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From Cancellation to Removal: The Protection of Migrants of 'Bad Character' in Australia

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FROM CANCELLATION TO REMOVAL: THE PROTECTION OF MIGRANTS OF 'BAD CHARACTER' IN AUSTRALIA

LILLIAN ROBB*

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I. INTRODUCTION

Australia has made a number of commitments to abide by international obligations under a variety of human rights treaties.¹ In migration matters, the key obligation among these is the obligation of *non-refoulement*. This is the obligation not to return people to countries where their life or freedom may be threatened,² where they face cruel, inhumane or degrading treatment,³ or where they face persecution for reasons of race, religion, ethnicity, membership of a particular social group, or political opinion.⁴ A failure to respect these obligations could result in serious consequences for the individuals affected. For Australia, the obligation of *non-refoulement* is central to the protection of the human rights of migrants.

Australia has made an ongoing commitment to respect the obligation of *non-refoulement*. In fact, Australia was one of the earliest parties to the Refugee Convention and a key player in the creation of an international legal regime for the protection of refugees following the Second World War.⁵ However, this paper will argue that Australia's migration legislation is not capable, in its current form and application, of ensuring that Australia upholds this commitment. In particular, this paper argues that migrants who are found to be of 'bad character' may be vulnerable to removal from Australia in breach of Australia's obligations of *non-refoulement*.

1. A list of treaties to which Australia is a signatory is published at: AUSTRALIAN GOV'T DEP'T OF FOREIGN AFF. & TRADE, TREATIES, <https://info.dfat.gov.au/Info/Treaties/Treaties.nsf/WebView?OpenForm&Seq=3> (last visited Sept. 29, 2019).

2. International Covenant on Civil and Political Rights arts. 6, 7, Dec. 16, 1966, 999 U.N.T.S. 171; Convention on the Rights of the Child arts. 6, 37, Nov. 20, 1989, 1577 U.N.T.S. 3.

3. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

4. Convention relating to the Status of Refugees art. 33, Jul. 28, 1951, 189 U.N.T.S. 137, as amended by the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 263.

5. See Mary Crock, *Refugees in Australia: Of Lore, Legends and the Judicial Process*, Papers from the Seventh Colloquium. Judicial Conference of Australia 3 (2003) (referencing the Refugee Convention of 1951 signed in Geneva).

Australia's adherence to *non-refoulement* obligations relies primarily on the operation of The *Migration Act 1958* (Commonwealth) (Migration Act), which regulates the entrance and presence of, migrants in Australia.⁶ It is the sole legislative instrument responsible for managing the right of migrants to enter or remain in Australia.⁷ It also provides the power to remove migrants from Australia in the absence of a right to stay.⁸ This paper presents an in-depth analysis of the protection visa application process and removal provisions as they relate to migrants of "bad character." This paper will illustrate the operation of the provisions through their application to a "hypothetical applicant" created for the purpose of explanation.

This analysis will illustrate that migrants who are owed *non-refoulement* obligations by Australia can be removed in breach of those obligations, creating the potential for grave impacts on the human rights of migrants in Australia. This paper will conclude that major reform of the Migration Act is required to protect the human rights of migrants who are covered by Australia's *non-refoulement* obligations. In addition, this paper will introduce a lack of clarity surrounding the operation of the provisions of the Migration Act, the outcome for migrants who are owed *non-refoulement* obligations, and Australia's intention and commitment with respect to the removal of migrants in breach of Australia's *non-refoulement* obligations. This creates the opportunity for the resulting human rights breaches to occur in the absence of critical analysis or discussion.

II. NON-REFOULEMENT: PROTECTING THE HUMAN RIGHTS OF MIGRANTS IN INTERNATIONAL LAW

The Doctrine of *Non-refoulement* is a fundamental principle of international law.⁹ Although not the sole mechanism for the protection of the human rights of migrants, the obligation of *non-refoulement* forms a vital element of the international communities' protection of those

6. *Migration Act 1958* (Cth) s 4 (Austl.).

7. *Id.*

8. *Id.* s 198.

9. See generally JANE MCADAM & GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW*, 211–15 (3d ed. 2007) (noting that non-refoulement must be considered under non-binding declarations and resolutions).

rights.¹⁰ The term “*non-refoulement*” derives from the word *refouler* in French, meaning to drive back or repel.¹¹ The term refers to a doctrine in international law that restricts the rights of states to “expel or return” migrants in cases where their “life or freedom” would be threatened.¹² In so doing, this doctrine forms an essential mechanism by which to prevent the forced return of migrants to serious harm or death.

Australia’s *non-refoulement* obligations arise from the Convention Relating to the Status of Refugees 1951,¹³ as amended by the Optional Protocol to the Convention Relating to the Status of Refugees 1967¹⁴ (collectively referred to as the Refugee Convention). This Convention forms the cornerstone for the protection of the human rights of migrants.¹⁵ Since the drafting of the Refugee Convention, the doctrine of *non-refoulement* under the Refugee Convention has become part of customary international law,¹⁶ binding all states even where they are not

10. *See id.* (observing that non-refoulement is key part of customary international law).

11. *See id.* at 201 (stating that refoulement should be distinguished from deportation or expulsion because it refers only to persons who are present illegally).

12. *See generally id.* at 211–15 (noting multiple sources and developments of the principle of non-refoulement).

13. Convention relating to Refugee Status, *supra* note 4, art. 33.

14. Protocol relating to the Status of Refugees pmb., Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 263.

15. *Walter Kalin, Art. 33(1) 1951 Convention, in THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 1334–35* (Andreas Zimmermann et al. eds., 2011) (noting the protection of refugees and asylum seekers from refoulement is a critical function of the Universal Declaration of Human Rights).

16. *See* MCADAM & GOODWIN-GILL, *supra* note 9, at 211–15 (noting continued codification of non-refoulement in international law); *see also* U.N. High Comm’r for Refugees, *Summary Conclusions: Exclusion From Refugee Status, Expert Roundtable, Lisbon, May 2001, in REFUGEE PROTECTION IN INTERNATIONAL LAW: U.N.H.C.R.’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 545* (Erika Feller et al eds., 2003) (noting infrequent use of the cessation clauses under the 1951 Convention); U.N. High Comm’r for Refugees, *Summary Conclusions: The Principle of Non-Refoulement, Expert Roundtable, Cambridge, July 2001, in REFUGEE PROTECTION IN INTERNATIONAL LAW: U.N.H.C.R.’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 178* (Erika Feller et al eds., 2003) (regarding non-refoulement as customary international law); Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion, in REFUGEE PROTECTION IN INTERNATIONAL LAW: U.N.H.C.R.’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 87, 149, 158* (Erika Feller et al. eds., 2003) (explaining the content of the principle of non-refoulement in customary international law).

signatories to it. Under the Refugee Convention, a person is able to meet the definition of a “refugee” if he or she fears persecution for reasons of race, religion, ethnicity, membership of a particular social group, or political opinion.¹⁷ The obligation of *non-refoulement* protects this group by requiring states to admit a migrant claiming the protection of the Refugee Convention and to provide a mechanism to determine their status.¹⁸ However, the obligation of *non-refoulement* under the Refugee Convention is not absolute.¹⁹ The Refugee Convention contains exceptions to the principle of *non-refoulement*.²⁰ Although a migrant may be a refugee, there is an exception to the obligations of *non-refoulement* if the migrant poses a threat to the security of the receiving country or the safety of the community of that country.²¹ This exclusion is contained in Article 33(2) of the Refugee Convention.²²

Since the drafting of the Refugee Convention, the doctrine of *non-refoulement* has grown as a concept in international law and is now included in treaties beyond the Refugee Convention.²³ An express prohibition on *refoulement* is contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT),²⁴ while an implied prohibition on *refoulement* is contained in the International Covenant on Civil and Political Rights 1966 (ICCPR).²⁵ Providing protection for people who are owed *non-refoulement* obligations under these treaties is known as “complementary protection.”²⁶ Unlike

17. Convention relating to Refugee Status, *supra* note 4, art. 33.

18. See MCADAM & GOODWIN-GILL, *supra* note 9, at 215 (noting that restrictions imposed by non-refoulement do not mean there is a guaranteed right to admission).

19. See *id.* at 215 (noting that non-refoulement only implicates a temporary right to admission).

20. Convention relating to Refugee Status, *supra* note 4, art. 33.

21. *Id.*

22. *Id.*

23. See generally MCADAM & GOODWIN-GILL, *supra* note 9, at 211–15 (detailing the development and codification of the non-refoulement in international law).

24. Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, *supra* note 3, art. 3; see also Lauterpacht & Bethlehem, *supra* note 16, at 149, 158 (reasserting that non-refoulement is considered customary international law).

25. International Covenant on Civil and Political Rights, *supra* note 2, arts. 6, 7; see also Lauterpacht & Bethlehem, *supra* note 16, at 158 (noting that the prohibition against torture inherently implies the principle of non-refoulement).

26. See MCADAM & GOODWIN-GILL, *supra* note 9, at 285 (noting complementary protection refers to the wider scope of non-refoulement); Erika Feller, Volker Turk, &

the obligations in the Refugee Convention, there is no exception to the obligation of *non-refoulement* under CAT and ICCPR.²⁷

III. THE PROTECTION VISA PROCESS UNDER SECTION 36

This paper asks whether the Australian legislation is capable of effecting Australia's international obligations of *non-refoulement*. The primary mechanism by which to give effect to Australia's *non-refoulement* obligations under the Refugee Convention, CAT, and ICCPR is Section 36 of the Migration Act.²⁸ This section provides the mechanism by which a migrant can apply for a protection visa in Australia.²⁹ Protection visas are permanent visas granted to migrants who Australia finds are owed *non-refoulement* obligations.³⁰ This part introduces Section 36 and the criteria that must be met for the grant of a visa under it.

The provisions in Section 36 of the Migration Act give effect to Australia's *non-refoulement* obligations by reflecting and codifying those obligations.³¹ The provision operates as an "independent and self-contained statutory framework which articulates Australia's interpretation of its protection obligations under the Refugee Convention"³² and "codifies" these obligations within sections of the

Frances Nicholson, *Refugee Protection in International Law: An Overall Perspective*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: U.N.H.C.R.'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, 3, 5 (Erika Feller et al. eds., Cambridge Univ. Press, 2003) (highlighting that different international instruments have sometimes created multiple procedures for the determination of international protection needs).

27. Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, *supra* note 3, art. 3; International Covenant on Civil and Political Rights, *supra* note 2, arts. 6, 7.

28. *Migration Act 1958* s 36.

29. *Id.*

30. *Id.*

31. See Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) para 2 (Austl.) (stating the purpose of the reform is to establish a 'robust' review process); see also MIGRATION AND REFUGEE DIVISION LEGAL SERVICES, ADMINISTRATIVE APPEALS TRIBUNAL, A GUIDE TO REFUGEE LAW IN AUSTRALIA, 7-2-7-4 (2019) [hereinafter GUIDE TO REFUGEE LAW IN AUSTRALIA], <https://www.aat.gov.au/guide-to-refugee-law-in-australia> (outlining the general procedure of applying for protection visas).

32. Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 10 (Austl.).

Migration Act.³³ As such, section 36 is a provision introduced to provide migrants with a full and thorough consideration of Australia's *non-refoulement* obligations.³⁴ In *Plaintiff M61/2010E v Commonwealth (Plaintiff M61)*,³⁵ the Full Bench of the High Court unanimously stated that:

[T]he text and structure of the [Migration] Act proceed on the footing that the [Migration] Act provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and by not returning that person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason.³⁶

The Full Court of the Federal Court in *COT15 v Minister for Immigration and Border Protection (No. 1) (COT15)*³⁷ engaged in this discussion also.³⁸ The Full Court states: "The [Migration] Act contemplates that [*non-refoulement*] obligations will be considered in the context of a protection visa application."³⁹ As such, Section 36 of the Migration Act forms a vital mechanism to allow Australia to adhere to international obligations.

The first step in establishing a claim for a protection visa involves an assessment of whether the migrant is owed *non-refoulement* obligations under either the Refugee Convention or CAT or ICCPR.⁴⁰ To be granted a protection visa, a migrant must satisfy all the positive criteria.⁴¹ The section has two paths, a migrant can apply for a protection visa on the grounds that he or she is a refugee, or he or she can apply under the

33. *Id.*

34. See generally ELIBRITT KARLSEN ET AL., SEEKING ASYLUM: AUSTRALIA'S HUMANITARIAN PROGRAM, PARLIAMENT OF AUSTRALIA 15 (2011), https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/158141/upload_binary/158141.pdf;fileType=application%2Fpdf#search=%22library/prspub/158141%22 (noting that temporary protection visas are granted until a final refugee status determination can be made).

35. *M61/2010E v Commonwealth* (2010) 243 CLR 319, 339 per Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ (Austl.).

36. *Id.*

37. *COT15 v Minister for Immigration & Border Prot. (No 1)* (2015) 236 FCR 148, 155–57 per North, Collier, and Flick JJ (Austl.) (endorsed in *Minister for Immigration & Border Prot. v Le* (2016) 244 FCR 56, 65, 67 per Bromberg J (Austl.)).

38. See *id.* (stating that there are contextual reasons to keep the immigrant detained while this determination is being made).

39. *Id.* at 157; see also *BCR16 v Minister for Immigration and Border Prot.* (2017) 248 FCR 456, 470 per Bromberg and Mortimer JJ (Austl.).

40. GUIDE TO REFUGEE LAW IN AUSTRALIA, *supra* note 31, at 1–3.

41. *Id.*

'complementary protection' provisions that allow visas to be granted to migrants who are owed *non-refoulement* obligations under CAT and ICCPR.⁴² Both paths for the grant of a protection visa require, broadly speaking, a finding that the applicant will suffer harm if he or she returns to his or her home country,⁴³ as well an assessment of the likelihood of that harm occurring.⁴⁴ Following this, an assessment is made of the negative criterion to establish whether a migrant is excluded for the grant of a visa.⁴⁵ It is at this later stage that issues such as character arise.

To satisfy the negative criterion, under either application pathway,⁴⁶ the migrant must establish that he or she is not a "danger to the Australia community" if he or she has been convicted of a "particularly serious crime."⁴⁷ This wording reflects directly the wording of Article 33(2) of the Refugee Convention, which states that a receiving country does not owe *non-refoulement* obligations to a migrant who threatens the community of the country.⁴⁸

42. Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) para 63 (Austl.).

43. *Migration Act 1958* ss 5J(4)(b), 36(2)(aa) (for refugee ground the harm must be serious as defined in Section 5J(4)(b) of the Migration Act; for complementary protection the harm must be significant as defined in Section 36(aa) of the Migration Act).

44. *Id.* ss 5(H)(1), 5(J), 5(J)(1)(b), 36(2)(aa) (refugee ground requires that the fear be 'well founded' under Section 5H(1) and defined in Section 5J of the Migration Act, and establishing 'well founded' involves a 'real chance' test contained in Section 5J(1)(b) and explained in *Chan v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379, 389 (Austl.) and *Minister for Immigration & Ethnic Affairs v Guo Wei Rong* (1997) 191 CLR 559, 572 (Austl.). For complementary protection this requires that the harm is a 'necessary and foreseeable consequence' of the applicant being removed and that there is a 'real risk' of the harm occurring as defined in *Minister for Immigration & Citizenship v SZQRB* (2013) 210 FCR 505, 522 (Austl.).

45. GUIDE TO REFUGEE LAW IN AUSTRALIA, *supra* note 31, at 1–17, 1–27–1–28 (stating that factors such as disease and conditions are considered).

46. Department of Immigration & Border Prot., *Policy Refugee and Humanitarian, The Protection Visa Processing Guidelines* (VM 4825, 13 April 2018) para 4.57.2 [hereinafter PAM3 – The Protection Visa Processing Guidelines].

47. *Migration Act 1958* s 36(2C)(b)(ii).

48. Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) paras 61–68 (Austl.); *see also* GUIDE TO REFUGEE LAW IN AUSTRALIA, *supra* note 31, at 7–30–32, 7–52 (claiming that it is not necessary for the immigrant to have been convicted of a crime to make this determination).

IV. APPLICATION UNDER SECTION 36: DISCONNECT BETWEEN NEGATIVE CRITERION AND INTERNATIONAL LAW

The provisions in section 36 are intended to ‘codify’ Australia’s international *non-refoulement* obligations including these exclusions from protection.⁴⁹ This part examines the negative criteria, or exclusionary criteria, for the grant of a protection visa as they apply to migrants of “bad character.” This part will conclude that Section 36 allows for the refusal of a protection visa application even where a migrant is owed *non-refoulement* obligations under international law. This occurs because Section 36 does not accurately reflect Australia’s *non-refoulement* obligations. This disconnect will be illustrated by its application to a hypothetical applicant, Charlie, who is refused a protection visa despite being owed *non-refoulement* obligations by Australia.

A. CHARLIE

Charlie is from Afghanistan.⁵⁰ Charlie arrived in Australia by boat at Christmas Island and was then held in immigration detention in Darwin.⁵¹ He faces a real chance of being persecuted by the Taliban if he returns on account of his Hazara ethnicity and involvement with foreign troops in Afghanistan.⁵² He is considered a spy and an infidel by the Taliban,⁵³ and he fears that he may be killed by them if he returns. While Charlie was in immigration detention, he was involved in a riot during which he damaged property inside the detention center.⁵⁴ He pled guilty and was convicted of damage to Commonwealth property.⁵⁵ Charlie was sentenced to a 12-month good behavior bond and ordered to pay for the

49. Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) paras 61-68 (Austl.); *see also* GUIDE TO REFUGEE LAW IN AUSTRALIA, *supra* note 31, at 7-30–32, 7-52.

50. *See generally* *NKWF v Minister for Immigration & Border Prot.* [2018] FCA 409 (Mar. 27, 2018) 1 (Austl.) (using “Charlie” to represent the applicants in the case); *NBNB v Minister for Immigration & Border Prot.* (2014) 220 FCR 44, 53, 56, 60, 63 per Buchanan J, Allsop CJ, and Katzmann J agreeing (Austl.) (using “Charlie” to represent the applicants in the case).

51. *See generally* *NKWF* [2018] FCA 409 at 1; *NBNB* 220 FCR at 47.

52. *See generally* *NKWF* [2018] FCA 409 at 2 per Siopis J; *NBNB* 220 FCR at 53, 56.

53. *See generally* *NKWF* [2018] FCA 409 at 2.

54. *See generally* *NBNB* 220 FCR at 56.

55. *See generally* *id.* at 48.

damage caused.⁵⁶

In immigration detention an Independent Protection Assessor⁵⁷ found that Charlie is a person to whom Australia owes *non-refoulement* obligations.⁵⁸ On the recommendation of this Assessor, the Minister allowed Charlie to apply for a protection visa under section 36 of the Migration Act.⁵⁹ In determining Charlie's application, the decision-maker looked first to whether Charlie met the criterion in Section 36(a) or 36(aa).⁶⁰ These are the positive criteria for the grant of a protection visa. The decision-maker determined that Charlie is a refugee under the definition contained in Section 5H.⁶¹ As such, he met the criteria for the grant of a protection visa under Section 36(a).⁶² The decision-maker additionally found that Charlie was owed *non-refoulement* obligations under CAT and ICCPR, making him eligible for the grant of a protection visa under Section 36(aa).⁶³

Following the determination that Charlie met the positive criteria for the grant of a protection visa, the decision-maker moved on to look at the negative criteria.⁶⁴ Sections 36(1C)(b) and 36(2C)(b)(ii)⁶⁵ require the decision-maker to determine whether Charlie is a "danger to the Australian community having been convicted by final judgement of a particularly serious crime."⁶⁶ The definition of a particularly serious crime

56. See generally *id.*

57. See generally JOINT SELECT COMMITTEE ON AUSTRALIA'S IMMIGRATION DETENTION NETWORK, FINAL REPORT 146 (2012).

58. See generally NBNB 220 FCR at 48, 49, 53, 60, 63 (using "Charlie" to represent the applicants in the case); see also JOINT SELECT COMMITTEE ON AUSTRALIA'S IMMIGRATION DETENTION NETWORK, *supra* note 57, at 146.

