Matter of B-Z-R-, Respondent

Decided by Attorney General December 9, 2021

U.S. Department of Justice
Office of the Attorney General

BEFORE THE ATTORNEY GENERAL

Pursuant to 8 C.F.R. § 1003.1(h)(1)(i), I direct the Board of Immigration Appeals ("Board") to refer this case to me for review of its decision. The Board's decision in this matter is automatically stayed pending my review. *See Matter of Haddam*, A.G. Order No. 2380-2001 (Jan. 19, 2001). To assist me in my review, I invite the parties to these proceedings and interested amici to submit briefs on: Whether mental health may be considered when determining whether an individual was convicted of a "particularly serious crime" within the meaning of 8 U.S.C. §§ 1158(b)(2)(A)(ii) and 1231(b)(3)(B)(ii). *See Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014) (holding that "a person's mental health is not a factor to be considered in a particularly serious crime analysis and that adjudicators are constrained by how mental health issues were addressed as part of the criminal proceedings").

The parties' briefs shall not exceed 6,000 words and shall be filed on or before January 10, 2022. Interested amid may submit briefs not exceeding 4,500 words on or before January 17, 2022. The parties may submit reply briefs not exceeding 3,000 words on or before January 24, 2022. All filings shall be accompanied by proof of service and shall be submitted electronically to AGCertification@usdoj.gov, and in triplicate to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

All briefs must be both submitted electronically and postmarked on or before the pertinent deadlines. Requests for extensions are disfavored.

Matter of B-Z-R-, Respondent

Decided by Attorney General January 6, 2022

U.S. Department of Justice
Office of the Attorney General

BEFORE THE ATTORNEY GENERAL

On December 9, 2021, pursuant to 8 C.F.R. § 1003.1(h)(1)(i), I directed the Board of Immigration Appeals to refer this case to me for review of its decision. To assist me in my review, I directed that opening briefs from the parties be filed on or before January 10, 2022, that briefs from amici be filed on or before January 17, 2022, and that reply briefs from the parties be filed on or before January 24, 2022.

On December 20, 2021, counsel for respondent filed a request to extend the deadline for submitting respondent's opening brief by twenty-one days, to January 31, 2022. In response to that request, I set the following briefing schedule in this matter:

The parties' briefs shall not exceed 6,000 words and shall be filed on or before January 31, 2022. Interested amici may submit briefs not exceeding 4,500 words on or before February 7, 2022. The parties may submit reply briefs not exceeding 3,000 words on or before February 14, 2022. All filings shall be accompanied by proof of service and shall be submitted electronically to AGCertification@usdoj.gov, and in triplicate to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

All briefs must be both submitted electronically and postmarked on or before the pertinent deadlines. Requests for further extensions are disfavored.

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UNITED STATES DEPARTMENT OF JUSTICE

OFFICE OF THE ATTORNEY GENERAL

WASHINGTON, DC

In the Matter of:	On certification to Attorney
B-Z-R- (No. A204 507 675)	General Merrick B. Garland

BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW SCHOLARS

TABLE OF CONTENTS

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. 8 U.S.C. §§ 1158(b)(2)(A)(ii) And 1231(b)(3)(B)(ii) Are Intended To Implement Article 33 Of The Refugee Convention And Should Be Interpreted Consistently With International Refugee Law Standards. 3

II. The Refugee Convention and Its Interpretative Authorities Define the PSC Bar Narrowly, Entailing A Fact-Sensitive Approach That Requires Consideration Of All Reliable Mitigating Information, Contrary To *G-G-S-*. 6

III. The Refugee Convention and Its Interpretative Authorities Make Present Danger To The Community A Distinct Prerequisite To Application Of The PSC Bar, Contrary To *Carballe*. 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

