

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S CI 2018 01629

CZG

Appellant

v

VICTIMS OF CRIME ASSISTANCE
TRIBUNAL

First Respondent

THE ATTORNEY-GENERAL FOR THE
STATE OF VICTORIA

Second Respondent

<u>JUDGE:</u>	McDonald J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	28 February 2019
<u>DATE OF JUDGMENT:</u>	2 April 2019
<u>CASE MAY BE CITED AS:</u>	CZG v Victims of Crime Assistance Tribunal & Anor
<u>MEDIUM NEUTRAL CITATION:</u>	[2019] VSC 203



ADMINISTRATIVE LAW – Application for leave to appeal and appeal on question of law – Victorian Civil and Administrative Tribunal – Affirmation of order of Victims of Crime Assistance Tribunal refusing to award assistance – Applicant with violent criminal history – Applicant directly contributed to events leading up to act of violence – *Victims of Crime Assistance Act 1996* ss 1, 7, 8, 8A, 27, 50, 54, 59 – *Victorian Civil and Administrative Tribunal Act 1998* ss 42, 98, 148.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Appellant	Mr M W Harding with Ms N J Blok	Gordon Legal
For the Second Respondent	Mr J Bayly	Victorian Government Solicitor

HIS HONOUR:

- 1 On 1 February 2014, CZG was shot in the neck. The bullet injured his spinal cord and left him a paraplegic without functional useful movement in his left arm. The offender was convicted of attempted murder and sentenced to 12 years' imprisonment with a non-parole period of nine years.¹
- 2 Immediately prior to being shot, CZG and two friends had gone to an agreed location to meet some men with whom CZG had exchanged hostile texts and phone calls during the course of 1 February 2014. The men were acquaintances of CZG's former girlfriend. She enlisted their assistance after an incident two days earlier involving CZG and a call she had received from him. During the course of the day, CZG had made a threat to kill his former girlfriend and threatened to kill her acquaintance. CZG and two of his friends went armed to the arranged meeting. CZG had a machete and his friends had golf clubs. CZG was shot by the offender, who mistakenly believed CZG had thrown a glass bottle, which had hit and injured the offender's girlfriend.²
- 3 CZG applied for assistance under Part 3 Division 2 of the *Victims of Crime Assistance Act 1996* ('Assistance Act') as a victim of crime. The application was refused by the Victims of Crime Assistance Tribunal ('VOCAT') on 12 October 2017. On 6 November 2017, CZG invoked the review jurisdiction of the Victorian Civil and Administrative Tribunal ('VCAT'). That jurisdiction is conferred by s 59(1)(a) of the Assistance Act.³ The review was heard by VCAT on 28 March 2018. On 5 April 2018, VCAT affirmed VOCAT's decision to refuse CZG an award of assistance ('affirmation order').
- 4 CZG seeks leave to appeal from the VCAT decision pursuant to s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* ('VCAT Act'). For the reasons which follow, leave to appeal will be granted in respect of questions of law A, B, C

¹ CZG v *Victims of Crime Assistance Tribunal* [2018] VCAT 523, [5].

² Ibid [2]–[3].

³ See also *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 42(1).

and D of the amended notice of appeal dated 24 August 2018, but the appeal is dismissed. Leave to appeal in respect of question of law E is refused.

Background

5 Before considering the questions of statutory construction raised by the application for leave to appeal, it is necessary to set out the background to the proceeding, both in VOCAT and VCAT.

6 CZG filed an application for assistance with VOCAT on 1 April 2014. The application was in accordance with the form prescribed by s 26 of the Assistance Act. CZG claimed assistance as a primary victim. He claimed six categories of assistance: special financial assistance (a lump sum payment for significant adverse effects suffered), counselling, medical expenses, safety-related expenses, loss, damage to clothing and other. No claim was made for loss of earnings.

7 On 2 April 2014, VOCAT acknowledged receipt of CZG's application for assistance. VOCAT's letter to CZG's solicitors included the following:

Please find enclosed 'Directions for Preparation of your Application' which outline the material you should file to support your application. Also enclosed is a Statement of Claim for you to list any expenses that have arisen or are outstanding as a result of the act of violence.

All relevant supporting material must be filed within 4 months of this date. When you notify the Tribunal in writing that all relevant material has been filed you will be advised by the Tribunal as to how your application will be dealt with.⁴

8 The information requested in the VOCAT letter of 2 April 2014 was not provided within the stipulated four-month period. Rather, on 11 September 2014, CZG's solicitors wrote to VOCAT as follows:

We refer to our abovenamed client's application for assistance.

We are instructed that the injuries suffered by our client from the act of violence have caused him to become quadriplegic. The medical and other expenses, including substantial adjustments to our client's place of residence, incurred and/or reasonably likely to be incurred as a direct result of the act of

⁴ Exhibit NCW-4 to the affidavit of Nicholas Charles White affirmed 10 May 2018.

violence are highly likely to exceed the maximum assistance available under section 8 of the *Victims of Crime Assistance Act 1996* ('the Act').

We have been provided with details of numerous treating practitioners, including our client's spinal consultant, nurse, occupational therapist, physiotherapist and social worker, who would be in a position to inform the Tribunal of the expenses incurred and reasonably likely to be incurred by our client.

Our client intends to seek the maximum assistance available under sections 8 and 8A of the Act. We note that the Tribunal has discretion in the making of awards, including under section 55 of the Act in respect of the form of payment.

Before incurring the costs of reports from the practitioners referred to above, we request the Tribunal's direction in progressing this matter in light of the exceptional circumstances.

If you have any queries, please contact our office.⁵

9 On 23 January 2015, VOCAT wrote to CZG's solicitors as follows:

The Tribunal has been provided with material by Victoria Police with respect to charges pending against [the offender], these include a charge of attempted murder and intentionally (or alternatively, recklessly) causing serious injury to [CZG].

The Tribunal has also been advised of significant prior criminal convictions recorded against [CZG], and is aware of issues regarding his alleged conduct which may require the Tribunal to have regard to section 54 of the *Victims of Crime Assistance Act 1996*.

Until the Tribunal has determined that it is appropriate to make an award to [CZG], medical expenses associated with obtaining evidence of the precise nature and extent of his injury and requirement for medical treatment and practical support, should not be undertaken.

The Tribunal has requested the consent of Victoria Police to disclose witness statements to your office. There is an objection by Victoria Police to the discloser [sic] of that material.

The Tribunal expects that once the outstanding criminal proceedings have been finalised, disclosure of witness material will be less sensitive. The tribunal is not aware of the progress of those proceedings.

The Tribunal directs, therefore that you advise of any issue which requires the Tribunal's urgent attention, and otherwise that you keep the Tribunal informed of the progress of the prosecution against [the offender].⁶

10 On 13 May 2015, CZG's solicitors wrote to VOCAT and advised that the offender

⁵ Exhibit NCW-6 to the affidavit of Nicholas Charles White affirmed 10 May 2018.

⁶ Exhibit NCW-7 to the affidavit of Nicholas Charles White affirmed 10 May 2018.

had been convicted of attempted murder. The letter concluded:

We look forward to receiving the Tribunal's direction in progressing this matter in light of our correspondence dated 11 September 2014.⁷

11 On 15 February 2016, VOCAT conducted a directions hearing. During the hearing, the presiding member stated that she did not wish CZG to incur the cost of obtaining medical evidence in support of his claim until there had been a determination of the preliminary question of the impact of CZG's conduct and criminal history on his claim for compensation under ss 8 and 8A.⁸ On 15 February 2016, VOCAT made orders as follows:

- (i) CZG to notify VOCAT within 28 days as to whether any of the findings of Beale J in relation to CZG, made in the context of his Honour's reasons for sentence in respect of the offender, are in dispute.
- (ii) VOCAT to obtain briefs of evidence in relation to prior convictions of CZG with consent to them being provided to his legal representatives.
- (iii) When the briefs of evidence referred to in paragraph (ii) are provided, CZG to file written submissions within two months on the question of his eligibility under ss 8 or 8A of the Assistance Act having regard to s 54 of the Assistance Act.

