Federal Court of Australia

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v EBD20 [2021] FCAFC 179

|  |  |
| --- | --- |
| Appeal from: | *EBD20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 334 |
|  |  |
| File number: | NSD 421 of 2021 |
|  |  |
| Judgment of: | **PERRAM, THAWLEY AND STEWART JJ** |
|  |  |
| Date of judgment: | 13 October 2021  |
|  |  |
| Catchwords: | **MIGRATION** – appeal from application for review of decision of Minister to refuse to grant a Protection (Class XA) visa – Minister not satisfied that the visa applicant passed the character test – Minister exercised discretion under s 501 of the *Migration Act 1958* (Cth) to refuse visa – where visa applicant previously subject of cancellation of a Refugee and Humanitarian visa – where Administrative Appeals Tribunal had concluded in review of visa cancellation that there were not reasonable grounds for considering that the visa applicant was a “danger to the Australian community” – whether Administrative Appeals Tribunal conclusion a mandatory relevant consideration in relation to the Minister’s exercise of his discretion under s 501 – whether Minister’s decision affected by legal unreasonableness and inconsistency – whether Minister did not properly exercise jurisdiction by failing to engage sufficiently with the Administrative Appeals Tribunal’s decision  |
|  |  |
| Legislation: | *Administrative Appeals Tribunal Act 1975* (Cth) s 43*Migration Act 1958* (Cth) ss 36, 65, 499, 501, 501CA  |
|  |  |
| Cases cited: | *Collector of Customs v LNC (Wholesale) Pty Ltd* (1989) 19 ALD 341; [1989] FCA 703*DOB18 v Minister for Home Affairs* (2019) 269 FCR 636; [2019] FCAFC 63*EBD20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 334*KDSP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1; [2020] FCAFC 108*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; [1986] HCA 40*Minister for Immigration and Border Protection v Makasa* (2021) 386 ALR 200; [2021] HCA 1*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18 *SZOQQ v Minister for Immigration and Citizenship* (2012) 200 FCR 174; [2012] FCAFC 40*WKCG v Minister for Immigration and Citizenship* [2009] AATA 512  |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | New South Wales |
|  |  |
| National Practice Area: | Administrative and Constitutional Law and Human Rights |
|  |  |
| Number of paragraphs: | 71 |
|  |  |
| Date of hearing: | 26 August 2021 |
|  |  |
| Counsel for the Appellant: | Mr G Kennett SC with Ms R Francois |
|  |  |
| Solicitor for the Appellant: | Australian Government Solicitor |
|  |  |
| Counsel for the Respondent: | Mr A Sullivan QC with Mr OR Jones |
|  |  |
| Solicitor for the Respondent:  | Turner Coulson Immigration Lawyers |

ORDERS

|  |  |
| --- | --- |
|  | NSD 421 of 2021 |
|   |
| BETWEEN: | MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS Appellant  |
| AND: | EBD20Respondent  |

|  |  |
| --- | --- |
| order made by: | PERRAM, THAWLEY AND STEWART JJ |
| DATE OF ORDER: |  13 october 2021 |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The cross-appeal be dismissed.
3. The orders of the primary judge be set aside and in lieu thereof:
	1. the application be dismissed;
	2. the applicant pay the respondent’s costs.
4. The respondent pay the appellant’s costs of the appeal and the cross-appeal.

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

REASONS FOR JUDGMENT

THE COURT:

1. The **Minister** of Immigration, Citizenship, Migrant Services and Multicultural Affairs appeals from orders made by the primary judge in this Court’s original jurisdiction, quashing a decision of the Minister to refuse to grant the respondent a Protection (Class XA) visa on character grounds under s 501(1) of the *Migration* ***Act*** *1958* (Cth): *EBD20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCA 334 (hereafter “**J**”). The respondent cross-appeals and relies on a notice of contention.

# BACKGROUND

## Grant and cancellation of a Refugee and Humanitarian visa

1. EBD20 is a male citizen of Iraq who arrived in Australia in 1997 at the age of 7 as the holder of a Refugee and Humanitarian (Class XB) visa. He has been convicted of a number of crimes, the first in 2004, for robbery in company. On 5 October 2012, EBD20 was sentenced in relation to four offences to which he had pleaded guilty, described next. On 8 May 2012, EBD20 pleaded guilty to two offences of wounding in company on 30 November 2010. He was, at the time, a member of the Notorious motorcycle gang. He was one of twelve men who arrived in five cars at a café in Mount Druitt where the treasurer of the Comanchero motorcycle gang was attacked, including by EBD20 with a baseball bat. On 15 May 2012, EBD20 pleaded guilty to two counts arising from events which occurred on 21 February 2011. EBD20 pleaded guilty to attempted specially aggravated break and enter with intent to intimidate. The circumstances of special aggravation, giving rise to count 2, were being armed with a dangerous weapon. One of the co-offenders had a Bentley twelve gauge pump action shotgun; another had .357 revolver and EBD20 was armed with a knife. The total sentence imposed was 5 years, with an overall non-parole period of 34 months.
2. EBD20’s Refugee and Humanitarian (Class XB) visa was cancelled on 6 July 2015 under s 501(3A) of the Act. That section provides for mandatory cancellation if the Minister is satisfied that a person does not pass the “character test”. EBD20’s application under s 501CA to revoke the cancellation decision was unsuccessful.