59. *Migration Act 1958* s 36(2C)(b)(ii) (exercising the power of the Minister under Migration Act 46A); see also NBNB 220 FCR at 50, 53, 57, 60, 63.

60. NBNB 220 FCR at 52, 55, 59, 62.

61. See *Migration Act 1958* s 5(H) (listing an individual's nationality as the factor to consider when determining whether the individual is a refugee).

62. See *id.* s 36(2)(a) (establishing that for a protection visa the individual has to be a "non-citizen in Australia of whom the minister is satisfied Australia has protection obligations because the person is a refugee").

63. *Id.* s 36(2)(aa).

64. GUIDE TO REFUGEE LAW IN AUSTRALIA, *supra* note 31, at 1-17, 1-27-28.

65. PAM3 – The Protection Visa Processing Guidelines, *supra* note 46, para 4.57.2. (stating that provisions in Sections 36(1C) and 36(2C)(b) are mirror provisions and the same considerations and findings should apply).

66. *Migration Act 1958* ss 36(1C)(b), 36(2C)(b)(ii).

is contained in Section 5M of the Migration Act.⁶⁷ It states that a particularly serious crime in Sections 36(1C)(b) and 36(2C)(b)(ii) can be the commission of either a serious Australian offense, or a serious foreign offense.⁶⁸ The definition of a serious Australian offense is further defined in Section 5(1) of the Migration Act:

[S]ERIOUS AUSTRALIAN OFFENCE means 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:
 - (i) imprisonment for life; or
 - (ii) imprisonment for a fixed term of not less than 3 years; or
 - (iii) imprisonment for a maximum term of not less than 3 years.⁶⁹

Charlie's conviction meets this definition of serious Australian offense.⁷⁰ Damage to Commonwealth property meets the criterion in Section 5(1)(a)(iii), which refers to property damage.⁷¹ Additionally, the crime for which Charlie is convicted qualifies as serious under Section 5(1)(b) due to the penalty that can be imposed for damaging Commonwealth property.⁷² The determination of whether a crime meets

67. *Id.* s 5M.

68. *Id.*

69. *Id.* s 5(1).

70. *Id.*

71. *Migration Act 1958* (Cth) s 5(1) (Austl.).

72. *See generally* NBNB 220 FCR 44, 54 per Buchanan J, Allsop CJ, and Katzmann J agreeing (Austl.).

the criterion in Section 5(1)(b) requires that the decision-maker have regard to the sentence that may be imposed for that type of offense, not the punishment that was actually imposed in the case at hand.⁷³ The maximum sentence for damage to Commonwealth property is ten years imprisonment.⁷⁴ As such, although Charlie was not himself sentenced to a term of imprisonment for over three years, the offense qualifies as a serious Australian offense and thus qualifies as a particularly serious crime for the purposes of Sections 36(1C)(b) and 36(2C)(b)(ii).⁷⁵

The second limb of the exclusion criteria involves a consideration of whether Charlie is a danger to the Australian community.⁷⁶ To make this determination the decision-maker used a test articulated by Deputy President Tamberlin QC in *WKCG v Minister for Immigration and Citizenship*.⁷⁷ The decision-maker determined whether Charlie posed “a real or significant risk or possibility of harm to one or more members of the Australian community.”⁷⁸ This involves both a present and forward looking analysis of the danger posed and requires the decision-maker to take into account all the circumstance of the case.⁷⁹ In Charlie’s case, the decision-maker looked to a past of mental illness and previous violent behavior. The decision-maker found that Charlie had been unstable due to psychiatric illness that resulted, at times, in violence towards the people around him.⁸⁰ On this basis, the decision-maker found that

73. See Department of Immigration & Border Prot., *Policy Refugee and Humanitarian, Refugee Law Guidelines* (LS 1813, 21 September 2018) para 14.3.

74. See *Crimes Act 1914* (Cth) s 29(1) (Austl.) (laying out the penalty for damaging Commonwealth property).

75. See generally *NBNB 220 FCR* at 54; see *Migration Act 1958* s 36 (laying out the criterion to be considered for protection visas).

76. This aspect of Charlie’s case differs from the case of *NBNB* (on which other elements of Charlie’s claim are based). There was no suggestion that any of the 5 applicants in *NBNB* were a risk to the Australian community. See generally *NBNB 220 FCR* at 44.

77. *EWG17 v Minister for Immigration & Border Prot.* [2018] FCA 1536, 5 per Collier J (Austl.) (applying *WKCG v Minister for Immigration & Citizenship* [2009] AATA 512 (Austl.) (finding that a danger exists if there is a risk of harm to a member of the Australian community)).

78. See *WKCG* [2009] AATA 512 ¶ 31.

79. See *WKCG* [2009] AATA 512 ¶ 29 (citing *Re Salazar Arbelaez v Minister for Immigration and Ethnic Affairs* (1977) 1 ALD 98, para 100 (Austl.)); *WKCG* [2009] AATA 512 para 3.

80. See *LKQD* [2018] AATA 2710 para 5; see generally *MZY YO v Minister for Immigration & Citizenship* (2013) 214 FCR 68, 72 (Austl.) (using “Charlie” to represent

Charlie posed a significant risk of harm to members of the Australian community and made the finding that this harm could continue to occur in the future.⁸¹ Charlie was refused the grant of a protection visa.⁸²

B. COMPARING THE DOMESTIC PROVISIONS TO INTERNATIONAL LAW

1. *The Refugee Convention*

The exclusion from the protection of *non-refoulement* obligations under the Refugee Convention applies to migrants who pose a threat to the security or community of the country in which they are seeking refuge.⁸³ Article 33(2) states, “[t]he benefit of the present provision [*non-refoulement*] may not, however, be claimed by a refugee whom . . . having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”⁸⁴ This exclusion applies to migrants who pose a “threat to the community of the country”⁸⁵ and requires two things. Firstly, the migrant must be found to be a “danger to the community,” and, secondly, the migrant must have been convicted of a “particularly serious crime.”⁸⁶ This exclusion principle is in place to deal with refugees who may pose a danger to the receiving state⁸⁷ or present a future risk to the receiving state.⁸⁸

To be excluded from the protection of *non-refoulement* under the Refugee Convention, a refugee must satisfy the exclusionary criteria

the applicants in the case).

81. See, e.g., *LKQD* [2018] AATA 2710 para 45; see also *MZY YO* 214 FCR at 72 (using “Charlie” to represent the applicants in the case).

82. *LKQD* [2018] AATA 2710 paras 182–83.

83. See U.N. High Comm’r for Refugees, *Handbook & Guidelines on Procedure & Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, at 55, U.N. Doc. HCR/1P/ENG/REV.3 (Dec. 2011) [hereinafter *Handbook & Guidelines on Procedure & Criteria for Determining Refugee Status*] (explaining that refugees who may be a danger to the security of the country are not protected by nonrefoulement obligations).

84. *Id.*

85. *Id.*

86. *Id.*

87. See *id.* at 55, 116–17.

88. See U.N. High Comm’r for Refugees, *Handbook & Guidelines on Procedure & Criteria for Determining Refugee Status*, *supra* note 83, at 55.

contained in Article 33(2).⁸⁹ However, the seriousness of the consequences to a refugee being returned to their country combined with the humanitarian nature of *non-refoulement* obligations gives rise to the conclusion that this exception must be interpreted restrictively⁹⁰ and with particular caution.⁹¹ The principles in Article 33(2) were recognized by the delegates of the Plenipotentiaries on the status of Refugees and Stateless persons to be exceptional in nature.⁹² The inclusion of these provisions was accompanied by reluctance and concern that the provisions may prejudice the efficiency of the *non-refoulement* principles as a whole.⁹³ This further contributes to the view that the exclusion principles should be approached with caution and applied restrictively.⁹⁴

The material consideration in establishing whether a migrant falls within the exception to *non-refoulement* contained in Article 33(2) of the Refugee Convention relates to the danger that a refugee may pose to the

89. *See id.*

90. *See* U.N. High Comm'r for Refugees, Letter dated Jan. 6, 2006 from the High Comm'r for Refugees addressed to Paul Engelmayr [hereinafter Letter from the U.N.H.C.R.], <https://www.refworld.org/docid/43de2da94.html> (citing NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS AND INTERPRETATION: A COMMENTARY 136–37 (U.N.H.C.R. ed, 1997)).

91. *See* U.N. High Comm'r for Refugees, U.N.H.C.R. Note on the Principle of Non-Refoulement (Nov. 1997) <https://www.refworld.org/docid/438c6d972.html> (concluding that the exceptions in article 33(2) must be read carefully); Lauterpacht & Bethlehem, *supra* note 16, at 133–34; Feller, Turk, & Nicholson, *supra* note 26, at 12.

92. *See generally* U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Sixteenth Meeting, U.N. Doc. A/CONF.2/SR.16 (Nov. 23, 1951) [hereinafter Summary Record of the Sixteenth Meeting], <https://www.unhcr.org/en-us/protection/travaux/3ae68cdc14/conference-plenipotentiaries-status-refugees-stateless-persons-summary.html?query=Conference%20of%20Plenipotentiaries%20on%20the%20Status%20of%20Refugees%20and%20Stateless%20Persons:%20Summary%20Record%20of%20the%20Sixteenth%20Meeting> (showing that in 1951 a concern about refugees committing crimes was present).

93. *See* Letter from the U.N.H.C.R., *supra* note 90 (citing United Nations Ad Hoc Committee on Refugees and Stateless Persons, *Report of the Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Geneva, 14 August to 25 August 1950*, at 13, U.N. doc E/AC.32/8 (Aug. 25, 1950)); U.N. ESCOR, 2nd Sess., 40th mtg. at 31, U.N. Doc E/AC.32/SR.40 (Sept. 27, 1950); Summary Record of the Sixteenth Meeting, *supra* note 92).

