorney-General* (2004) 223 CLR 575  *Jacobellis v Ohio* 378 US 184 (1964)  *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11  *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645  *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573  *Lee v NSW Crime Commission* (2013) 251 CLR 196  *LKQD v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2019) 167 ALD 17  *McGarry v The Queen* (2001) 207 CLR 121  *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633  *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259  *Moana v Minister for Immigration and Border Protection* (2015) 230 FCR 367  *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359  *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1  *Plaintiff M65/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173  *Pushpanathan v Minister of Citizenship and Immigration* [1998] 1 SCR 982  *Queensland v The Commonwealth* (1989) 167 CLR 232  *R v Panozzo* (2007) 178 A Crim R 323  *Re WKCG and Minister for Immigration and Citizenship* (2009) 110 ALD 434  *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611  *Robert Bosch (Australia) Pty Ltd v Secretary, Department of Innovation, Industry, Science and Research* (2011) 197 FCR 374  *Shrestha v Minister for Immigration and Border Protection* (2018) 264 CLR 151  *Stewart v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 281 FCR 578  *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3  *Tabcorp Holdings Ltd v Victoria* (2016) 328 ALR 375  *Thomas v Mowbray* (2007) 233 CLR 307  *Wyong Shire Council v Shirt* (1981) 146 CLR 40 at 48  *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289  *Macquarie Dictionary* online, definition of “danger”  *Oxford English Dictionary* online, definition of “danger”  Goodwin-Gill G, McAdam J, and Dunlop E, *The Refugee in International Law* (4th Ed), Oxford University Press, 2021  Grahl-Madsen A, *Commentary on the Refugees Convention 1951 (Articles 2-11, 13-37)*, United Nations High Commission for Refugees, 1997  Hathaway J, *The Rights of Refugees under International Law* (2nd ed), Cambridge University Press (2021)  Lauterpacht, E and Bethlehem, D, ‘The Scope and Content of the Principle of Non-refoulement: Opinion’ in Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, 2003 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 152 |
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| Date of hearing: | 17 November 2022 |
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| Counsel for the Appellant: | Mr M Albert with Mr H Crosthwaite (pro bono) |
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| Solicitor for the Appellant: | Asylum Seeker Resource Centre |
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| Counsel for the First Respondent: | Mr B McGlade |
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| Solicitor for the First Respondent: | Sparke Helmore Lawyers |
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| Counsel for the Second Appellant: | The second respondent filed a submitting notice, save as to costs |

ORDERS

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|  | | QUD 188 of 2022 |
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| BETWEEN: | DMQ20  Appellant | |
| AND: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS  First Respondent  ADMINISTRATIVE APPEALS TRIBUNAL  Second Respondent | |

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| order made by: | RARES, THOMAS AND SNADEN JJ |
| DATE OF ORDER: | 30 May 2023 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent’s costs of the appeal, to be assessed in default of agreement in accordance with the Court’s Costs Practice Note (gpn-costs).

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

RARES J:

1. The sole issue in this appeal relates to the meaning of the exclusion from Australia’s non-refoulement obligations in Art 33(2) of the *Convention Relating to the Status of Refugees*, opened for signature on 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (the ***Refugees Convention****)*, as expressed in s 36(1C) of the *Migration Act 1958* (Cth), if the Minister has reasonable grounds to consider that the person “is a danger to the Australian community”.
2. The Administrative Appeals **Tribunal** affirmed the decision of a delegate of the Minister that found that the appellant was a danger to the Australian community. The primary judge held that the Tribunal had not erred in applying its construction of s 36(1C). I have had the privilege of reading the reasons of Thomas and Snaden JJ and agree with their conclusion that the appeal fails, but I have arrived at that position by a different route, which I explain below.

# The legislative context

1. The *Migration Act* relevantly provides:

**36 Protection visas—criteria provided for by this Act**

(1A) An applicant for a protection visa must satisfy:

(a) both of the criteria in subsections (1B) and (1C); and

(b) at least one of the criteria in subsection (2).

(1B) A criterion for a protection visa is that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*).

(1C) 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 a final judgment of a particularly serious crime, is a danger to the Australian community.

Note: For paragraph (b), see section 5M.

(emphasis added)

1. As the note below s 36(1C) specifies, s 5M provides:

**5M Particularly serious crime**

For the purposes of the application of this Act and the regulations to a particular person, paragraph 36(1C)(b) has effect as if a reference in that paragraph to a particularly serious crime included a reference to a crime that consists of the commission of:

(a) a serious Australian offence; or

(b) a serious foreign offence.

1. In turn, each of the expressions “serious Australian offence” and “serious foreign offence” are defined in s 5(1) of the Act.
2. The *Refugees Convention* provides, relevantly:

**Article 33**

**Prohibition of expulsion or return (“refoulement”)**

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

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

(emphasis added)

1. The *Migration Act* provides in s 31 that there are criteria for classes of visa, some of which the Act itself prescribes and others which are left to be prescribed by the regulations. Importantly, s 36(1A) provides that an applicant for a protection visa (as defined in s 35A) must satisfy at least three statutory criteria, namely both of the criteria in ss 36(1B) and (1C), and at least one in s 36(2). The threshold criteria in s 36(2) are found in pars (a) and (aa), namely, that the Minister is satisfied that Australia has protection obligations because either the person is a refugee (as defined in s 5H) or the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm (as defined in s 36(2A)).
2. The criteria in s 36(1B) and (1C) draw a distinction between the evaluation by, respectively the Australian Security Intelligence Organisation (**ASIO**), assessing under its Act whether the person poses “a risk to security” (s 36(1B)), or the Minister, on reasonable grounds, considering whether the person is either “a danger to Australia’s security” (s 36(1C)(a)) or “having been convicted by a final judgment of a particularly serious crime [as defined in s 5M], is a danger to the Australian community” (s 36(1C)(b)).
3. Thus, subject to the considerations that I discuss below, the expression “a danger”, as used in each paragraph of s 36(1C) appears to have a meaning different to “a risk”, as used in s 36(1B).

# The legislative history of s 36(1B) and (1C) of the *Migration Act*

1. Article 32(2) allows a State Party to expel a refugee only pursuant to a process according to law and, “except where compelling reasons of national security otherwise require”, the refugee has a right to submit evidence to clear himself or herself and to appeal. The Parliament inserted ss 36(1A) and (1B) into the *Migration Act*, in the *Migration Amendment Act 2014* (Cth) (No. 30 of 2014), to overcome the decision of the High Court in *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1. That decision held invalid a regulation that imposed a public interest criterion for a protection visa that was inconsistent with Arts 32 and 33.
2. Schedule 5 of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No. 135 of 2014) (the **2014 Amendments**) inserted, among other provisions, ss 5H-5M and 36(1C) into the *Migration Act*, together with a suite of additional provisions. The Explanatory Memorandum for the Bill that came to be enacted as the 2014 Amendments, that the then Minister for Immigration and Border Protection circulated in the House of Representatives, made clear that the new provisions, including ss 5M and 36(1C), were intended to be a reasonably precise reflection of Australia’s non-refoulement obligations under Art 33(2), stating (at [1236]):

**New subsection 36(1C) is intended to codify Article 33(2) of the Refugees Convention** which provides for an exception to the principle of *non-refoulement* in Article 33(1) of the Refugees Convention. As such, **a person who is captured by new subsection 36(1C) will not engage Australia’s *non-refoulement* obligations under the Refugees Convention** or for the purposes of the new statutory framework relating to refugees.

(emphasis added)

1. In the second reading speech for the Bill that became enacted as the 2014 Amendments, the Minister told the House (Hansard: House of Representatives, 25 September 2014 at 10547-10548):

**Schedule 5 of the bill will also create a new, independent and self-contained statutory refugee framework which articulates Australia’s interpretation of its protection obligations under the refugees convention.** The government remains committed to ensuring it abides by its obligations in respect to the refugees convention and this change does not in any way compromise this commitment. **The new statutory framework will enable parliament to legislate its understanding of these obligations within certain sections of the Migration Act without referring directly to the refugees convention and therefore not being subject to the interpretations of foreign courts or judicial bodies which seek to expand the scope of the refugees convention well beyond what was ever intended by this country or this parliament.** This parliament should decide what our obligations are under these conventions—not those who seek to direct us otherwise from places outside this country. **The new framework clearly sets out the criteria to be satisfied in order to meet the new statutory definition of a ‘refugee’ and the circumstances required for a person to be found to have a ‘well-founded fear of persecution’, including where they could take reasonable steps to modify their behaviour to avoid the persecution.**

**Let me be clear, the government is not changing the risk threshold required for assessing whether a person has a well-founded fear of persecution.** Under the new framework, refugee claims will continue to be assessed against the ‘real chance’ test, which has been the test adopted by successive governments, in line with the High Court’s decision in Chan Yee Kin v Minister for Immigration and Ethnic Affairs [1989] HCA 62.

….

**The new framework will also clarify those grounds which exclude a person from meeting the definition of a refugee or which, upon a person satisfying the definition of a refugee, render them ineligible for the grant of a protection visa.**

(emphasis added)

# The relevant Australian authorities

1. In *Re* *WKCG and Minister for Immigration and Citizenship* (2009)110 ALD 434 at 438-439 [25]-[31], the Hon Brian Tamberlin QC DP considered the elements of Art 33(2) that subsequently came to be reflected in s 36(1C)(b). He found (at 438 [25])) that the question whether a person “is a danger to the Australian community” was one of fact and degree that had to be approached by having regard to all of the circumstances of each individual case. Tamberlin QC DP identified, non-exhaustively, some relevant considerations as including (at 438 [26]-[27]):

the seriousness and nature of the crimes committed, the length of the sentence imposed, and any mitigating or aggravating circumstances. The extent of the criminal history is relevant as is the nature of the prior crimes, together with the period over which they took place. The risk of re-offending and recidivism and the likelihood of relapsing into crime is a primary consideration. The criminal record must be looked at as a whole and prospects of rehabilitation assessed. **The assessment to be made goes to the future conduct of the person and this involves a consideration of character and the possibility or probability of any threat, which could be posed to a member or members of the Australian community.**

The person’s previous general conduct and total criminal history are highly relevant to assessing the risk of recidivism. In *Re Salazar Arbelaez and Minister for Immigration and Ethnic Affairs* (1977) 18 ALR 36 at 38; 1 ALD 98 at 100, Brennan J said:

…

Rehabilitation is never certain. One cannot predict of an offender that he will not fall again whatever the circumstances. The duty of the Tribunal is to apprehend what is the acceptable level of risk and to assess whether a particular applicant in the particular circumstances of his case is at an unacceptable level of risk.

1. He found (at 438 [29]) that, *first*, the words “having been convicted by a final judgment of a particularly serious crime” operated to limit the class of persons on whom s 36(1C)(b) operated and, *secondly*, whether there were reasonable grounds for the Minister to consider that a particular person “is a danger to the community” was a separate question. Tamberlin QC DP reasoned (at 439 [31]):

The language of the Article directs attention to the expression “danger”. This expression indicates that regard must be had to the future as well as the present, and includes a consideration of what may be foreseen to be the conduct of the person in the future. **In assessing whether a danger exists, it will be sufficient if there is a real or significant risk or possibility of harm to one or members of the Australian community. It is not necessary to establish that there is a probability of a real and immediate danger of present harm.** The provision is designed to protect the community from both immediate harm and harm in the reasonably foreseeable future. The determination of this must be made by reference both to past circumstances and, as Brennan J, pointed out (*Salazar* at ALR 38 ; ALD 100 ) it involves an assessment of the applicant’s level of risk**. It is too high a threshold to require that the possibility of harm must be established at the higher level of probability. In my view, the expression “danger” involves a lesser degree of satisfaction than that required by the expression “probable.”**

(bold emphasis added; original underlined emphasis)

1. Subsequently, in *DOB18 v Minister for Home Affairs* (2019) 269 FCR 636 at 653-659 [72]-[87], when dealing with a matter under s 501BA of the *Migration Act*, Logan J gave detailed, but *obiter*, consideration to the meaning of s 36(1C)(b) to which neither Robertson J nor, in dissent, I, referred to when dealing with the different issues that arose under s 501BA. Logan J explained that, in his view, “‘danger’ carries a qualitatively different meaning to ‘risk’” (at 657 [82]) and continued, saying:

In my view, read in context, “danger” in s 36(1C) means **present and serious risk**. To the extent that what is stated in *WKCG* might be thought to suggest otherwise, I respectfully disagree with the observations made in that case about “danger”. In my view, it carries a narrower and more restrictive meaning that [scil: than] just “risk”.