U.S. Cases and Administrative Decisions

Ahmetovic v. INS,
62 F.3d 48 (2d Cir. 1995).....13

Air France v. Saks,
470 U.S. 392 (1985).....6

Matter of B-Z-R-,
28 I&N Dec. 424 (A.G. 2021) 11

Matter of Carballe,
19 I&N Dec. 357 (BIA 1986) 3, 11, 13, 14

Matter of G-G-S-,
26 I&N Dec. 339 (BIA 2014) 2, 6, 11, 13, 14

I.N.S. v. Cardoza-Fonseca,
480 U.S. 421 (1987).....5, 6

I.N.S. v. Stevic,
467 U.S. 407 (1984).....4, 5

Mosquera-Perez v. INS,
3 F.3d 553 (1st Cir. 1993).....13

Murray v. Schooner Charming Betsy,
6 U.S. 64 (1804).....5

N-A-M- v. Holder,
587 F.3d 1052 (10th Cir. 2009) 13

U.S. Statutes and Legislative History

8 U.S.C. § 1158(b)(2)(A)(ii).....3, 5

8 U.S.C. § 1231(b)(3)(B)(ii) 3, 5

H.R. Conf. Rep. No. 96-781 (1980), *reprinted in* 1980 U.S.C.C.A.N. 160 5

Treaties

United Nations Convention relating to the Status of Refugees,
189 U.N.T.S. 150 (July 28, 1951)..... *passim*

Art. 1F(b) 7

Art. 1F(c) 3

Art. 33 ..... *passim*

Art. 33(1) 1, 4

Art. 33(2) ..... *passim*

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Art. 2(1) 6

Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (May 23, 1969).....6

Art. 31(1) 6

Art. 31(3)(b) 6

Art. 32 6

United Nations Authorities

Ali v. Achim, U.S. No. 06-1346 (dismissed by consent), UNHCR brief (Appendix 3) 10, 11, 12

DECLARATION OF STATES PARTIES TO THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, UN Doc. HCR/MMSP/2001/09, 16 Jan. 2002 3-4

UNHCR, *Comments on the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004* (2004) 9

UNHCR, *Criminal Justice and Immigration Bill: Briefing for the House of Commons at Second Reading* (2007), available at https://www.unhcr.org/en-us/576d237f7.pdf 7-8, 9, 12

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Foreign Cases

Al Sirri (FC) v. Secretary of State,
[2012] U.K.S.C. 54 (U.K.) 6

Betkoshabeh v. Minister for Immigration & Multicultural Affairs,
[1999] FCA 16 (Austl.), *rev'd on other grounds*, [1999] FCA 980 (Austl.) 11

EN (Serbia) v. Secretary of State,
[2009] EWCA Civ. 630 (UK) 8, 10, 12

IH (s. 72 "Particularly Serious Crime"),
[2009] UKAIT 00012 (UK) 10

Kenya National Commission on Human Rights v. Attorney General,
[2017] eKLR (Kenya) 10, 13

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[1998] 1 S.C.R. 982 (Can.) 12

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[2009] AATA 512 (Austl.) 12-13

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[2021] AATA 2 (Austl.) 13

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Glossary of Internet Links to Foreign Cases

For the reader's convenience, we provide here a list of URL links for foreign cases cited in this brief:

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rev'd on other grounds, [1999] FCA 980 (Austl.):
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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici International Law Scholars research, write and teach in the field of international and comparative refugee and asylum law, including the United Nations Convention relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951) ("Refugee Convention"). Individual *amici*'s names and affiliations are listed in Appendix 1. *Amici*'s interest in submitting this brief is to further the understanding of international refugee law and promote the resolution of the issues before the Attorney General in a manner consistent with the United States' legal obligations under international human rights law and the Refugee Convention.