94. *See* Letter from the U.N.H.C.R., *supra* note 90 (explaining that the exceptions to Article 33(2) must be approached carefully and restrictively).

community of the receiving state.⁹⁵ At international law this requires a number of considerations. First, the danger to the community must be “serious.”⁹⁶ This finding must be grounded on an objectively reasonable suspicion based on evidence, and must involve substantial threatened harm.⁹⁷ This determination refers to the future danger that the migrant poses to the community.⁹⁸ Although the past actions of the individuals may form part of the determination, the finding must be forward-looking.⁹⁹ This determination additionally requires a consideration of individual circumstances and proportionality in balancing the interests of the state with those of the individual concerned.¹⁰⁰ The decision-maker must consider the seriousness of the danger posed, the likelihood of the danger being realized, the imminence of the danger, and the nature and seriousness of the risk of *refoulement*.¹⁰¹ Additionally, the return of the individual must be the last resort available for dealing with the danger posed to the community.¹⁰² These factors make for a high bar that must be satisfied at international law for a migrant to be found a danger to the community of the receiving state.

In the domestic legislation there is very little jurisprudence on what constitutes a danger to the Australian community.¹⁰³ However, a case like

95. See Lauterpacht & Bethlehem, *supra* note 16, at 90 (explaining the application of the Article 33(2) exception to non-*refoulement*).

96. See Feller, Turk, & Nicholson, *supra* note 26, at 12 (noting that the danger to the country of refuge must be serious); see also *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 39 (Can.) (holding that the only circumstance under which someone may be *refouled* as a danger to the community is if they have committed a serious crime).

97. See *Suresh*, [2002] 1 S.C.R. at 41–42 (proclaiming that the seriousness of the threat must be based in objectively reasonable suspicion and the harm must be substantial).

98. See Lauterpacht & Bethlehem, *supra* note 16, at 129 (showing that the danger explained in article 33(2) must be a future danger).

99. See *id.*

100. See *id.* at 138 (explaining that individual circumstances and proportionality are taken into account when assessing the danger of a refugee).

101. See *id.* at 137–38 (covering the factors taken into account when looking at proportionality); see Handbook & Guidelines on Procedure & Criteria for Determining Refugee Status, *supra* note 83, at 31 (showing factors of the nature of the past crime when looking at danger to community).

102. See Feller, Turk, & Nicholson, *supra* note 26, at 12 (opining that *refoulement* must be the last resort).

103. See MCADAM & GOODWIN–GILL, *supra* note 9, at 237 (noting that the case law is limited on the question of what constitutes ‘dangerous’ in the refugee context).

Charlie's raises questions about whether the bar is as high in the Australian legislation as it is under the Refugee Convention.¹⁰⁴ Harm caused by psychiatric illness is likely manageable, which raises questions about whether Charlie's removal is the last resort available for dealing with the danger he poses.¹⁰⁵ It is questionable whether the harm that Charlie poses is "serious" and whether there is a sufficient likelihood of the danger being realized.¹⁰⁶ This is particularly questionable when these factors are weighed against the seriousness of the risk of *refoulement* in Charlie's case.

The second central element of Article 33(2) of the Refugee Convention exception is the requirement that the migrant is convicted of a particularly serious crime.¹⁰⁷ In cases where the conduct does not meet the requirement of being a particularly serious crime, the future risk to the community does not arise for consideration.¹⁰⁸ In other words, a risk to the community of the receiving country will not be sufficient without a finding that the conviction was for a crime that is particularly serious in nature.¹⁰⁹ The types of crime that are likely to be covered by the serious crime definition can range and include, *inter alia*, murder, rape, armed robbery, and arson.¹¹⁰ Under the Refugee Convention, a crime, for the purposes of exclusion, will not be characterized as particularly serious merely because of the nature of the crime.¹¹¹ A finding that the crime is 'serious' will depend on the circumstances surrounding the commission of the crime.¹¹²

104. See generally *LKQD* [2018] AATA 2710 para 48.

105. See *WKCG* [2009] AATA 512 para 23; *LKQD* [2018] AATA 2710 para 48.

106. See generally *LKQD* [2018] AATA 2710 para 22.

107. See *A v Minister for Immigration & Multicultural Affairs* [1999] FCA 227 para 3 (Austl.) (explaining that a crime must be serious in order for there to be *refoulement*); *Betkoshabeh v Minister for Immigration & Multicultural Affairs* (1998) 84 FCR 463, 467 (Austl.) (reversed on other grounds in *Minister for Immigration & Multicultural Affairs v Betkoshabeh* (1999) 55 ALD 609 (Austl.)).

108. Lauterpacht & Bethlehem, *supra* note 16, at 138.

109. *Id.*

110. *Id.* at 139 (citing PAUL WEIS, THE REFUGEE CONVENTION, 1951: THE TRAVAUX PREPARATOIRES ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS 342 (vol. 7 1995)); MCADAM & GOODWIN-GILL, *supra* note 9, at 238.

111. See *A v Minister for Immigration & Multicultural Affairs* [1999] FCA 227 para 4 (asserting that a crime will not be characterized as serious merely by reference to the nature of the crime itself).

112. MCADAM & GOODWIN-GILL, *supra* note 9, at 238.

This is at odds with the definition of a particularly serious crime in the Australian legislation.¹¹³ Under Section 5M of the Migration Act the seriousness of the crime committed involves a determination of the seriousness of the type of crime rather than a determination of the particulars of the crime actually committed.¹¹⁴ Jane McAdam and Guy Goodwin-Gill state that an approach that looks at the penalty imposed alone will likely be arbitrary and inconsistent with international law.¹¹⁵ They state that the determination of what constitutes a particularly serious crime in the context of the exception to *non-refoulement* obligations ought to involve an assessment of all of the circumstances including the nature of the offence, the background to its commission, the behavior of the individual, and the actual terms of any sentence imposed.¹¹⁶ The criteria in the Australian legislation look only to the type of crime committed and the penalty which can be imposed, but they do not include a consideration of the wider circumstances surrounding the commission of the crime.¹¹⁷

This distinction between the definition in international law and in the domestic legislation could have an impact in cases like Charlie's. Charlie was convicted of a crime considered to be particularly serious because the maximum possible sentence for damaging Commonwealth property is ten years and the type of crime he committed involved property damage.¹¹⁸ However, Charlie was not sentenced to any term of imprisonment for the crime that he actually committed, which was fairly minor.¹¹⁹ Additionally, the circumstances of the crime involve an

113. See Peter Billings, *Refugee Protection and State Security in Australia: Piecing Together Protective Regimes*, 24 AUSTL. J. ADMIN. L. 222, 228 (2018) (stating that a criterion for a protection visa is that an applicant has not been convicted by a final judgment of a particularly serious crime).

114. *Migration Act 1958* s 5M.

115. MCADAM & GOODWIN-GILL, *supra* note 9, at 239.

116. *Id.* at 239–40.

117. See Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) paras 35–36 (Austl.) (defining a “serious Australian offence” based on the type of crime committed and the punishment of that crime).

118. See *Crimes Act 1914* (Cth) s 29 (Austl.) (providing that a person who destroys or damages any property will be guilty of an offence that carries a penalty of ten years imprisonment).

119. *NBNB v Minister for Immigration & Border Prot.* (2014) 220 FCR 44, 48 per Buchanan J, Allsop CJ, and Katzmann J agreeing (Austl.) (using “Charlie” to represent the applicants in the case).

individual in immigration detention, which can have the effect of exacerbating behavior such as this.¹²⁰ If Charlie's crime was considered in the context of all of these factors, a decision-maker may not have considered this crime to be "serious."¹²¹ For these reasons, Charlie's crime should not be serious enough to meet the high bar for exclusion from the protection of *non-refoulement* obligations at international law. This results in Charlie being refused a protection visa despite being owed *non-refoulement* obligations under the Refugee Convention.¹²²

2. Complementary Protection: CAT and ICCPR

Charlie is also owed *non-refoulement* obligations by Australia under CAT¹²³ and ICCPR.¹²⁴ These obligations are without exception.¹²⁵ There is no exclusion from the protection of these treaties for migrants who have committed crimes.¹²⁶ Charlie would face harm on return to

120. See *LKQD* [2018] AATA 2710 at 52 (arguing that the detention environment had an impact on the applicant's mental health and was partly a cause of his incidents in detention); *MZY YO* 214 FCR at 70 (stating that a detained individual committed a criminal offense after learning that he would be held at a detention facility for a longer period); see also *NBMZ* 220 FCR at 30 (finding that an individual committed property damage while incarcerated in an immigration detention facility); *NBNB* 220 FCR at 47 (illustrating the alleged crimes applicant committed while detained at a detention facility); Billings, *supra* note 113, at 231 (citing *MZY YO* 214 FCR at 68) (arguing that the "character test" applies to "non-citizens convicted of a criminal offense while in, during or after an escape from, immigration detention"); Debrah Mercurio & Fuchsia Millevoi, *Out of Character: The Impact of the 2011 Amendments to the Character Test*, in 35 *BULLETIN* 36–37 (Aug. 2013); Melissa Bull et al., *Sickness in the System of Long-Term Immigration Detention*, 26 *J. REFUGEE STUD.* 47, 60 (2013); *Urahman v Semrad* (2012) 229 *A Crim R* 11, 21 per Southwood J (Austl.).

121. See *MCADAM & GOODWIN–GILL*, *supra* note 9, at 239–40 (listing factors to be considered for "seriousness," thereby informing the decision-maker's choice).

122. See *WEIS*, *supra* note 110, at 325 (stating conditions under which a refugee may be denied the benefit of non-refoulement).

123. Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, *supra* note 3, art. 3.

124. International Covenant on Civil and Political Rights, *supra* note 2, arts. 6, 7.

125. See *id.* (stating every human has a right to life and a right to be free from arbitrary deprivation of life); Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, *supra* note 3, art. 3.

126. See Convention against Torture & Other Cruel, Inhumane or Degrading Treatment or Punishment, *supra* note 3, art. 3 (stating that no State will expel, return or extradite a person to another state where there are substantial grounds for believing he would be in danger or subjected to torture); International Covenant on Civil & Political Rights, *supra* note 2, arts. 6, 7.