(emphasis added)

1. His Honour also observed (at 658 [87]), after referring to decisions of the Supreme Courts of Canada and the United Kingdom dealing with Art 1F of the *Refugees Convention*:

Other difficulties about an uncritical acceptance of all that is stated in *WKCG* arise from that part of the passage quoted to which I have given emphasis. That there is a “danger” is, necessarily in my view, a conclusion based on an assessment of the present “level of risk”. But that does not mean that the word, “danger” carries a meaning that differs from case to case. Its meaning is fixed, but whether it is present in respect of, materially, a person applying for a protection visa will depend on the circumstances of the given case.

1. In *WKCG* 110 ALD 434, Tamberlin QC DP was not concerned to elaborate the metes and bounds of the meaning of “a danger to the community of [Australia]” in Art 33(2). That is because he found as a fact that “there is no significant risk that [WKCG] will be a danger to others” (at 439 [33]) and the applicant would “be strongly motivated to avoid any risk of further imprisonment or punishment” (at 440 [36]). The Deputy President concluded that WKCG “constituted **such a low risk** to the Australian community that he is not a danger. The evidence weighs strongly against the prospect of recidivism” (at 442 [45]).
2. Given those factual findings, the issue of what degree of risk or other peril amounted to a danger on which Logan J made his observations in *DOB18* 269 FCR 636 never arose for resolution by Tamberlin QC DP. Logan J said (269 FCR at 657 [83]) that ‘danger’ in s 36(1C) meant “present and serious risk” and suggested that this might be different to what the Deputy President had said. However, as I explain below, Tamberlin QC DP’s test of a “real or significant risk or possibility of harm” (where the words ‘real or significant’ qualify each of the following alternatives) appears to accord with the preponderance of international judicial authority.

# The Tribunal’s reasons

1. The Tribunal found that the appellant had been convicted of contravening a domestic violence order on four occasions against his domestic partner. On 10 August 2016, he was sentenced for the most recent offence to 15 months imprisonment, which the Tribunal found to have been a particularly serious crime. It quoted the following remarks of the sentencing judge:

This is the fourth such breach of a domestic violence order involving the same aggrieved. It is a violent breach. It involves you striking the aggrieved to the head on multiple occasions, to the body on multiple occasions, and it involves you dragging her in a way that must have been painful and humiliating. It is a serious example of domestic violence. It may not be of the worst category, but it is an unsavoury incident that would have caused deep distress.

1. Relevantly, the Tribunal analysed the reasoning in both *WKCG* 110 ALD 434 and *DOB18* 269 FCR 636, together with other decisions, in order to form its view as to the meaning of “a danger to the Australian community”. It noted that some Tribunal decisions considered that Tamberlin QC DP and Logan J may have found different meanings for the word “danger”. However, the Tribunal said (at [64]-[65]):

It is consistent to say that **in order for a person to be a “danger” there must exist, at the time of the decision, a present risk which is “real” or “significant” or “serious” which is “neither remote nor fanciful” that the person will cause harm of a sufficiently serious nature (for example “of physical harm, or extreme emotional harm”) in the present or the future**. If no such risk is present at the time of decision, it can not be said that a person is a danger. Similarly, if a present risk of future harm relates to a harm which is insufficiently serious, for example a moderate risk of mere “upset” then the person will not be a danger. Conversely, if there is a low risk but one which is none-the-less “real” or “significant” or “serious” of particularly serious future harm, say grave physical injury, then that risk may be sufficient to determine that a person is a danger to the Australian community.

In determining whether an applicant meets the criteria in section 36(1C) of the Act, the decision maker is vested with a fact finding function and not a discretion. If the decision maker is satisfied of the required matters in section 65 of the Act, including that the Applicant meets the criteria in section 36(1C) of the Act, the visa must be granted.

(emphasis added)

1. It found (at [72]-[75]) that the Deputy President had not enunciated a test for determining whether a person is a danger. Rather, it said that Tamberlin QC DP had recognised that the question whether a person constitutes a danger to the Australian community (under Art 33(2) that still applied in 2009) was one of fact and degree that had to be addressed having regard to all of the circumstances, including what it termed was the guidance in the Deputy President’s reasons.
2. The Tribunal then analysed the evidence and submissions in detail before concluding (at [139]-[144]):

[139] After careful consideration of this issue, including consideration of all the matters mentioned above, **the Tribunal has found that there is a real, significant and serious risk which is neither remote nor fanciful that the Applicant will cause harm to members of the Australian community if he remains in Australia**.

[140] The Tribunal considers that notwithstanding that the Applicant has not been found guilty of any offences for some time and the efforts that he has made to rehabilitate himself, and despite all of the strong incentives that exist for the Applicant not to reoffend, the Tribunal considers that the Applicant’s long and frequent history of offences, including his very serious violent offences committed against his former partner, on balance suggest that the Applicant will cause harm to members of the Australian community if he remains in Australia.

[141] The Tribunal has found that the Applicant has been convicted by a final judgment of a particularly serious crime. The offence of contravention of a domestic violence order for which the Applicant was sentenced to 15 months imprisonment on 10 August 2016 was an offence against a law in force in Australia where the offence involved violence against a person. In addition, the offence was punishable by imprisonment for a maximum term of not less than three years.

[142] The Tribunal has found that the Applicant’s violent offences are very serious and involved repeated and increasingly serious, abusive and violent conduct towards his former partner. The Tribunal has found that if the Applicant engages in conduct similar to the conduct which gave rise to his offences for contravention of a domestic violence order, this would likely result in physical and psychological harm to victims and possibly severe harm. **The Tribunal has found that there is a real, significant and serious risk that the Applicant will reoffend if he remained in Australia.**

[143] **The Tribunal finds that, at the time of this decision, there exists a present risk which is real, significant and serious, which is neither remote nor fanciful that the Applicant will cause physical harm and perhaps severe physical harm, or extreme emotional harm in the present or the future if he were allowed to remain in Australia. Therefore, the Tribunal finds that the Applicant is a danger to the Australian community**

[144] Consequently, the Tribunal is not satisfied that the Applicant meets the criterion for the grant of a Protection visa in section 36(1C)(b) of the Act.

(emphasis added)

# The primary judge’s reasons

1. Her Honour found, correctly, that the observations of each of Tamberlin QC DP, in *WKCG* 110 ALD 434, and Logan J, in *DOB18* 269 FCR 636, were *obiter dicta* and could not be said to define conclusively the meaning of a “danger to the Australian community” in s 36(1C)(b). She said that those *obiter dicta* did no more than provide guidance as to the meaning of s 36(1C)(b). The primary judge found that the Tribunal correctly determined, at [64] of its reasons:

that in order for a person to be a “danger” there must exist, at the time of the decision of the Minister, a present risk which is “real” or “significant” or “serious”, and which is neither remote nor fanciful, that the person will cause harm of a sufficiently serious nature in the present or future.

1. Her Honour found that the Tribunal did not fall into any jurisdictional error in identifying or applying that test so that the appellant was not entitled to relief in respect of those matters and she dismissed the application with costs.

# The appellant’s submissions

1. The only ground of appeal was that the primary judge erred in failing to find that the Tribunal asked itself the wrong question or applied the wrong test when considering whether the appellant “is a danger to the Australian community” within the meaning of s 36(1C).
2. The appellant argued that “the Australian community” was “the community at large or in general or as a whole”. He contended that the Tribunal had undertaken its analysis of the danger only by reference to one or more members of the community. He submitted that the Tribunal erred in its conclusion that ‘danger’ meant that there was a real, significant or serious risk. He asserted that the primary judge recast the meaning of ‘danger’, or came to a similar meaning, as requiring “a peril or only a risk or a possibility”. The appellant argued that ‘danger’, as used in s 36(1C), required “a high level of risk”. He contended that her Honour had also erred in holding that “danger to the Australian community” had “the inherent requirement of real risk of serious harm”. The appellant submitted that elsewhere in the *Migration Act*, such as in s 501(6), the Parliament had used the expression “a danger to the Australian community” sometimes adding, such as in ss 5C(d)(iii) and (v) and 5C(h), “or a segment of that community” so that, read consistently with the Act as a whole and the construction given to those provisions in various judicial decisions, s 36(1C) required that the refugee present a danger of national concern to the whole Australian community in general or at large and not a segment or one or more individual members of it. He submitted that leading scholars, such as Sir Elihu Lauterpacht QC, Sir David Bethlehem QC and Professor Atle Grahl-Madsen, had characterised Art 33(2) as referring to a danger to the safety and well-being of the population in general.
3. The appellant argued that the amendment to the *Migration Act* in 2021 that introduced s 197C(3) meant that he could no longer be refouled to Sudan, where he was at risk of persecution, as s 198 previously would have required, because s 197C(3) prevented that occurring. Thus, he said, he would be held in indefinite immigration detention. However, he did not identify how this change affected the construction of s 36(1C), given the unpalatability of the alternative to indefinite detention, namely, refoulement to persecution.

# The construction of Art 33(2) in other jurisdictions

1. In *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230-231, Brennan CJ identified the following principle of statutory construction as applicable to a domestic statute that seeks to give effect to a treaty, that Kiefel CJ, Bell, Gageler, Keane and Gordon JJ applied in *Comptroller-General of Customs v Pharma-A-Care Laboratories Pty Ltd* (2020) 270 CLR 494 at 511 [35]), namely :

If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, **the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty.** To give it that meaning, **the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way.**

(emphasis added; footnotes omitted)

1. Here, the Parliament intended to define Australia’s obligations under the *Refugees Convention* by specifying in s 5M, among other matters, what was “a particularly serious crime”. Otherwise, s 36(1C) appears to reflect the extent of Australia’s international obligations inherent in its ratification of Art 33(2).
2. In *Queensland v The Commonwealth* (1989) 167 CLR 232 at 239-240, Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ held:

Although municipal courts do not administer international law, they take cognizance of international law in finding facts and they interpret municipal law, so far as its terms admit, consistently with international law. Regard may therefore be had to the terms of the Convention in deciding whether an international duty of protection and conservation exists, but the existence or otherwise of the duty is not necessarily concluded by the municipal court's construction of its terms or by its opinion as to the Convention's operation. **The existence of an international duty depends upon the construction which the international community would attribute to the Convention and on the operation which the international community would accord to it in particular circumstances. The municipal court must ascertain that construction and operation as best it can in order to determine the validity of a law of the Commonwealth**, conscious of the difference between the inquiry and the more familiar curial function of construing and applying a municipal law.