SUMMARY OF ARGUMENT

Article 33(1) of the Refugee Convention effectuates one of the fundamental principles of international human rights law, the principle of *non-refoulement*. The United States committed to abide by Article 33 by acceding to the United Nations Protocol relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223, T.I.A.S. No. 6577 (Nov. 1, 1968) ("Refugee Protocol"). The Article 33 obligation not to *refoule* refugees is subject to the particularly serious crime ("PSC") bar – a narrow exception applicable only where the refugee, "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." Refugee Convention, art. 33(2).[1]

U.S. immigration statutes were enacted with the express intent of fully implementing and conforming to the Refugee Convention. But in several respects, current U.S. regulatory interpretations read the PSC bar too broadly, contrary to UN and international authorities and the

[1] *Amici* acknowledge that PSC determinations may arise in contexts where a noncitizen has not (yet) been determined to be a refugee. However, as elaborated below, the U.S. statutory provisions at issue in this case were enacted to meet the United States' obligations to refugees under Article 33. This brief uses "refugee" as a shorthand to reflect that those provisions should be implemented on the assumption that, but for the PSC bar, the noncitizen would qualify for refugee protection.

prevailing consensus among other States parties. In particular, current U.S. law defines PSC overbroadly, improperly restricts the use of evidence potentially favorable to the refugee, and unduly downplays the "danger" element of the PSC bar. *See generally* Appendix 2 (Philip L. Torrey, *et al*., *United States Failure to Comply with the Refugee Convention: Misapplication of the Particularly Serious Crime Bar to Deny Refugees Protection from Removal to Countries Where Their Life or Freedom Is Threatened* (Harvard Immigration and Refugee Clinical Program & Immigrant Defense Project 2018)); Fatma Marouf, *A Particularly Serious Exception to the Categorical Approach*, 97 Bos. U. L. Rev. 1427, 1459-68 (2017). As a result, the United States is currently failing to meet its international treaty and human rights obligations. This proceeding presents an opportunity to remedy some aspects of that failure.

At a minimum, as both parties agree, the Attorney General should rule that (unless a crime is a *per se* PSC or a *per se* non-PSC) all relevant and reliable evidence should be considered in determining whether a crime is a PSC, including mental health evidence, which should be considered in mitigation as appropriate. In other words, *Matter of G-G-S-*, 26 I&N Dec. 339 (BIA 2014), should be overruled. Under Article 33(2), all relevant and reliable evidence bearing on the PSC bar should be admitted and considered.

As respondent notes, however, more is required to meet the United States' obligations under international human rights law and align U.S. implementation of the PSC bar with the Refugee Convention. In particular, merely ruling that relevant mental health evidence should be considered would beg the question of what it must be relevant to – *i.e.*, the criteria for the PSC bar. Refugee Convention authorities and the prevailing international consensus indicate that the PSC bar should only apply if two distinct conditions are both met: (1) the refugee has committed a PSC, and (2) the refugee poses a "danger to the community." In contrast, current U.S. administrative

precedent requires only that the first (PSC) condition be met, albeit taking into consideration whether the crime is indicative of dangerousness – a different inquiry from whether, at the time of the *refoulement* decision, the refugee (still) poses a danger to the community. That precedent (for example, *Matter of Carballe*, 19 I&N Dec. 357 (BIA 1986)) should also be overruled.

Amici respectfully urge the Attorney General to better align U.S. law with U.S. obligations under the Refugee Convention and international human rights standards. This proceeding may not be suitable for wholesale reform of every aspect in which U.S. law deviates from international standards, but the Attorney General should rule that (1) mental health evidence should be admitted and considered insofar as relevant to the PSC bar and reliable; and (2) relevance to the PSC bar encompasses relevance to the distinct question of whether, at the time of the immigration tribunal/*refoulement* decision, the refugee poses a "danger to the community" of the United States.

ARGUMENT

I. 8 U.S.C. §§ 1158(b)(2)(A)(ii) And 1231(b)(3)(B)(ii) Are Intended To Implement Article 33 Of The Refugee Convention And Should Be Interpreted Consistently With International Refugee Law Standards.