## Application for and refusal of a Protection visa

1. EBD20 applied for a Protection (Class XA) visa on 15 June 2017. That is the visa application the subject of this appeal. On 19 October 2017, a delegate of the Minister refused to grant the visa because of the application of s 36(1C)(b) of the Act. Section 36 includes:

**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) …

(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.

## The Tribunal’s s 36(1C) decision

1. EBD20 successfully sought review in the Administrative Appeals **Tribunal**. The Tribunal made its decision and published its reasons on 3 October 2018 (hereafter “**T**”). The Tribunal concluded that there were not reasonable grounds for considering that EBD20 was “a danger to the Australian community”, stating at T[22] and T[48]:

… I have had the advantage of seeing and hearing the applicant in the witness box and of hearing the evidence of those who gave evidence on his behalf. For reasons which follow, I have decided that the applicant does not constitute a danger to the Australian community …

Putting the various findings I have made together as to the position of the applicant since his last offending in 2011, and having attempted to estimate him in the witness box, and having heard what was said about him by his intended wife and family members, I do not think that there are reasonable grounds for considering him to be a danger to the Australian community. I think it is likely that the community will be safe from him. The reviewable decision will therefore be set aside and remitted to the respondent for reconsideration with the direction that the applicant is not a danger to Australia.

1. The Tribunal made the following decision under s 43(1)(c)(ii) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**):

The reviewable decision is set aside and remitted to the respondent for reconsideration with the direction that the applicant is not a danger to Australia.

## The Minister’s decision to refuse the grant of a Protection visa

1. In accordance with the Tribunal’s decision, the matter was remitted for reconsideration. Consistently with the Tribunal’s direction, the Minister – by his delegate or otherwise – did not decide that the criterion in s 36(1C)(b) was not satisfied. Rather, on 8 October 2020, the Minister personally refused to grant the Protection visa, because the Minister was not satisfied that the respondent passed the “character test” in s 501(6) of the Act and, on that basis, decided to exercise his discretion under s 501(1) to refuse to grant the visa.
2. The parts of s 501 particularly relevant to this decision are as follows:

**501 Refusal or cancellation of visa on character grounds**

*Decision of Minister or delegate—natural justice applies*

(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

…

(6) For the purposes of this section, a person does not pass the ***character test*** if:

(a) the person has a substantial criminal record (as defined by subsection (7)); or

(7) For the purposes of the character test, a person has a ***substantial criminal record*** if:

…

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or…

1. The Minister’s decision was accompanied by a statement of reasons (hereafter “**D**”), which included:

**CHARACTER TEST**

…

[7] I take into account the submissions by made by [EBD20]’s representative, who makes reference to the s 36(1C) finding by the Administrative Appeals Tribunal (AAT) on 3 October 2018. His representative submits that the general power to refuse [EBD20]’s visa on the basis that he does not pass the character test is not applicable where there is a specific duty under section 36(1C), which provides that [EBD20] is eligible for the visa provided he is not a danger to Australia’s security or a danger to the Australian community.

[8] However, I do not consider those submissions to throw any doubt on the accuracy or currency of information contained in [EBD20]’s criminal history certificates or the sentencing remarks of the District Court of New South Wales dated 5 October 2012. Furthermore, I note that [EBD20] has stated that he accepts the findings of the court and the sentence imposed for his criminal offending.

[9] As a result of the sentence of imprisonment, [EBD20] has a substantial criminal record. I find that he does not pass the character test by virtue of s 501(6)(a) of the Act with reference to s501(7)(c) of the Act and that he has not satisfied me that he passes the character test.

**DISCRETION**

…

**Risk to the Australian Community**

[22] In making my decision I considered that Australia has a low tolerance of any criminal conduct by visa applicants, reflecting that there should be no expectation that such people should be allowed to remain permanently in Australia.

[23] I have considered whether [EBD20] poses a risk to the Australian community through reoffending by having regard to any mitigating or causal factors in his offending, and giving consideration to the steps [EBD20] has undertaken to reform and address his behavior. I have also taken into account [EBD20]’s overall conduct in the custodial and non-custodial environment, and his insight into the offending.

…

[41] I also note with concern that on 6 February 2015, information was received that [EBD20] had been associating with a member of an ‘Organised Crime Network’. During an interview on 12 February 2015, [EBD20] was questioned about this and he claimed he thought that he was not permitted to associate with ‘bikies with colours’ and the person he was associating with was a gang member before, but is no longer. The report stated that while [EBD20]’s response to supervision has been satisfactory, his overall response appears to be superficial and his association was of great concern. I note that a recommendation of revoking his parole order was supported, and his parole was subsequently cancelled.

