FEDERAL COURT OF AUSTRALIA

Case Decision date

The appellant was a national of Turkey. He had left

			drawn between the international jurisprudence and the definitions in question, and relying in this regard on the Full Federal Courtôs judgment in *Minister for Immigration and Citizenship v MZYYL*. In that case, the Full Court had found that the complementary protection regime in the Act was óa code in the sense that the relevant criteria and obligations are defined in it and it contains its own definitionsô. In the present case, the Court found the Tribunal was correct in following *MZYYL* (para 41). With respect to the second ground, the Court stated (para 39): óI am unable to see how the information that the Turkish government had started to crack down on cases of torture and ill-treatment ï especially when contained in a report relied on by the appellant in his own submissions to the Tribunal ï was an irrelevant consideration when dealing with his claim that, as a necessary and foreseeable consequence of being removed from Australia to Turkey, there was a real risk that he would be subjected to torture. I therefore reject that contention.ô The Court dismissed the appeal.
SZSHJ v Minister for Immigration and Border Protection [2014] FCA 268 (Yates J)	27 March 2014	35ï60	The case relates to: the application of s 91R(3) to complementary protection. (Section 91R(3) provides that, in determining whether a person has a well-founded fear of persecution for a Convention reason, conduct engaged in by the applicant in Australia is to be disregarded unless the applicant

satisfies the Minister that he or she engaged in the conduct otherwise than for the purpose of strengthening

could be demonstrated (para 51). The primary judge found that the Tribunal had had proper regard to the

the case put has sufficiently raised the relevant issue but relevant matters to be taken into account are whether or not the claim for complementary protection clearly

			dissenting) dismissed the appeal. Relevantly, item 35 of Schedule 1 to the *Migration Amendment (Complementary Protection) Act 2011* (Cth) provides that the complementary protection provisions apply, inter alia, to óan application for a protection visa é that is not finally determined (within the meaning of subsection 5(9) of [the Act] before [24 March 2012]ô. Whether or not SZRNYôs application had been finally determined before 24 March 2012 was hence relevant to whether the RRT was obliged to consider the applicantôs claims against the complementary protection provisions. On this question of statutory construction, Griffiths and Mortimer JJ held: óWe consider that the delegateôs decision on SZRNYôs visa application was not finally determined by the Tribunal under Part 7 of the Act until such time as the Tribunal had notified both the applicant and the Secretary as ss 430A(1) and (2) require. Notification in this context means notification in accordance with the Act; namely ss 441A and 441B and not actual notification. Only when those requirements were fulfilled was the visa application ñfinally determinedò within the meaning of s 5(9)(a) of the Act.ô (para 84) In reaching this conclusion, the Full Federal Court, like the primary judge, considered the decision in *Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 131 to be relevant:

			óAlthough the question of the proper construction of s 5(9) of the Act did not arise in that [*SZQOY*] (rather, it focused on the related question of when the Tribunal becomes *functus officio*), the é observations of both Logan J and Barker J [extracted at paras 89ï90] are especially apposite in highlighting the significance of the notification requirements to the Tribunalôs ñcore functionò of review.ô (para 88) On the basis of this construction of s 5(9) of the Act, Griffiths and Mortimer JJ held that the RRT was obliged to consider whether SZRNY was owed protection obligations under the complementary protection provisions (para 106). Accordingly, their Honours dismissed the Ministerôs appeal. Buchanan J, dissenting, upheld the appeal. His Honour held: óIn my opinion, once the decision of the RRT was despatched to the Secretary and (albeit incorrectly addressed) to the first respondent, the decision of the delegate was no longer subject to any form of review by the RRT. The position does not change because despatch to the first respondent was ineffective or because it did not conform to the direction in s 430A(1)(b) (i.e. to use a method in s 441A) or to the related direction in s 441A to post the decision to the last notified address. Although it remained necessary to comply with s 430A(1) using one of the methods specified in s 441A (by post or otherwise) that did not

Immigration and Multicultural Affairs (2003) 216 CLR 473: óProceedings before the tribunal are not adversarial; and the issues are not defined by pleadings, or any analogous process. Even so, this court has insisted that, on judicial review, a decision of the tribunal must be considered in the light of the basis upon which the application was made, not upon an entirely different basis which may occur to an applicant, or an applicantôs lawyers, at some later stage in the process.ô (para 50)
In *NABE*, the Court held that every case must be considered according to its own circumstances (para 50).