The principle of *non-refoulement* "prohibits States from returning a refugee or asylum seeker to territories where there is a risk that his or her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, or political opinion." Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion* at 89, ¶ 2 (2001, rev. 2003), available at https://www.unhcr.org/publ/publ/419c75ce4.pdf. It is a well-established principle of customary international law and one of the fundamental pillars of international human rights law. *See, e.g.*, DECLARATION OF STATES PARTIES TO THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, UN Doc. HCR/MMSP/2001/09, 16 Jan. 2002

("Acknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law"); Lauterpacht & Bethlehem, at 149, ¶ 216 (given "the evident lack of expressed objection by any State to the normative character of the principle of non-refoulement, we consider that non-refoulement must be regarded as a principle of customary international law."); Guy S. Goodwin-Gill, *Non-Refoulement and the New Asylum Seekers*, 26 Va. J. Int'l L. 899, 902 (1986) ("The binding obligations associated with the principle of non-refoulement are derived from conventional and customary international law.").

The *non-refoulement* principle is effectuated by Article 33(1) of the Refugee Convention, which provides:

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

Article 33(2) provides two exceptions to that obligation, both phrased in the present tense and both based on "danger" to the State:

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

The second – italicized – exception is the PSC bar at issue in this case.

In 1968, the United States acceded to the Refugee Protocol, thereby becoming "bound . . . to comply with the substantive provisions of Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees." *I.N.S. v. Stevic*, 467 U.S. 407, 416 (1984). While the President and Senate believed that the Refugee Convention was "largely consistent with existing United States law," *id.* at 417, by ratifying it the United States committed to implement

refugee protections consistent with international standards. Congress did so by enacting the 1980 Refugee Act. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring the United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees[.]"). In particular, Congress enacted the provisions at issue in this proceeding for the express purpose of conforming to Article 33. *See, e.g., id.* at 441 ("The 1980 Act made withholding of deportation under § 243(h) mandatory in order to comply with Article 33.1"); *Stevic*, 467 U.S. at 421 ("Section 203(e) of the Refugee Act of 1980 amended the language of § 243(h), basically conforming it to the language of Article 33"). In conference, the Senate acceded to the House's preference to spell out the exceptions to withholding of deportation and asylum, rather than simply incorporating Article 33(2) by reference, with the express "understanding that [the language of the provisions at issue in this case, now codified at 8 U.S.C. §§ 1158(b)(2)(A)(ii) and 1231(b)(3)(B)(ii)] is based directly upon the language of the Protocol and it is intended that the provision be construed consistent with the Protocol." H.R. Conf. Rep. No. 96-781 at 20 (1980), *reprinted in* 1980 U.S.C.C.A.N. 160, 161. Consistent with that understanding, the statutory language duplicates the PSC language in Article 33(2). *See, e.g.*, 8 U.S.C. § 1158(b)(2)(A)(ii) ("the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States.").

It is fundamental that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). In the case of the PSC bar, given its duplication of Refugee Convention language

and its legislative history, the only permissible construction is in accordance with the Refugee Convention.

That entails careful review of the text and purpose of the Refugee Convention. *See* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (May 23, 1969), art. 31(1) ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."). It is also appropriate to consider the interpretative practice of States parties[2] and the responsible international agency, the United Nations High Commissioner for Refugees ("UNHCR"), *id.*, art. 31(3)(b); *see Cardoza-Fonseca*, 480 U.S. at 439 n.22 ("the [UNHCR Refugee] Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform [and] has been widely considered useful in giving content to the obligations that the Protocol establishes"),[3] and supplemental means of interpretation, including the Refugee Convention's history and consensus among leading international scholars, *see* Vienna Convention art. 32.

II. The Refugee Convention and Its Interpretative Authorities Define the PSC Bar Narrowly, Entailing A Fact-Sensitive Approach That Requires Consideration Of All Reliable Mitigating Information, Contrary To *G-G-S-*.