[42] I have considered the decision of the Administrative Appeals Tribunal (AAT) who found that [EBD20]’s (2010) offending was a serious crime involving violence. His most recent offending (2011) involved no actual violence on [EBD20]’s behalf though he was armed with a knife at the time. The AAT found that [EBD20] does not constitute a danger to the community.

[43] The AAT took into account that [EBD20]’s circumstance[s] are different now to what they were some seven years ago as he no longer has any connection with the gang or its members; he has formed a relationship with a young lady of good standing in the community and they intend to marry and start a family; he is more mature now and has been drug free since 2011 or 2012. Furthermore, he has job prospects through a brother of a school friend and the support of his family. Despite the findings of the AAT, I am of the view that [EBD20]’s conduct remains untested in the community.

[44] I acknowledge that there are a number of factors indicative of a lowering of the risk of [EBD20] reoffending, including his expressions of remorse and that he submits that he no longer has ties to gangs, its members or former members. I note that [EBD20] was generally compliant during his time in prison, on parole and in immigration detention. Also that his partner is said to be a strong source of support, along with other family members. However, I note that [EBD20] had protective factors in the past being the support of his family and community yet he continued to offend.

[45] I also take into account that [EBD20] displayed some compliant conduct in prison and whilst on parole in 2015. However, I also note that whilst in the community on parole he associated with a person said to have been a member of an organised crime network, and I find this of concern particularly given [EBD20]’s violent offending conduct in 2010 was gang related.

[46] I have considered that the Australian Criminal Intelligence Commission (ACIC) designates OMCGs as one of the most high-profile manifestations of organised crime in Australia. I am aware that OMCGs remain the target of national law enforcement operations to reduce the criminal threat posed by OMCGs to the community.

[47] I also take into account the information contained in [EBD20’s] criminal history certificates, the sentencing remarks of the District Court of New South Wales dated 5 October 2012, and various probation reports showing that [EBD20] was a member of the Notorious OMCG until at least October 2012 when he was sentenced to prison.

[48] I find [EBD20]’s past membership of the Notorious OMCG indicates his willingness to associate with anti-social and criminal elements in the community, and his willingness to engage in violent criminality as a gang member. Whilst I have taken into account [EBD20]’s submission that he is no longer a member of the gang, I find that he subsequently associated with a person said to have been a gang member, whilst he was on parole in 2015 and that also in this instance such association was despite having family support and knowing the consequence of returning to prison which did not act as a motivational factor for him to fully disassociate himself from criminal elements whilst in the community. Such non-compliant conduct resulted in his parole being revoked.

[49] I note that after [EBD20] returned to prison and was released, he went straight into immigration detention and has not since returned to the general community.

[50] I find that [EBD20] … has not yet had the opportunity to test his ability to remain drug free in the community for any length of time and to refrain from associating with member/s of criminal gangs that may make him vulnerable to the negative influence of such associates, which he states was a major influence in his past offending.

[51] Overall, I find that there remains an ongoing risk that [EBD20] will reoffend. Should [EBD20] engage in further criminal conduct of a similar nature, it could result in dangerous and violent conduct that could cause significant physical harm and/or psychological injury to members of the Australian community.

1. The Minister concluded that the respondent posed a risk of harm to the Australian community that the Minister did not consider was outweighed by any countervailing considerations. The Minister stated at D[86]-[91]:

[86] [EBD20] has committed multiple serious crimes, including offences of a violent nature and as a member of a criminal gang. [EBD20] and non-citizens who commit such offending should not generally expect to be permitted to remain in Australia.

[87] I find that the Australian community could be exposed to significant harm should [EBD20] reoffend in a similar fashion. I could not rule out the possibility of further offending by [EBD20]. The Australian community should not tolerate any further risk of harm.

[88] I found the above consideration outweighed the countervailing considerations in [EBD20]’s case, including the best interests of his nephew treated as a primary consideration, the impact on his partner, mother and other family members, and that he is owed international non-refoulement obligations.

[89] I am cognisant that where significant harm could be inflicted on the Australian community, even strong countervailing considerations are insufficient for me not to refuse the visa. This is the case even applying a higher tolerance of criminal conduct by [EBD20], than I otherwise would, because he has lived in Australia from a very young age.

[90] In reaching my decision I concluded that [EBD20] represents an unacceptable risk of harm to the Australian community and that the protection of the Australian community outweighed any countervailing considerations above.

[91] Therefore, I decided to exercise my discretion to refuse to grant [EBD20]’s application for a Protection (Class XA) visa under s 501(1) of the Act.