(emphasis added)

1. Of course, here the question is not whether the *Refugees Convention* or Art 33(2), properly construed, can support the constitutional validity of s 36(1C), but rather what is the proper construction of the domestic enactment having regard to the Parliament’s apparent intention to give effect to its definition of Australia’s international non-refoulement obligations as a ratifying State Party to the *Refugees Convention*.
2. The statutory expression “is a danger to the Australian community” must be construed as a cognate expression in the context of all of s 36(1C) itself, s 36 and the Act as a whole. Accordingly, while s 36(1C) must be construed as part of a domestic statute, that construction should be informed by reference to public international law principles, including Arts 31 and 32 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), and jurisprudence on Art 33(2), having regard to the section’s language that clarifies the circumstances in which Australia’s protection obligations will not apply to a person whom the Minister considers on reasonable grounds is a danger of one or other kind. That is the more so because statutory provisions should be interpreted, so far as possible, to be consistent with international law, especially where a provision, such as s 36(1C) of the *Migration Act*, seeks to give effect to matters of international law such as it does in respect of Art 33(2) of the *Refugee Convention*: *Kingdom of Spain v Infrastructure Services Luxembourg SARL* [2023] HCA 11 at [16] per Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ.
3. In *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, the Supreme Court of Canada (McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ) construed the Canadian statutory analogue of s 36(1C) that enacted Art 33(2). That appeal concerned the first limb (reflected in s 36(1C)(a) of the *Migration Act*), but the Court said of the whole of the analogue of Art 33(2) (at 51-52 [90]-[91]):

These considerations lead us to conclude that a person constitutes a “danger to the security of Canada” **if he or she poses a serious threat to the security of Canada, whether direct or indirect**, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. **The threat must be “serious”, in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.**

This definition of “danger to the security of Canada” does not mean that Canada is unable to deport those who pose a risk to individual Canadians, but not the country**. A different provision,** **the “danger to the public” provision, allows the government to deport those who pose no danger to the security of the country per se — those who pose a danger to Canadians, as opposed to a danger to Canada — provided they have committed a serious crime.**

(bold emphasis added; original underlined emphasis)

1. The Supreme Court gave a broad construction to the analogue of Art 33(2) in arriving at the test for whether there was a “danger to the security of Canada”, saying that it was not necessary to require that there should be “direct proof of a specific threat to Canada”. Rather, the Court held that it sufficed if there were “a real and serious possibility of adverse effect to Canada”, which need not be direct. In that case, the Supreme Court found that it was open to the decision maker to conclude that the refugee’s support for terrorism abroad, namely membership of and an active role in the Liberation Tigers of Tamil Eelan (see 11-12 [1], 50-51 [87]-[88]), at a minimum could provide “proof of a potentially serious threat” (at 51 [89]).
2. In *Zaoui v Attorney-General (No 2)* [2006] 1 NZLR 289 at 310 [45], the Supreme Court of New Zealand essentially adopted the test in *Suresh* [2002] 1 SCR 3. There, Keith J delivering the reasons of Elias CJ, Gault, Blanchard and Eichelbaum JJ and himself rejected the judicial addition of glosses to qualify or elaborate on the words of the *Refugees Convention* (at 310 [46]). Keith J reasoned that:

to come within art 33.2, the person in question must be thought on reasonable grounds to **pose a serious threat to the security of New Zealand; the threat must be based on objectively reasonably grounds and the threatened harm must be substantial**.

1. I am also of opinion that judicial glosses should not be added to the words “a danger” as used in Art 33(2), and its adoption in s 36(1C). That is because the States Party to the *Refugees Convention* chose those words to express their agreement as to the obligations that they undertook under it to each other, as Stanley Burnton LJ, with whom Hooper LJ agreed, held in *EN (Serbia) v Home Secretary* [2010] QB 633 at 654-655 [43]-[45]. Laws LJ, in his concurring judgment, emphasised that “a treaty usually represents a negotiated settlement, a compromise, whose terms have been carefully chosen so as to identify the limits of what has been agreed” (see at 676 [118] and at 676-677 [115]-[118]). Their Lordships held that “danger to the community” in Art 33(2) required the danger to be real and that, if there were a serious risk of repetition of the particularly serious crime for which the refugee had been convicted, “he is likely to constitute a danger to the community” ([2010] QB at 655 [45], 676 [114] and 677 [118]).
2. It is important to appreciate that the purpose of Art 33(2) is not to define who is a refugee, but to relieve the host State Party of its obligation not to refoule an actual refugee who falls within one of the criteria in that Article, as Professor James Hathaway explained in *The Rights of Refugees under International Law* (2nd ed), Cambridge University Press (2021) pp 402-406, drawing on *Pushpanathan v Minister of Citizenship and Immigration* [1998] 1 SCR 982 at [58]. Thus, even though the host State Party can refoule the person, he or she retains the status of a refugee in international law and can seek to be admitted to another State than that in which he or she fears persecution.
3. There is debate amongst public international law scholars about the nature and operation of Art 33(2) in respect of States Parties’ non-refoulement obligations, some of which Logan J discussed in *DOB18* 269 FCR at 653-658 [71]-[86], some of which Professors Goodwin-Gill and McAdam and Ms Emma Dunlop discuss in *The Refugee in International Law* (4th Ed), Oxford University Press, 2021 at pp 267-274 and others of which are discussed in Hathaway: op cit: at 412-418.
4. In most Convention jurisdictions, some material in addition to the refugee’s conviction for a particularly serious crime is necessary to establish, for the purposes of Art 33(2), that he or she is a danger to the host State Party’s community. But there is not much in the scholarship about what “a danger to the community” is, as Prof Goodwin-Gill and his co-authors recognise (at op cit. 270-272). Rather, the scholarly debate and most judicial decisions have focussed on elucidating what “a particularly serious crime” is, being a concept which the 2014 Amendments crystallised in Australian domestic legislation.
5. In his *Commentary on the Refugees Convention 1951* *(Articles 2-11, 13-37)*, Professor Atle Grahl-Madsen wrote in 1962-1963 while he worked as a special consultant in the office of the United Nations High Commission for Refugees (**UNHCR**), published by the UNHCR in October 1997, that “danger to the community” in Art 33(2) was different to “national security”. He opined that, as used in Art 33(2), “danger to the community” means:

a danger to the peaceful life of the population [at large] in its many facets. **In this sense a man will be a danger to the community if he** sabotages means of communication, blows up or sets fire to houses and other constructions, **assaults or batters peaceful citizens**, commits burglaries, holdups or kidnapping etc., in short **if he disrupts or upsets civil life, and particularly if this is done on a large scale, so that the person concerned actually becomes a public menace**.

**However, a single crime will in itself not make a man a danger to the community.** This is especially true if the crime is committed against an individual to whom the criminal had a special relationship, as for example a crime passionelle. If, however, the one and only crime which a person has committed is clearly antisocial and demonstrates a complete or near complete lack of social and moral inhibitions, e.g. the blowing up of a passenger airplane in order to collect life insurance, or wanton killing in a public place, then it may be appropriate to classify the perpetrator as a danger to the community.

**On the other hand, a man who has committed a number of crimes, should not be considered as a danger to the community on the sole ground that he is a recidivist.** This was firmly stressed by the United Kingdom delegate, who, hoping “that the scope of the joint amendment would not be unduly widened ... wished to point out that to be classified by the courts as a hardened or habitual criminal, a person **must have committed either serious crimes, or an accumulation of petty crimes. The first case would be covered by the joint amendment, and he was quite content to leave the second outside the scope of the provision”.** His view was apparently accepted by the Conference, which did not adopt an Italian proposal to insert the words “or having been declared by the Court a habitual offender” (after the word “crime”) in the text of Article 33 (2).

(emphasis added)

1. Prof Grahl-Madsen endorsed an opinion of the UNHCR that:

**Whether the commission of a crime by a refugee makes him a danger to the community is quaestio facti.** It may be that a person who has been convicted for a major crime or several times for a minor, but nevertheless serious, offence, constitutes, as a habitual criminal, a danger to the community, while a person, who, on the other hand, has been convicted for a capital crime - which he has committed in a state of emotional stress or in self-defence - would not constitute a danger to the community.”

The word “serious” must clearly be underlined. A common thief is only one among a thousand thieves in a country, and any one of them will hardly deserve to be called a “danger to the community”…

(emphasis added)

1. As the Supreme Court of Canada explained in *Suresh* [2002] 1 SCR at 52 [91], the ground of exception in Art 33(2) of “a danger to the community” allows the host State to deport a person who poses “a danger to Canadians, as opposed to a danger to Canada”. They held that this distinction reflected the two limbs of Art 33(2), now contained in the two paragraphs of s 36(1C). This construction is consistent with the views of Lauterpacht and Bethlehem of the “danger to the community” limb of Art 33(2) as being directed to a danger to the safety and wellbeing of the population in general.
2. The question whether there are reasonable grounds to consider that a refugee who has been convicted of a particularly serious crime as defined in s 5M of the *Migration Act* “is a danger to the Australian community” necessarily is fact specific in each individual case.
3. There appears to be a degree of international consensus that, to enliven the exception to the host State’s non-refoulement obligations under Art 33(2) (or s 36(1C)(b)), reasonable grounds must exist to consider that the refugee poses a serious threat or risk of substantial, rather than negligible, harm to the local community.

# The construction of s 36(1C)

## “Reasonable grounds”

1. In domestic Australian law, a statutory provision that a decision-maker have “reasonable grounds” for a state of mind “requires the existence of facts which are sufficient to induce that state of mind in a reasonable person”: *George v Rockett* (1990) 170 CLR 104 at 112 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ. Article 33(2) uses a similar criterion that s 36(1C) adopted.

## The expression: “a danger”

1. Importantly, s 36(1C) uses the criterion of a person who “is a danger” of one or other particular kind prescribed in its two limbs. The Parliament chose the expression “a danger”, as used in Art 33(2), to identify the nature of a characteristic of a person to whom s 36(1C) applies in contradistinction to its choice of criterion in s 36(1B) that the person be assessed as “**a risk** to security” (emphasis added).
2. The fact that the Parliament used different expressions in ss 36(1B) and (1C) must be considered in the context that it did so when enacting s 36(1C) with the purpose of transposing the text of the second limb of Art 33(2) into the *Migration Act* so as to articulate its interpretation of that provision in the *Refugees Convention*: *Applicant A* 190 CLR at 230-231. Notably, when enacting s 36(1B) to deal with Australia’s obligations in respect of the first limb of Art 32(2) of the *Refugees Convention*, the Parliament did not use or transpose the language of the Convention.
3. Accordingly, the words “a danger to the Australian community” as used in s 36(1C) should be given the same meaning (adapted for the substitution of “Australia” for “of that country”) as they have in Art 33(2) and interpreted in accordance with Arts 31 and 32 of the *Vienna Convention on the Law of Treaties*, subject to the Parliament’s specification of the meaning of “particularly serious crime” in defining the extent of Australia’s non-refoulement obligations: *Applicant A* 190 CLR at 230-231; *Queensland v The Commonwealth* 167 CLR at 239-240.
4. The Parliament expressed the disqualifying thresholds in ss 36(1B) and (1C) differently, using, in s 36(1B), the concepts of “a risk to security” and, in s 36(1C), “a danger” to Australia’s security or to the Australian community. It follows that the Parliament intended that the words “a danger” in s 36(1C), as reflecting its treaty obligation under Art 33(2), to refer to something more than a mere risk that the person is a danger to Australia’s security or to the Australian community.
5. Accordingly, the appellant’s submission that the expression “a danger to the Australian community” in s 36(1C) should be construed consistently with the same or similar expressions used in other provisions of the Act, such as s 501(6)(d)(v), must be rejected. That is because of the legislative intention that s 36(1C) give effect to Australia’s international obligations, as a State Party, under Art 33(2) of the *Refugees Convention*. It follows that the section should be interpreted, so far as possible, to be consistent with international law: *Kingdom of Spain* [2023] HCA 11 at [16]. In contrast, the other provisions of the Act to which the appellant referred, that use the same or a similar expression, apply in a wholly domestic context as Perram, Thawley and Stewart JJ explained in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v EDB20* (2021) 287 FCR 581 at 589–590 [26]–[30], 594 [55]–[57], 596 [69].
6. The *Oxford English Dictionary* online defines “danger” as “liability or exposure to harm or injury; the condition of being exposed to the chance of evil; risk; peril” (sense 4a) and the *Macquarie Dictionary* online defines it as “liability or exposure to harm or injury; risk; peril” (sense 1) and “an instance or cause of peril” (sense 2).
7. A danger, in its natural and ordinary meaning as used in Art 33(2) and s 36(1C) (as understood by States Party to the *Refugees Convention*) conveys a threat of a substantial kind to Australia’s security or the Australian community based on objectively reasonable grounds (or suspicion): *Suresh* [2002] 1 SCR at 51-52 [90]-[91]; *EN (Serbia)* [2010] QB at 655 [45], 676 [114], 677 [118]; *Zaoui* [2006] 1 NZLR at 310 [45].
8. The concept of what is “a danger” involves an evaluation along a spectrum comprising, *first*, the probability or likelihood of the occurrence of an event or circumstance and, *secondly*, the consequence of its occurrence.
9. Thus, the word “danger” connotes that there are reasonable grounds to perceive a threat of serious, or potentially serious, consequences if the situation said to pose the danger were ignored. For example, warning signs around electricity infrastructure, cliffs and level crossings often refer their audience to the danger to life or of serious injury which a person would face if he or she proceeded heedless of the warning about the respective danger of electrocution, falling or collision with a train. The common law test of negligence, in contrast, uses a far lower standard, being the need for a reasonable person in the position of the alleged wrongdoer to foresee that if he or she proceeds there is a reasonably foreseeable risk that the claimant will be injured: *Wyong Shire Council v Shirt* (1981) 146 CLR 40 at 48 per Mason J. However, such a reasonably foreseeable risk need not be of such a character as to be a danger or be described as a threat.
10. Moreover, as used in s 36(1C)(b), “a danger” can relate to the particularly serious crime for which the person has been convicted as that might bear on what will occur if he or she were admitted into, or allowed to remain within, the Australian community.
11. Of course, the second limb in Art 33(2) and s 36(1C)(b) does not require that there be a causal link between the refugee’s conviction and the danger. But, neither provision excludes an evaluation of the present or future danger to the community having regard to past crime. Both provisions require, as a precondition of consideration of whether a person is a danger to the community, that he or she has been convicted of a particularly serious crime (here or abroad): *A v Minister for Immigration and Multicultural Affairs* [1999] FCA 227 at [3] per Burchett and Lee JJ and [41]-[43] per Katz J. And, as Stanley Burnton LJ said of Art 33(2) in *EN (Serbia)* [2010] QB at 655 [46]: “normally the danger is demonstrated by proof of the particularly serious offence and the risk of its recurrence, or the recurrence of a similar offence”. He added that, in his view, “a disregard for the law, demonstrated by the conviction, would be sufficient to establish a connection between the conviction and the danger”. However, he held that Art 33(2) did not require there to be any causal link between the conviction and the danger.