12 On 12 October 2017, CZG's application for assistance was refused by VOCAT. The VOCAT decision was not included in the materials filed in support of the current application for leave to appeal. However, the decision is summarised in the reasons of the Senior Member in VCAT delivered on 5 April 2018 ('reasons') as follows:

VOCAT accepted that the impact of the offending had been catastrophic on the applicant. However, taking into account matters including the nature and prevalence of the violent criminal offending undertaken by the applicant between the age of 15 and 19 years, the serious injuries which he caused to victims and the fear he incited, his threatening pursuit of his former girlfriend including threatening to kill her on 1 February 2014, the contribution made by

⁷ Exhibit NCW-8 to the affidavit of Nicholas Charles White affirmed 10 May 2018.

⁸ Affidavit of Nicholas Charles White affirmed 27 June 2018, [10].

that conduct to the confrontation which took place on 1 February 2014, and his armed presence at that confrontation, VOCAT concluded that to make an award of assistance to the applicant under either s 8 or s 8A of the Act would be contrary to the intention and purposes of the Act and would not accord with community expectations.⁹

13 CZG applied to VCAT for a review of the VOCAT decision. In conducting the review, VCAT exercised jurisdiction conferred by s 59(1)(a) of the Assistance Act. In exercising its review jurisdiction, VCAT had all of the functions of VOCAT and any function conferred on VCAT under the VCAT Act, the regulations and the rules.¹⁰

14 Soon after the commencement of the hearing in VCAT on 28 March 2018, the following exchange took place between the Senior Member and counsel for CZG:

SENIOR MEMBER: Let's just talk about what's in issue and what's not in issue here [counsel for CZG]. Because I understand it's not disputed that the injury was suffered, that it was catastrophic, very serious injury. I've read the victim impact statements of both your client and his mother. As I understand it there's no dispute about the impact, about his current circumstances. In a way they go without saying that if you suffer an injury such as that there will be all kinds of implications.

It really is a matter for you and of course I will hear the evidence, but if things are not in dispute which I understand they're not, the focus as I understand it here is on what are the factors under s. 54 of the Act? Given that there's no dispute there was a serious injury and I understand there's no suggestion that CZG – that being shot was in some way proportionate reaction to anything CZG did. As I understand it it's agreed that the offender's response was disproportionate to something that might have been seen as a provocation, but by someone else, not by CZG.

The focus is really on – and there is no dispute about what CZG needs might be. The focus is on a consideration of any conduct leading up to the events that might be seen as contributing and consideration of past criminal history.¹¹

15 CZG's counsel took no issue with any of the Senior Member's observations. Counsel for VOCAT submitted:

I think that you've summarised the issues from the respondent's point of view appropriately and it seems to the respondent that the issue is whether s. 54 totally precludes assistance or not. And if not whether the applicant

⁹ *CZG v Victims of Crime Assistance Tribunal* [2018] VCAT 523, [12].

¹⁰ *Victorian Civil and Administrative Tribunal Act 1998* (Vic) ss 51(1)(a) and (c).

¹¹ Transcript of proceeding in VCAT (28 March 2018), 7.23–8.17.

should be entitled to financial assistance as well as special financial assistance. They are the issues as the respondent understands it.¹²

- 16 Thereafter, the VCAT proceeding was conducted on the basis that the issue for determination was whether or not VCAT should make an award of assistance under ss 8 and/or 8A, having regard to s 54 of the Assistance Act.
- 17 The procedural background set out above is noteworthy. In the current proceeding, the appellant contends that the Senior Member erred by making a 'global' assumption that CZG was eligible for assistance.¹³ The appellant contends that the discretion conferred upon VOCAT/VCAT by s 54 of the Assistance Act to refrain from making an award of assistance can only be exercised after a finding has been made as to an applicant's entitlement for assistance, and the quantum thereof, in respect of each category of assistance which is claimed. These contentions are inconsistent with CZG's submissions before VCAT. The Senior Member invited a submission from CZG's counsel as to issues which fell for determination. The application was heard on the basis of a 'global' assumption of CZG's eligibility for assistance. Counsel for CZG could have but did not make a submission in VCAT that the discretion to refrain from making an award of assistance could only be exercised after the Senior Member had determined CZG's eligibility for, and the quantum of, assistance in respect of each of the categories of assistance which he claimed.

Relevant legislation

- 18 The following provisions of the Assistance Act are relevant to the issues which fall for determination in the current proceeding:

1 Purpose and objectives of Act

- (1) The purpose of this Act is to provide assistance to victims of crime.
- (2) The objectives of this Act are —

¹² Ibid 9.09–9.15.

¹³ Transcript of proceeding (28 February 2019), 20.29.

- (a) to assist victims of crime to recover from the crime by paying them financial assistance for expenses incurred, or reasonably likely to be incurred, by them as a direct result of the crime; and
- (b) to pay certain victims of crime financial assistance (including special financial assistance) as a symbolic expression by the State of the community's sympathy and condolence for, and recognition of, significant adverse effects experienced or suffered by them as victims of crime; and
- (c) to allow victims of crime to have recourse to financial assistance under this Act where compensation for the injury cannot be obtained from the offender or other sources.

...

7 Who is a primary victim?

- (1) A primary victim of an act of violence is a person who is injured or dies as a direct result of an act of violence committed against him or her.

...

8 Assistance available to primary victims

- (1) A primary victim may be awarded by the Tribunal assistance of up to \$60 000 plus any special financial assistance awarded in accordance with section 8A.
- (2) The amount awarded to a primary victim may be made up of amounts—
 - (a) for expenses actually incurred, or reasonably likely to be incurred, by the primary victim for reasonable counselling services;
 - (b) for medical expenses actually and reasonably incurred, or reasonably likely to be incurred, by the primary victim as a direct result of the act of violence;
 - (c) of up to \$20 000 for loss of earnings suffered, or reasonably likely to be suffered, by the primary victim as a direct result of the act of violence;
 - (d) for expenses incurred by the primary victim through loss of or damage to clothing worn at the time of the commission of the act of violence;
 - (e) for safety-related expenses actually and reasonably incurred, or reasonably likely to be incurred, by the primary victim as a direct result of the act of violence.

- (3) In exceptional circumstances, there may also be included in the amount awarded to a primary victim within the limit set by subsection (1) an amount for other expenses actually and reasonably incurred, or reasonably likely to be incurred, by the primary victim to assist his or her recovery from the act of violence.
- (4) Except as provided by subsection (2)(d) or (e), assistance may not be awarded to a primary victim for expense incurred through loss of or damage to property.

8A Special financial assistance to primary victims for significant adverse effects

- (1) Without limiting persons who are primary victims by virtue of section 7, for the purposes of this section a person is also a primary victim of an act of violence if he or she experiences or suffers any significant adverse effect as a direct result of an act of violence committed against him or her.
- (2) A person may be awarded special financial assistance by the Tribunal in accordance with this section if the Tribunal is satisfied that—
 - (a) an act of violence was committed against the person; and
 - (b) the person has experienced or suffered a significant adverse effect as a direct result of that act of violence; and
 - (c) that act of violence is a category A, B, C or D act of violence for the purposes of this section.

...

50 Making of awards

- (1) The Tribunal may award assistance to an applicant if satisfied—
 - (a) that an act of violence has occurred; and
 - (b) that the applicant is a primary victim, secondary victim or related victim of that act of violence or a person who has incurred funeral expenses as a direct result of the death of such a primary victim; and
 - (c) that the applicant is eligible to receive the assistance.

...

54 Matters to which Tribunal must have regard

In determining whether or not to make an award of assistance or the amount of assistance to award, the Tribunal must have regard to the following:

- (a) the character, behaviour (including past criminal activity and the number and nature of any findings of guilt or convictions) or attitude of the applicant at any time, whether before, during or after the commission of the act of violence;
- ...
- (c) whether the applicant provoked the commission of the act of violence and, if so, the extent to which the act of violence was in proportion to that provocation;
- (d) any condition or disposition of the applicant which directly or indirectly contributed to his or her injury or death;
- (e) whether the person by whom the act of violence was committed or alleged to have been committed will benefit directly or indirectly from the award;
- (f) any other circumstances that it considers relevant.

The VCAT decision

- 19 The primary focus of VCAT's decision on 5 April 2018 to affirm the decision of VOCAT to refuse CZG's application for an award of assistance was whether or not, having regard to ss 54(a), (d) and (f), an award of assistance should be made:

Not every person who is a victim of crime will receive assistance. An application for assistance must satisfy a number of threshold criteria. The Act contains a number of limiting provisions. Section 54 is one of these.