## The application for judicial review in this Court

1. EBD20 commenced judicial review proceedings in this Court, advancing two grounds of review. The first ground of review was:

In light of the findings of the Tribunal (which are treated as findings of the Minister pursuant to s 43(6) of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**)[)], and/or the direction of the Tribunal made pursuant to s 43(1) of the AAT Act, the Minister was obliged to conclude that [EBD20] was not a danger and/or risk to the Australian community. In failing to so find, the Minister committed jurisdictional error.

1. The primary judge did not reach a conclusion in respect of this ground, primarily because he concluded that the application should be allowed in respect of ground 2: J[69]-[73].
2. Ground 2 of the judicial review application was:

The Minister failed to give proper, genuine and realistic consideration to the fact that the Tribunal had determined that [EBD20] was not a danger and/or risk to the Australian community, and/or acted in a legally unreasonable way in failing to act consistently with and/or considering the Tribunal’s determination and/or failed to properly take into account a mandatory relevant consideration, and therefore committed jurisdictional error.

1. In relation to this ground, the primary judge held that the Minister erred by failing to give “proper, genuine or realistic consideration” to the Tribunal’s reasons: J[74]-[97]. The primary judge considered the Minister had a duty to give proper consideration to the Tribunal’s decision and reasons whether those reasons were properly characterised as either:
* “a mandatory relevant consideration (having regard to their legal status in having brought to legal finality the administrative decision-making process in respect of the criterion provided for in s 36(1C)(b) in [EBD20’s] application)”; or
* “a critical element of the representations [EBD20] made to the Minister”: J[84]
1. The primary judge rejected the Minister’s submission that “the Tribunal’s decision and its reasoning was ‘just another piece of material before him’ that the Minister was entitled to place such weight on as he thought fit”: J[87].

# THE ISSUES ON APPEAL

1. The Minister contended that the Tribunal’s s 36(1C) decision was not a mandatory relevant consideration in relation to his exercise of the discretion under s 501(1) and that the consideration given by the Minister to the Tribunal’s decision was not such (or so inadequate) as to demonstrate or give rise to jurisdictional error.
2. EBD20 embraced the primary judge’s reasoning and, by a notice of contention, argued that the primary judge should also have found that the Tribunal’s decision and reasons were a mandatory relevant consideration which the Minister failed properly to take into account and that the Minister’s decision was legally unreasonable. By a cross-appeal, EBD20 also argued that the primary judge erred in failing to conclude that the Minister was obliged to conclude that EBD20 was not a danger or risk to the Australian community in determining whether to grant the visa. The obligation was said to arise by reason of the operation of s 43(6) of the AAT Act.
3. It is convenient to deal first with the cross-appeal.

# THE CROSS-APPEAL

1. Section 43(6) of the AAT Act must be read with s 43(1). Those subsections provide:

**Division 6—Tribunal’s decision on review**

43 Tribunal’s decision on review

…

(1) For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:

(a) affirming the decision under review;

(b) varying the decision under review; or

(c) setting aside the decision under review and:

(i) making a decision in substitution for the decision so set aside; or

(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.

…

(6) A decision of a person as varied by the Tribunal, or a decision made by the Tribunal in substitution for the decision of a person, shall, for all purposes (other than the purposes of applications to the Tribunal for a review or of appeals in accordance with section 44), be deemed to be a decision of that person and, upon the coming into operation of the decision of the Tribunal, unless the Tribunal otherwise orders, has effect, or shall be deemed to have had effect, on and from the day on which the decision under review has or had effect.

1. The “decision” about which s 43(6) speaks is the decision which results from the Tribunal’s review. The Tribunal set aside the delegate’s decision and remitted the matter for reconsideration with a direction under s 43(1)(c)(ii). That left the visa application in the state of being the subject of no decision.
2. The reference in the opening words of s 43(6) to “[a] decision of a person as varied by the Tribunal” and “a decision made by the Tribunal in substitution for the decision of a person” is a reference to s 43(1)(b) and (c)(i), respectively; see also: *Minister for Immigration and Border Protection v* ***Makasa*** (2021) 386 ALR 200; [2021] HCA 1 at [51]. Section 43(6) is not expressed to apply to a decision under s 43(1)(c)(ii).
3. Section 43(6) has no direct relevant operation in the present case.
4. It follows that the cross-appeal must be dismissed.

# THE APPEAL

## Granting or refusing a visa under s 65

1. The grant or refusal of a visa occurs under s 65 of the Act. The Minister is to grant a visa “if satisfied” that various criteria have been met and that the grant of the visa is not prevented by various provisions including s 501. Section 65 provides:

**65 Decision to grant or refuse to grant visa**

(1) Subject to sections 84 and 86, after considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 91W (evidence of identity and bogus documents), 91WA (bogus documents and destroying identity documents), 91WB (applications for protection visas by members of same family unit), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa.