When the PSC bar applies, it results in the denial of fundamental human rights protections to people at risk of death or persecution. Accordingly, UN, international and national authorities have consistently instructed that it must be construed narrowly. Consistent with the plain meaning

[2] *See, e.g., Air France v. Saks*, 470 U.S. 392, 404 (1985) (in interpreting treaties, "we 'find the opinions of our sister signatories to be entitled to considerable weight.'") (citation omitted).

[3] *See also Al Sirri (FC) v. Secretary of State*, [2012] U.K.S.C. 54, ¶ 36 (U.K.) ("The guidance given by the UNHCR is not binding, but 'should be accorded considerable weight,' in the light of the obligation of Member States under article 35 of the Convention to facilitate its duty of supervising the application of the provisions of the Convention.") (citation omitted) (construing the separate Article 1F(c) exception to refugee status narrowly in light of UNHCR guidance). (Under Article 2(1) of the Refugee Protocol, the United States is subject to the same obligation to facilitate UNHCR's duties.)

of Article 33(2), which applies the double qualifier "particularly serious" to "crime," the UNHCR Refugee Handbook provides that the PSC bar is to be invoked only in "extreme cases." UNHCR, *Handbook on Procedures & Criteria for Determining Refugee Status and Guidelines on International Protection* ¶ 154 (1979, rev. 1992) ("UNHCR Handbook").[4] In his authoritative commentary, a principal author of the UN Refugee Convention and the UNHCR's first Protection Director explained that Article 33(2) must:

> be interpreted restrictively. . . . As to criminal activities, the word "crimes" is not to be understood in the technical sense of any criminal code but simply signifies a serious criminal offence. Two conditions must be fulfilled: the refugee must have been convicted by final judgment for a particularly serious crime, and he must constitute a danger to the community of the country. What crimes are meant is difficult to define since the principle that the criminal, not the crime, is to be punished applies. Certainly, capital crimes such as murder, rape, armed robbery and arson are included. However, even a particularly serious crime, if committed in a moment of passion, may not necessarily constitute the refugee as a danger to the community.

Paul Weis, *The Refugee Convention, 1951: The Travaux Preparatoires Analysed with a Commentary* 245-46 (1990), available at https://www.unhcr.org/4ca34be29.pdf. Likewise, one of the most-cited commentaries in existence when the United States acceded to the Refugee Protocol explained that "[a]lthough the decision whether the crime is a particularly serious one would depend on the merits of the case, the offence must normally be a capital crime (murder, arson, rape, armed robbery, etc.)." Atle Grahl-Madsen, *Commentary on the Refugee Convention, Division of International Protection of the United Nations High Commissioner for Refugees (Articles 2–11, 13–37)* at Article 33 ¶ 9 (1963). Later authorities also emphasize that PSC is to be construed narrowly. *See, e.g.,* UNHCR, *Criminal Justice and Immigration Bill: Briefing for the*

[4] UNHCR construes the phrase "serious nonpolitical crime" in Article 1F(b) as limited to "a capital crime or a very grave punishable act." UNHCR Handbook ¶ 155. The addition of "particularly" in Article 33(2) was clearly intended to specify an even narrower subset of crimes. *See* James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder,* 34 Cornell Int'l L.J. 257, 290 (2001).

House of Commons at Second Reading ¶ 7 (2007) ("UNHCR CJIB"), available at https://www.unhcr.org/en-us/576d237f7.pdf (PSC bar applies only in "extraordinary cases" involving "refugees who become an extremely serious threat to the country of asylum due to the severity of crimes perpetrated by them in the country of asylum"); *EN (Serbia) v. Secretary of State*, [2009] EWCA Civ. 630 ¶¶ 81-83 (UK) (holding unlawful a broad designation of crimes such as theft as presumptive PSCs).