The Court held:

óApplying these principles, the Court in *NABE* said that although the claim might have been seeing as arising on the material before the Tribunal it did not represent, in any way, ña substantial clearly articulated argument relying upon established factsò in the sense in which that term was used in *Dranichnikov*. A judgment that the Tribunal failed to consider a claim which is not expressly advanced is not lightly to be made. The claim must emerge clearly from the materials before the Tribunal.ô (para 51)

ó[I]n my opinion, the current claim was not apparent on the face of the material before the Tribunal or squarely or sufficiently raised by the material. The claim as now put is taken out of its original context both in the submission of t ɦ ˈ m ɜ ɾ

			relevant paragraph, [190], of the Tribunalôs decision.ô (para 52)
SZRSN v Minister for Immigration and Citizenship [2013] FCA 751 (Mansfield J)	6 August 2013	43ï9	This case relates to: the meaning of ósignificant harmô This was an appeal against the decision of the Federal Magistrates Court in *SZRSN v Minister for Immigration and Citizenship* [2013] FMCA 78 (see summary of this case, below, for relevant background). The Federal Court dismissed the appeal. On the question of whether the appellantôs separation from his children in Australia could amount to ósignificant harmô, the Court held: óAn interpretation of the legislation that incorporates removal from oneôs family by the Australian government as ñsignificant harmò would be an extremely strained reading, and one not in accordance with the clear intention of Parliament in enacting the complementary protection criterion. That intention was to honour Australiaôs non-refoulement obligation. In short, the appellant has failed to identify or demonstrate any error in the application of the term ñsignificant harmò by the Federal Magistrate.ô (para 49) In January 2014, the claimant sought re-examination of his application, and the delegate of the Minister found that it was not valid as it had been dealt with already. The claimant sought review of the delegateôs decision in *SZRSN v Minister for Immigration* [2014] FCCA 557

			(18 March 2014), in which case he was unsuccessful. He further appealed that decision unsuccessfully in *SZRSN v Minister for Immigration and Border Protection* [2014] FCA 527 (5 May 2014).
SZGIZ v Minister for Immigration and Citizenship [2013] FCAFC 71 (Allsop CJ, Buchanan and Griffiths JJ) Full Federal Court	3 July 2013	1ï75	This case relates to: proper construction of section 48A of the Act relevance of Australiaôs international obligations to construction of the Act The appellant was from Bangladesh. He applied for a protection visa on 11 March 2005, claiming to be a refugee. This application was rejected, primarily on the ground that section 91R(3) of the Act required the appellantôs conversion in Christianity in Australia to be disregarded for the purpose of determining his claim to be a refugee. On 24 March 2012, the *Migration Amendment (Complementary Protection) Act 2011*

which duplicated an earlier unsuccessful application, in the sense that both applications raised the same

			the statute must be enforced even if they amount to a contravention of accepted principles of international law. Such a position is not reached after construing s 198A(3)(a). 60. Here, to deny a person a statutory entitlement to seek protection from, for example, torture, because the Minister had previously not been satisfied of a claim of a well-founded fear of persecution under the Refugees Convention would not only conflict with Australiaôs international obligations, but also would be arbitrary. 61. Nothing in the above approach denies the central task with which the Court is concerned: the construction of a law of the Parliament: cf *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54; 231 CLR 52.ô
MZYXS v Minister for Immigration and Citizenship [2013] FCA 614 (Marshall J)	21 June 2013	32ï40	This case relates to: relocation (reasonableness) The appellant claimed that the Refugee Review Tribunal had erred, inter alia, by failing to distinguish between the statutory test in section 36(2B)(a) and the case law concerning relocation in the refugee context (para 33). However, Marshall J rejected this claim: ó37. é The issues which arise when considering the reasonableness of relocation in the refugee context are the same which arise in the complementary protection context. Read fairly, the reasons of the Tribunal show that it understood this. The Tribunal did not fail to