1. One of the criteria which the Minister must be satisfied has been met is that provided by s 36(1C)(b): s 65(1)(a)(ii). One of the matters which the Minister must be satisfied does not prevent the grant of the visa is s 501(1): s 65(1)(a)(iii).
2. Section 36(1C) enacts into domestic law Australia’s interpretation of Article 33(2) of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967. Article 33(1) prohibits the expulsion (or refoulement) of a refugee to places where his or her life or freedom would be threatened on account of a convention reason. Article 33(2) provides:

The benefit of [Article 33(1)] 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.

1. Whilst the issues raised by s 36(1C)(b) and 501(1) might overlap, the statutory questions posed by the provisions are different in many respects. Section 36(1C) does not provide a discretionary power. Rather, it provides, through the mechanism of a criterion of eligibility for a protection visa, a limited exception to Australia’s non-refoulement obligation. Reflecting the language of Art 33(2), s 36(1C)(b) contains a requirement that the view taken by the Minister must be taken “on reasonable grounds”.
2. Section 501(1) confers a discretionary power to refuse the grant of any visa “if the person does not satisfy the Minister that the person passes the character test”. Section 501(1) does not expressly require any consideration to be given to whether a person is a “danger”. Unlike s 36(1C), s 501(1) applies to all visas. The discretion in s 501(1) is intentionally broad. One of the matters the Minister typically, if not invariably, takes into account in considering the discretion is risk to the Australian community.
3. The criterion for eligibility for a visa in s 36(1C)(b) and the discretion not to grant the visa under s 501(1) serve different purposes, albeit facts relevant to one might also be relevant to the other. In ***KDSP*** *v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 279 FCR 1; [2020] FCAFC 108 at [284], O’Callaghan and Steward JJ observed:

*…* If an applicant fails to satisfy s 36(1C) they will not be eligible for a visa. In such a case, there will be no role for s 501 to play as there will simply be nothing to refuse. If an applicant satisfies s 36(1C), he or she may, like all other visa applicants in Australia, be subject to the Minister’s discretionary powers in s 501. In this way, and in our view, ss 36(1C) and 501(1) are cumulative requirements.

1. The delegate’s decision the subject of the Tribunal’s review was not one which concerned s 501(1). Before the matter was remitted by the Tribunal, there was no necessary occasion for the Minister to consider the operation of the discretion in s 501(1) given that the delegate took the view that there were reasonable grounds for considering EBD20 was “a danger to the Australian community”.

## The Tribunal’s decision

1. The role of the Tribunal was to review the delegate’s decision. The delegate’s decision was one to refuse the grant of a visa under s 65, because EBD20 failed to meet the criterion in s 36(1C)(b).
2. The Tribunal set out each of the various observations which had been made by the Honourable B Tamberlin QC in ***WKCG*** *v Minister for Immigration and Citizenship* [2009] AATA 512 at [25], [26] and [29]-[31] as to the meaning of “danger to the Australian community”: at T[25]. The test as articulated in *WKCG* at [31] is, in summary: whether there is a real or significant risk or possibility of harm to one or more members of the Australian community; it “involves an assessment of the applicant’s level of risk”, but probability of harm is not required for a conclusion that the person “is a danger to the Australian community”.
3. It should be noted that the question whether the test is accurately stated in *WKCG* does not directly arise for consideration in this appeal, but there is a real question in that regard – see: *DOB18 v Minister for Home Affairs* (2019) 269 FCR 636; [2019] FCAFC 63 at [72]-[89] (Logan J).
4. After setting out the relevant paragraphs of *WKCG*, the Tribunal referred to the decision of the Full Court in *SZOQQ v Minister for Immigration and Citizenship* (2012) 200 FCR 174; [2012] FCAFC 40 at [52] before noting that the Full Court had neither adopted nor rejected the test as stated in *WKCG*: at T[26]-[27].
5. Having set those matters out, the Tribunal stated at T[28] (emphasis added):

The expression “danger to the Australian community” is to be construed in its context, but has no technical meaning. The phrase is used in both s 36 and s 501(6)(d) of the Act, albeit in slightly different contexts. The language is that of ordinary English. Whether it is satisfied involves a close consideration of the whole of the relevant facts and circumstances as they present today. **I am not sure that there is any one test as such. The view that a person is a danger to the Australian community can be held in a variety of circumstances. Prior criminal conduct is obviously relevant. The degree of risk of recidivism is obviously relevant, and that requires attention to his motivation not to re-offend. What rehabilitation a person has undergone is obviously relevant. When his last offending occurred is relevant. The views of those who know him well can be relevant.**

1. Having identified at T[28] what it considered to be the relevant questions, the Tribunal then set out its various findings from T[29]-[46] before concluding at T[48] that there were not reasonable grounds for concluding that EBD20 was “a danger to the Australian community”. Its conclusion is set out at [5] above.
2. The Tribunal accepted that EBD20 firmly intended not to have further connection with organised criminal networks: at T[44]. It accepted he had formed a new and genuine relationship with a woman who would encourage his separation from the gang: T[34]-[35], [44]. The Tribunal referred to the change in EBD20 which had been observed by EBD20’s elder sister. It noted that EBD20 may have arranged what could turn out to be a full time job: T[43]. The Tribunal referred at T[46] to evidence from a forensic psychologist in terms which suggest it accepted the evidence:

I heard from a forensic psychologist who examined [EBD20] by telephone over two and a half hours while he was in detention on Christmas Island in April this year. She assessed him as a low to moderate risk of re-offending, noting that the items which influenced his score were historical in nature, and that his prognosis was considered positive because of the high level of support he receives from his family and partner, his expressed remorse, and his motivation towards engaging in counselling in the future. She also spoke with his mother, elder sister and partner, and formed the view that they would all provide good support to him.