Afghanistan, which engages these obligations.¹²⁷ He is vulnerable to possible deprivation of life, torture, or cruel and inhuman treatment of punishment¹²⁸ at the hands of the Taliban.¹²⁹ This is a situation that many refugees face. Jane McAdam and Guy Goodwin-Gill state that a migrant who fears persecution will likely also fear at least inhuman or degrading treatment or punishment, if not torture.¹³⁰ As such, a migrant who is excluded from the protection of the obligations of *non-refoulement* under the Refugee Convention may nonetheless be owed protection from return under CAT and ICCPR.¹³¹

However, although Australia's *non-refoulement* obligations under CAT and ICCPR are without exception, Charlie is excluded from the grant of a protection visa.¹³² Australia's *non-refoulement* obligations under CAT and ICCPR are served in Australian law through the complementary protection regime.¹³³ However, to be granted a protection visa on the grounds of complementary protection criteria Charlie would be required to meet the negative criteria in Section 36 as applied above.¹³⁴ As such, Charlie would be unsuccessful under Section 36 despite being owed *non-refoulement* obligations by Australia under CAT and ICCPR.¹³⁵

127. *NBNB v Minister for Immigration & Border Prot.* (2014) 220 FCR 44, 53 per Buchanan J, Allsop CJ, and Katzmann J agreeing (Austl.) (showing that Charlie, like the applicant in this case, is owed *non-refoulement* obligations because of dangerous conditions in his home country).

128. See *Migration Act 1958* ss 36(2A)(a), 36(2A)(b), 36(2A)(d) (detailing conditions under which a non-citizen will suffer “significant harm”).

129. See, e.g., *NKWF* [2018] FCA 409 para 7 per Siopis J (using “Charlie” to represent the applicants in the case); *NBNB* 220 FCR at 53, 56 (using “Charlie” to represent the applicants in the case).

130. *MCADAM & GOODWIN-GILL*, *supra* note 9, at 239.

131. *Id.*

132. *NBNB* 220 FCR at 52 (refusing the applicant, who is analogous to Charlie, a visa despite Australia's *non-refoulement* obligation).

133. *SZTAL v Minister for Immigration & Border Prot.* (2016) 243 FCR 556, 578 (Austl.).

134. *Migration Act 1958* s 36(2C); Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) paras 87-88 (Austl.); see also *GUIDE TO REFUGEE LAW IN AUSTRALIA*, *supra* note 31, at 10-36; PAM3 – The Protection Visa Processing Guidelines, *supra* note 46, para 4.57.2 (noting that the provisions in Sections 36(1C) and 36(2C)(b) are mirror provisions and therefore the same considerations and findings should apply).

135. See Letter from Jane McAdam, Univ. of Oxford, to Alistair Sands, Sec., S. Select Comm. on Ministerial Discretion in Migration Matters, Parliament House, 6 (Sept. 23, 2003) (on file at Parliament Library, Austl.) (claiming that the Australian government contravenes its international obligations under CAT and ICCPR by its use of a “highly

Section 36 operates to codify Australia's international obligations; however, section 36 does not ensure that all migrants who are owed *non-refoulement* obligations are granted a protection visa.¹³⁶ The provisions in Section 36(1C) do not accurately reflect the exclusion principles contained in the Refugee Convention due to the disconnect between the definitions of "particularly serious crime" and "danger to the Australian community" in the Australian legislation as compared to the Refugee Convention.¹³⁷ Additionally, the legislation applies this same exclusion to the grant of the complementary protection criteria in Section 36(1)(aa).¹³⁸ This excludes migrants from the grant of a protection visa on complementary protection grounds despite there being no such exception at international law.¹³⁹ The result is that migrants can be refused the grant of a protection visa in Australia despite being owed *non-refoulement* obligations under both the Refugee Convention and under CAT and ICCPR.¹⁴⁰

V. APPLICATION UNDER SECTION 36: THE USE OF SECTION 501 TO REFUGEE PROTECTION VISA APPLICATIONS

The criticisms introduced in the previous part effect a fairly small group of people who happen to fall between the domestic and international definitions of "particularly serious crime" and "danger to the Australian community." This part illustrates a more widely applicable

subjective" test when deciding to reject a visa application based on "public interest"; see also Jane McAdam, *Australian Complementary Protection: A Step-By-Step Approach*, 33 SYDNEY L. REV. 687 (2011) (comparing of Australia Complementary Protection Criteria and international obligations under treaties including the CAT and ICCPR).

136. See *Migration Act 1958* s 501 (stating the Minister may refuse to grant a visa if he is not satisfied the applicant passes the character test).

137. See *A v Minister for Immigration & Multicultural Affairs* [1999] FCA 227 para 4 (asserting that both a "particularly serious" crime as well as a "crime that shows that the refugee is a danger to the community" are required for rejecting a refugee visa application).

138. *Migration Act 1958* s 36(1A)(a).

139. See WEIS, *supra* note 110, at 325 (stating that a refugee may be expelled or returned if there are reasonable grounds for regarding him as a security risk to the country, he has been convicted of a "particularly serious crime," or is a danger to the community).

140. *NBNB v Minister for Immigration & Border Prot.* (2014) 220 FCR 44, 52 per Buchanan J, Allsop CJ, and Katzmann J agreeing (Austl.).

failure within Section 36. If a migrant has applied for a protection visa, and then is not excluded as Charlie was, their application may still be refused on character grounds.¹⁴¹ This can occur where the migrant does not pass the broad and far reaching “character test” contained in Section 501(6) of the Migration Act.¹⁴² This results, again, in a migrant being refused the grant of a protection visa despite being owed *non-refoulement* obligations by Australia.

The character test in Section 501(6) is extensive. A migrant does not pass the character test if he or she has a “substantial criminal record,” has been “convicted of an offence in immigration detention,” is part of an “organization involved in criminal conduct,” is “suspected of involvement in trafficking or crimes of international concern,” is found guilty of “sexual offences involving a child,” or has been charged with crimes of genocide, crimes against humanity, or war crimes.¹⁴³ In addition, a migrant will fail the character test if they are not of good character having regard to his or her “past and present criminal [and general] conduct,” or there exists a risk that the migrant would “engage in criminal conduct,” “harass, molest, intimidate, or stalk another person,” “represent a danger to the Australian community,” “incite discord in the Australian community,” or “vilify a segment of the Australian community.”¹⁴⁴ As such, this provision covers a far broader range of crimes and behaviors than is covered by the negative criteria within Section 36.

A. CHARLIE

Charlie’s crimes were committed in immigration detention which means that he would automatically fail the character test in Section 501(6) by virtue of section 501(6)(aa) which refers to offenses committed “while the person was in immigration detention.”¹⁴⁵ As such, Charlie’s protection visa application could be refused using this provision.¹⁴⁶

141. *BCR16* 248 FCR para 44 (using “Charlie” to represent the applicants in the case).

142. *Migration Act 1958* s 501(6).

143. *Id.* ss 501(6)(a)–(b), 501(6)(e), 501(6)(f)(i)–(iii), 501(7) (further defining Substantial Criminal Record).

144. *Id.* ss 501(6)(c)–(d).

145. *Supra* Part IV.A; *Migration Act 1958* s 501(6)(aa)(i).

146. *Id.* s 501(3A).

However, the provisions in Section 501 can also be used to refuse the visas of migrants in a far broader range of circumstances. The broad application of the provisions in Section 501(6) can be illustrated by altering the facts of Charlie's case.

In this scenario we will remove two elements of Charlie's offence: his mental health challenges and the property damage.¹⁴⁷ In this example, Charlie assaulted a friend in immigration detention. He has no history of violence or mental health issues. The decision-maker must first consider whether Charlie is excluded from the grant of a protection visa under Sections 36(1C) or 36(2C)(b).¹⁴⁸ Charlie is not excluded under these provisions because his crime was not "serious" and he was not found to be a "danger to the Australian community."¹⁴⁹ However, the decision-maker then looks to the provisions in Section 501(6) and considers that Charlie fails the character test on the grounds of his present criminal and general conduct.¹⁵⁰ As such, the decision-maker refuses Charlie's application under Section 501(1)¹⁵¹ because he does not pass the character test in Section 501(6).¹⁵²

In this formulation of Charlie's case, he is not excluded from the grant of a protection visa under Section 36(1C) or 36(2C)(b), and his offense does not meet the high bar for exclusion from the protection of *non-refoulement* under the Refugee Convention.¹⁵³ Unlike the provisions in Sections 36(1C) and 36(2C)(b), the provisions in Section 501 do not set out to codify Australia's *non-refoulement* obligations and are not interpreted consistently with Australia's international obligations.¹⁵⁴ The crime of

147. *Supra* Part IV.A.

148. Minister for Immigration & Citizenship (Cth), *Direction [No 75] – Refusal of Protection Visas Relying on Section 36(1C) and Section 36(2C)(b)*, 6 September 2017 (Austl.) [hereinafter *Direction [No 75]*].

149. *Migration Act 1958* ss 36(1C)(b), 36(3C)(b)(ii).

150. *Id.* ss 501(6)(c)(i)–(ii).

151. See PAM3 – The Protection Visa Processing Guidelines, *supra* note 46, paras 4.57.2–4.57.3.

152. See, e.g., *NBMZ v Minister for Immigration and Border Prot.* (2014) 220 FCR 1, 42 (Austl.); *WASB v Minister for Immigration & Border Prot.* (2013) 217 FCR 292, 293–94 (Austl.) (emphasizing the Minister's discretion to refuse a visa based on character).

153. WEIS, *supra* note 110, at 342 (explaining that offenses such as murder, rape, armed robbery, and arson are "particularly serious" and trigger *non-refoulement* obligations).

154. See Billings, *supra* note 113, at 225 (citing *WASB* 217 FCR at 301–02 per Barker J).

assault is unlikely to be sufficiently “serious” to exclude Charlie from the protection of *non-refoulement* under the Refugee Convention.¹⁵⁵ As a result, again, Charlie’s protection visa application is refused despite him being owed *non-refoulement* obligations under the Refugee Convention.