## The expression: “the Australian community”

1. I reject the appellant’s argument that the expression “the Australian community”, as used in s 36(1C)(b), cannot refer to a danger to an individual within that community. If the appellant’s argument were correct, a person who expressed a determination to assassinate the King, the Governor-General as head of state, the Prime Minister or some other prominent public figure, or to overthrow the Government, would not be capable of being found to be a danger to the Australian community even though such an act would affect the nation as a whole. So too, conduct that is inimical to significant norms of behaviour, including acts such as murder, assault occasioning bodily harm, drug trafficking, terrorism (including support for terrorism), frauds and domestic violence can be considered as constituting or evidencing a danger to the community as a whole, because they undermine or conflict with those norms, even though there may only be one actual or potential victim: see too *EN (Serbia)* [2010] QB at 655 [47].
2. A particularly serious crime (in the sense used in Art 33(2) and s 36(1C)) has a potential to impact on and adversely affect the whole community, even though there may be only a single individual victim of the offending conduct. The purpose of Art 33(2) was to allow States Party to refuse to give protection to the categories of persons that it described. The States Party used the exception in Art 33(2), that a person “who having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country”, to enable a host State to form a view of whether a refugee “is a danger to [its] community”, when called on to offer protection to the person. For example, a convicted murderer (whether the conviction occurred in the host State or elsewhere) who was unrepentant and un-rehabilitated might well be considered to pose a serious threat of engaging in further violent criminal conduct, including murder, and so be a danger to the community were he or she to be afforded protection in the host State. That is because once the convicted murderer is allowed to be a part of the host State’s community, depending on the facts of that case, his or her presence could be or pose a serious threat since he or she could move throughout it and could engage in criminal activity anywhere within it.
3. Indeed, States Party to the *Refugees Convention* must have contemplated that non-refoulement obligations would not be owed by a host State if it had reasonable grounds to consider that there was a danger or, using other descriptions, a future serious possibility, risk or threat that, if left in their community, a refugee, who had already been convicted of committing a particularly serious crime within the meaning of Art 33(2), would commit that particularly serious crime, or a crime of that character. However, as Professor Grahl-Madsen’s commentary (in the passage quoted at [40] above) explained that, in negotiating Art 33(2), the States Party considered that the risk of recidivism was, itself, not sufficient. That was because, if the nature of the crimes of an habitual petty thief did not amount to particularly serious crimes, a host State would not be justified in denying the refugee protection. But, as he noted, the States Party regarded Art 33(2) as entitling a host State to deny a refugee protection if it considered, on reasonable grounds, that having committed a particularly serious crime he or she would be a danger to the community, were he or she to become a recidivist offender by committing a crime or crimes of the same seriousness.
4. In a different statutory context, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ discussed the meaning of the expression “a danger to society or part of it” under s 98 of the *Sentencing Act 1995* (WA) in *McGarry v The Queen*  (2001) 207 CLR 121. They said that identification of that expression’s meaning was not without difficulty (at 129 [20]). They noted that the provision in which that expression appeared set out four criteria, three of which suggested that the degree of danger meant more than a risk, even a significant risk, that the offender would reoffend (being the fourth criterion) (at 129 [21], 130 [23]).
5. Here, the need for the Minister to consider the existence of reasonable grounds in respect of the danger referred to in s 36(1C)(b) arises only if the person has been convicted of a particularly serious offence. Ordinarily as Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ explained in *McGarry* 207 CLR at 130-131 [25], a sentencing court will consider the nature of a danger to society or a part of it posed by an offender in the sentence that it imposes for the relevant crime. Likewise, here, s 36(1C) prescribes something more than the mere fact of the conviction, by requiring that, in addition, there be reasonable grounds to consider that the person is to be refused eligibility for a protection visa because he or she “**is** a danger to the Australian community” (emphasis added).
6. No doubt the drafters of the *Refugees Convention* were concerned that no host State Party should be bound to accept a refugee who, objectively, could be regarded as posing a danger to its community, especially after the horrors of World War II. The aim of protecting the public from a person whom the decision maker (whether judicial or executive) considers on reasonable grounds “is a danger to the community” is a well-recognised concern of governmental institutions internationally and is reflected in the language of both Art 33(2) and s 36(1C)(b).
7. Over at least the last 30 years Australian legislatures have enacted statutes that authorise subsequent, non-punitive detention or lesser restraints on freedom of persons who have been convicted of crimes and served their sentences of imprisonment. Similarly, many other democratic nations have enacted legislation authorising preventative detention to deal with, or guard against ongoing, threats to their communities from terrorism and persons who have fanatical beliefs, such as those who participated in the attacks on the United States of America on 11 September 2001 or, subsequently, adherents of the sect known as Islamic State and similar violent ideologies.
8. The purpose of such laws is prophylactic in the sense that, at least as enacted in Australia, the executive Government must satisfy a court that the continuing, post-sentence detention of the person is necessary to protect the community because of the nature and likelihood of the prospect that he or she will engage in conduct, usually, of the kind for which the person was sentenced. For example, *first*, Divs 104, 105 and 105A of the *Criminal Code* in the *Criminal Code Act 1995* (Cth) authorise control orders, preventative detention orders and post-sentence detention orders for those who pose a risk of engaging in terrorist activities (see *Thomas v Mowbray* (2007) 233 CLR 307). The objects of the power to make control orders in s 104.1 include “protecting the public from a terrorist act”. The powers conferred on a court by Div 105A to make a post-sentence detention order enable it to order that a person be detained after serving his or her sentence to prevent a terrorist act in specified circumstances. The legislative purpose of those powers appears in the heading “Post-sentence orders” and s 105A.1 which provides:

**105A.1 Object**

The object of this Division **is to protect the community** from serious Part 5.3 offences **by providing that terrorist offenders who pose an unacceptable risk of committing such offences are subject to:**

(a) a continuing detention order; or

(b) an extended supervision order.

(emphasis added)

1. *Secondly*, State legislation authorises the ongoing detention of certain categories of convicted criminals, such as paedophiles, who are not fully rehabilitated or pose an ongoing risk of reoffending (see *Fardon v Attorney-General* (2004) 223 CLR 575). For example, s 3(a) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), with which the High Court was concerned in *Fardon* 223 CLR 575, stated that one of that Act’s objects was:

to provide for the continued detention in custody or supervised release of a particular class of prisoner **to ensure adequate protection of the community** …

(emphasis added)

1. Prophylactic laws of that character (such as ss 104.1(a) and 105A.1 of the *Criminal Code* and the *Dangerous Prisoners (Sexual Offenders) Act*) are calculated to protect the wider community from the serious and real risk of the person committing further offences were he or she to be at liberty as ordinarily would occur after the conclusion of his or her sentence of imprisonment. As Callinan J said in *Thomas* 233 CLR at 507 [595]:

The making of orders by courts to intercept, or prevent conduct of certain kinds is a familiar judicial exercise. Every injunction granted by a court is to that end. And every application for an interlocutory injunction requires the court to undertake a balancing exercise, that is to say of the convenience of the competing interests, and the efficacy and necessity of the orders sought. Injunctions to restrain public nuisances require the same approach. Orders to prevent apprehended violence, to bind people over to keep the peace, and, more recently, as in *Fardon v Attorney-General (Qld)* [(2004) 223 CLR 575], to approve curially continued detention as a preventative purpose to protect the public, are exercises undertaken, and, in my view, as here, better so undertaken by the courts. **Protection of the public is frequently an important, sometimes the most important of the considerations in the selection of an appropriate sentence of a criminal. That too is necessarily both a balancing and a predictive exercise**. It is one that necessarily takes account of the role of the police and other officials in preventing crime, and even of further criminal conduct on the part of the offender to be sentenced, as well as his personal circumstances.

(emphasis added)

## Summary

1. Thus, the criterion in s 36(1C)(b) that a person “is a danger to the Australian community” can be seen as reflecting a norm of public international law contained in Art 33(2) that recognises that each State Party to the *Refugees Convention* has no obligation to accept a refugee who is a danger to its community. Thus, a State Party has no obligation under Art 33(2) of the *Refugees Convention* to accept a refugee who is a danger to the community of that State in the broad sense that, were such a person to be allowed to remain, there are reasonable grounds, based on evidence, for regarding [or to “consider” in the language of s 36(1C)] that he or she poses a serious threat of causing substantial, rather than negligible, harm because he or she would, or would be likely to, commit a crime or crimes or act in such a way that offended significant societal norms in that society.
2. In any particular case it will be a question of fact or degree whether or not a person can satisfy the criterion in s 36(1C).

# Did the Tribunal make a jurisdictional error

1. It is important to read the reasons of an administrative decision maker realistically, as a whole, and not to construe them minutely and finely, with an eye keenly attuned to the identification of error: *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ; *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at 196 [59]-[60] per French CJ, Bell, Keane and Gordon JJ.
2. I reject the appellant’s argument that, in [64] of its reasons or elsewhere, the Tribunal identified an erroneous test that it would apply as its construction of the expression “a danger to the Australian community”. Rather, in [64] the Tribunal explained why, despite what Logan J said in his hypothetical disagreement with a potential reading of what Tamberlin QC DP may have said, it did not consider that the Deputy President and his Honour had stated inconsistent tests when each construed s 36(1C). While the primary judge said that the Tribunal determined the test in [64] of its reasons, I think it more accurate to say that the Tribunal lucidly formulated and applied the following test in [139] and [143] of its reasons, being its determinative reasoning, namely that the appellant fell within the statutory criterion that he “is a danger to the Australian community” because “there is a real, significant and serious risk, which is neither remote nor fanciful, that [he] will cause harm to members of the Australian community if he remains in Australia”. It found that the harm was “physical harm and perhaps severe physical harm, or extreme emotional harm in the present or the future”.
3. While the Tribunal did not use the exact language of the test that I have derived (see at [63] above), namely that the appellant “poses a serious threat or risk of substantial, rather than negligible, harm to the Australian community”, its reasons revealed that the test that it applied (at [139]-[143] of its reasons) was materially similar.
4. As I have explained above, a domestic violence offence may affect not just the individual who suffers the direct physical manifestation of the impugned conduct, but also children and other direct members of the household in which the offending occurred and potentially, as well, a wider circle of family, friends and onlookers.
5. Moreover, it was open to the Tribunal to find, as it did, that, based on his past convictions of particularly serious offences, if the appellant remained in Australia, there “is a danger” that he would cause physical harm “or extreme emotional harm in the present or in the future” of a nature and extent that met the criterion in s 36(1C).
6. Her Honour was correct to reject the appellant’s challenge to the Tribunal’s decision.