...

Section 54 makes it clear that an applicant's character and conduct – before, at the time, and after the act of violence, must be taken into account in exercising the discretion whether or not to make an award of assistance.

As acknowledged by both parties, while past criminal offending does not preclude an applicant from applying for assistance, it must be taken into account in deciding whether to make an award or for how much.

Similarly, conduct which has contributed in some way to the injury suffered does not preclude an applicant from applying for assistance but it must be taken into account.

Either or both may reduce the amount awarded, limit the award to a particular category of assistance, or lead to a refusal.¹⁴

¹⁴ *CZG v Victims of Crime Assistance Tribunal* [2018] VCAT 523, [17], [19]–[22].

- 20 The Senior Member referred to CZG's criminal history, which included three separate instances of violent offending causing harm:

The applicant was found guilty of causing serious injury in 2010 when he was 16, a violent assault in which he stabbed the victim seven times in the leg, abdomen and shoulder, in an altercation after the applicant and another person attempted to gatecrash a party (the 2010 offence). The victim had pursued the applicant and threw a punch at him. The applicant fled the scene after stabbing the victim. The victim required emergency surgery, and was hospitalised for more than a week.

The applicant was found guilty of an armed robbery in 2011 when he was 16 and on bail for the 2010 offence. He was armed with a baseball bat and, with another co-offender, also armed, chased, threw to the ground and robbed a young man walking along the street (the 2011 offence).

He was found guilty of an armed robbery in 2012 at a McDonalds' store, just before his 18th birthday, while on parole for the 2011 offence. The applicant was armed with a sledgehammer, his co-accused were armed with an axe and a baseball bat. They assaulted and intimidated staff, demanded and stole cash takings and smashed computer terminals on the cashiers' desks at the store (the 2012 offence).

The victims' impact statements in the criminal proceedings, which were on the VOCAT file, make it clear that the applicant's conduct had a serious effect on them. I am satisfied that his criminal conduct was a cause of repeated and substantial detriment to the community.¹⁵

- 21 The Senior Member also made findings regarding the events leading up to the shooting on 1 February 2014:

The confrontation in which the applicant was shot followed events in which the applicant was directly involved.

A few days before, while a passenger in a car with his then current girlfriend, the applicant had by chance seen a former girlfriend driving in her car. His evidence before me was that his girlfriend, who was driving, had done a U-turn and chased the car. He told police that they chased her 'just for a laugh'. He later stated that it was not really for a laugh, that his current girlfriend was angry with his former girlfriend.

Regardless of why they did it, there is no doubt that it frightened the applicant's former girlfriend. She told police that her passenger had called Epping Police who told them to drive to the police station. They had also called '000'. She told police the applicant had threatened her with a crowbar when she had stopped her car outside Epping police station.

The applicant denies that he was armed or threatened the former girlfriend with a crowbar. He said in evidence before me that she turned left and

¹⁵ Ibid [41]–[44] (emphasis in original).

stopped outside Epping police station. They then drove away without stopping.

I am not able to resolve the question of whether or not the applicant threatened his former girlfriend with a crowbar, save to observe that it would seem extremely foolish to do so outside a police station. The evidence is consistent, however, that she took the step of driving to the Epping police station. I am satisfied that the applicant was directly involved in an incident which would, objectively, have been frightening for his former girlfriend and that she took the step of driving to a police station for protection.

The incident provides some context for the former girlfriend's response to a call the applicant then made to her on 1 February 2014.

The applicant said at the hearing the call was normal and friendly, that he called her because he'd had a fight with his current girlfriend.

Nevertheless, it is clear that she was concerned by the contact from the applicant because she asked an acquaintance for assistance. Her acquaintance and another called the applicant threatening him and telling him he had to meet them.

In the course of the increasingly hostile communications, the applicant sent a message to his former girlfriend threatening to kill her. He told police he was angry with her for 'making trouble'. He agreed that he had also sent a message to the men that he was going to kill them.

It is not in dispute that the applicant went to the agreed meeting place armed with a machete and accompanied by two others armed with golf clubs.

Taking the above into account, I am satisfied that the applicant had a direct involvement in the sequence of events that led to the act of violence, and that his conduct is highly relevant under s 54(a) and (d) of the Act.

The confrontation would not have occurred but for the incident in which his former girlfriend was chased and frightened, and the applicant's subsequent call to her. Whatever his reasons for making the call to her, had he not done so she would not have asked for help from her acquaintance. She asked for help because she was, quite reasonably, frightened and concerned by the previous incident.

While the applicant is not responsible for any threats her acquaintance made to him, he engaged in unlawful behaviour and escalated the conflict by making a threat to kill his former girlfriend, and making a threat to kill her acquaintance.

Further, instead of involving the police, he made the decision to arm himself, enlist two others and attend the meeting. While I accept that at the time he did not see any other alternative and did not want the other men to come to his grandmother's house where he lived with his family; and I accept that he did not expect anyone to bring a gun, I am satisfied that he went expecting violent conflict and prepared to engage in it.

It is not in dispute that the applicant did not throw the glass bottle which hit the offender's girlfriend and that in any event the offender's action were

disproportionate to any provocation.¹⁶

- 22 The Senior Member made a number of findings in respect of other evidence which was led on behalf of CZG. The Senior Member noted that CZG had not reoffended in the four years since the shooting. While this was a matter to be taken into account:

it has less weight in the particular and tragic circumstances here in my view, as it is not possible to know whether he would have continued offending had he not suffered a serious disabling injury.¹⁷

The Senior Member noted that CZG agreed in cross-examination that he had not felt remorse at the time of his past criminal offending.¹⁸

- 23 The Senior Member considered that CZG's current circumstances are 'very difficult':

He lives with his mother and younger brother in the one-bedroom flat his mother rents. His mother is his main carer. Because of the special equipment he needs such as a hoist and his wheelchair, he sleeps in the bedroom and his mother and younger brother sleep in the living room. He is susceptible to urinary tract infections and has regular stays in hospital to treat them.

He receives income through a disability support pension of around \$850 per fortnight. His mother receives a carer's allowance of \$260 per week. He receives assistance through the NDIS – the services of a personal care attendant who comes for two hours in the morning three or four days a week, taxi vouchers and financial support for the purchase of medical supplies and physical aids.

The applicant's mother described his daily care needs, which are extensive and physically demanding for her. She has occasional respite including when the applicant has a hospital stay but it is clear that she shoulders the day-to-day responsibility for looking after him.¹⁹

- 24 The Senior Member's reasons for affirming VOCAT's decision were as follows:

The seriousness of the applicant's injury and the impact on him of the act of violence weigh in favour of an award of assistance, as submitted on his behalf.

It is the sole matter, however, weighing in favour of an award, and it is far outweighed by his past, violent, criminal history; the harm he caused by his own offending; his direct contribution to the events leading up to the

¹⁶ Ibid [48]–[62].

¹⁷ Ibid [63].

¹⁸ Ibid [65].

¹⁹ Ibid [66]–[68].

confrontation in which he was injured; his unlawful and violent threat to kill his former girlfriend on the day; and his conduct in attending the confrontation armed and prepared to engage in violent conflict.

I agree with the view of the VOCAT member that to make an award of assistance to the applicant, whether reduced or otherwise, under either s 8 or s 8A of the Act would be contrary to the intention and purposes of the Act and would not accord with community expectations.

I have taken into account that the findings of guilt in his criminal history related to offences committed before he turned 18. As submitted, they are to be seen in a different light to adult offending. They are nevertheless serious offences with a direct impact on the victims and society.

Further, in this case, in addition to previous serious offending there is also direct involvement by the applicant in the events leading to the act of violence, including a threat to kill made on the day.

I have taken into account the evidence about the applicant's family history and his attempts to reform himself prior to the act of violence. Given the evidence of his conduct in the days and hours leading up to the act of violence, I am not persuaded that any reformation had taken place. In particular, his threat to kill his former girlfriend because she had made trouble for him supports a conclusion that his violent character had not abated.

Taking into account the matters I must have regard to, I have decided to refuse the application for an award of assistance under s 8 of the Act for expenses, and s 8A for special financial assistance.