As elaborated in Appendix 2, U.S. law has significantly deviated from prevailing UN and international standards, including by recognizing *per se* PSCs, by deeming a broad range of relatively ordinary crimes to constitute (non-*per se*) PSCs, by refusing to assess current dangerousness, and by refusing to consider whether the danger to the community is proportional to the danger to the refugee. *See generally* Appendix 2, at 13-17. These failures to meet international standards make it essential that the Attorney General conform U.S. refugee protection to the Refugee Convention and its interpretative standards insofar as the opportunity to do so is presented.

One aspect of the UN and international consensus is directly relevant to the immediate question presented in this proceeding. To limit the exception to refugee protection to crimes that really are "particularly serious" and refugees who pose a "danger to the community," UN and international authorities require that the facts relating to the crime be fully examined and the refugee have the opportunity to present and have considered all potentially mitigating evidence. *See, e.g.*, UNCHR, *Note on Non-Refoulement submitted by the High Commissioner for Refugees to the Executive Committee of the High Commissioner's Programme, 29th Session, Subcommittee of the Whole on International Protection* ¶ 14 (Aug. 23, 1977), available at https://www.unhcr.org/en-us/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-

commissioner.html ("where the refugee has been convicted of a serious criminal offence, it is important to take into account any mitigating factors and the possibilities of rehabilitation and reintegration within society"); UNHCR, *UNHCR Comments on the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004* 4 (2004) (PSC determination should consider "the overall context of the offence, including its nature, effects and surrounding circumstances, the offender's motives and state of mind, and the existence of extenuating or aggravating circumstances"); UNHCR CJIB ¶ 10 ("Factors to be considered include the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, and whether most jurisdictions would consider the act in question as a serious crime."); Grahl-Madsen, at Article 33 ¶ 9 (before a crime may be considered "particularly serious," an adjudicator must consider mitigating factors even with respect to crimes such as murder, rape or armed robbery); Hathaway & Harvey, at 292 (PSC must be "committed with aggravating factors, or at least without significant mitigating circumstances."); Lauterpacht & Bethlehem, at 138 ¶ 183 (individual circumstances must be considered); *id.* at 140 ¶ 191 (mitigating factors must be considered); Guy S. Goodwin-Gill & Jane McAdam, THE REFUGEE IN INTERNATIONAL LAW 270 (4th ed. 2021) ("as a matter of international law, the interpretation and application of [PSC] in the context of an exception to *non-refoulement* ought necessarily to involve an assessment of all the circumstances, including the nature of the offence, the background to its commission, the behaviour of the individual, and the actual terms of any sentence imposed"); *see also* UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* ¶ 2 (2003) ("given the possible serious consequences of exclusion, it is important to apply [the Refugee Convention's exclusion clauses] with great caution and only after a full assessment of the individual circumstances of the case.").

Precedent of other States parties interpreting the PSC exception is to the same effect. *See, e.g., Kenya National Commission on Human Rights v. Attorney General*, [2017] eKLR, at 12 (Kenya) ("in view of the serious consequences to a refugee for being returned to a country where he or she is in danger of persecution, the exception provided for in Article 33 (2) should be applied with the greatest caution. It is necessary to take fully into account all the circumstances of the case and, where the refugee has been convicted of a serious criminal offence, any mitigating factors and the possibilities of rehabilitation and reintegration within society."); *IH (s. 72 "Particularly Serious Crime")*, [2009] UKAIT 00012 ¶ 74 (UK) ("[W]hether a crime is a 'particularly serious' one in a given case must be a struggle by the decision-maker (judicial or otherwise) with the facts and circumstances relating to the conviction and the offender."); *EN (Serbia)* ¶¶ 66-69 (except perhaps in extraordinary cases, an irrebuttable presumption that a particular crime to which a particular sentence attaches is a PSC violates the Refugee Convention).