Minister for Immigration			apply the correct test in considering s 36B(2B)(a). é ô ó39. It is accepted that s 36(2)(aa) and s 36(2B)(a) must be considered together and as a whole; see *MZYYL*. That is what the Tribunal did in this case. The Tribunal considered whether relocation was reasonable and practicable in the particular circumstances of the applicant and the impact upon him of relocation within his country in reliance in *SZATV v Minister for Immigration and Citizenship and Anor* (2007) 233 CLR 18 and *SZFDV v Minister for Immigration and Citizenship and Anor* (2007) 233 CLR 51. Although those cases do not deal with the complementary protection regime, they deal with the question of the reasonableness of internal relocation, being a matter directly addressed by s 36(2B)(a) of the Act. It was appropriate for the Tribunal to draw guidance from these decisions.ô

(para 247).

Relevance of international jurisprudence

Contrary to the comments in *Minister for Immigration and Citizenship v MZYYL* [2012] FCAFC 147, it is apparent from the judgment that international jurisprudence on the CAT and ICCPR are relevant to interpretation of the domestic complementary protection provisions. This is because the Court characterises s 36(2)(aa) as a órecognitionô of

any discretion in his favour by the Minister were his

ó476. I am

			ó464. The Minister notes there are State Parties to the ICCPR, notably the United States of America, which do not accept the existence of *non-refoulement* obligations at all, even in relation to those fundamental rights. While Australia has accepted a *non-refoulement* obligation in relation to Art 6 and Art 7, it has repeatedly asserted that such an obligation does not extend to Art 14, for example in *A.R.J. v Australia* Communication No 692/1996 HRC (28 July 1997) (*A.R.J. v Australia*), [4.12] and *C v Australia*, Communication No 900/1999 HRC (28 October 2002) [4.11]. The Minister submits the Committee has consistently declined to rule on the question when raised by applicants in individual communications, as for example in *A.R.J. v Australia*; *Kwok v Australia* [9.8]; *Judge v Canada*, Communication No 829/1998 HRC (5 August 2002) (*Judge v Canada*); *Alzery v Sweden*, Communication No 1416/2005 HCR (25 October 2006) [11.9].ô ó465. The Minister submits there are cogent reasons for maintaining the current scope of the *non-refoulement* obligation. The fact that human rights might not be as well respected in another State, as in Australia, should not of itself give rise to a *non-refoulement* obligation. This would deprive the primarily territorial scope of Art 2 of real meaning by effectively requiring Australia to ensure that the full extent of rights in the ICCPR is guaranteed to persons within another jurisdiction. See also the comments *Judge v Canada*, Individual Opinion

(Chanet).ô

(Murphy J)			This was an application to review the decision of the Minister to refuse to grant a protection visa to the applicant on character grounds. The applicant, from Iran, had been found to be a person to whom Australia had obligations under the Refugee Convention (para 1). In rejecting the applicantôs argument that the Ministerôs decision was incompatible with Australiaôs *non-refoulement* obligation under Art 33 of the Refugee Convention, the Court held: óThe Minister was correct in stating in the Reasons that the decision to refuse the applicant a protection visa on character grounds was not ñin itselfò a decision to remove him from Australia. This is so because (at any time prior to removal) it was open to the Minister to exercise his power under s 195A of the Act to grant the applicant a visa of a particular class, if satisfied that it was in the public interest to do so. It therefore cannot be said that a necessary consequence of the decision to refuse the protection visa was that the applicant would be removed to any country, let alone *refouled* to a country where he faced persecution. The facts of the present case illustrate this as the Minister granted a Bridging Visa to the applicant, which had the effect that he was released from detention and the statutory obligation to remove him from Australia was lifted.ô (para 68) óEven if the decision to refuse the applicant a protection visa did amount to a decision to remove him from

			Australia (which it did not), such a decision would not necessarily offend the *non-refoulement* obligation. The obligation requires that the applicant not be removed to any country where he has a well-founded fear of persecution for a Convention ground. He may, of course, be removed to a ñsafeò country - that is, a country where he has no well founded fear of such persecution. The Minister was correct in stating in the Reasons that his decision to refuse a protection visa is not ñof itselfò incompatible with Australia's *non-refoulement* obligation.ô (para 69)
SZRLY v Minister for Immigration and Citizenship [2012] FCA 1459 (Griffiths J)	21 December 2012	27ï32, 41ï3	This case relates to: best interests of the child The appellant claimed, inter alia, that the Federal