While many in the community would no doubt feel compassion for him, as I do, the applicant is not an appropriate recipient of an award of assistance under the Act in my view. His own violent criminal conduct combined with his direct contribution to the events leading up to the act of violence have disqualified him.²⁰

Questions of law and grounds of appeal

Question of law A: Whether the affirmation order made by VCAT on 5 April 2018 constituted a valid exercise of the power conferred by s 51(2) of the VCAT Act if, upon the proper construction of the Assistance Act, VCAT was required to and did not satisfy itself of the matter specified by s 50(1)(c) of the Assistance Act.

Appeal ground 1A: VCAT erred in law by making the affirmation order in purported exercise of the power conferred by s 51(2)(a) of the VCAT Act, in circumstances where VCAT was required to be, and did not consider or make a finding that it was, satisfied of the matter referred to in s 50(1)(c) of the Assistance Act. By reason thereof, the affirmation order is invalid.

²⁰

Ibid [73]–[80].

25 Mr Harding, who appeared with Ms Blok on behalf of CZG, submitted that VCAT had no power to make an order affirming VOCAT's decision if it had not first satisfied itself of CZG's eligibility to receive assistance pursuant to s 50(1)(c) of the Assistance Act.

26 The Senior Member accepted that CZG was the primary victim of an act of violence resulting in extremely serious injury.²¹ As such, CZG was a primary victim as defined in s 7(1) of the Assistance Act. Pursuant to s 8(1) of the Assistance Act, CZG was eligible to be awarded assistance of up to \$60,000, plus special financial assistance of up to \$10,000 under s 8A. Attempted murder is a category A offence for the purposes of s 8A(5).²² As such, the minimum amount of special financial assistance which can be awarded is \$4,667 and the maximum amount is \$10,000.²³

27 Mr Harding submitted that, although it could be inferred from the Senior Member's reasons that she was satisfied of the matters referred to in ss 50(1)(a) and (b), no such inference is available to sustain the existence of satisfaction referred to in s 50(1)(c).²⁴ I reject this submission. The Senior Member stated:

Not every person who is a victim of crime will receive assistance. An application for assistance must satisfy a number of threshold criteria. The Act contains a number of limiting provisions. Section 54 is one of these.²⁵

This passage included a footnote, 'Set out in s 50(1)' of the Assistance Act, in reference to the phrase 'threshold criteria'. Relevantly, this included the criteria in s 50(1)(c) 'that the applicant is eligible to receive the assistance'.

28 If the Senior Member considered that CZG did not satisfy each of the s 50(1) criteria, there would have been no utility in considering the application of s 54. The discretion conferred by s 54 to refrain from making, or to reduce, an award of assistance is preconditioned upon an applicant being otherwise eligible to receive an

²¹ Ibid [7]–[8].

²² *Victims of Crime Assistance (Special Financial Assistance) Regulations 2011* (Vic) reg 6, sch 1.

²³ *Victims of Crime Assistance Act 1996* (Vic) s 8A(5).

²⁴ Appellant, 'Outline of Submissions', filed 24 August 2018, [21].

²⁵ *CZG v Victims of Crime Assistance Tribunal* [2018] VCAT 523, [17].

award of assistance. This assumption of eligibility is apparent in the final paragraph of the Senior Member's reasons:

While many in the community would no doubt feel compassion for him, as I do, the applicant is not an appropriate recipient of an award of assistance under the Act in my view. His own violent criminal conduct combined with his direct contribution to the events leading up to the act of violence have **disqualified him.**²⁶

- 29 I grant the appellant leave to appeal in respect of question of law A, but I dismiss appeal ground 1A. The Senior Member was satisfied that CZG was eligible to receive assistance. However, having regard to the matters set out in s 54, the Senior Member determined not to make an award of assistance. This approach discloses no error of law.

Question of law B: Whether the affirmation order constituted a valid exercise of the power conferred by s 51(2) of the VCAT Act if, upon the proper construction of the Assistance Act, VCAT was required to determine the review of that order by making an order setting it aside under s 51(2)(c) of the VCAT Act.

Appeal ground 1B: VCAT erred in law by making the affirmation order, in purported exercise of the power conferred by s 51(2) of the VCAT Act, in circumstances where, on the proper construction of the Assistance Act, VOCAT had exercised its statutory powers in relation to an application that did not contain the information mandated by s 27(1)(f) of the Assistance Act.

- 30 Mr Harding submitted that VCAT had no power to make an order affirming the VOCAT order because VOCAT exercised its powers in relation to an application which did not contain information which was mandatory pursuant to s 27(1)(f) of the Assistance Act. In effect, Mr Harding submitted that the VOCAT order was a nullity because it was made in respect of an application which did not comply with s 27(1)(f). Consequently, there was no order which VCAT could affirm.
- 31 Section 27(1)(f) provides that an application for assistance must set out the amount and type of assistance sought. The application filed by CZG specified the types of assistance which he sought. However, it did not indicate, in respect of each category of assistance, how much assistance was sought. On 2 April 2014, VOCAT wrote to

²⁶ Ibid [80] (emphasis added).

CZG's solicitors enclosing a statement of claim 'for you to list any expenses that have arisen or are outstanding as a result of the act of violence'.²⁷ CZG did not complete this document within the stipulated four-month period. Rather, CZG's solicitors wrote to VOCAT on 11 September 2014, as set out earlier in this judgment.

32 The following matters are not controversial. First, CZG foreshadowed that he would be claiming the maximum amount of compensation under both ss 8 and 8A: \$70,000. Second, CZG requested direction from VOCAT before incurring the costs of obtaining reports from treating practitioners. Third, CZG identified the circumstances relating to his claim for assistance as 'exceptional'.²⁸ Fourth, CZG's lawyers noted that VOCAT 'has discretion in the making of awards, including under section 55 of the Act in respect of the form of payment'.²⁹

33 No submission was advanced by CZG before VCAT that the order of VOCAT should be set aside because CZG's application did not comply with s 27(1)(f) of the Assistance Act. Mr Harding submitted that nothing turns on this, because compliance with s 27(1)(f) is a jurisdictional precondition for a valid application.

34 Although no statement of claim was filed by CZG, VOCAT was advised in the letter of 11 September 2014 that CZG claimed \$60,000 of assistance under s 8 and \$10,000 assistance under s 8A of the Assistance Act. Thus, in a practical sense, there was compliance with s 27(1)(f). CZG identified the type of assistance which he sought and the amount which he sought.

35 If the information provided in the letter of 11 September 2014 did not comply with s 27(1)(f), it does not follow that VOCAT did not have jurisdiction to hear and determine CZG's application. The question of whether the doing of an act is a precondition to the valid exercise of a statutory power is a question of statutory construction. In *Project Blue Sky Inc v Australian Broadcasting Authority*,³⁰ the plurality

²⁷ Exhibit NCW-4 to the affidavit of Nicholas Charles White affirmed 10 May 2018.

²⁸ Exhibit NCW-6 to the affidavit of Nicholas Charles White affirmed 10 May 2018.

²⁹ Ibid.

³⁰ (1998) 194 CLR 355.

stated:

An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition.³¹

36 Notwithstanding the mandatory terms of s 27, I do not discern a legislative purpose to deprive VOCAT of jurisdiction to hear and determine an application wherever there is any non-compliance with the terms of s 27(1). To construe s 27 in this way would have draconian and unintended consequences, at odds with the beneficial nature of the Assistance Act. Further, I accept the submission of Mr Bayly, who appeared for the Attorney General, that, where the Assistance Act intends non-compliance to result in invalidity, it does so in express terms. Section 29(2) provides that VOCAT must strike out an application made out of time unless it considers that, in the particular circumstances, the application ought not be struck out. Further, s 52 expressly prescribes circumstances in which VOCAT/VCAT must refuse to make an award of assistance.

37 If the conclusion set out above is incorrect, it does not automatically follow that non-compliance with s 27(1)(f) constitutes jurisdictional error. For an error to constitute a jurisdictional error, the error must be material. 'A breach is material to a decision only if compliance could realistically have resulted in a different decision'.³² CZG bears the onus of establishing that compliance with s 27(1)(f) could realistically have

³¹ Ibid 388–9 [91] (McHugh, Gummow, Kirby and Hayne JJ). See also *Brygel v Stewart-Thornton* [1992] 2 VR 387, 397–8 (JD Phillips J); *Halwood Corporation Ltd v Roads Corporation* [1998] 2 VR 439, 445–6 (Tadgell JA, Brooking and Ormiston JJA agreeing); *Davis v The Queen* (2016) 262 A Crim R 492, 506–7 [59]–[61] (the Court); *Tsolacis v McKinnon* (2012) 38 VR 260, 276–7 [62] (Cavanough J); *Redline Towing and Salvage Pty Ltd v Convenor of Medical Panels* [2012] VSC 472, [8] (Pagone J); *Ashton Millson Investments Ltd v Colonial Ltd* (2001) 162 FLR 145, 155–6 [38]–[39] (Warren J); Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 282–3 [5.40].