# Conclusion

1. It follows that there is no substance to the appellant’s contention that the words “a danger to the Australian community” in s 36(1C) should be given a construction that excludes a person, such as here, whom the Tribunal found on reasonable grounds to pose a present, real, significant and serious risk, that was neither remote nor fanciful, of engaging in conduct similar to his very serious domestic violence offences reflected in his previous convictions were he granted a visa.
2. Accordingly, the appeal should be dismissed with costs.

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| I certify that the preceding seventy-six (76) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Rares. |

Associate:

Dated: 30 May 2023

REASONS FOR JUDGMENT

THOMAS AND SNADEN JJ:

1. The appellant is Sudanese. He arrived in Australia in 2009, then aged 18. He held a Global Special Humanitarian (Class XB) (Subclass 202) visa, which had been issued to him pursuant to the *Migration Act 1958* (Cth) (the “**Act**”).
2. Between 2011 and 2016, the appellant embarked upon a series of criminal misadventures. They culminated in his pleading guilty to and being convicted of domestic violence offences, first in 2015 and again in 2016. Perhaps the most serious instance of offending took place on 12 April 2016, when, in contravention of a court order that had been made against him, he visited upon his former partner, struck her multiple times to her head and body, and then dragged her across the ground in what a court later described as a “painful and humiliating” manner. That followed three other instances of violent or aggressive conduct in which the appellant had engaged toward his former partner and police over the preceding two years.
3. On 10 August 2016, the appellant was sentenced to 15 months’ imprisonment. In consequence of his offending, the appellant’s visa was cancelled under s 501(3A) of the Act. A subsequent application to have that cancellation revoked failed.
4. By a document dated 24 October 2017, the appellant made an application under the Act for a protection visa. That application (the “**Visa Application**”) was refused by a delegate of the first respondent (the “**Minister**”). The appellant then applied to the second respondent (the “**Tribunal**”) under s 500(1) of the Act for a review of that decision. That application (the “**Review Application**”) was determined on 22 June 2020. The Tribunal affirmed the decision of the Minister’s delegate.
5. That decision (the “**Tribunal Decision**”) was the subject of an application to this court for judicial review pursuant to s 476A of the Act. It was dismissed with costs: *DMQ20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 514 (hereafter, the “**Primary Judgment**”). By an amended notice of appeal dated 24 October 2022, the appellant now appeals from the whole of that judgment.
6. For the reasons that follow, the appeal should be dismissed with costs.

# The central question

1. The bases upon which the appellant pressed (and hopes still to press) his Visa Application need not here be rehearsed in any detail. It is not presently disputed that he is a person to whom Australia owes protection obligations because he is a refugee (as defined) and because, if he is removed to Sudan, there are substantial grounds for believing that he will be exposed to a real risk of significant harm.
2. Despite that reality, the Visa Application was dismissed—initially by the Minister’s delegate and, later, by the Tribunal—because it was considered that the appellant could not satisfy the criteria stipulated by s 36(1C) of the Act. That section (read in context with other parts of s 36) provides as follows:

**36 Protection visas—criteria provided for by this Act**

…

(1A) An applicant for a protection visa must satisfy:

(a) both of the criteria in subsections (1B) and (1C); and

(b) at least one of the criteria in subsection (2).

…

(1C) 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 a final judgment of a particularly serious crime, is a danger to the Australian community.

1. Section 5M of the Act addresses what is meant by the reference in s 36(1C)(b) to “particularly serious crime”:

**5M Particularly serious crime**

For the purposes of the application of this Act and the regulations to a particular person, paragraph 36(1C)(b) has effect as if a reference in that paragraph to a particularly serious crime included a reference to a crime that consists of the commission of:

(a) a serious Australian offence; or

…

1. “[S]erious Australian offence” is defined by s 5 of the Act to mean:

…an offence against a law in force in Australia, where:

(a) the offence:

(i) involves violence against a person; or

(ii) is a serious drug offence; or

(iii) involves serious damage to property; or

(iv) is an offence against section 197A or 197B (offences relating to immigration detention); and

(b) the offence is punishable by:

…

(iii) imprisonment for a maximum term of not less than 3 years.

1. The Minister’s delegate and, later, the Tribunal took the view that the appellant is somebody who, having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community. The first half of that equation—namely, that the appellant is somebody who has been convicted by a final judgment of a particularly serious crime—is not controversial. At issue before the primary judge was—and now on appeal is—whether the Tribunal’s assessment that the appellant is a “danger to the Australian community” involved a misconstruction of what the Act contemplates by that phrase. If it did, then two consequences would follow: first, that the Tribunal’s Decision should be seen to have been reached otherwise than “…on a correct understanding and application of the applicable law” (see eg: *Shrestha v Minister for Immigration and Border Protection* (2018) 264 CLR 151, 155 [2] (Kiefel CJ, Gageler and Keane JJ)) and was, as such, a product of jurisdictional error; and, second, that the primary judge erred by not granting the relief that the appellant sought. If it did not, then it would follow that the Tribunal’s Decision was made within jurisdiction and that her Honour was correct so to decide.
2. The primary judge held that the Tribunal’s Decision was not attended by jurisdictional error as alleged and the appellant charges her Honour with having erred by so concluding. By his amended notice of appeal, he sought to establish error on two grounds, namely:

1. The primary judge erred in failing to find that the [s]econd [r]espondent asked itself the wrong question or applied the wrong test when considering whether the [a]ppellant ‘is a danger to the Australian community’ for the purposes of s 36(1C) of the *Migration Act 1958* (Cth).

2. The primary judge erred by failing to find that, having regard to all of the material, the Tribunal misconstrued its statutory task by reasoning that there were not ‘reasonable grounds’ to consider that the [a]ppellant ‘is a danger to the Australian community’.

1. The second of those grounds involves (or would have involved) a departure from what was advanced before the primary judge. At the hearing of the appeal, leave to advance it was denied. The court’s reasons for doing so were given *ex tempore* and needn’t here be repeated. The sole issue for consideration on the appeal is whether the Tribunal misunderstood what the Act contemplates by the reference in s 36(1C)(b) to “a danger to the Australian community”.

# The Tribunal’s Decision

1. In reasons published in support of its decision, the Tribunal noted that s 36(1C) of the Act “…was enacted to codify the effect of Article 33(2) of the *United Nations Convention Relating to the Status of Refugees*, adopted in 1951, as amended by the *1967 Protocol Relating to the Status of Refugees*…” After recording the terms of Article 33 of that convention (hereafter, the “**Refugees Convention**”), the Tribunal noted that satisfaction of the criteria in s 36(1C)(b) of the Act required analysis on two fronts: first, as to whether an applicant had been convicted by final judgment of a particularly serious crime and, second, as to whether he or she qualifies as “a danger to the Australian community”.
2. As to the second, the Tribunal made the following observations:

…[I]n order for a person to be a “danger” there must exist, at the time of the decision, a present risk which is “real” or “significant” or “serious” which is “neither remote nor fanciful” that the person will cause harm of a sufficiently serious nature (for example “of physical harm, or extreme emotional harm”) in the present or the future. If no such risk is present at the time of decision, it can not be said that a person is a danger. Similarly, if a present risk of future harm relates to a harm which is insufficiently serious, for example a moderate risk of mere “upset” then the person will not be a danger. Conversely, if there is a low risk but one which is none-the-less “real” or “significant” or “serious” of particularly serious future harm, say grave physical injury, then that risk may be sufficient to determine that a person is a danger to the Australian community.

1. The Tribunal then set about considering the nature of the appellant’s criminal misconduct and the extent to which it might inform whether or not he qualified as a “danger to the Australian community”. The following observations were recorded on that score (errors original):

On 18 May 2015, the [appellant] was convicted of contravention of domestic violence order on 2 December 2014 and was sentenced to 3 months imprisonment. On the same day, the [appellant] was convicted of two other counts of contravention of domestic violence order, one on 3 February 2015 and the other on 10 March 2015. The [appellant] was sentenced to 8 months imprisonment for these offences. On the same day the [appellant] was convicted of ‘assault or obstruct police officer’ on 10 March 2015, a conviction was recorded and no further punishment imposed.

The Court Brief in relation to the first contravention of domestic violence order offence, to which the [appellant] pleaded guilty, indicated that on 2 December 2014 the police attended upon the dwelling of the [appellant’s] former partner. The [appellant] was present at the former partner’s dwelling. The court brief relevantly stated:

*“The named aggrieved [former partner’s name] stated that an argument started over the respondent not respecting the aggrieved. The respondent has stated that he will “Fuck her up and kill her”. The aggrieved’s mother one [former partner’s mother’s name] and department of child safety personnel have have arrived for a welfare check on the couple’s child and have waited outside the dwelling. The aggrieved has received a slap to the arm which one the aggrieved’s mother has seen and other witnesses have heard from outside. The witnesses have then called Police. The aggrieved has then exited the property and waited with the witnesses for Police to arrive.*

*Police were called at around 10:40 on 2 December, upon arrival at the aggrieved’s address the defendant was located in the front room of the house sat down. The defendant was observed by Police to be clenching his fists and posturing in an aggressive manner. Police offered the defendant the opportunity to speak to them in relation to this matter which he has refused…”*

The information in the Court Brief was put to the [appellant] by the Respondent’s solicitor. The [appellant] indicated that he had attended his former partner’s residence to collect some of his clothes. He indicated that his former partner began shouting at him and an argument ensued. He said that he slapped his partner because she was shouting at him. He then said that he had not actually slapped her but that she was holding him and that he had pushed her away from him. The [appellant] denied that he had said to his former partner that he would “Fuck her up and kill her”.

The domestic violence order was varied on 2 December 2014 to prohibit the [appellant] from attending the residence or workplace of his former partner.

The Court Brief in relation to the second contravention of domestic violence order offence, to which the [appellant] pleaded guilty, relevantly stated:

*“The aggrieved stated that she and the defendant began arguing about their baby at approximately 5:10 PM that day, at the job address. The defendant began verbally abusing the aggrieved. The aggrieved has then left to the residents and walked outside to a neighbouring unit complex and sat down to give her and the defendant time to calm down. A short time later, the defendant has approached the aggrieved and continued to verbally abuse her telling her to go home as she was embarrassing him. The aggrieved refused and the defendant has grabbed the aggrieved’s hair and pulled her up onto her feet. At this time the aggrieved has returned home with the defendant.*

*Police took up a witness who stated he observed the aggrieved sitting down on the side of the road. The defendant has then approached the aggrieved with a baby in his arms. He was unsure if the defendant pushed the aggrieved at that time and the defendant walked back down victory Street. A short time later the defendant returned to the aggrieved’s location without the baby. At this time the aggrieved started walking away from the defendant. The defendant has then grabbed the aggrieved and attempted to pull her down victory Street. The aggrieved appeared to attempt to get away from him however the defendant continued to pull her down victory Street. The witness did not see the defendant or aggrieved after this time.”*

The information in the Court Brief was put to the [appellant] by the [r]espondent’s solicitor. The [appellant] indicated that he had attended his former partner’s residence that day in order to see their son. He said that he was aware that attending his former partner’s residents was in contravention of the domestic violence order. He said that he was aware that grabbing his former partner’s hair and pulling her to her feet was also a breach of the domestic violence order.

The Court Brief in relation to the third contravention of domestic violence order offence for which the [appellant] was convicted on 18 May 2015, relevantly stated:

*“The defendant both was present at the aggrieved’s home and was not of good behaviour towards her. Police entered the dwelling at [redacted] and spoke with the aggrieved. She stated that the defendant had attended her address but had only come to the front fence. Police then spoke with other witnesses who stated that they knew of the defendant and observed him both in the dwelling and the yard of [redacted] just prior to police arrival. Further the witnesses state that they could hear the male and female arguing.*

*Witness 1 states that they heard the defendant state “I’ll hit that baby”.*

*Witness 2 states that they saw the defendant both in the yard and in the dwelling of [redacted] while the defendant and aggrieved were verbally fighting.”*

The information in the Court Brief was put to the [appellant] by the [r]espondent’s solicitor. The [appellant] indicated that he had attended his former partner’s residents in order to collect some of his belongings. At first, he indicated that while he was approaching his former partner’s residence the police arrived and he ran off. He later said that he was on his former partner’s property but did not enter the house. The [appellant] indicated that his partner had been yelling at him. He denied that he had stated “I’ll hit that baby”. However, he admitted that he had pleaded guilty to the offence as detailed in the Court Brief.