The relevant facts plainly encompass any mental illness or disability that may have affected the refugee's conduct, and mental illness and disability can present significant mitigating evidence. Accordingly, international authority requires that the refugee be afforded an opportunity to have mental health evidence considered. In 2006, UNHCR filed a Supreme Court *amicus* brief stating that mitigating factors such as mental state must be considered in a PSC determination, including specifically in that case evidence that the refugee suffered from post-traumatic stress disorder. Appendix 3 (*Ali v. Achim*, U.S. No. 06-1346 (dismissed by consent), UNHCR brief at 18-20). And the Federal Court of Australia has ruled that "[t]he extent to which psychological illness has lessened the moral culpability of the offender is a matter to be taken into account when determining whether an offence is a particularly serious one in the context of Art 33(2) of the Convention,"

Betkoshabeh v. Minister for Immigration & Multicultural Affairs, [1999] FCA 16 (Austl.), ¶ 9, *rev'd on other grounds*, [1999] FCA 980 (Austl.).

Consistent with those authorities and the underlying principle that PSC should be narrowly construed, giving a refugee every opportunity to present relevant evidence before being denied fundamental human rights protections, the Attorney General should overrule *G-G-S-*.

III. The Refugee Convention and Its Interpretative Authorities Make Present Danger To The Community A Distinct Prerequisite To Application Of The PSC Bar, Contrary To *Carballe*.

Amici recognize that the Attorney General's notice frames the question posed narrowly: "[w]hether mental health may be considered" when making a PSC determination. *Matter of B-Z-R-*, 28 I&N Dec. 424 (A.G. 2021). However, *amici* submit that that question cannot be properly resolved, and a ruling that mental health should be considered cannot be effectively implemented, without addressing the issues for which mental health information may be relevant. Thus, it is important to clarify the criteria for application of the PSC bar.

The Refugee Convention and its interpretative authorities are particularly clear on this issue: the PSC bar requires both a conviction for a PSC ***and*** a determination that the refugee "constitutes a danger to the community of that country." Article 33(2). Those two elements are linked – past criminal behavior may provide evidence of present dangerousness – but distinct. As UNHCR explained in *Ali v. Achim*, "the requirement of constituting a 'danger to the community' does not operate as a presumption arising out of a past conviction, but instead requires a separate assessment that is both individualized and prospective." Appendix 3, at 18. And as UNHCR told the UK Parliament:

> Conviction of a particularly serious crime in and of itself is not sufficient. The person concerned must, in view of this crime, also present a danger to the community. In UNHCR's opinion, the second provision of Article 33(2) should not be applied solely by reason of the existence of a past crime but on an assessment

> of the present or future danger posed by the wrong-doer. It is therefore not the acts the refugee has committed, which warrant his expulsion, but that these acts may serve as an indication of his future behaviour and thus indirectly justify his expulsion to the country of persecution.

UNHCR CJIB ¶ 11.

That is the natural reading of Article 33(2) – if a PSC alone were required, the separate dangerousness clause written in a different (present versus past) tense would be superfluous – and consistent with the purpose of Article 33(2), which was to permit States to protect themselves from "danger," not to add extra punishment to a criminal sentence. And a wealth of authoritative commentary reinforces that reading. As Paul Weis explained, "[t]wo conditions must be fulfilled: the refugee must have been convicted by final judgment for a particularly serious crime, and he must constitute a danger to the community of the country." Weis, at 245; *accord*, Gunnel Stenberg, NON-EXPULSION AND NON-REFOULEMENT: THE PROHIBITION AGAINST REMOVAL OF REFUGEES WITH SPECIAL REFERENCE TO ARTICLES 32 AND 33 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES 221 (1989); Grahl-Madsen, at 234, 239; Lauterpacht & Bethlehem, at 129 ¶ 147, 139 ¶ 187, 140 ¶ 191; Hathaway & Harvey, at 291; Appendix 3 at 11-16.