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Article 1 of the Convention as meaning ñevery human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlierò. It is also to be noted that the Preamble to the Convention contains the following statement:

> Bearing in mind that, as indicated in the Declaration of the Rights of the Child, ñthe child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birthò

I am not aware of any judicial authority supporting the proposition that Article 3 the Convention applies to

Anthonypillai (2001) 106 FCR 426 at [36] and *M38/2002 v Minister for Immigration and*

J)

applicantôs visa because he was sentenced to 8.5 yearsô imprisonment for importing cocaine. The applicant said that if he were deported to Nigeria he would be mistreated in the Nigerian criminal justice system, and deporting him would breach Australiaôs *non-refoulement* obligations under the ICCPR.

The FCA held that the AAT had erred in applying the óreal chanceô test (ordinarily applied for assessing a refugee claim) to assess Australiaôs *non-refoulement* obligations under the ICCPR.

[78] Asking whether the formulation in *Chan* [óreal chanceô test for a refugee claim] is different to the formulation in *Pillai* [ónecessary and foreseeable consequenceô test for a *non-refoulement* claim under the ICCPR] é is an almost meaningless question. It is a more useful inquiry to ask what it is that both treaties are doing. The Refugees Convention seeks to define when a visa will be granted to a person seeking refuge. The ICCPR concept of non-refoulement is addressed to a different question; namely, whether a person can be sent to a particular State. So, too, the harms which are involved are different. The Refugees Convention will be satisfied by persecution which may fall well short of death, torture or other similarly irreparable harm. Non-refoulement under the ICCPR, by contrast, requires

			will suffer significant harm in a country if the Minister is satisfied that: (a) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm. The Minister argued that the appropriate standard of protection was that of óreasonableô protection. He argued that the RRT óerred in holding that a higher standard was required than that under s 36(2)(a) of the Act, namely to reduce the level of risk of significant harm to something less than a real oneô (para 7). The court rejected this interpretation. It held that s 36(2B)(b): 1. ódeems a particular circumstance to mean that the non-citizen will not suffer significant harm if the non-citizen were to be returned to the receiving country. If any of the circumstances mentioned in s 36(2B) are found to exist, the Minister must conclude that the non-citizen would not suffer significant harm for the purposes of s 36(2)(aa). However, the inquiry in s 36(2B) is not at large. It is an inquiry into the *particular circumstances that appertain to the non-citizen whose application for a visa is under consideration*. That is made clear by the reference in the chapeau to the ñnon-citizenò and the references in paragraphs (a) and (b) to

			the non-citizen relocating or seeking protection from an authority of the country but, even more particularly, by paragraph (c) which speaks of the non-citizen personally.ô (para 33, emphasis added) 2. uses different language from the State protection test adopted in relation to the Refugees Convention (para 34) 3. does not órequire either the conclusion that it is inevitable that the non-citizen will suffer significant harm or the conclusion that it is certain that he or she will not. The express terms of the section require the Minister to be satisfied that, given the protection available to MZYYL in the receiving country, there would not be a *real risk* that he will suffer significant harm.ô (para 35) The Minister argued that the standard of protection in s 36(2B)(b) was satisfied óif the State authority in question operates an effective legal system for the detection, prosecution and punishment of acts constituting serious harm and the non-citizen has access to such protection.ô (para 36). The court rejected that interpretation: ó It is contrary to the express words of the section. To

construe the provision in that way would have the Court ignore or read out of s 36(2B)(b) (and, indeed, other sections in the Complementary Protection Regime) the phrase ñreal riskò and the reference to the non-citizen. The Ministerôs construction seeks to have the Court focus on the system rather than the individual. That is not the question posed by the section. At least part of the problem with the Ministerôs construction of s 36(2B)(b) arises because the Minister seeks to treat s 36(2B)(b) as a ñcarve-outò to be considered after the enquiry provided for in s 36(2)(aa). That approach should be rejected. The section must be read as a whole. The enquiry provided for in s 36(2)(aa) necessarily involves consideration of the matters referred to in s 36(2B). The Minister does not undertake the enquiry in s 36(2)(aa) and then move to s 36(2B).ô (para 36)

The court also examined two further problems with the Ministerôs— ę x l ! (uc

paras 271ï73.