³² *Minister for Immigration and Border Protection v SZMTA* (2019) 93 ALJR 252, 263 [45] (Bell, Gageler and Keane JJ). See also *Hossain v Minister for Immigration and Border Protection* (2018) 92 ALJR 780, 788 [29]–[31] (Kiefel CJ, Gageler and Keane JJ).

resulted in a different decision.³³ Prior to VOCAT's rejection of CZG's claim for assistance, CZG's lawyers had informed VOCAT that CZG was claiming the maximum assistance of \$70,000 in respect of six categories of assistance. If compliance with s 27(1)(f) required CZG to stipulate the amount claimed in respect of each of the categories of assistance, he has not established that compliance could realistically have resulted in a different decision by VOCAT.

38 I grant leave to appeal in respect of question of law B, but I dismiss appeal ground 1B.

Question of law C: Whether, properly construed, s 54 of the Assistance Act is a provision that confers power to refuse to make an award of assistance (including by means of an order made under s 51(2)(a) of the VCAT Act) prior to the appellant's eligibility for assistance being determined.

Appeal ground 1: VCAT erred in law in the construction of s 54 of the Assistance Act by concluding at paragraph 17 of the reasons that s 54 is a limiting provision.

Appeal ground 3: VCAT erred in law in concluding at paragraph 80 of the reasons that s 54 of the Assistance Act conferred on it a discretion to decide whether the appellant was an appropriate recipient of assistance under the Assistance Act and/or that s 54 could be applied with that effect in circumstances where VCAT made no finding about the assistance the appellant was eligible to receive under ss 8 or 8A of the Assistance Act.

Question of law D: Whether, on the proper construction of the Assistance Act, the determination of whether to make an award of assistance (or the amount thereof) under s 54 of that Act must be undertaken for each kind of assistance that an applicant for assistance is eligible to receive under the Assistance Act.

Appeal ground 4: VCAT erred in law in failing to determine whether an award of assistance should be made to the appellant in relation to each kind of assistance the appellant was eligible to receive due to the act of violence at the time it had regard to the matters referred to in ss 54(a) and (d) of the Assistance Act.

Appeal ground 5: VCAT erred in law by failing to perform the review function conferred by s 59(1)(a) of the Assistance Act and by s 42(1) of the VCAT Act in that it failed to make findings about the kinds and amounts of assistance the appellant was eligible to receive before it had regard to the matters referred to in ss 54(a) and (d) of the Assistance Act.

³³ *Minister for Immigration and Border Protection v SZMTA* (2019) 93 ALJR 252, 263 [46] (Bell, Gageler and Keane JJ).

39 It is convenient to deal with questions of law C and D and their related appeal grounds together as they involve the construction of s 54 of the Assistance Act. Mr Harding accepted that s 54 conferred a discretion upon the Senior Member to determine that CZG not receive an award of assistance by reason of the matters set out in ss 54(a), (c), (d) and (f). However, he submitted that the discretion cannot be exercised until after a determination is made as to the quantum of assistance that an applicant is entitled to receive in respect of each category of assistance prescribed by ss 8 and 8A, which has been claimed. He submitted that, in order for the s 54 discretion to be validly exercised, it is not sufficient for the VCAT member to conclude that the applicant has a 'prima facie ... broad eligibility to assistance'.³⁴

40 Mr Harding submitted that, by exercising the s 54 discretion without first determining the quantum of assistance which CZG was entitled to receive in respect of the six categories of assistance which he claimed, the Senior Member 'stepped over a critical step that the Act contemplates being undertaken'.³⁵

41 Questions of law C and D raise issues as to the proper construction of s 54 of the Assistance Act. The correct approach to the interpretation of statutory provisions was considered by the Court of Appeal in *Treasurer of Victoria v Tabcorp Holdings Ltd*.³⁶ Maxwell P, Beach JA and McMillan AJA relevantly held:

As so often in the work of an appellate court, these appeals concern a question of statutory interpretation. At issue is the interpretation of ordinary English words, in a provision imposing a tax. As the High Court has repeatedly emphasised, the task of statutory interpretation begins, and ends, with the words which Parliament has used. For it is through the statutory text that the legislature expresses, and communicates, its intention.

Interpreting a particular provision requires consideration of the legislative context and — where relevant — the legislative history. But if the words are clear and unambiguous, and can be intelligibly applied to the subject-matter, the provision must be given its ordinary and grammatical meaning, even if the result may seem inconvenient or unjust. These principles apply to a taxing statute as to any other.³⁷

³⁴ Transcript of proceeding (28 February 2019), 20.18–20.19.

³⁵ Ibid 20.20–20.21.

³⁶ [2014] VSCA 143.

³⁷ Ibid [1]–[2] (citations omitted).

42 The jurisdiction of VOCAT/VCAT to make an award of assistance is derived from s 50(1) of the Assistance Act, read in conjunction with ss 8 and 8A.³⁸ In *Pham v Victims of Crime Assistance Tribunal*,³⁹ McLeish JA stated:

It is true, as the Attorney-General submitted, that s 8 establishes categories for which assistance may be granted, including by prescribing criteria for falling within those categories. In doing so, it is aptly described as prescribing conditions of eligibility for assistance. Where its terms are satisfied, VOCAT therefore has power to award assistance under s 50(1) of the Act. However, s 8 does not address itself to the calculation of the amount of assistance in any particular case. Rather, s 8 is jurisdictional in character because, read with the requirement of eligibility for assistance in s 50(1)(c), it defines and circumscribes the power of VOCAT to award assistance to primary victims.

Section 16, in contrast, is expressly concerned with ‘determining’ the amount of assistance to be awarded. It operates by reference to ‘the loss, expense or other matter for which assistance is sought from the Tribunal’. In other words, it presupposes that VOCAT’s jurisdiction to award assistance has been invoked and that the Act has provided for that jurisdiction. The provision establishing jurisdiction is here found in s 8, read with s 50(1)(c). Viewed in that light, s 16 assists in ascertaining the amount of assistance to be awarded, but is subject to the jurisdictional limits fixed by s 8. Consistently with this structure, the parameters in s 8, including the pecuniary limits on recovery, only operate once s 16 has been applied and any reductions required by that provision have been made.⁴⁰

43 Mr Harding submitted that the passage set out above supports the proposition that, before the s 54 discretion may be exercised, there must first be a determination by VOCAT/VCAT as to both the eligibility of an applicant to receive the categories of assistance claimed and the quantum of that assistance. I reject this submission. Section 54 is concerned with ‘determining’ whether an applicant will receive an award of assistance and, if so, the amount of such assistance. The exercise of the s 54 discretion is premised upon VOCAT/VCAT having jurisdiction to make an award of assistance. However, the words ‘in determining whether or not to make an award of assistance or the amount of assistance to award’ emphasise that the operation of s 54 is anterior to the actual award of assistance under ss 8 and 50(1) of the Assistance Act.⁴¹ Further, contrary to appeal ground 1, the Senior Member’s description of

³⁸ See also *Victims of Crime Assistance Act 1996* (Vic) s 59(1) in respect of VCAT.

³⁹ [2016] VSCA 102.

⁴⁰ Ibid [40]–[41] (Tate and Ferguson JJA agreeing) (citations omitted).

⁴¹ Cf ibid [39].

s 54 as a 'limiting provision' discloses no error. Section 54 is a limiting provision in the sense that it confers a discretion upon VOCAT/VCAT to refrain from making, or to reduce, an award of assistance.