1. It is not clear precisely what test the Tribunal applied given that it said at T[28] that there was not one test as such. However, it is clear from T[28] (set out at [5] above) and the Tribunal’s discussion which preceded T[28] that the “degree of risk of recidivism” was important to the Tribunal in the assessment of whether there were reasonable grounds to conclude EBD20 was “a danger to the Australian community”. The Tribunal appears to have accepted the evidence of the clinical psychologist that EBD20 had a low to moderate risk of re-offending. The Tribunal must, however, have considered that the risk of recidivism was not sufficiently high as to warrant a conclusion that there were reasonable grounds for considering EBD20 “a danger to the Australian community”.
2. Unsurprisingly in light of the material before the Tribunal, including the expert evidence it apparently accepted, the Tribunal did not conclude that EBD20 posed no risk.
3. The Tribunal’s reasons must be read in the context that the level of risk was being assessed in order to answer the specific question posed by s 36(1C)(b), namely whether there were reasonable grounds for concluding that EBD20 was “a danger to the Australian community” and in the context of its findings, including its apparent acceptance of evidence consistent with an ongoing low level risk. At T[48], the learned Deputy President stated:

… I do not think that there are reasonable grounds for considering him to be a danger to the Australian community. I think it is likely that the community will be safe from him.

1. This statement does not involve a conclusion that EBD20 posed no risk. It is a conclusion that the community was likely to be safe. It was a very favourable conclusion in favour of EBD20, but it was not one which went so far as to say he posed no risk. The Tribunal’s view was that the level of risk posed by EBD20 was not sufficient for it to be said that there were reasonable grounds for considering EBD20 to be “a danger to the Australian community”.
2. It might be observed that one does not know what decision the Tribunal would have reached if the Tribunal had been asking itself whether there was “a risk to the Australian community” at a level sufficient to warrant exercise of the broad discretion under s 501(1) to refuse the visa. Indeed, one does not know what test the Tribunal would have adopted if it had embarked on that exercise, or what level of risk it would have regarded as tolerable, for the simple reason that it was not reviewing any decision involving such a question.
3. It might be further observed that, if the review was one concerning the exercise of a discretion under s 501(1), the task would have involved the Tribunal complying with lawful directions made under s 499 of the Act which would necessarily have affected the Tribunal’s analysis in a way not shared with the task in which it was in fact engaged.

## The remittal for reconsideration

1. As mentioned, the Tribunal set aside the delegate’s decision refusing the visa. The application for a protection visa was therefore once again on foot and needed to be determined by either grant or refusal under s 65(1).
2. The Minister proceeded on the basis that the criterion in s 36(1C)(b) was satisfied, consistently with the Tribunal’s direction – see: *Collector of Customs v LNC (Wholesale) Pty Ltd* (1989) 19 ALD 341 at 345; [1989] FCA 703 at 10 (Davies J). The Minister then considered whether or not to apply the discretion in s 501(1) as he was lawfully entitled, if not obliged by s 65(1)(a)(iii), to do – see: *KDSP* at [284]. He decided to exercise the discretion to refuse the visa.
3. EBD20 submits the Minister’s decision was affected by jurisdictional error in three ways:
4. first, that the Tribunal’s decision and reasons were a mandatory relevant consideration which was not taken into account;
5. secondly, that the Minister’s decision was legally unreasonable and the reasons for the decision did not disclose an intelligible justification for rejecting the reasoning of the Tribunal (and was inconsistent with the Tribunal’s decision and reasons);
6. thirdly, he submits that the Minster failed sufficiently to engage with the Tribunal’s decision.

## Mandatory relevant considerations

1. As to the first matter, mandatory relevant considerations in the sense described in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; [1986] HCA 40 can be express or implied. The Tribunal’s decision and reasons were not, according to the terms of s 501(1), express mandatory considerations. Given that s 36(1C) and s 501 are different statutory powers directed to different purposes, it should not be implied into s 501(1) that a Tribunal’s earlier decision as to the application of s 36(1C)(b) is a mandatory relevant consideration on a subsequent consideration of the application of s 501(1).
2. In any event, there is no question that the Minister did consider the Tribunal’s decision and reasons. As will be explained below, the consideration given was also adequate.