Thus, the standard of risk or threshold for complementary protection cases *is the same* as for refugee cases ï the órealchanceô test (see para 31 of *MZYYL*).

Interpretation of complementary protection provisions

As a preliminary point, the court held that the issue before the court was a matter of statutory construction of the *Migration Act*, because of the nature of Australiaôs complementary protection regime:

óThe regime establishes criteria ñthat engageò Australiaôs express and implied non-refoulement obligations under the [ICCPR, CAT and CROC] é The Complementary Protection Regime is a code in the sense that the relevant criteria and obligations are defined in it and it contains its own definitions é Unlike s 36(2)(a), the criteria and obligations are not defined by reference to a relevant international law. Moreover, the Complementary Protection Regime uses definitions and tests different from those referred to in the International Human Rights Treaties and the commentaries on those International Human Rights Treaties.ô (para 18)

óIt is therefore neither necessary nor useful to ask how the é

			case are governed by the applicable provisions of the Act, namely ss 36(2)(aa) and 36(2B) é ô (para 20)
Santhirarajah v Attorney-General for the Commonwealth of Australia [2012] FCA 940 (North J)	31 August 2012	267, 271ï75	This was an extradition case in which the standard of proof (or threshold) for cases involving potential return to torture under the Convention against Torture (CAT) was considered. The court noted that there is a difference between the way the US and Australia interpret the threshold for ósubstantial grounds for believingô under CAT: óThe US interpretation places a heavier burden on the affected person than the Australian interpretation. Proof as required by the US that it is more likely than not that a person would be in danger of being subjected to torture is a higher standard than proof as required by Australia of a foreseeable, real and personal risk of tortureô (para 273).
MZYRM v Minister for Immigration and Citizenship [2012] FCA 986 (Gray J)	15 August 2012	16ï17	This case relates to: commencement of complementary protection provisions The appellants applied for a protection visa in August 2010. Their application was refused by a delegate of a Minister on 31 May 2011. On 8 September 2011, the RRT forwarded to the appellants its decision to affirm the decision of the delegate (para 1). The Court held that the complementary protection provisions did not apply to the appellants: óItem 35 [of Schedule 1 of the *Migration Amendment (Complementary Protection) Act 2011* (Cth) (óthe amending Actô)] provides that the amendments made by the schedule apply in relation to an application for a

			protection visa made on or after the day on which item 35 commences, or that is not finally determined within the meaning of s 5(9) of the Migration Act before the day on which the item commences.ô (para 16) óSection 2 of the amending Act deals with commencement. It contains a table detailing the dates on which various provisions of the amending Act and items in the schedule came into operation. By reference to that table, it is clear that item 35 came into operation on 24 March 2012. Well before that date, the appellantsô applications for protection visas had been finally determined as that phrase is defined in s 5(9) of the Migration Act. In particular, para (a) of s 5(9) provides that an application is finally determined when a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Pt 5 or Pt 7. For the purposes of an application to the Tribunal for review, Pt 7 contains the relevant provisions. It is clear that s 5(9) treats an application for a protection visa as having been finally determined when a decision that has been made in respect of it is no longer subject to any form of review under Pt 7. A review under Pt 7 having been completed, and not being otherwise the subject of any jurisdictional error, it is clear that the application underlying it has been finally determined for relevant purposes, at the latest by 8 September 2011.ô

Case	Decision date	Relevant paragraphs	Comments

The Court held that the Tribunal erred in using its earlier findings relevant to s.91R(3) of the Act as part of its considerations with respect to the complementary protection criteria (paras 50-61).

That is, ótheô finding that s.91R(3) of the Act required the conduct in Australia to be disregarded was a finding which, amongst other findings, formed the basis of its conclusion as to the complementary protection criterionô (para 56).