44 Mr Harding relied upon the decision of Vice President Judge Ginnane (as his Honour then was) in *Meinderts v Victims of Crime Assistance Tribunal*.⁴² Mr Meinderts had applied to VCAT pursuant to s 59(1)(a) of the Assistance Act for a review of a decision of VOCAT refusing to make an award of assistance. On 28 May 2010, Mr Meinderts was assaulted by three people. They knocked him to the ground with a shopping trolley and struck him in the head up to ten times with the shopping trolley handle bar. He was punched and kicked before having his wallet and cash stolen. One offender pleaded guilty in the County Court on 6 December 2010 to one charge of intentionally causing serious injury and armed robbery. Mr Meinderts was admitted to hospital for ten days. The hospital records revealed that he suffered extensive fractures of the face and skull, a sinus fracture, an eye fracture, lacerations and a wrist fracture resulting in the need for his hand to be in a splint.⁴³

45 Mr Meinderts had an extensive criminal history, having spent eight years in youth training centres or adult gaols since the age of 16 years.⁴⁴ Before Judge Ginnane, the respondent submitted that Mr Meinderts' past extensive and serious criminal activity was such that VCAT should refuse to make an award of assistance in his favour. It was submitted that his criminal history suggested an ongoing disregard for the safety of others and their property, and for societal morals. He had not been living in the community long enough to make claims of rehabilitation sufficient to outweigh his past criminal activity, and he should not now have access to public money.⁴⁵ Judge Ginnane stated:

The *Act* does not establish a system of financial assistance for all victims of crime. Each case must be considered on its merits having regard to the objects of the *Act* and the prescribed considerations. The *Act* does not

⁴² [2011] VCAT 1831.

⁴³ Ibid [5]–[8].

⁴⁴ Ibid [18].

⁴⁵ Ibid [24].

prevent persons, even those with an extensive criminal history, seeking financial assistance, when they are the victims of crime.

However the *Act* does require that consideration be given to an applicant's character, behaviour, including their criminal activity or attitude. In addition the objectives of the *Act* require consideration of whether an applicant is an appropriate recipient of a symbolic expression by the State of the community's sympathy. These are significant matters in the proper exercise of the discretion in this application.

Proper consideration of the applicant's criminal history requires taking into account, the nature of the offences and the harm both physical and mental that the victims of them are likely to have suffered. The applicant has been out of jail for a comparatively short period of time.

However he has suffered severe injuries and made some attempts to change his life.

The proper application of these considerations requires an item by item approach to the applicant's claims.⁴⁶

46 Thereafter, Judge Ginnane considered each of the six categories of assistance claimed by Mr Meinderts. It is clear that his Honour rejected the respondent's submission that he should refuse to make any award of assistance in favour of Mr Meinderts because of his past criminal history. However, he did give express consideration as to whether the amount of special financial assistance under s 8A should be reduced because of Mr Meinderts' criminal history.

47 Mr Meinderts suffered a category B act of violence for which the minimum and maximum amount of special financial assistance that could be awarded ranged from \$1,300 to \$3,250. Taking into account the objectives of the Act and the considerations prescribed by s 54, Judge Ginnane decided not to award Mr Meinderts any special financial assistance. He considered that the 'appropriate balance' in the case was to refuse Mr Meinderts' claim for special financial assistance, but to allow the claimed medical and clothing expenses, together with a comparatively small sum in respect of loss of earnings.⁴⁷

48 I do not consider that Judge Ginnane's decision in *Meinderts* is authority for the

⁴⁶ Ibid [31]–[35].

⁴⁷ Ibid [79].

proposition that the discretion conferred by s 54 to refrain from making an award of assistance cannot lawfully be exercised unless a determination has first been made as to the applicant's entitlement to assistance in respect of each category of assistance claimed. Judge Ginnane did not consider that he should refrain from awarding any assistance to Mr Meinderts by reason of the criteria prescribed by s 54.

49 In circumstances where VOCAT/VCAT is considering the application of the s 54 discretion with a view to reducing the amount of assistance which might otherwise be awarded, the approach adopted by Judge Ginnane is one which could be adopted by VOCAT/VCAT. The appellant submits, however, that Judge Ginnane's approach must be followed in all cases, including where VOCAT/VCAT has concluded that, by reason of the s 54 criteria, an applicant should receive no assistance. I reject this submission.

50 The exercise of the discretion to refrain from making an award of assistance is not contingent upon there first being a determination of the level of assistance which would otherwise be awarded to an applicant in respect of each of the categories of assistance claimed. Nothing in the text of s 54 mandates such an outcome. The subject matter of s 54 is the determination of whether or not to make an award of assistance or the amount of assistance to award. Applying the plain meaning of the words of s 54 to this subject matter, there is no obligation imposed upon VOCAT/VCAT to first determine the level of assistance which would have been awarded to an applicant absent the criteria in s 54 before determining that no award of assistance should be made.

51 Depending upon the facts of a particular application for assistance, VOCAT/VCAT might determine that a proper consideration of whether to refrain from making an award of assistance requires detailed information regarding the expenses incurred by an applicant in respect of the categories of assistance which are claimed. However, the circumstances of CZG's application permitted consideration of whether to refrain from making an award of assistance absent detailed information. As noted by the Senior Member at the outset of the proceeding, there was no issue

that CZG was the primary victim of an act of violence. He had suffered catastrophic injuries and claimed the maximum level of compensation under ss 8 and 8A of the Assistance Act. He had a significant history of juvenile offending. He was directly involved in the events which preceded the shooting. He was armed with a machete when he was shot. This combination of factors meant that the Senior Member could determine whether to refrain from making an award of assistance, absent information regarding the expenses claimed in respect of the individual categories of assistance.

52 The Senior Member was required by s 98(1)(d) of the VCAT Act to determine CZG's application for assistance with as much speed as the requirements of the VCAT Act, the Assistance Act and a proper consideration of the matters before it permitted.⁴⁸ The circumstances pertaining to CZG's application meant the Senior Member was able to give proper consideration to whether or not an award of assistance should be made to CZG.

53 Materiality is also a relevant consideration in respect of questions of law C and D. It is submitted on behalf of CZG that, before exercising the discretion to refrain from making an award of assistance, the Senior Member was obliged to first determine the level of assistance which CZG would otherwise have received in respect of each of the claimed categories of assistance. The Senior Member concluded that CZG's violent criminal conduct combined with his direct contribution to the events leading up to the shooting disqualified him from receipt of an award of assistance. If the Senior Member had, in the first instance, determined the level of assistance CZG would have received in respect of each of the claimed categories of assistance, this could not realistically have resulted in a different decision.

54 Leave to appeal in respect of questions of law C and D is granted, but the appeal on grounds 1, 3, 4 and 5 is dismissed.

⁴⁸ See also *Victims of Crime Assistance Act 1996* (Vic) s 32(1)(c).

Question of law E: Whether the statutory discretion conferred by s 54 of the Assistance Act was exercised by VCAT in a manner that was legally unreasonable.

55 Mr Harding submitted that question of law E 'raises a question of law as to whether the Senior Member exceeded the boundaries of her authority.'⁴⁹ He submitted that, as a consequence of being legally unreasonable, the Senior Member's decision was unlawful, as beyond power.⁵⁰ The specific errors which CZG contends disclose legal unreasonableness are:

- Giving inadequate weight to a factor;
- Giving excessive weight to a factor;
- Failing to take account of relevant considerations;
- Taking into account an irrelevant consideration;
- The decision being one which is plainly unjust and lacking an evident and intelligible justification.

56 I reject CZG's contention that the Senior Member's decision is unlawful as beyond power by reason of legal unreasonableness. Section 148 of the VCAT Act confers original, rather than appellate jurisdiction, upon the Supreme Court.⁵¹ An appeal under s 148 is not an appeal by way of rehearing. Rather, the proceeding is in the nature of judicial review.⁵² An appeal under s 148 is not a vehicle for the Court to usurp the fact-finding function of VCAT.⁵³

57 Contrary to Mr Harding's submission, the Senior Member's refusal to make an award of assistance to CZG is not one which bespeaks error. The Senior Member's reasons address separately:

- CZG's criminal history;⁵⁴

⁴⁹ Appellant, 'Outline of Submissions', filed 24 August 2018, [68].

⁵⁰ Ibid.

⁵¹ *Osland v Secretary to the Department of Justice (No 2)* (2010) 241 CLR 320, 331-2 [18] (French CJ, Gummow and Bell JJ).

⁵² Ibid.

⁵³ Ibid 332 [19] (French CJ, Gummow and Bell JJ).