The consensus among States that have acceded to the Convention is to the same effect. In *Pushpanathan v. Minister of Citizenship and Immigration*, [1998] 1 S.C.R. 982, ¶ 12 (Can.), the Canadian Supreme Court held that present dangerousness to the community is an independent prerequisite for the PSC bar to apply. The UK Court of Appeal considers it "clear that art. 33(2) imposes two requirements on a state wishing to refoule a refugee . . . his conviction by a final judgment of a particularly serious crime and his constituting a danger to the community." *EN (Serbia)* ¶ 39. The Administrative Appeals Tribunal of Australia holds that "whether a person 'constitutes a danger' is a separate additional matter to be independently established," *WKCG v. Minister for Immigration & Citizenship*, [2009] AATA 512, ¶ 29 (Austl.), and "[t]he assessment

to be made goes to the future conduct of the person," *id.*, ¶ 26; *accord*, *XHKD v. Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs*, [2021] AATA 2, ¶¶ 212-15 (Austl.). The Kenyan High Court holds that Article 33(2) requires consideration of "the possibilities of rehabilitation and reintegration within society." *Kenya National Commission*, [2017] eKLR, at 12. And at least Austria, Germany and Norway have taken the same position. *See* Appendix 2 at 23-24.

Amici acknowledge contrary U.S. administrative interpretations. In *Carballe*, the BIA took the position that a separate finding of dangerousness is not required for the PSC bar to apply, although "[i]n determining whether a conviction is for such a crime, the essential key is whether the nature of the crime is one which indicates that the alien poses a danger to the community." 19 I&N Dec. at 360. However, nothing compels the Attorney General to adhere to *Carballe* and its progeny. Courts have reluctantly deferred to agency discretion while expressing disquiet about the BIA's failure to give the dangerousness clause of the PSC rule independent meaning. *See, e.g.*, *Mosquera-Perez v. INS*, 3 F.3d 553, 555-56 (1st Cir. 1993); *Ahmetovic v. INS*, 62 F.3d 48, 52-53 (2d Cir. 1995); *N-A-M- v. Holder*, 587 F.3d 1052, 1061 (10th Cir. 2009) (Henry, J., concurring) ("The statute mentions both a 'danger to the community' inquiry and a 'particularly serious' offense inquiry; ignoring one of those inquiries does not give full effect to the meaning to the statute."). A decision overruling *Carballe* would present a stronger case for *Chevron* deference than *Carballe* itself.

Carballe was an essential (but insufficient) premise of the BIA's decision in *G-G-S-*: the BIA deemed mental health evidence irrelevant because it deemed evidence that might relate to present dangerousness but not to the seriousness of the crime irrelevant. 26 I&N Dec. at 343-44. *G-G-S-* can and should be overruled even if *Carballe* survives: mental health evidence is relevant

to determining whether a crime is a PSC. But to conform U.S. law to the Refugee Convention, and to permit proper consideration of mental health evidence, *Carballe* should also be overruled.

Indeed, doing so is particularly important for refugees with mental health issues. The PSC bar inquiry properly focuses on whether the refugee has been convicted of a PSC ***and*** what inference can be derived from that conviction as to whether the refugee ***presently*** "constitutes a danger to the community." It is potentially highly relevant to that inquiry to determine whether, for example, the refugee committed his crime(s) under the influence of a mental health condition that (due to treatment or natural remission) may no longer affect his behavior.

CONCLUSION

Based on their review of international and comparative refugee law, *amici* International Law Scholars join both parties in advocating overruling *G-G-S-*, since its categorical exclusion of mental health evidence is inconsistent with U.S. treaty obligations and international refugee protection standards. From the same standpoint, *amici* also advocate overruling *Carballe* and its progeny, since international refugee law makes present dangerousness an independent prerequisite for application of the PSC bar.

February 7, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Simon A. Steel, hereby certify that, this brief complies with the certification notice's requirements for *amicus* briefs in that it contains 4,500 words, within the 4,500 word limit.

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CERTIFICATE OF SERVICE

I, Simon A. Steel, hereby certify that, on February 7, 2022, I caused three copies of the Brief of *Amici Curiae* International Law Scholars and the three Appendices thereto, in response to the certification of *Matter of B-Z-R-*, to be mailed to:

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