The Court confirmed that s.91R(3) has óno application, or relevance, to the complementary protection criterion (*SZSXH v Minister for Immigration and Border Protection* [2014] FCA 914 at [21])ô (para 47).

Therefore, the Court held that a jurisdictional error had been revealed in the circumstances and the Court made orders:

> quashing the decision of the second respondent (the Tribunal) made on 8 November 2013, compelling the second respondent to reconsider the application according to law, and that the first respondent (Minister for Immigration and Border Protection) pay the applicantsô costs (fees and payments made to the

(Unsuccessful)			obligations as part of the applicantôs claim, consideration of all integers of a claim with respect to complementary protection, and the application of the óreal chanceô test to the óreal riskô test The applicant was a citizen of Vietnam and claimed to fear harm based on three discrete reasons. First, the applicant claimed to fear harm from person A, following a traffic accident with person A in Vietnam. The applicant claimed that she was threatened with harm if she proceeded to sue person A for the damages arising from the physical injuries she sustained in the accident (para 6). Second, the applicant claimed to fear harm based on the discrimination she faced in Vietnam as a practising Catholic (para 5). Third, the applicant claimed to fear harm from person B who assisted her to travel to Australia. The applicant had been unable to repay person B for assisting her to travel to Australia, and in response person B had threatened to take the applicantôs familyôs property (para 9). Following a óprotection obligations determinationô the relevant officer found that the applicant was not credible, and óif the claims were true, the claims did not establish the need for protectionô under the Refugee Convention (para 10). The case was then automatically referred for an independent protection assessment (para 11). Section 36(2)(aa) was introduced into the Act on 24 March 2012, before the independent protection

assessment review interview for this case took place (which was on 16 May 2012) (paras 13 and 15).

complementary protection criterionô (para 30).

any duty on the part of the Reviewer to assist the

			Since the applicant did not succeed on any of the grounds on which she relied, the application was dismissed (paras 59-60).
SZTFZ v Minister for Immigration & Anor [2014] FCCA 1861 (Judge Driver) (Unsuccessful)	17 October 2014	1, 10, 11-16, 20, 24, 26-30	This case relates to: consideration of an applicantôs claim for complementary protection when the applicant relies on the same claim for protection under the Refugee Convention The applicant was a citizen of Sri Lanka and claimed to ófear harm based upon an imputed political opinion of support for the Liberation Tigers of Tamil Eelamô (LTTE) (para 1). The Tribunal concluded that óthere is no credible evidence as to the true realB>30048000300370055004C6(

have a well founded fear of persecution, it also finds that there is not a real risk he will suffer significant harm in Sri Lankaô. (para 15)

óNotwithstanding this general conclusion, the Tribunal did separately consider whether any harm arising from the applicantôs alleged illegal departure from Sri Lanka would amount to significant harmô for the purposes of s.36(2)(aa) of the Act. óIt concluded that there was no ñreal riskò of such harm arisingô (para 16)

Before the Federal Circuit Court, the applicant submitted that the óTribunal did not give proper consideration to whether the applicantôs claims for complementary protection satisfied the statutory criterionô in s.36(2)(aa) of the Act. Instead, it was claimed, óthe Tribunal relied on its findings made in respect of the applicantôs claimsô under the Refugee Convention. As a result, the applicant submitted that óthe Tribunal asked the wrong question because it failed to take into account the fact that the test for complementary protection under s.36(2)(aa) is separate to, and different from, the test for assessing refugee claims under s.36(2)(a)ô (para 20).

With reference to *SZSGA v Minister for Immigration* [2013] FCA 774 the Court held that óit is not always necessary for the Tribunal to give extensive reasons for the rejection of complementary protections claims. This is especially so where the facts giving rise to the complementary protection claims are the same as those

óWhilst many of the applicantôs claims were disbelievedô, óthe Tribunal accepted some parts of the applicantôs factual claimsô. óSpecifically, the Tribunal accepted that the applicant was from an area formerly controlled by the LTTE, had done training with the LTTE and