B. CRITICISMS

The possibility for a protection visa application to be refused using Section 501 negates any work that may be done at amending the failures contained in Sections 36(1C) and 36(2C)(b).¹⁵⁶ In addition, this possibility adds another unrelated and distinct mechanism by which to cancel a visa creating an unnecessarily complex and unclear character regime.¹⁵⁷ The refusal of protection visas using the character test in Section 501(6) has been the subject of criticism.¹⁵⁸ Peter Billings draws attention to migrants who will “automatically fail” the character test after being convicted of a criminal offense while in immigration detention, or during the act of escaping immigration detention, regardless of the “gravity of the crime, sentence imposed, or danger they present to the community.”¹⁵⁹ He argues that these individuals are subject to refusal for the grant of a protection visa, which limits their access to protection visas and asylum in Australia despite being owed *non-refoulement* obligations.¹⁶⁰ Peter Billings also argues that the standard of proof in Section 501 is too low in comparison to the standard of proof required under the Refugee Convention.¹⁶¹ This too contributes to the potential for refusal of

155. See WEIS, *supra* note 110, at 342 (stating that murder, rape, armed robbery, and arson are examples of “particularly serious crimes”).

156. See Billings, *supra* note 113, at 230 (stating that an individual may be “excludable” despite being owed protection obligations).

157. See *id.* at 227 (characterizing the Migration Act and its operation as labyrinthine and complex).

158. See Savitri Taylor, *Exclusion From Protection of Persons of ‘Bad Character’: Is Australia Fulfilling its Treaty-Based Non-Refoulement Obligations?*, 8 AUSTL. J. HUM. RTS. 83, 96–97 (2002) (exploring whether the character provisions prevent Australia from fulfilling its international obligations); Billings, *supra* note 113, at 230 (noting that subsections 501(6)(aa)-(ab) contain a low threshold for activation compared to international standards).

159. Billings, *supra* note 113, at 230 (citing the *NBNB* to illustrate).

160. *Id.* at 230.

161. *Id.* at 232 (“[T]he requisite standard of proof is demonstrably lower under domestic law, compared with international law standards that regulate ‘risky’ refugees who pose a danger to the host state.”).

protection visa applications in cases where migrants are owed *non-refoulement* obligations.¹⁶² Additionally, Savitri Taylor argues that the Migration Act should be “amended so that . . . the separate powers of refusal and cancellation of visas on character grounds contained in [Section] 501 . . . do not apply to protection visas” to avoid the consequence that protection visas will be refused in cases where migrants are owed *non-refoulement* obligations.¹⁶³

This part establishes that a protection visa application may be refused on the grounds that a migrant does not pass the character test in Section 501(6) of the Migration Act. This allows protection visa applications to be refused in cases where migrants are owed *non-refoulement* obligations by Australia.¹⁶⁴ Further, it allows for the refusal of a visa based on a broad character test immediately after a migrant has successfully established that he or she can pass the, much narrower, character tests in Sections 36(1C) and 36(2C)(b).¹⁶⁵ As such, there is a doubling-up of character provisions being applied to Section 36 visa applications.

VI. THE REMOVAL POWER IN SECTION 197C: A LACK OF EFFECTIVE SAFEGUARDS

The preceding parts have established that migrants in Australia who are owed *non-refoulement* obligations may be excluded from the grant of a protection visa despite those obligations. This possibility renders them vulnerable to removal from Australia. The question of what will happen to migrants in this position is currently surrounded by a distinct lack of certainty or clarity. Policy statements and statements of government suggest that Australia will not remove migrants from Australia in breach of Australia's *non-refoulement* obligations.¹⁶⁶ However, alongside this, the parliament of Australia has passed a legislative amendment that compels the removal of migrants in breach of those obligations.¹⁶⁷ This part aims

162. See generally *id.*

163. Taylor, *supra* note 158, at 102.

164. *Id.* at 92–93.

165. See Billings, *supra* note 113, at 229 (stating that Section 501 “now prescribes a broader range of circumstances in which a person does not pass the character test”).

166. Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) para 89 (Austl.); PAM3 – The Protection Visa Processing Guidelines, *supra* note 46, paras 4.12.7, 4.39.4, 4.42.2; *Direction [No 75]*, *supra* note 148.

167. Migration and Maritime Powers Legislation Amendment (Resolving the

to illustrate the lack of clarity, summarize this new amendment, and assess the safeguards in place to prevent the removal of migrants from Australia in breach of *non-refoulement* obligations.

A. THE FAILURES OF SECTION 36

The previous two parts have identified a number of cases in which a migrant may be refused the grant of a protection visa while being owed *non-refoulement* obligations by Australia. This possibility is, interestingly, acknowledged in a number of policy documents.¹⁶⁸ These examples provide an illustration of the lack of clarity surrounding migrants who are owed *non-refoulement* obligations and who are refused protection visas.

The previous part illustrates that a migrant may be ineligible for the grant of a protection visa while being owed *non-refoulement* obligations due to the disparity between the definitions of “particularly serious crime” and “danger to the Australian community” in the domestic and international legislation. This possibility is mentioned, but not addressed, in policy documents. The Immigration Department’s Policy and Advice Manual (PAM3) states that “there may be instances when a [protection visa] application is refused but they will nevertheless engage Australia’s *non-refoulement* obligations, including where they fail to meet . . . [Section] 36(1C)”.¹⁶⁹ The PAM3 does not provide examples of cases in which this may occur.¹⁷⁰ Additionally, Ministerial Direction 75, which provides guidance for decision-makers relying on Section 36(1C), directs that the refusal of a protection visa on the grounds of Section 36(1C) does not extinguish Australia’s *non-refoulement* obligations in all instances.¹⁷¹ The direction states that the refusal of a protection visa because someone is a danger to the Australian community does not necessarily mean that person will be removed from Australia.¹⁷² The Ministerial Direction also does not provide any concrete examples.¹⁷³ These statements provide an

Asylum Legacy Caseload) Act 2014 (Cth) sch 5(1) (Austl.) (Amending the Migration Act to include Section 197C and providing that Australia’s *non-refoulement* obligations are “irrelevant” for the purposes of removing unlawful non-citizens).

168. PAM3 – The Protection Visa Processing Guidelines, *supra* note 46, paras 4.57.2–4.57.3; *Direction [No 75]*, *supra* note 148.

169. PAM3 – The Protection Visa Processing Guidelines, *supra* note 46, para 4.58.3.

170. *See generally id.*

171. *Direction [No 75]*, *supra* note 148.

172. *Id.*

173. *Id.*

acknowledgement that Section 36 may fail to provide for the grant a protection visa where a migrant is owed *non-refoulement* obligations; however, the practical impact of these statements is currently unclear.¹⁷⁴

The fact that *non-refoulement* obligations under CAT and ICCPR are without exception is also addressed in policy with a number of statements acknowledging it expressly. The Explanatory Memorandum to the introduction of the complementary protection criteria expresses an understanding that “Australia’s obligations under the ICCPR and CAT are absolute and cannot be derogated from.”¹⁷⁵ However, the Explanatory Memorandum also states that Australia must “balance the delivery of its humanitarian program with [the] protection [of] the Australian community.”¹⁷⁶ To address the failure of the legislation to provide a protection visa to all people owed *non-refoulement* obligations on complementary protection grounds, the Explanatory Memorandum states that “even if a non-citizen is considered ineligible to be granted a protection visa [under Section 36,] Australia will be bound by its *non-refoulement* obligations not to remove the non-citizen. . . .”¹⁷⁷ PAM3 makes a very clear statement relating to this fact. It states:

The subsections in [Section] 36(2C)(b), although similarly worded, do not relate to any exceptions to obligations of *non-refoulement*. This is because there are no exceptions to Australia’s *non-refoulement* obligations under the ICCPR and CAT. Instead, a finding that there are serious reasons for considering that an applicant falls within either of those subsections only means that they are taken not to satisfy the criterion in [Section] 36(2)(aa) and will therefore be ineligible for a [protection visa] if they do not satisfy the criteria in one of the other subsections in [Section] 36(2). Therefore, an applicant who comes under the provisions in either of the subsections in [Section] 36(2C)(b) may nevertheless engage Australia’s *non-refoulement* obligations.¹⁷⁸

In practice this raises questions about whether a migrant can be removed if that migrant fails to be granted a protection visa but is owed *non-refoulement* obligations under CAT and ICCPR.

174. PAM3 – The Protection Visa Processing Guidelines, *supra* note 46, para 4.58.3; *Direction [No 75]*, *supra* note 148.

175. Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) 14 (Austl.).

176. *Id.*

177. *Id.*

178. PAM3 – The Protection Visa Processing Guidelines, *supra* note 46, para 4.39.4.

B. REMOVAL POWERS: THE INTRODUCTION OF SECTION 197C

The question of what happens to migrants who do not hold visas and are owed *non-refoulement* obligations has been the subject of a recent legislative amendment. In 2014, the Migration Act was amended so that the power to remove migrants from Australia arises irrespective of any *non-refoulement* obligations owed by Australia.¹⁷⁹ These changes have the potential to seriously impact Australia's protection of the human rights of migrants.¹⁸⁰ However, there also exists a further lack of clarity surrounding this provision.¹⁸¹ Its passage was accompanied by statements that the introduction of this provision would not result in the removal of migrants in breach of Australia's *non-refoulement* obligations.¹⁸² These statements rely on the operation of the protection visa regime and a series of safeguard mechanisms.¹⁸³ However, this part illustrates that the safeguards in place do not ensure that migrants are not removed in breach of Australia's *non-refoulement* obligations.

The 2014 legislative amendments to the removal powers were made to overcome the issue of indefinite detention. In *Al-Kateb v Godwin* (*Al-Kateb*), the High Court held that indefinite detention is authorized in Australia under the Migration Act.¹⁸⁴ This decision arose from the

179. Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) sch 5 (1) (Austl.).

180. See generally Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) Attach A 4–5 (Austl.).

181. Australian Human Rights Commission, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* 8–10 (Oct. 31, 2014) [hereinafter Australian Human Rights Commission] (observing the government's acknowledgement that the plain meaning of proposed Section 197C may not be consistent with Australia's non-refoulement obligations).

182. Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) Attach A 10 (Austl.).

183. See generally Department of Immigration and Border Protection, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (4 November 2014) 16–17 (Austl.); Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 166 (Austl.).