## Legal unreasonableness and inconsistency

1. As to the second matter, the grant of the discretionary power in s 501(1) is presumed to have been made on the implied condition that it be exercised reasonably – see generally: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; [2013] HCA 18.
2. EBD20 submitted that the Tribunal’s decision and reasons were inconsistent with the Minister’s decision and that the Minister’s reasons disclosed no intelligible justification for rejecting the Tribunal’s reasons. This submission largely hinges upon a contention that the Tribunal concluded that EBD20 posed no risk to the Australian community. For the reasons given earlier, this contention is not correct.
3. Properly analysed, there is no real inconsistency between the Tribunal’s decision about s 36(1C)(b) and the Minister’s decision in relation to s 501(1). The Minister was considering the exercise of the discretion in s 501(1) in respect of a person who had been found not to be “a danger to the Australian community” within the meaning of s 36(1C)(b).
4. As a matter of principle, it is not irrational or inconsistent to decide under s 36(1C)(b) that there are not reasonable grounds for concluding that a person is “a danger to the Australian community”, but nevertheless to reach the conclusion that the person presents a sufficient level of risk to warrant exercising the discretion under s 501(1) not to grant a visa.
5. The Minister approached the matter, first, on the basis that “Australia has a low tolerance of any criminal conduct by visa applicants, reflecting that there should be no expectation that such people should be allowed to remain permanently in Australia”: D[22]. Secondly, he considered whether EBD20 posed a risk through reoffending: D[23] and following. The ultimate conclusions in respect of these two matters were:

[86] [EBD20] has committed multiple serious crimes, including offences of a violent nature and as a member of a criminal gang. [EBD20] and non-citizens who commit such offending should not generally expect to be permitted to remain in Australia.

[87] I find that the Australian community could be exposed to significant harm should [EBD20] reoffend in a similar fashion. I could not rule out the possibility of further offending by [EBD20]. The Australian community should not tolerate any further risk of harm.

1. The “test” the Minister applied with respect to level of risk was, in substance, that no risk of harm was tolerable: at D[87]. This was not the test which the Tribunal applied to the question before it. Whatever threshold the Tribunal applied (see T[28]), the Minister’s risk tolerance threshold for s 501(1) purposes was lower.
2. The Minister and the Tribunal were each looking at the level of risk to answer different questions. The different inquiries contained a common element, namely an assessment of the level of risk which EBD20 posed. The Tribunal concluded that the level of risk was not sufficient for s 36(1C)(b); but it did not conclude there was no risk. The Minister concluded that the level of risk was sufficient to warrant the exercise of the discretion in s 501(1). A conclusion that the level of risk was not such that the person was a “danger” for the purposes of s 36(1C)(b) does not mean that the level of risk was insufficient to warrant an exercise of the discretion in s 501(1). The Minister might lawfully take the view, as he evidently did, that a low risk is sufficient for exercise of the discretion under s 501(1) and that it is not necessary for s 501(1) purposes that the risk be at a level such that the criterion in s 36(1C)(b) was not satisfied.
3. The Minister recorded in his reasons that he had considered the Tribunal’s conclusion that EBD20 was not “a danger to the Australian community” and explained why he considered that EBD20 posed a risk at a level sufficient to exercise the discretion in s 501(1). This was appropriate. The consideration which the Tribunal had given to the question of whether EBD20 was “a danger to the Australian community” was relevant to the Minister’s task under s 501(1), in particular because, in answering the question before the Tribunal, the Tribunal had looked at matters relevant to the level of risk posed by EBD20, including the possibility he might reoffend. To the extent there is tension between the ultimate conclusions of the Tribunal and the Minister, that is explained by the fact that the level of risk was being assessed in relation to different questions and that the Minister’s test as to the level of risk for the purposes of s 501(1) was not the same as the Tribunal’s test as to the level of risk for the purposes of s 36(1C)(b).
4. The fact that the Tribunal considered the level of risk insufficient for the question it had to answer did not prevent the Minister assessing whether the level of risk was, notwithstanding, sufficient for the different question he had to answer. The Minister was not bound to determine that the level of risk was insufficient for s 501(1) purposes merely because the Tribunal had concluded that the level of risk was insufficient to reach a conclusion of “danger” under s 36(1C)(b).
5. There was a direction from the Tribunal to the effect that the criterion in s 36(1C)(b) was satisfied. The Minister acted in accordance with the direction. The direction was not one which had the effect that the Minister could no longer consider the level of risk EBD20 posed when considering the other conditions for the grant of the visa including whether it could not be granted because of an exercise of discretion under s 501(1): s 65(1)(a)(iii).
6. The present case is different to *Makasa*. In *Makasa*, a delegate suspected Mr Makasa failed the character test by reason of sentences imposed in 2009 and cancelled Mr Makasa’s visa under s 501(2). In 2013, the Tribunal made a decision under s 43(1)(c)(i), setting aside the delegate’s decision and substituting a decision that the visa not be cancelled. In 2017, being satisfied that Mr Makasa failed the character test solely by reason of the 2009 convictions, the Minister again exercised the discretion conferred by s 501(2), taking later convictions into account in the exercise of the discretion. The High Court held that, once exercised in respect of facts constituting a failure to pass the character test to decide not to cancel a visa, the power conferred by s 501(2) of the Act cannot be re-exercised in respect of the same failure to pass the character test to decide to cancel the visa: at [23], [27], [56].
7. The present case concerns a single refusal to grant a visa, not successive exercises of the one power to cancel a visa. The visa application has only been refused once on the basis of s 501(1) and had never been refused on that basis at the time of the Tribunal’s decision.
8. The Minister’s decision is not relevantly inconsistent with the Tribunal’s decision. It was not legally unreasonable for that or any other demonstrated reason.