⁵⁴ *CZG v Victims of Crime Assistance Tribunal* [2018] VCAT 523, [40]-[47].

- CZG's conduct leading up to the shooting;⁵⁵
- Evidence that CZG had not reoffended in the four years since the shooting;⁵⁶
- CZG's expression of remorse;⁵⁷
- CZG's very difficult current circumstances;⁵⁸ and
- A report prepared in 2012 which indicated that CZG might have a mild intellectual disability.⁵⁹

58 The discretion conferred upon the Senior Member by s 54 included the power not to make any award of assistance. The matters relied upon by the Senior Member, including the matters she was obliged to have regard to, provide an 'evident and intelligible justification'⁶⁰ for the decision.

59 Ground 9 of the amended notice of appeal contends that the Senior Member gave excessive weight to the considerations set out in ss 54(a) and (d) of the Assistance Act, and failed to give sufficient weight to other matters. CZG contends that it was 'unsustainable' for the Senior Member to conclude that the seriousness of CZG's injury and the impact upon him of the act of violence were far outweighed:

by his past, violent, criminal history; the harm he caused by his own offending; his direct contribution to the events leading up to the confrontation in which he was injured; his unlawful and violent threats to kill his former girlfriend on the day; and his conduct in attending the confrontation armed and prepared to engage in violent conflict.⁶¹

60 CZG submits:

The Senior Member's focus on the s. 54 matters has resulted in profoundly inadequate weight being given to evidence before, and accepted by, the Senior Member, of CZG's injury and its enduring impacts.

...

The weight the Senior Member gave to CZG's misdeeds is properly to be

⁵⁵ Ibid [48]–[62].

⁵⁶ Ibid [63].

⁵⁷ Ibid [64]–[65].

⁵⁸ Ibid [66]–[68].

⁵⁹ Ibid [70].

⁶⁰ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 367 [76] (Hayne, Kiefel and Bell JJ).

⁶¹ *CZG v Victims of Crime Assistance Tribunal* [2018] VCAT 523, [74].

regarded as disproportionate. This disproportion demonstrates that in critical ways in relation to important matters the Senior Member's reasoning carried the exercise of discretion beyond the scope, purpose and objects of the statutory source of the power she purportedly exercised. This makes her conclusions legally unreasonable.⁶²

61 In proceedings in the nature of judicial review, issues of weight are usually characterised as matters for the decision-maker which do not give rise to errors of law.⁶³ In *Minister for Aboriginal Affairs v Peko-Wallsend Limited*,⁶⁴ Mason J stated:

[I]n the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power.⁶⁵

62 All of the matters prescribed by ss 54(a), (d) and (f) which were taken into consideration by the Senior Member were matters which she was required to have regard to. The balancing exercise undertaken by the Senior Member and the weight which she attributed to different considerations discloses no error of law.

63 CZG submits that the Senior Member gave 'profoundly inadequate weight' to CZG's injury and its enduring impacts. The Senior Member's reasons record her finding that CZG suffered an extremely serious injury which has had a profound impact upon him.⁶⁶ I reject CZG's submission that the Senior Member gave profoundly inadequate weight to CZG's injury and its enduring impact upon him. The Senior Member gave those matters significant weight.

64 CZG submits that the objects of the Assistance Act distinguish between financial assistance for expenses incurred or reasonably likely to be incurred 'to assist victims of crime to recover from the crime',⁶⁷ and financial assistance, including special financial assistance, 'as a symbolic expression by the State of the community's sympathy and condolence for, and recognition of, significant adverse effects

⁶² Appellant, 'Outline of Submissions', filed 24 August 2018, [77], [87].

⁶³ *Attorney-General (NSW) v X* (2000) 49 NSWLR 653, 676 [120] (Spigelman CJ).

⁶⁴ (1986) 162 CLR 24.

⁶⁵ Ibid 41.

⁶⁶ *CZG v Victims of Crime Assistance Tribunal* [2018] VCAT 523, [8].

⁶⁷ *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(a).

experienced or suffered by them as victims of crimes'.⁶⁸

65 CZG submits that no attention was given by the Senior Member to the objects or the purposes of:

- Assisting a victim of crime such as CZG to recover from the crime;⁶⁹ and/or
- The payment of assistance as a symbolic expression by the State of the community's sympathy for and recognition of the significant adverse effects experienced or suffered by a victim of crime.⁷⁰

66 The Senior Member set out the objectives of the Assistance Act prescribed by s 1(2).⁷¹
The Senior Member stated, in respect of s 54:

Section 54 makes it clear that an applicant's character and conduct – before, at the time, and after the act of violence, must be taken into account in exercising the discretion whether or not to make an award of assistance.

As acknowledged by both parties, while past criminal offending does not preclude an applicant from applying for assistance, it must be taken into account in deciding whether to make an award or for how much.

Similarly, conduct which has contributed in some way to the injury suffered does not preclude an applicant from applying for assistance but it must be taken into account.

Either or both may reduce the amount awarded, limit the award to a particular category of assistance, or lead to a refusal.⁷²

67 The reasoning set out above is not attended by error. Notwithstanding the beneficial nature of the Assistance Act, VOCAT/VCAT has a discretion under s 54 to refrain from making an award of assistance. The Senior Member concluded that an award of assistance to CZG 'would be contrary to the intention and purposes of the Act and would not accord with community expectations'.⁷³ This conclusion is not erroneous. It is an acknowledgement that, in certain circumstances, an applicant's conduct may disqualify them from receiving an award of assistance.

⁶⁸ Ibid s 1(2)(b).

⁶⁹ Appellant, 'Outline of Submissions', filed 24 August 2018, [79].

⁷⁰ Ibid.

⁷¹ *CZG v Victims of Crime Assistance Tribunal* [2018] VCAT 523, [16].

⁷² Ibid [19]–[22].

⁷³ Ibid [75].

68 CZG submits that the nature of his history of criminal conduct as a young person and the harm he caused by that offending ought to have been evaluated by the Senior Member under s 54(a) of the Assistance Act from the standpoint that his culpability for his crimes and the harm that he caused by reason of those crimes fell to be assessed at the markedly lower standard that applies to juvenile offending.⁷⁴

69 The Senior Member stated in respect of CZG's past criminal activity:

I have taken into account that the findings of guilt in his criminal history related to offences committed before he turned 18. As submitted, they are to be seen in a different light to adult offending. They are nevertheless serious offences with a direct impact on the victims and society.⁷⁵

70 CZG submits that 'the different light' referred to in the passage set out above is not exposed in the Senior Member's reasons.⁷⁶ I do not accept this submission. The Senior Member recorded her agreement with CZG's counsel's submission 'that it is relevant that the offending occurred before the applicant reached adulthood. He is not in the category of an adult offender who has continued criminal offending through adulthood'.⁷⁷ Assessing CZG's offending from the markedly lower standard that applies to juvenile offending, he was convicted of three separate instances of serious offending causing harm. This past criminal activity was a matter which the Senior Member was required to have regard to under s 54(a) of the Assistance Act.

71 Appeal ground 10 contends that the Senior Member erred in law by:

- (a) Failing to take into account a relevant consideration, namely, her finding at paragraph 61 of the reasons that the appellant saw no other alternative and did not want the other men to come to his grandmother's house where he lived with his family.
- (b) The finding is a relevant consideration because:

⁷⁴ Appellant, 'Outline of Submissions', filed 24 August 2018, [85].

⁷⁵ *CZG v Victims of Crime Assistance Tribunal* [2018] VCAT 523, [76].

⁷⁶ Appellant, 'Outline of Submissions', filed 24 August 2018, [86].

⁷⁷ *CZG v Victims of Crime Assistance Tribunal* [2018] VCAT 523, [45].

- (i) s 54(a) requires VCAT to take into account the behaviour and attitude of the appellant before or during the act of violence;
- (ii) s 54(d) requires VCAT to take into account any disposition of the appellant which directly or indirectly contributed to his injury.

72 The Senior Member's finding at paragraph 61 of her reasons is as follows:

Further, instead of involving the police, he made the decision to arm himself, enlist two others and attend the meeting. While I accept that at the time he did not see any other alternative and did not want the other men to come to his grandmother's house where he lived with his family; and I accept that he did not expect anyone to bring a gun, I am satisfied that he went expecting violent conflict and prepared to engage in it.⁷⁸

73 The Senior Member's finding at paragraph 61 needs to be read in conjunction with all of the findings at paragraphs 48 to 62 under the heading, 'The applicant's conduct leading up to the act of violence'.