184. *Al-Kateb v Godwin* (2004) 219 CLR 562, 657, 661 (Austl.) (rejecting the appellant's argument that the Court should have a fixed period as the outer limit of the reasonable period of detention for the purposes of deportation).

relationship between three provisions.¹⁸⁵ First, Section 198 of the Migration Act provides that an officer must remove an unlawful migrant from Australia as soon as is “reasonably practicable” while Section 189 of the Migration Act authorizes an officer to detain an unlawful migrant and Section 196 requires that the individual remains in detention until he or she is removed from Australia.¹⁸⁶ The Full Bench of the High Court in *Al-Kateb* considered the relationship between these three provisions and found that they allow for the indefinite detention of a migrant if removal from Australia is not reasonably practicable.¹⁸⁷ It was held that the removal of a migrant in breach of Australia’s *non-refoulement* obligations was not “reasonably practicable,” making their indefinite detention authorized.¹⁸⁸

The legislative amendments in 2014 were introduced to respond to this case law.¹⁸⁹ The new provision, Section 197C of the Migration Act, states that Australia’s *non-refoulement* obligations in relation to a migrants will no longer prevent a migrants’ removal from Australia.¹⁹⁰ Under this new provision, an officer must remove a migrant from Australia

185. *See id.* at 562.

186. *Migration Act* ss 189, 196, 198.

187. *NBMZ 220 FCR* at 30 per Buchanan J, Allsop CJ, and Katzmann J) (citing *Al-Kateb* 219 CLR 562).

188. *See M70/2011 v Minister for Immigration & Citizenship* (2011) 244 CLR 144, 190–191 per Gummow, Hayne, Crennan, Bell JJ (Austl.) (finding that removing a person from the Australian territory without first having decided whether the person concerned has a well-founded fear of persecution may put Australia in breach of the obligations under the Refugees Convention, in particular the non-refoulement obligations). *Cf. NAGV & NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 222 CLR 161, 171–72 per Gleeson CJ, McHugh, Gummow, Hayne, Callinan, Heydon JJ, with Kirby J agreeing (Austl.) (noting that a State bound by a non-refoulement obligation “has no choice but to tolerate [the protected individual’s] presence within its territory). *But see M47/2012 v Director-General of Security* (2012) 86 ALJR 1373, 1390, 1401, 1456 per French J, per Gummow J, per Crennan J (Austl.) (warning about the possibility of serious conflict between the right to expel and the non-refoulement obligation and the possibility that the lawfulness of detention being affected by the length of the removal process).

189. *See generally* Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 9 (Austl.).

190. *DMH16 v Minister for Immigration & Border Prot.* (2017) 253 FCR 576, 581 per North J (Austl.) (interpreting Migration Act 1958 s 197c); *see also* Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 9 (Austl.).

irrespective of the existence of, or assessment of, Australia's *non-refoulement* obligations.¹⁹¹ In 2017, North ACJ held in *DMH16 v Minister for Immigration and Border Protection* (2017) 253 FCR 576 (DMH16) that the correct understanding of Section 197C was that a migrant would be removed from Australia immediately even if that removal was in breach of Australia's international *non-refoulement* obligations.¹⁹² This took the possibility of indefinite immigration detention off the table.¹⁹³ In so doing, his Honor's decision threw into doubt the understanding that Australia would not remove people in breach of Australia's *non-refoulement* obligations.¹⁹⁴

C. CONTINUING ABSENCE OF CLARITY

Although Section 197C suggests that Australia has the power to remove migrants in breach of *non-refoulement* obligations, there continues to be a lack of clarity in the application of this provision.¹⁹⁵ During the passage of the bill introducing Section 197C continuing statements were made that the new provision would not result in the removal of migrants in breach of *non-refoulement* obligations and that Australia would continue to adhere to those obligations.¹⁹⁶ The Statement of Compatibility with Human Rights states that “[a]nyone who is found to engage Australia's *non-refoulement* obligations will not be removed in breach of those obligations.”¹⁹⁷ It additionally states that “the Government is not . . . seeking to avoid obligations” and that “[w]hilst on its face the measure may appear to be inconsistent with *non-refoulement* obligations under the

191. *Migration Act 1958* ss 197c, 198.

192. *DMH16* 253 FCR at 581–82 per North ACJ (Acting Chief Justice North's reasoning in *DMH16* was subsequently applied by Siopis J in *NKWF* [2018] FCA 409 and Moshinsky J in *AQM18 v Minister for Immigration and Border Protection* [2018] FCA 944 (Austl.)).

193. *Id.* (noting that the Minister failed to understand that the effect of the refusal of the protection visa would be immediate removal of the applicant or temporary detention until the Minister decides whether to exercise his power under s 195A).

194. *See id.* at 578–79.

195. Australian Human Rights Commission, *supra* note 181, at 8–10 (noting again that the Australian government recognized that the plain meaning of the proposed Section 197C may not be consistent with its non-refoulement obligations).

196. Submission No 171, *supra* note 183, at 16–17.

197. Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) Attach A 29 (Austl.).

CAT and the ICCPR . . . anyone who is found through visa or ministerial intervention processes to engage Australia's *non-refoulement obligations* will not be removed in breach of those obligations."¹⁹⁸ These statements were made in reliance on two mechanisms that can operate to prevent migrants being removed in breach of *non-refoulement obligations*.

The first mechanism relied on to prevent the removal of migrants from Australia in breach of Australia's *non-refoulement obligations* is the protection visa application process.¹⁹⁹ However, it has been illustrated that the protection visa application process, being the provisions in Section 36, does not ensure that a migrant who is owed *non-refoulement obligations* is granted a protection visa.²⁰⁰ The example of Charlie illustrates two pathways by which a migrant owed *non-refoulement obligations* may be subject to the operation of Section 197C despite a full assessment of those obligations under Section 36.²⁰¹ This leaves only the second mechanism relied on to prevent the removal of migrants in breach of Australia's *non-refoulement obligations*.

The second mechanism proposed is a safeguard referred to as the personal powers of the Minister.²⁰² The personal powers of the Minister include a range of powers sometimes referred to as "alternative management options"²⁰³ or Minister's public interest powers,²⁰⁴ which operate as a safeguard mechanism.²⁰⁵ The powers provide the Minister

198. *Id.* Attach A 28; *see also* Submission No 171, *supra* note 183, at 17; Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 166 (Austl.); Minister for Immigration & Border Prot. (Cth), *Direction [No 65]: Visa Refusal and Cancellation Under s 501 and Revocation of a Mandatory Cancellation of a Visa Under s 501CA* (Dec. 22, 2014) 9, 14–15, 19–20.

199. Submission No 171, *supra* note 183, at 16–17; Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 166 (Austl.).

200. *NBNB v Minister for Immigration & Border Prot.* (2014) 220 FCR 44, 52 per Buchanan J, Allsop CJ, and Katzmann J agreeing (Austl.).

201. *Id.* at 52, 72, 74–75; *NKWF* [2018] FCA 409 at 1, 5.

202. Submission No 171, *supra* note 183, at 17; Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 166–67 (Austl.).

203. *See, e.g., DMH16* 253 FCR at 578 per North ACJ (Austl.); *NKWF* [2018] FCA 409 at 5.

204. *See, e.g.,* Submission No 171, *supra* note 183, at 17.

205. *See* Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) 165–167, Attach

with option to intervene when a migrant is in detention awaiting removal, or where a migrant has exhausted all available visa options under the Migration Act.²⁰⁶ In this situation, the Minister may: allow the migrant to apply for a protection visa under Section 36 even if they would otherwise be statutorily barred from making such an application; grant a visa to a person in detention if he considers it to be in the public interest to do so; or make a residence determination to allow the migrant to live in the community during their detention.²⁰⁷ However, these also fail to provide a sufficiently certain mechanism by which to ensure that migrants are not removed in breach of Australia's *non-refoulement* obligations.

These powers are all non-compellable.²⁰⁸ A number of submissions made to the Senate Standing Committee inquiry into the Amendment Bill criticize the reliance on non-compellable powers to ensure compliance with *non-refoulement* obligations.²⁰⁹ In particular, the non-compellable nature of the powers means that there is no requirement that the powers be exercised fairly or at all.²¹⁰ A submission to the inquiry by the Human Rights Law Centre states:

Personal, non-compellable and non-reviewable ministerial discretion is an inadequate safeguard against wrongful return to persecution. Strong, clear and legally-enforceable protection, not personal discretion, is required to

A 20-21 (Austl.); Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011 (Cth) para 90 (Austl.).

206. See *Migration Act 1958* ss 48B, 195A(2), 197AB.

207. *Id.*

208. See generally Senate Select Committee, Australian Parliament, *Inquiry Into Ministerial Discretion in Migration Matters*, (Report, March 2004) ch 2 [hereinafter Senate Report 2004].

209. Australian Human Rights Commission, *supra* note 181, at 9–10 (arguing that reliance on non-compellable Ministerial powers is insufficient protection from non-refoulement under *Minister for Immigration & Citizenship v SZQRB* (2013) 210 FCR 505 (Austl.)); Human Rights Law Centre, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Oct. 31, 2014) paras 41–46 [hereinafter Human Rights Law Centre] (criticizing that the discretionary powers that exist under the Migration Act are personal, non-compellable and non-reviewable and citing *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 (Austl.)).

210. See Human Rights Law Centre, *supra* note 209, para 41 (citing *S10/2011 v Minister for Immigration & Citizenship* (2012) 246 CLR 636 (Austl.)); see also Australian Human Rights Commission, *supra* note 181 (citing *SZQRB* 210 FCR 505).

guarantee fundamental rights.²¹¹

Similarly, the submission of the Australian Human Right Commission states that the personal and non-compellable powers of the Minister are an insufficient safeguard to protect Australia's *non-refoulement* obligations.²¹² This submission cites the case of *Minister for Immigration and Citizenship v SZQRB* in which the Minister decided that he would not exercise any personal powers to grant the applicant a visa or allow the applicant to apply for a visa even though his removal to Afghanistan would be in breach of Australia's *non-refoulement* obligations.²¹³ The submission relies on this example to show that a non-compellable power cannot be relied on to prevent the removal of a migrant in all cases.²¹⁴

A further weakness in this safeguard is the potential for a removal to occur even where there has not yet been any assessment of Australia's *non-refoulement* obligations with respect to the migrant. The removal powers may be exercised irrespective of whether there has been an assessment of Australia's *non-refoulement* obligations.²¹⁵ In addition, a migrant will not be able to challenge their removal on the basis that their claims of *non-refoulement* have not been assessed.²¹⁶ The submission of the Human Rights Law Centre to the Senate Standing Committee inquiry into the Amendment Bill makes the observation that the only way to know if a migrant would face a risk of harm on return to their home country is to thoroughly assess the claims; however, the submission states that the Amendment Act seeks to return migrants regardless of whether this has been done.²¹⁷ This lack of assessment could be very problematic. For example, if a migrant had failed to apply for a protection visa in the requisite time, they would be subject to removal

211. Human Rights Law Centre, *supra* note 209, para 43.

212. Australian Human Rights Commission, *supra* note 181, paras 25–26 (citing *SZQRB* 210 FCR 505 as an example of a case in which non-compellable personal powers are an insufficient safeguard).