The Court Brief in relation to the ‘assault or obstruct police officer’ offence, to which the [appellant] pleaded guilty, stated that when police had attended the [appellant’s] former partner’s residence in relation to conduct for which the [appellant] was convicted of the third count of contravention of a domestic violence order, the [appellant] failed to stop after being ordered to do so by the police. Upon being ordered to stop a second time the [appellant] ran away from police.

In addition to these offences the [appellant] has been convicted or found guilty of seven relatively minor drug-related offences, two other public nuisance offences, contravene direction or requirement, possess tainted property, and two counts of failure to appear in accordance with undertaking. The [appellant] also had a $300 recognisance forfeited for breach of good behaviour requirement and was later resentenced for the original offence.

The two other public nuisance offences involved the [appellant] yelling at, and acting aggressively towards, police officers. However, these offences were not treated as being particularly serious as no conviction was recorded for either offence and the [appellant] was fined $250 and $200 respectively.

The [appellant] also pleaded guilty to two incidents of breach of discipline under the *Corrective Services Act 2006* (Qld) which were committed in prison. The first breach was committed on 24 May 2016. On that occasion, the [appellant] was observed to be involved in a fight with another prisoner and to assault him. The [appellant] pleaded guilty to “acting in a way contrary to the security or good order of a corrective services facility” and was reprimanded.

The second breach was committed on 21 June 2016 and involved an assault on another prisoner. The [appellant] pleaded guilty to “acting in a way contrary to the security or good order of a corrective services facility” and was subjected to separate confinement for a period of three days.

At the hearing, the [appellant] admitted that he was involved in a fight with another prisoner on each occasion. He said that on each occasion the other prisoner swung at him initially and that he retaliated by punching back. The [appellant’s] representative submitted that low weight should be attributed to these offences as for people in prison and immigration detention, “if you don't stand up for yourself, you will get flogged in there”. The Tribunal has taken this into account as a mitigating factor for these offences.

The Minister’s representative also sought to rely on four incidents of violent behaviour recorded by immigration detention centre staff between December 2016 and September 2018. As these incidents involved behaviour which could result in the [appellant] being charged with criminal offences, the Tribunal adjourned briefly to allow the [appellant’s] representative to explain the privilege against self-incrimination to the [appellant]. When the hearing recommenced, the [appellant] chose to avail himself of that privilege and to not answer questions in relation to the recorded incidents. As the [appellant] is entitled to the privilege against self-incrimination and as the [appellant] has not, as yet, so much been charged with any offences arising from the incidents, the Tribunal places no weight on the allegations made against the [appellant] by detention centre staff. However, the Tribunal considers the existence of the reports of misbehavior (sic) including violence by the [appellant] mean that the Tribunal is reluctant to make a positive finding that the [appellant] has been of good behaviour since he has been in immigration detention.

1. That analysis culminated in the Tribunal’s recording that the appellant’s domestic violence offending was “very serious” and “evidence[d] a pattern of behaviour of increasing violence towards [his] former partner”. Later, it went on to note that the appellant’s “…violent behaviour has not been restricted to offences against his former partner…” and that he had also “…acted aggressively towards police” and had “…pleaded guilty to two breaches of discipline [whilst] in prison [which involved] fighting with and assaulting a fellow prisoner”.
2. The Tribunal then turned to consider what the consequences might be were the appellant to commit further offences, noting (errors original):

If the [appellant] were to reoffend in manner similar to his conduct which gave rise to his offences for contravention of a domestic violence order, the Tribunal finds that this would likely result in physical and psychological harm to victims and possibly severe harm.

The Tribunal finds that the most likely victims of any future harm would be the [appellant’s] former partner, any future partners, and possibly members of the community more generally. The Tribunal notes that the [appellant] claimed that he separated from his partner in 2014 and then went on to commit multiple incidents of domestic violence against her after they had separated. In those circumstances, the Tribunal is not confident that the fact that the [appellant] is separated from his former partner will mean that he will not reoffend against her. The [appellant] and his former partner share a child, which may mean that they may come into contact if the [appellant] is granted a form of custody or visitation rights in the future.

The Tribunal has had regard to the [appellant’s] other offending including his numerous minor drug-related offences. The Tribunal considers that these offences appear to be related to the [appellant] possessing marijuana and marijuana paraphernalia for his own marijuana consumption. As such, the Tribunal is not particularly concerned with the repetition of those sorts of crimes in and of themselves. However, the Tribunal is concerned that a return to drug consumption may affect the risk that the [appellant] will continue to engage in violent behaviour. This will be discussed further below.

Similarly, the Tribunal is not particularly concerned with the repetition of behaviour leading to the [appellant’s] offences for committing public nuisance in and of themselves. However, the Tribunal is concerned that some of the behaviour engaged in during those incidents has been aggressive, including towards police, and a repeat of that type of aggressive behaviour could escalate into serious physical violence.

Overall, the Tribunal considers that the [appellant’s] repeated offences of contravene a domestic violence order are very serious, they involved repeated and increasing levels of violence against the [appellant’s] former partner. The Tribunal finds that if the [appellant] engages in conduct similar to his conduct which gave rise to his offences for contravention of a domestic violence order, this would likely result in physical and psychological harm to victims and possibly severe harm.

1. Next, the Tribunal considered how likely it was that harm of the kinds identified above might be realised. That consideration culminated in a finding that “…there exists a present risk which is real, significant and serious, [and] which is neither remote nor fanciful[,] that the [appellant] will cause physical harm and perhaps severe physical harm, or extreme emotional harm in the present or the future if he were allowed to remain in Australia”. That being so, the Tribunal considered that the appellant “…is a danger to the Australian community”.
2. It proceeded to affirm the decision of the Minister’s delegate to reject the appellant’s Visa Application for want of satisfaction of the criteria in s 36(1C) of the Act.

# The appellant’s contentions

1. The appellant maintains that the Tribunal’s conclusion that he is a danger to the Australian community involved a misconstruction of that statutory concept. His contention is advanced at two levels: first, that the Tribunal misunderstood what does or does not qualify as “danger”; and, second, that the Tribunal misunderstood what does or does not qualify as “the Australian community”.
2. As to the former, the appellant submits that the concept of “danger”, as embodied by s 36(1C)(b) of the Act, imports something more than a risk of harm that is, as the Tribunal put it, “…real, significant and serious, [and] which is neither remote nor fanciful”.
3. As to the latter, the appellant submits that the reference in s 36(1C)(b) of the Act to “the Australian community” should be understood as a reference to all, rather than an identifiable member or identifiable members of the Australian population. At any event, he submits that it means something more than simply a single member of the Australian community (specifically in this case, his former partner).
4. Before turning to each contention, something might first be said about the nature of the court’s present task. At issue is what is contemplated by the correct construction of the relevant statutory phrase, “…danger to the Australian community”; and whether it accords with the Tribunal’s conception of that phrase in the present case.
5. Section 36(1C) was introduced into the Act by the passage of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). It was enacted to serve as the domestic recognition of Australia’s *non‑refoulement* obligations—or, perhaps more accurately, the Commonwealth Parliament’s understanding as to what constitutes Australia’s *non-refoulement* obligations—under Art 33(2) of the Refugees Convention.
6. It is convenient here to replicate Art 33 of the Refugees Convention in full. It is headed, “Prohibition of expulsion or return (‘*refoulement’*)” and reads:

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

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

1. The proper construction of a statutory phrase such as the one now in focus turns upon the application of well-established canons of statutory construction. Several such principles bear upon the meaning that might be attributed to the reference in s 36(1C)(b) to “danger to the Australian community”. Amongst them is the acknowledgment that statutory provisions that give effect to matters of international law should, so far as possible, be interpreted consistently with any instruments of international law to which they were intended to give effect: *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11, [16] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).
2. Thus, the proper construction of the phrase, “…danger to the Australian community” falls to be determined at least partly upon consideration of the construction of its prototype in Art 33(2) of the Refugees Convention. To that proposition it will be necessary later to return.
3. It is convenient, now, to address the appellant’s two contentions—namely as to the meanings of “danger” and “the Australian community” in s 36(1C)(b) of the Act.

# “Danger”

1. Neither the Act nor the Refugees Convention defines what is or is not within the concept of “danger”. Insofar as concerns its incorporation within s 36(1C)(b) of the Act, then, “danger” is a term of everyday usage, which should be understood to carry its ordinary meaning.
2. Conceptually (at least for present purposes), “danger” is a function of probability and consequence. A person will pose a “danger” insofar as there is a sufficient likelihood that he or she will engage in conduct that visits upon others a sufficient degree of harm. Both of those constituent concepts may be measured along spectra. Future conduct might be inconceivable, highly improbable, likely or certain (or any degree in between). The harm that it might visit might range from minor to severe. At issue presently is what combinations of probability and consequence should suffice to qualify as “danger” in the sense contemplated by s 36(1C)(b) of the Act (and its analogue in Art 33(2) of the Refugees Convention).
3. The appellant’s submissions did not clearly articulate an answer to that question. Instead, they focused upon what should *not* suffice; and sought to impress upon the court that the conception that the Tribunal favoured in this matter was in that realm. Specifically as to the requisite likelihood that an applicant for protection might engage in the future in conduct that visits harm of a kind sufficient to engage s 36(1C)(b) of the Act, the appellant submitted that “danger” imports something more than “real risk”. During the hearing of the appeal, the following exchange took place with counsel for the appellant, which neatly illustrates what was advanced:

MR ALBERT: …We reject real risk. We say if Parliament [meant] real risk, it would have used the word[s] “real risk”. They’ve used it elsewhere. They didn’t mean real risk. They mean something more than a real risk. That’s the first point. Danger does not mean possibility. Any form of possibility. A real possibility, even a significant possibility: that’s not enough either. And I hope your Honours appreciate that the language I’m using here is language that comes from various sources that I’m going to go through. So we reject that. If Parliament had meant to use the word “possibility”, it would have used the word “possibility”. It didn’t. It used the word “danger”. It’s more than possibility; it’s more than a real risk.

SNADEN J: What’s above real risk?

MR ALBERT: Well, that’s where we get - - -

SNADEN J: Other than certainty.

MR ALBERT: No, no, there’s – well, with respect, there’s quite a bit before you get to certainty and where the language of serious or significant risk comes in. Now, the problem with significant - - -

SNADEN J: You just said significant possibility is not enough.

MR ALBERT: Well, no, possibility we reject. So your Honour is right. Any qualifier on possibility we say is wrong. If Parliament had mean possibility it would have said possibility.

SNADEN J: Possibility and risk are synonyms, aren’t they?

MR ALBERT: No, with respect. In our submission, not. Your Honours, the difficulty – and again, let me just acknowledge this. We are talking about a spectrum. We are talking about the use of the English language. There is precision and imprecision in the way that it’s used. I am definitely repeating myself, but we’re asking your Honours to construe the whole phrase, not the word “danger” on its own, and again, I emphasise the word “is a danger”, not “may be a danger”, and that, perhaps, is my best direct response to your Honour. If Parliament had intended for danger to refer to a possibility, it would have coupled it with the word “may”, because the phrase “may be a danger”, we would have to accept, would pick up possibilities.

THOMAS J: So are you saying it has - - -

MR ALBERT: We say - - -

THOMAS J: - - - to be a certainty? Are you saying it has to be a certainty, then?

MR ALBERT: No, your - - -

THOMAS J: Well, anything that’s not a certainty is a possibility.

MR ALBERT: Well, we wouldn’t accept that either. There’s probability - - -

THOMAS J: Why don’t you accept that?

MR ALBERT: - - - after possibility.

THOMAS J: Why don’t you accept that?

MR ALBERT: Because there’s probability after possibility. So you start with possibility. You start with a risk. Then somewhere near risk, you’ve got a possibility. Might be a bit below; might be a bit above. Then you’ve got a probability, then you’ve probably got a near certainty and then you’ve got a certainty. We definitely do not say certainty; we definitely do not say near certainty. We say it is above real risk; it is above any form of possibility, otherwise Parliament would have used the phrase “may be a danger” not “is a danger”.