			Rather, the Tribunal found that there was no risk of any kind of harmô (para 28). óA more general analysis of the reasons of the Tribunal confirms that it applied the correct test to the applicantôs claims for complementary protectionô (para 29) The applicant failed to establish that the Tribunal decision was affected by jurisdictional error and the applicant was dismissed (para 30).
SZTGN v Minister for Immigration & Anor [2014] FCCA 1467 (Judge Driver) (Successful)	3 October 2014	2, 17, 44, 46 and 48	This case relates to: the failure to distinguish between the Refugee Convention and the complementary protection criteria óThe applicant is a citizen of Afghanistan and claimed to fear harm at the hands of the Talibanô (para 2). The applicant raised three grounds for review. Relevantly, Ground 1 detailed that the Independent Protection Assessor (Assessor) ófailed to address a basis for complementary protection, namely, whether the applicant was owed complementary protection in respect of the danger of travelling to Bamyan province (being the place the Assessor presumed the applicant would return to if his refugee application in Australia

asserted claim was not clearly articulated by the applicantô but rejected the Ministerôs contention that the claim did not clearly arise on the material before the Assessorô (para 44).

The Court accepted that there are ócircumstances where a conclusion in relation to a refugee claim is so comprehensive that it can also dispose of a claim for complementary protection based upon the same facts. For example, if the factual basis for the claim is rejected, then it may be rejected for all purposes. Further, if a conclusion is that there is no real risk of *any* harm, that may also be sufficient for all purposes. Here, however, the Assessor recognised that there was a risk of harm on the roads to Bamyan which may be taken to have been a real risk. The Assessor reasoned that the applicant would not be targeted for any reason bearing upon a connection to the Refugees Convention. This is not a finding so comprehensive as to relieve the Assessor from the need to consider the facts and circumstances in relation to complementary protectionô. (para 46)

The Court concluded that the óAssessor fell into reviewable legal errorô with respect to Ground 1 (para 48).

(Unsuccessful)

The applicant was a citizen of Pakistan and claimed to fear harm based on óhis political opinion and membership of the Awami National Party (the ANP)ô (para 25).

The Refugee Review Tribunal found óthat there was a real chance the Applicant would face serious harm from the Taliban and other extremist groups for reason of his political opinion and his membership of a particular social group of ANP members in Pakistan if he returned to Swat or Karachi now or in the foreseeable futureô (para 29). óThe Tribunal also accepted that the authorities could not provide the level of protection the Applicant was entitled to expectô (para 29). However óthe Tribunal concluded that it was reasonable for the Applicant to relocate within Pakistan and that his risk of being harmed by the Taliban or other extremist groups

			evidence provided by the Applicant of such attacksô (para 48). The Court held that the Tribunal referred specifically to the particular information provided by the applicantôs adviser, including information óin relation to events in Balochistan, in a town outside Karachi and to a YouTube video, but found that there was an absence of country information to support evidence of attacks on ANP members or their families outside Khyber Pakhtunkhwa, Karachi and Balochistan in recent yearsô (para 49). Thirdly, in relation to the Tribunalôs finding that various Taliban organisers did not communicate across Pakistan, the applicant argued that this finding was not supported by publically available country information before the Tribunal (para 51). The Court concluded that in the óabsence of identification of what country information is said not to have been considered, this complaint must failô (para 52). Fourthly, the applicant ósubmitted that the Tribunal had failed to consider properly the test whether the Applicant would suffer serious harm as per s.91R(2)(a) of the Act if he [was] asked to relocate in Pakistanô (para 54). The Court held that the Tribunalôs reasons did not demonstrate that there is an óarguable error on this basis. Rather, the Tribunal accepted that the Applicant faced serious harm for the purposes of s.91R(2) of the Act within specified, localised areas. However it found, for the reasons which it gave, that the Applicant was not at risk of such harm outside those specified areasô (para 54).