213. *See id.* para 24 (citing *SZQRB* 210 FCR 505 per Lander and Gordon JJ).

214. *See id.* (examining *Minister for Immigration & Citizenship v SZQRB* (2013) 210 FCR 505 (Austl.) as a demonstration of the Minister's personal non-compellable powers as an appropriate safeguard).

215. Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) paras 1132, 1141 (Austl.).

216. *Id.* paras 1141, 1146.

217. Human Rights Law Centre, *supra* note 209, paras 59–60.

with no assessment of Australia's *non-refoulement* obligations.²¹⁸ In this instance, they would be unable to challenge the decision on the grounds that there had been no assessment of protection obligations.²¹⁹

Additionally, the safeguard mechanisms fail to operate effectively due to their inability to ensure that the Minister is aware of a removal case. The ability of the Minister to exercise one of these personal powers is reliant on the Minister becoming aware of the removal of the migrant and being aware that the migrant is owed *non-refoulement* obligations.²²⁰ The Minister may not be made aware of the fact that the applicant is owed *non-refoulement* obligations where there has been no positive assessment of those obligations in relation to the migrant.²²¹ To compound these concerns, an officer is not required to consider whether the migrant being removed is owed *non-refoulement* obligations before removal.²²² An officer is also under no obligation to check whether the Minister has considered exercising any personal powers.²²³ Combined, these factors leave open the possibility that the Minister will not be made aware of the case or the *non-refoulement* obligations owed before the removal occurs.

VII. CONCLUSION

Under international law, Australia owes *non-refoulement* obligations to migrants who are protected under the Refugee Convention, CAT, and ICCPR.²²⁴ These obligations require that Australia does not return migrants owed *non-refoulement* obligations to the countries in which they face harm.²²⁵ However, the Migration Act in its current form does not

218. See, e.g., Lauterpacht & Bethlehem, *supra* note 16, at 134 (maintaining that *non-refoulement* obligations arise irrespective of whether there has been any formal assessment of *non-refoulement* obligations).

219. Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) para 1146 (Austl.)

220. *Id.* (noting that the removal officer is not required to assess non-refoulement obligations or ensure that the Minister has reviewed the case for such concerns).

221. *Id.* paras 1132, 1141.

222. *Id.* para 1132.

223. *Id.* para 1146.

224. Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) paras 1125–26 (Austl.).

225. Australian Human Rights Commission, *supra* note 181, paras 11–12 (noting that Australia has international obligations under a variety of conventions specifically the

ensure this.²²⁶ The hypothetical applicant presented illustrates that a migrant may become subject to removal from Australia despite being owed *non-refoulement* obligations by Australia.²²⁷ This possibility is left open due to the failures of Section 36 to provide for the grant of a protection visa to migrants owed *non-refoulement* obligations in character cases.²²⁸ This weakness in the legislation is compounded by the introduction of Section 197C and the lack of any effective procedural safeguards.

Resolving the concerns raised in this paper could be achieved in a number of ways. First, the issues that arise could be resolved through the creation of a mechanism by which a migrant can avoid removal from Australia on the basis that they are owed *non-refoulement* obligations.²²⁹ This could be achieved by repealing Section 197C.²³⁰ However, the repeal of this section in isolation would result in indefinite, indeterminate immigration detention for people affected by character.²³¹ This outcome raises a distinct set of legal questions relating to the legality of such detention and Australia's human rights obligations with respect to

Refugee Convention, the International Covenant on Civil and Political Rights, and Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

226. Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) para 1132 (Austl.).

227. See *NBNB v Minister for Immigration & Border Prot.* (2014) 220 FCR 44, 52–53 per Buchanan J, Allsop CJ, and Katzmann J agreeing (Austl.) (using “Charlie” to represent the applicants in the case); *NKWF* [2018] FCA 409 at 4, 6 (using “Charlie” to represent the applicants in the case).

228. See Taylor, *supra* note 158, at 90–91 (explaining that the possibility of a protection visa depends on the ability, but not the obligation, of the Minister to act).

229. See HUMAN RIGHTS WATCH, “BY INVITATION ONLY:” AUSTRALIAN ASYLUM POLICY 77 (2002) (concluding that current detention does not meet Australia's non-refoulement obligation and that further mechanisms are required).

230. See *generally* Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) paras 1128–30, 1132 (Austl.) (noting current function of 197C and that the repeal of 197C would have an inverse effect).

231. See *generally* Amnesty International Australia, Submission to Senate Legal and Constitutional References, *Inquiry into Administration and Operation of the Migration Act 1958* (August 2005) [hereinafter Amnesty International Australia] (maintaining that without change, or if left to ministerial discretion, migrants affected by character would face indefinite detention).

immigration detention.²³² Alternatively, a strengthening of the personal powers of the Minister could be considered to create a more reliable safeguard to prevent removal when *non-refoulement* obligations are owed.²³³ The strengthening of personal, and ultimately discretionary powers of the Minister brings with it another distinct set of legal questions. Relying on the discretion of the Minister to ensure compliance with Australia's international obligations may not provide a sufficiently certain mechanism to ensure compliance with those obligations.²³⁴ To provide a sufficient safeguard, the powers would need to ensure that every case of a migrant-owed *non-refoulement* obligations is brought to the attention of the Minister, and that the exercise of the powers is both compellable and reviewable.²³⁵

The repeal of Section 197C and the strengthening of the powers of the Minister to prevent removal are both changes that focus on the removal mechanisms.²³⁶ However, there are also changes that could be considered to amend the provisions in Section 36. Major changes would be required to strengthen Section 36 such that a migrant who is claiming the protection of *non-refoulement* is given a full and thorough consideration of their case.²³⁷ To ensure that migrants who are owed *non-refoulement* obligations under the Refugee Convention are not refused protection

232. See AMNESTY INTERNATIONAL, THE IMPACT OF INDEFINITE DETENTION: THE CASE TO CHANGE AUSTRALIA'S MANDATORY DETENTION REGIME 3 (2005) (stating that indefinite detention would violate international law); HUMAN RIGHTS WATCH, *supra* note 229, at 79 (explaining the U.N. Human Rights Committee's finding that Australia's detention policy did not comply with its commitments and is therefore unlawful).

233. Senate Report 2004 para 4.54.

234. See, e.g., Senate Report 2004 paras 4.119–4.120 (explaining the over reliance on ministerial power in recent years); see also U.N. High Comm'r for Refugees, Ruman Mandal (External Consultant), *Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")* para 185 (June 2005), <https://www.unhcr.org/protect/PROTECTION/435df0aa2.pdf> (discussing the reliance on the personal powers of the Minister under Section 417 of the Migration Act to ensure compliance with Australia's complementary protection obligations prior to the 2011 legislative changes).

235. Senate Report 2004 para 4.96.

236. *Contra* Amnesty International Australia, *supra* note 231, at 4 (explaining that the current over-reliance on ministerial discretion, and thus ministerial power, has caused inconsistent outcomes for migrants).

237. See *id.* (calling for a formal, independent review on a case by case basis and regular and automatic access to courts for judicial oversight of decisions).

visas, the provisions in Section 36(1C) need to be shifted so that they more accurately reflect the provisions contained in Section 33(2) of the Refugee Convention.²³⁸ This could be achieved by amending the definition of “particularly serious crime” and “danger to the community” to definitions reflecting the narrow interpretation applied by international law.²³⁹ Additionally, strengthening Section 36 would require a shift in the complementary protection criteria such that exclusions on character grounds do not apply to migrants owed *non-refoulement* obligations under CAT and ICCPR.²⁴⁰ These two changes would bridge the disconnect between the Australian legislation and international law. However, these changes would not be sufficient to achieve the goal of strengthening Section 36 unless changes are made such that failing the character test in Section 501(6) is no longer a ground for the refusal of a protection visa.²⁴¹

The Migration Act, as it currently stands, does not guarantee compliance with Australia’s *non-refoulement* obligations in character cases.²⁴² Without significant changes to the Migration Act or a significant shift in Australia’s commitment to avoid the removal of migrants in breach of *non-refoulement* obligations, there exists a contradiction between the operation of the Migration Act and the commitment of the Australian Government.²⁴³ This legislation, which has the potential to result in grave impacts on human rights, contains a double up of character exclusions, is surrounded by a lack of clarity in its operation, was passed through a parliament that was not fully cognizant of its impact, and was accompanied by parliamentary materials that did not accurately reflect

238. *See id.* (noting the changes required to conform with the standards established by the Refugee Convention).

239. *See* Taylor, *supra* note 158, at 102 (concluding that the current application is too broad to align with international law standards).

240. *See id.* at 101–02 (noting that the obligations under the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment are non-derogable and that the current system of review is insufficient to meet these obligations).

241. *See id.* at 89 (noting that failing the character test is grounds for denial of a protection visa).

242. *See id.* at 99 (explaining that a person who has not been convicted of a crime may be refused a visa, which would breach Australia’s *non-refoulement* obligation).

243. Explanatory Memorandum, Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth) para 1129-32 (Austl.).

the operation or potential impact of the legislation. These elements combine to produce a protection regime incapable of ensuring the protection of the human rights of migrants in Australia. In addition, the lack of parliamentary understanding of this legislation and lack of clarity surrounding its operation creates the opportunity for these breaches of human rights to occur in the absence of critical attention and discussion.