…

1. With respect, there was an air of unreality to what was advanced. At least for present purposes, “risk”, “possibility” and “probability” are synonyms. They serve as means by which to measure the quantitative dimension inherent in the concept of “danger”. In other words, there exists a “danger” if there exists a sufficient risk, possibility or probability of sufficient harm. Attempts to distinguish those synonymous concepts—“risk”, “possibility” and “probability” (real, significant, substantial or otherwise)—are, at least for present purposes, misconceived.
2. Similarly, it is artificial—or, at the very least, difficult—to distinguish the existence of danger from the possibility that danger exists. Necessarily, to perceive “danger” is to embark upon a process of speculation. Such processes may be informed by historical and other assessments (for example, as to a visa applicant’s criminal history and the measures that he or she has taken to rehabilitate); but they remain speculative and are inherently immune to precise quantification. “Danger”, then, is a binary proposition: a person, circumstance or thing that presents a sufficient likelihood of sufficient harm will bespeak the presence of danger, even though there remains a prospect—and perhaps, in some cases, a likelihood—that that harm might never be realised. There may well be no relevant distinction to be drawn between a person who *is* a danger to others and a person who *might be* such a danger.
3. Qualitatively, it is clear enough that the reference in s 36(1C)(b) of the Act to “danger” was intended to denote a prospect of harm. Given the statutory context—involving, as it does, an exception to the expectation that Australia will afford protection to refugees and others in need of it—it is likely that the Parliament intended that it should involve harm of non-trivial kinds. The likelihood—even a very high likelihood or certainty—that a person might cause others to feel anxious, offended, embarrassed, miserable or despondent, for example, is unlikely to suffice. “Danger” implies a prospect (howsoever measured) of injury (at the least), most likely of physical or psychological kinds.
4. As Rares J traverses above, the analysis just completed accords with the limited assistance afforded by international authorities (which speak variously of “danger” for the purposes of Art 33(2) of the Refugees Convention as encompassing a “serious threat”, a “real and serious possibility of adverse effect”, or a “serious risk of repetition of [criminal behaviour]”).
5. When assessing the presence of danger (in the sense that the natural and ordinary meaning of that word imports), the required analysis is both quantitative (what is the level of probability that something might happen?) and qualitative (what are the consequences if it does?). They are related inquiries: a high probability of mid-level personal injury, for example, might bespeak the presence of danger no more tellingly as would a moderate or even low probability of serious injury or death. Examples abound. A person who drives a car with brakes that they know to be faulty is likely to survive any resultant accident with minor (or no) injuries; but the possibility of injury (or worse), coupled with the near certainty of brake failure, would likely suffice to associate the act of driving with the presence of danger. Conversely, if one were to load a single bullet into a revolver and then spin the chamber, the prospect that the gun might fire upon the pulling of its trigger would be relatively low (no higher than one-in-six); and yet a person at whom it were pointed would feel very much (and very rightly) in danger.
6. To speak of the presence of “danger”, then, is to speak of a risk of harm that extends beyond what ordinarily attends routine human activity. Driving in a car, flying in a commercial aeroplane and swimming in the ocean are all activities that carry some inherent risk of harm; and yet they could not properly be regarded as dangerous (at least not when undertaken in the usual ways). Perhaps in recognition of that, it has been said that a risk of harm that is not “serious” falls short of the statutory conception of “danger” in s 36(1C)(b) of the Act: *DOB18 v Minister for Home Affairs* (2019) 269 FCR 636, 657 [83] (Logan J).
7. Insofar as danger might present in the form of a person (as s 36(1C) of the Act contemplates), the likelihood that he or she might visit harm upon others must at least rise beyond what is contemplated by ordinary personal interactions. A person likely would not, for example, be thought of as a danger to others merely because he or she might, through routine contact with them, unwittingly spread a virus or communicable disease. A person who is a known carrier of something particularly harmful and who has a tendency to interact with others intending that they should (and knowing that they might) contract it, on the other hand, may well be.
8. In its human form, then, “danger” presupposes that there should be something about a person’s character or proclivities (or both) that suggests a probability and quality of harm to others that is beyond the typical consequences of routine interaction. Ordinarily, that would fall to be assessed by reference to the person’s prior conduct and the likelihood that it might be repeated. A person with no history of violent offending would ordinarily be thought not to pose any danger to others, no matter that he or she might possess some real capability to inflict harm. A person with an appetite for and history of violence, on the other hand, might well be thought otherwise.
9. From the above analysis, two propositions emerge.
10. First, it is likely not possible—and much less is it advisable to attempt—precisely to define what does and does not constitute “danger” for the purposes of s 36(1C)(b) of the Act. It is a concept without technical meaning that falls for consideration under the light of the whole of the relevant facts and circumstances that present in any given matter: *Re* *WKCG and Minister for Immigration and Citizenship* (2009) 110 ALD 434, 438 [25] (Tamberlin DP); *LKQD v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2019) 167 ALD 17, 30 [57] (Jackson J). Perhaps like other indefinable concepts, one generally knows it when one sees it (to borrow from the famous observation of Mr Justice Stewart in *Jacobellis v Ohio* 378 US 184, 197 (1964); see also the observations of the Victorian Court of Appeal in *R v Panozzo* (2007) 178 A Crim R 323, 340 [43] (Chernov and Redlich JJA and King AJA)).
11. Second, whatever might be said of what does *not* fallwithin the conceptual limits of “danger”, it is clear beyond doubt that the circumstances with which the present matter engages fall well and truly within them. The Tribunal concluded that “…there exists a present risk which is real, significant and serious, which is neither remote nor fanciful[,] that the [appellant] will cause physical harm and perhaps severe physical harm, or extreme emotional harm[,] in the present or the future…” The present appeal (leaving to one side the proposed additional ground that the court declined to entertain) does not seek to challenge that finding. Rather, the contention is put simply that it does not bespeak a risk of harm that is sufficient to constitute the appellant as a “danger” in the sense that that term is employed in s 36(1C)(b) of the Act.
12. That proposition cannot be accepted. A finding that somebody poses a real, significant, serious and present risk of visiting physical harm very squarely suffices to establish that they constitute a “danger” for the purposes of s 36(1C)(b) of the Act. That is the way in which the Tribunal construed the statutory concept and doing so involved no misunderstanding of the kind about which the appellant complains. The learned primary judge was drawn so to conclude and, with respect, her Honour did not err.

# “The Australian community”

1. The appellant next submits that the reference in s 36(1C)(b) of the Act to “the Australian community” ought to be understood as just that: a reference to the Australian community collectively or as a whole, rather than to one or some of the individuals who comprise it. The criteria is concerned, he contends, to exclude from protection only those who pose a danger that extends beyond identifiable members of the population. It is said that the Tribunal misunderstood the conceptual limits of “the Australian community” and wrongly concluded that any danger that he poses is posed to the community at large.
2. Such a construction, the appellant says, should be preferred for any one or more of four reasons.
3. First, it is said that the reference in s 36(1C)(b) to “the Australian community” stands in contrast to other provisions of the Act that refer more expansively to “the Australian community or a segment of [it]”: see, for example, the Act, ss 5C(1)(d)(v) and (h), 116(1)(e)(i), 500A(1)(c)(v), 501(6)(d)(v) and 501(6)(h). Reading the Act consistently, it was submitted, required that the court ascribe to the phrase “the Australian community” a meaning that was not apt to encompass identifiable individuals or “a segment” within it.
4. Second, the appellant contends that his preferred construction of “the Australian community” is consistent with international law; specifically, with Art 33(2) of the Refugees Convention and the academic consideration that it has attracted. By his written submissions in the appeal, the appellant contended (references omitted):

According to a seminal opinion given by leading scholars on the Refugees Convention, Professor Sir Elihu Lauterpacht and Sir Daniel Bethlehem, the phrase “danger to the community” in Art 33(2) is “intended as a reference to the safety and well-being of the population in general’. This accords with UNHCR’s analysis (by Professor Atle Grahl‑Madsen): ‘the word “community” as used in Article 33(2) denotes the population at large, and… a “danger to the community” means a danger to the peaceful life of the population in its many facets’. It is directed to a person who ‘disrupts or upsets civil life, and particularly if this is done on a large scale, so that the person concerned actually becomes a public menace’. In analysis prescient to this case, UNHCR concludes that a crime not covered by the phrase is one ‘against an individual to whom the criminal had a special relationship’. In other words, the ‘community’ referred to in Art 33(2) is the population in general or as a whole or at large. If s 36(1C) is to have the ‘same meaning’ as Art 33(2), the person must thus pose such a danger. That understanding is inconsistent with what the Tribunal applied here.

1. Third, the appellant submits that excluding identifiable individuals from the definition of “the Australian community” is consistent with the plain and ordinary meaning of those words. A “community”, he says, is by nature collective.
2. Fourth, the appellant submits that his construction of “the Australian community” is warranted by application of established canons of statutory construction. There are two dimensions to that submission. First, it is said that if the phrase is construed so as to apply to him, the result would be to visit upon him a prospect of indefinite immigration detention; and, thus, that the court should strive to adopt a construction that would avoid that outcome. Second, it is said that s 36 of the Act is beneficial in nature and, thus, should be interpreted in the manner most favourable to those who seek Australia’s protection.
3. For the reasons that follow, we reject the appellant’s central submission as to what qualifies as “the Australian community” for the purposes of s 36(1C)(b) of the Act. That reference is apt to encompass any and all members of the population of Australia. We shall address each of the appellant’s four constituent contentions momentarily; but not before making the following observation.
4. The notion that s 36(1C)(b) of the Act is intended to except from protection only applicants who pose a danger to the entirety of the Australian community (or the community as a collective) is difficult—we think impossible—to reconcile with the statutory definition of “particularly serious crime” (above, [85]-[86]). It is to be recalled that that concept encompasses (amongst others) offences that involve “violence against a person”. It is plain that s 36(1C)(b) contemplates that a person who is convicted of an offence involving violence against a person might thereby (or partly thereby) be thought to constitute a danger to the Australian community. Obviously enough, that danger inures in the prospect, to be assessed in the usual ways (including by reference to concepts such as recidivism, remorse and rehabilitation), that the convicted person might repeat his or her conduct.
5. On the appellant’s construction, it is as good as impossible to see how the commission of such an offence (and the prospect of its repetition) might suffice to inspire some perception of danger to the community as a collective. As the appellant would have it, conviction for an offence of violence against a person would serve only as something of a gateway. In order that the convicted person might qualify as a danger, there would need to be something else about him or her, and likely something foreign to the conviction, that suffices to establish the requisite danger *to the community*. In the case of an applicant who had been convicted of an offence involving violence against a person, the exception in s 36(1C) would be enlivened only if he or she happened also to be somebody who posed some broader, national danger. Such a construction stretches the words of the statute beyond what is credible.
6. We return in any event to the four contentions that the appellant advanced to support his contention that the reference to “the Australian community” in s 36(1C)(b) of the Act is a reference to the community as a whole, and not to any or some of its constituent members.
7. The first is that the Act should be construed consistently, such that the use of different terms in different parts should be presumed to reflect a parliamentary intention that they should carry different meanings. Because the Act refers in other parts to “segments” of the Community, it is said that the absence of such a reference in s 36(1C)(b) means that the section contemplates danger in a collective sense.
8. There is superficial force to the appellant’s submission. It is a “sound rule” of statutory construction “…to give the same meaning to the same words appearing in different parts of a statute unless there is a reason to do otherwise”: *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, 618 (Mason J, with whom Barwick CJ and Jacobs J agreed); *Kline v Official Secretary to the Governor-General* (2013) 249 CLR 645, 660 [32] (French CJ, Crennan, Kiefel and Bell JJ, with whom Gageler J agreed in the result). Equally, it may be presumed that different phrases within the same enactment are intended to convey different meanings: *Construction, Forestry, Mining and Energy Union v Hadgkiss* (2007) 169 FCR 151, 160 [53] (Lander J, with whom Buchanan J agreed in the result; North J dissenting). Howsoever true, it has been noted that “…the presumption that arises from variations in language is of very slight force if the words in themselves are sufficiently clear”: *Commissioner of Taxes (Vic) v Lennon* (1921) 29 CLR 579, 590 (Higgins J in dissent; Knox CJ and Starke J disagreeing in the result); *Stewart v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 281 FCR 578, 588 [44] (Rares, Anastassiou and Stewart JJ).
9. Departure from the presumptions summarised above may be appropriate where similarities or differences in phraseology within a statute can be attributed (or partly attributed) to the scope or frequency of its amendment (see, eg, *Robert Bosch (Australia) Pty Ltd v Secretary, Department of Innovation, Industry, Science and Research* (2011) 197 FCR 374, 382 [35] (Murphy J); Dennis C Pearce, *Statutory Interpretation in Australia* (9th ed, LexisNexis Butterworths, 2019) 144) or where context otherwise requires it (see, eg, *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 643 (Gibbs J, with whom Mason and Murphy JJ agreed in the result; Stephen and Jacobs JJ dissenting).
10. There can be no question that the Act has been the subject of frequent and considerable amendment. In context—and, in particular, having regard to what is contemplated by the phrase “particularly serious crime”—we consider that nothing of substance emerges from the use in other parts of the Act of phrases of wider application (such as those that refer more broadly to “segment[s]” of the community or population). The authorities that the appellant advanced to support his contention (*Moana v Minister for Immigration and Border Protection* (2015) 230 FCR 367 (North, Jessup and Rangiah JJ) and *BAL19 v Minister for Home Affairs* (2019) 168 ALD 276 (Rares J)) do not, in truth, address the issue of central relevance.
11. Moreover, the language of s 36(1C)(b) faithfully reflects the language of Art 33(2) of the Refugees Convention. That that was the intention that animated its enactment is clear from the explanatory memorandum that accompanied the legislation that introduced it: Explanatory Memorandum*,* Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), 180 [1236]. That reality serves as additional context to rebut what might otherwise be a forceful presumption that different phrases should mean different things. Presently, the employment of different phrases in different parts of the Act does not bear materially upon the proper construction of s 36(1C)(b).
12. We turn, then, to the academic or extra-judicial consideration of Art 33(2) of the Refugees Convention upon which the appellant relies. Two instruments are advanced as authority in support of his construction of the phrase, “the Australian community”. The first is an opinion entitled, “The scope and content of the principle of *non-refoulement*”, written by renowned international lawyers Sir Elihu Lauterpacht and Sir Daniel Bethlehem (the opinion is itself a chapter of Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003)). The second is a commentary written in 1963 by another eminent international lawyer, Professor Atle Grahl-Madsen, posthumously republished (or partly republished) in 1997 by the United Nations High Commissioner for Refugees and titled, “commentary on the refugee convention 1951 articles 2-11, 13-37”.
13. In that latter work, Professor Grahl-Madsen sought conceptually to distinguish “danger to the country” from “danger to the community” (references omitted):