## Engagement with the Tribunal’s reasons

1. As to the third matter, EBD20 contended that the Minister did not properly exercise the jurisdiction entrusted to him by failing to engage sufficiently with the Tribunal’s decision. EBD20 submitted that the only real “engagement” by the Minister with the Tribunal’s decision was found in the last sentence of D[43], which states: “Despite the findings of the [Tribunal], I am of the view that [EBD20]’s conduct remains untested in the community”.
2. EBD20 submitted that the conclusion that he was untested in the community was wrong, referring to the primary judge’s reasons at J[94] and [95], where his Honour stated:

A true appreciation of the circumstances as are revealed in the Tribunal’s reasons (and also as is apparent from the State Parole Authority letter dated 27 February 2015) would also have required the Minister at least to have qualified his conclusion [at D[43]] that [EBD20]’s “conduct remains to be untested [sic – remains untested] in the community”.

On the materials before the Minister including the Tribunal’s reasons it was plain that [EBD20]’s conduct had been tested in the community for at least a not insignificant period of time. That was a circumstance which the Tribunal recognised but the Minister did not as is made apparent in the erroneous conclusion that it was in consequence of a breach of his parole involving his association with a member of an organised criminal network that [EBD20]’s freedom in the community had been brought to an end. That was the only basis that the Minister could have been entitled to discount [EBD20]’s good behaviour whilst at liberty in the community.

1. The Minister’s observation at D[43] that EBD20’s conduct “remains untested in the community” must be read in the context of the decision as a whole. The Minister was aware that EBD20 had been released on parole for a period of 9 months and demonstrated “compliant conduct … whilst on parole”. The Minister expressly stated as much at D[45]:

I also take into account that [EBD20] displayed some compliant conduct in prison and whilst on parole in 2015. However, I also note that whilst in the community on parole he associated with a person said to have been a member of an organised crime network, and I find this of concern particularly given [EBD20]’s violent offending conduct in 2010 was gang related.

1. The Minister’s observations at D[50] about the lack of testing of EBD20’s conduct in the community concerned the period after parole had been revoked.
2. EBD20 also points to a likely factual error in the Minister’s reasons. The Minister appeared to have concluded at D[41] and [48] that EBD20’s parole was revoked because of his non-compliant conduct in associating with a gang member whilst on parole. If that is what the Minister intended, which is likely, his conclusion was wrong. The Tribunal’s reasons at T[29] recorded that EBD20 was told that his parole would be revoked if he did such a thing again (associating with a gang member) and stated at T[30] that his parole was later revoked because he faced further charges.
3. This factual error does not establish that the Minister did not engage with the Tribunal’s reasons. Nor was the error of fact dispositive, central or critical.
4. The Minister’s reasons show a consideration of the Tribunal’s reasons of a kind consistent with the lawful exercise of the discretion in s 501(1), including through the explanation given as to why the risk posed by EBD20 was sufficient to warrant the exercise of the s 501(1) discretion. EBD20 has not established jurisdictional error on this basis.

# CONCLUSION

1. The Minister did not fail to take into account a mandatory consideration or fail sufficiently to engage with the Tribunal’s reasons. The Minister’s decision was not legally unreasonable. The Tribunal’s direction was given effect. The Minister’s view that EBD20 posed a risk to the Australian community was not relevantly inconsistent with the Tribunal’s conclusion that the criterion in s 36(1C)(b) was satisfied. The effect of what has occurred, as a matter of substance, is that the Minister has concluded that EBD20 was not a danger to the Australian community but nevertheless poses a risk at a level such that the discretion in s 501(1) should be exercised not to grant the visa.
2. The Minister’s decision has not been shown to be the subject of jurisdictional error in any of the ways raised in the appeal. The primary judge erred in concluding that the consideration given by the Minister to the Tribunal’s decision and reasons was such as to demonstrate jurisdictional error.
3. The appeal should be allowed with costs and the cross-appeal dismissed with costs.

|  |
| --- |
| I certify that the preceding seventy-one (71) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Perram, Thawley and Stewart. |

Associate:

Dated: 13 October 2021