74 Of particular relevance are the Senior Member's findings that:

- CZG made a threat to his former girlfriend to kill her;
- CZG made a threat to his former girlfriend's acquaintance to kill him;
- CZG attended the agreed meeting place armed with a machete and accompanied by two others armed with golf clubs; and
- CZG went to the meeting expecting violent conflict and prepared to engage in it.⁷⁹

75 The Senior Member concluded, correctly, that CZG 'had a direct involvement in the sequence of events that led to the act of violence and that his conduct is highly relevant under s 54(a) and (d) of the Act'.⁸⁰

76 The appellant submits that:

[I]nvolvement is not treated by s 54 as a matter of significance. The matters

⁷⁸ Ibid [61].

⁷⁹ Ibid [48]–[62].

⁸⁰ Ibid [58].

referred to in s 54(a) and (d) require something more. In the case of (a) there must be a rational link to character, behaviour or attitude. For s 54(d) the question is whether CZG had any condition or disposition that directly or indirectly *contributed* to his injury.⁸¹

77 I reject this submission. The Senior Member's findings had a direct nexus with s 54(a): namely, CZG's character, behaviour and attitude before and during the commission of the act of violence. The findings were also relevant for the purposes of s 54(d) to a disposition of the appellant which directly contributed to his injury, namely, a willingness to make threats of violence and a preparedness to engage in violent conflict. Further, the findings were in respect of matters which the Senior Member considered relevant. As such, the Senior Member was required by s 54(f) of the Assistance Act to have regard to those matters.

78 CZG submits that the Senior Member failed to take into account a relevant consideration, namely, the finding at paragraph 61 that the appellant saw no other alternative to attending the meeting and did not want the men he was meeting to come to his grandmother's house where he lived with his family. CZG submits:

This finding engaged the considerations made relevant by s. 54(a) and (d). It was relevant to an assessment of CZG's behaviour and attitude. It is consistent with a condition, or more relevantly, a disposition that was defensive and/or protective of his grandmother and his family. The Senior Member also found that CZG's state of mind was one in which 'he did not see any other alternative' but to meet as had been demanded of him.⁸²

79 I reject CZG's submission that the Senior Member failed to have regard to the finding at paragraph 61. To the contrary, the Senior Member made an express finding at paragraph 61 that CZG did not see any other alternative than to attend the meeting and did not want the men to come to his grandmother's house where he lived with his family. Nevertheless, notwithstanding this finding, the Senior Member recorded her satisfaction that CZG went to the meeting on 1 February 2014 expecting violent conflict and prepared to engage in it. In effect, CZG submits that the Senior Member did not give sufficient weight to her finding that CZG did not see

⁸¹ Appellant, 'Outline of Submissions', filed 24 August 2018, [92] (emphasis in original).

⁸² Ibid [93].

any alternative other than to attend the meeting and did not want his assailants to come to his grandmother's house where he lived with his family. The weight to be attributed to these matters was a matter for the Senior Member and does not disclose an error of law.

80 Appeal ground 11 contends that the Senior Member erred in law by:

- (a) taking into account an irrelevant consideration, namely, her finding at paragraph 58 of the reasons that the appellant was directly involved in the sequence of events that led to the act of violence. VCAT concluded that the finding was highly relevant including to s 54(d) of the Assistance Act.
- (b) The finding is irrelevant to s 54(d) of the Assistance Act because the subsection requires VCAT to take into account any disposition of the appellant that directly or indirectly contributed to his injury.

81 CZG submits that:

The injury was an injury to CZG's neck. It was caused by [the offender] choosing to use a gun to shoot him. The matter made relevant by s. 54(d) is what if any condition or disposition of CZG's directly or indirectly contributed to his neck injury. CZG's involvement in the sequence of events that produced the meeting where [the offender] chose to act in the way that he did is irrelevant to s. 54(d). So is the factor cited by the Senior Member in her assessment of weight as 'his (CZG's) direct contribution to the events leading up to the confrontation in which he was injured'.⁸³

82 CZG does not submit that the Senior Member erred in concluding that he had a direct involvement in the sequence of events that led to the act of violence, and that his conduct was highly relevant for the purposes of s 54(a) of the Assistance Act.⁸⁴ Therefore, assuming in CZG's favour that the Senior Member erred in having regard, for the purposes of s 54(d), to the finding concerning CZG's involvement in the sequence of events that led to the shooting, any error is without consequence. The Senior Member was required to have regard to this matter under s 54(a) as it involved CZG's behaviour before the shooting. Further, this was a matter which the

⁸³ Ibid [96].

⁸⁴ *CZG v Victims of Crime Assistance Tribunal* [2018] VCAT 523, [58].

Senior Member considered to be relevant and was therefore required to have regard to under s 54(f) of the Assistance Act. In any event, I reject CZG's submission that his direct involvement in the sequence of events that led to the shooting was not a relevant consideration for the purpose of s 54(d). His direct involvement in the sequence of events leading up to the shooting evinced a disposition which directly or indirectly contributed to his injury. His presence at the meeting at which he was shot was not by chance. Rather, it was premeditated and occurred in circumstances where CZG had made threats to kill his former girlfriend and her acquaintance. He attended the meeting armed and ready to engage in violence. His willingness to do so was a 'disposition' within the meaning of s 54(d).

83 Appeal ground 12 contends that the Senior Member erred in law in that, by concluding that the seriousness of the appellant's injury and the impact on him of the act of violence were far outweighed by the matters referred to in paragraph 74 of the reasons, she exercised the discretion conferred by s 50 of the Assistance Act to refuse assistance unreasonably in light of the terms of s 50(1), s 54 and the scope, purpose and relevant objects of the Assistance Act.

84 This appeal ground challenges the weight to be accorded to the matters set out in paragraph 74 of the reasons. CZG places particular weight upon the Senior Member's statement:

I agree with the view of the VOCAT member that to make an award of assistance to the applicant, whether reduced or otherwise, under either s 8 or s 8A of the Act would be contrary to the intention and purposes of the Act and would not accord with community expectations.⁸⁵

85 CZG submits:

This statement exposes a profound misconception of the intention and purposes of the Assistance Act, and the statutory sources of 'community expectations'. This misconception itself exposes the exercise of discretion as unreasonable.

...

⁸⁵ Ibid [75].

The decision to refuse any award of assistance lacked an evident or intelligible justification derived from the purpose and objects and the nature and scope of the discretion conferred by s. 54 of the Assistance Act. The exercise of discretion was accordingly legally unreasonable and results in a conclusion that the review function conferred on the VCAT has not been lawfully performed. The consequence is that the Affirmation Order is beyond power.⁸⁶

86 I reject this submission. Section 54 conferred upon VOCAT/VCAT a discretion to refrain from making an order of assistance. The Senior Member concluded that, in light of the matters set out in paragraph 74 of her reasons, any award of assistance to CZG would be contrary to the intention and purposes of the Assistance Act and would not accord with community expectations. The Senior Member concluded that CZG's violent criminal conduct, combined with his direct contribution to the events leading up to the act of violence, disqualified him from an award of assistance. This conclusion was one which was open to the Senior Member based upon the evidence before VCAT. It does not manifest a misconception of the intention and purposes of the Assistance Act. Section 54 manifests a legislative recognition that, in certain circumstances, an applicant for assistance, although the primary victim of an act of violence, will not qualify for assistance.

87 CZG has not established an arguable case that the discretion conferred by s 54 of the Assistance Act was exercised by VCAT in a manner that was legally unreasonable. Leave to appeal in respect of question of law E is refused.

Conclusion

88 Leave to appeal is granted in respect of questions of law A, B, C and D, but the appeal is dismissed. Leave to appeal in respect of question of law E is refused. I shall provide the parties with an opportunity to make submissions on the costs of the application for leave to appeal.

⁸⁶ Appellant, 'Outline of Submissions', filed 24 August 2018, [100], [104].

CERTIFICATE

I certify that this and the 34 preceding pages are a true copy of the reasons for Judgment of McDonald J of the Supreme Court of Victoria delivered on 2 April 2019.

DATED this 2nd day of April 2019.


Associate