As threats against the “national security” (the State, its constitution, organs and external peace) are covered by the term “danger to the country”, it will seem that the word “community” as used in Article 33 (2) denotes the population at large, and that a “danger to the community” means a danger to the peaceful life of the population in its many facets. In this sense a man will be a danger to the community if he sabotages means of communication, blows up or sets fire to houses and other constructions, assaults or batters peaceful citizens, commits burglaries, holdups or kidnapping etc., in short if he disrupts or upsets civil life, and particularly if this is done on a large scale, so that the person concerned actually becomes a public menace.

However, a single crime will in itself not make a man a danger to the community. This is especially true if the crime is committed against an individual to whom the criminal had a special relationship, as for example a crime passionelle. If, however, the one and only crime which a person has committed is clearly antisocial and demonstrates a complete or near complete lack of social and moral inhibitions, e.g. the blowing up of a passenger airplane in order to collect life insurance, or wanton killing in a public place, then it may be appropriate to classify the perpetrator as a danger to the community.

On the other hand, a man who has committed a number of crimes, should not be considered as a danger to the community on the sole ground that he is a recidivist. This was firmly stressed by the United Kingdom delegate, who, hoping “that the scope of the joint amendment would not be unduly widened ... wished to point out that to be classified by the courts as a hardened or habitual criminal, a person must have committed either serious crimes, or an accumulation of petty crimes. The first case would be covered by the joint amendment, and he was quite content to leave the second outside the scope of the provision”. His view was apparently accepted by the Conference, which did not adopt an Italian proposal to insert the words “or having been declared by the Court a habitual offender” (after the word “crime”) in the text of Article 33 (2).

The Office of the United Nations High Commissioner for Refugees has expressed a similar view:

“Whether the commission of a crime by a refugee makes him a danger to the community is *quaestio facti*. It may be that a person who has been convicted for a major crime or several times for a minor, but nevertheless serious, offence, constitutes, as a[n] habitual criminal, a danger to the community, while a person, who, on the other hand, has been convicted for a capital crime – which he has committed in a state of emotional stress or in self-defence – would not constitute a danger to the community.”

1. Lauterpacht and Bethlehem drew a similar distinction:

As to the meaning of the word ‘community’, it is evident that this is intended as a reference to the safety and well-being of the population in general, in contrast to the national security exception which is focused on the larger interests of the State...

1. The appellant seizes upon the references in those works to “the population in general” (or the correspondent “population at large”). They reflect, so he contends, an intention to exclude from protection against *refoulement* under the Refugees Convention only those who present a danger to the community as a collective; and not those who are a danger merely to identifiable individuals.
2. Though advanced with skill and industry, that contention must be rejected. The passages to which the appellant refers do no more than identify the need to distinguish, for the purposes of Art 33(2), the protection of a state from the protection of its citizens. They recognise that a person may constitute a danger to the community by reason of his or her prior conduct and the likelihood of its repetition. They do not, as the appellant contends, extend further to suggest that such a danger will exist only if the harm that presents is harm that threatens to be visited upon the community collectively.
3. The opinion of Prof Grahl-Madsen, in particular, is instructive. It notes that the commission of a single criminal act against a person to whom the perpetrator had a special relationship “will in itself not make a man a danger to the community”. So much may readily be accepted. That proposition, though, is focused not upon the quality or universality of the harm that a refugee might inflict; but rather upon whether or not he or she might fairly be thought to pose a sufficient risk of inflicting it. Criminal behaviour properly described as aberrant or opportunistic might very conceivably be thought not to reflect a level of risk of repetition that is sufficient to constitute its perpetrator as a danger to the community. But the same might not be said of a recidivist offender—for example, one who has repeatedly partaken of criminal misconduct and presents as likely to embark upon similar misadventures in the future.
4. As to the nature of the harm that a person must be at sufficient risk of inflicting in order to qualify as a danger to the community, the extra-judicial opinions to which the appellant refers are neutral at best; and, more likely, favour the construction of the phrase “danger to the Australian community” that the Minister advances. Again, Prof Grahl-Madsen’s opinion is instructive. It contemplates that the danger might manifest in a refugee’s propensity to “disrupt[] or upset[] civil life”, including by means of crimes against individual victims, such as assault and kidnapping. Excepting degrees of seriousness, we do not understand either analysis to read in such a way as to reflect any limitation inherent in Art 33(2) of the Refugees Convention concerning the character of the potential harm that a refugee must be at risk of visiting in order that he or she might qualify as a “danger to the community”.
5. We turn, next, to the third of the appellant’s four contentions as to why “danger to the Australian community” should be read to require a risk of harm to the community in a collective sense. There can be no difficulty in accepting, as a general proposition, that s 36(1C)(b) of the Act should be construed having regard to the plain and ordinary meaning of the words that it employs. Similarly, it could hardly be doubted that a “community” is collective by nature. Nonetheless—and insofar as “danger” connotes the existence of a sufficient risk of injury (or worse), as we have concluded above—to read “danger to the Australian community” in the collective sense for which the appellant contends would be to stray beyond the semantic limits of those words. Communities are intangible by nature. They cannot be killed or physically harmed, nor may they sustain injury of the kinds that might suffice to bespeak the presence of “danger” for the purposes of s 36(1C)(b) of the Act. That is a fate necessarily reserved for individuals.
6. That acknowledged, it is clear that the phrase “the Australian community” in s 36(1C)(b) of the Act—read particularly in contradistinction to the reference in s 36(1C)(a) to “danger to Australia’s security”—is a short-hand reference to the people that comprise it. A person thus poses a danger to the Australian community if he or she poses a danger to Australians: *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, 52 [91] (McLachlin CJ, L’Heureux‑Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).
7. The fourth and final contention advanced by the appellant in favour of a narrow construction of the phrase “the Australian community” is itself comprised in two parts. First, it is said that s 36 of the Act is beneficial in nature, and should be construed in such a way as to extend its benefit as fulsomely as possible. Second, it is said that the section should be read with an appreciation of the consequences that attach to each construction, one of which (if the construction favoured by the primary judge prevails) is that the appellant will be exposed to the prospect of indefinite immigration detention. We shall address each in turn.
8. It may be accepted that s 36 of the Act operates beneficially. It serves to identify the circumstances in which Australia will afford visa protection to those in need of it. Insofar as it contemplates disqualifications such as those for which s 36(1C) of the Act provides, it may be accepted that the court might ordinarily strive to construe them narrowly and, in so doing, extend the benefit of the section as widely as possible. Against that, of course, it should be remembered that s 36(1C) is also beneficial by operation: it serves to benefit (through protection against danger) the state and its citizens.
9. Regardless, the court’s task remains one of construction. It is guided by the usual array of textual and contextual cues; and not always do they incline in favour of the same construction. Ultimately, the task is to construe the provisions of present relevance in a way that accords with their legislative purpose: *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 592 [44]-[45] (French CJ, Gummow, Hayne, Kiefel and Bell JJ); *Acts Interpretation Act 1901* (Cth), s 15AA.
10. In the case of s 36(1C) (and Art 33(2) of the Refugees Convention), that purpose is clear enough: to protect the population from danger posed by those to whom refugee or complementary protection would otherwise be afforded. The construction of “the Australian community” that the appellant favours would, if accepted, leave that purpose substantially unfulfilled. It would excise from the realm of visa protection only those who constitute a danger to Australia’s security and those who, having a history of particularly serious criminality, constitute a danger generally to the whole of the Australian community (rather than constituent members of it). It would leave the community—via the agency of its individual members—exposed to the very species of significant harm that, in this case, was found to present. We do not accept that such a construction accords with the legislative purpose that evidently underpins s 36(1C) of the Act.
11. For equivalent reasons, the prospect that the appellant might (or perhaps will) be subjected to prolonged or indefinite immigration detention is not a circumstance that warrants acceptance of his preferred construction of s 36(1C)(b) of the Act. Again, it may be accepted as a general proposition that a court charged with construing a statute will prefer a construction that preserves rights of liberty and autonomy over one that doesn’t: *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 378 [68] (Redlich, Osborn and Priest JJA). That preference emerges as an incident of the broader principle of legality—the notion that, unless expressed in sufficiently clear terms, statutes should ordinarily be construed so as not to constrain or interfere with elemental rights, freedoms or immunities: *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ, with whom Deane and Dawson JJ and Toohey J agreed); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 30-31 [42] (French CJ), 66 [148] (Heydon J); *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).
12. The principle of legality does not operate as a fetter upon the ability of parliaments to remove or qualify important personal rights: *Lee v NSW Crime Commission* (2013) 251 CLR 196, 310 [313] (Gageler and Keane JJ). Here, it is plain enough that the Parliament has seen fit to require the detention of non-citizens that are not authorised by operation of a visa to remain in Australia. Even assuming that that should warrant a narrower reading of the exclusions that condition the criteria for visa protection, the court’s task presently remains to give effect to the legislative purpose for which s 36(1C)(b) exists. The construction for which the appellant contends would substantially imperil the realisation of that purpose.
13. The reference in s 36(1C) of the Act to “the Australian community” is apt to encompass any and all of the members thereof. That was the construction upon which the Tribunal made the assessment of the appellant that it made. Proceeding in that way involved no misunderstanding or error of the kind that the appellant alleges. With respect, the learned primary judge was correct so to conclude.

# Conclusion

1. The Primary Judgment is not a product of appealable error as alleged. The appeal should be dismissed and the appellant should pay the Minister’s costs.

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| I certify that the preceding seventy-six (76) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Thomas and Snaden. |

Associate:

Dated: 30 May 2023