			Lastly, the applicant argued that recent events in Pakistan meant that it was not safe for him to return to Pakistan (para 55). However, the Court held that the applicantôs submissions were ónot a basis for establishing jurisdictional error or, indeed, an arguable case or prospects of success such as to justify the grant of an extension of timeô (para 56). The Court held that it was not in the interests of the administration of justice to grant the extension of time sought by the Applicant and the application for an extension of time was dismissed (para 57).
SZUDL v Minister for Immigration & Anor [2014] FCCA 2018 (Judge Nicholls) (Unsuccessful)	4 September 2014	4, 44, 46, 47-50, 87, 94 and 102.	This case relates to: consideration of an applicantôs claim with respect to the two criteria for a protection visa under ss. 36(2)(a) and (aa). The applicant is a citizen of Iran. óThe applicant claimed to fear harm if he were to return to Iran, variously, because he was known by the Iranian authorities to have engaged in a homosexual act, his political anti-regime views and activities, his ñabandonmentò of Islam, and his interest in, and conversion to, Christianity. The applicantôs conversion to Christianity was the only claim which was considered in these proceedings (para 44). The applicant sought an extension of time to apply for judicial review of the decision of the Refugee Review

Tribunal, which affirmed the decision of the Ministerôs delegate, to refuse the applicant a protection visa (paras 1 and 4).

óThe applicantôs argument was that, in addressing the

			time (para 102).

Sri Lankan prisons, and occurred not just because a prisoner was suspected of supporting the LTTE, with the consequence that all detainees were at risk (para 17).

The Court found that the Tribunal had considered the applicantôs claims before rejecting them (para 23ï8).

Grounds 3 to 5

Grounds three to five asserted that the Tribunal failed to consider the applicantôs claim to fear cruel, inhuman or degrading treatment or punishment if he returned to Sri Lanka. The applicant submitted that in addition to being at risk of torture in detention he would be subjected, by reason of the poor conditions in Sri Lankan gaols, to cruel, inhuman or degrading treatment there (paras 10, 30).

The Tribunal had stated that the statutory definition was exhaustive (para 32). The applicant claimed that the Tribunal had (paras 10, 38):

misunderstood or misapplied the law;
failed to comply with Ministerial Direction No 56 by failing to take into account the PAM 3 Protection Visa complementary prold

			purport to define the component elements of ósignificant harmô. Rather, they discuss matters which may be taken into consideration when determining whether a particular circumstance amounts to significant harm. As such, the Tribunal was not wrong to say that the terms were defined by the statute (para 40). The Court considered the Tribunalôs reasons and concluded that it had had regard to the CP Guidelines and international jurisprudence (para 42): óI infer from the choice of words in those latter sentences, particularly ñvictimò and ñlevel of severityò, that the Tribunal had had regard to para.29 of the CP Guidelines. As the international jurisprudence to which the applicant particularly referred was cited in that paragraph of the CP Guidelines, I conclude that the Tribunalôs consideration of that paragraph included a consideration of the international jurisprudence referred to there. The Tribunal was not relevantly required to do more. Neither the ministerial direction nor the CP Guidelines required the Tribunal to look first at the guidelines and then separately at international cases. The guidelines simply required the Tribunal to have regard to international jurisprudence. As that jurisprudence was set out in the guidelines themselves, the Tribunal discharged its relevant obligation by considering those guidelines.ô The Court dismissed the application for review.

SZSPT v Minister for Immigration & Anor [2014] FCCA 1388	1 July

(Judge Raphael)

			different ethnic groups within Sri Lanka. On the available evidence, it was not applied in a discriminatory way against Tamils (para 15). As such, the real risk applied to any person who broke the law and was thus a risk faced by the population generally.

SZTBE v Minister for Immigration & Border Protection & Anor [2014] FCCA 1288 (Judge Emmett) The Court dismissed the application for judicial review.	19 June 2014	75ï97	This case relates to: meaning of cruel or inhuman treatment or punishment. The applicant was a national of Sri Lanka, of Hindu faith and Tamil ethnicity. He claimed to fear harm in Sri Lanka for a number of reasons, including that he would be detained by the Sri Lankan authorities as a failed asylum seeker (para 2). The delegate and the RRT rejected the applicantôs claims. With respect to the applicantôs Б

			The applicant also submitted that to describe the conditions in the Sri Lankan prison as ócramped, uncomfortable and unpleasantô suggested that the RRT had not had proper regard to the country information before it that provided specific detail that went beyond those descriptions. However, the Court noted it was for the RRT to consider whether the conditions that the applicant may experience if he spent time in prison on remand amounted to cruel or inhuman treatment or punishment (para 86). The Court did not accept the applicantôs submission that, because the RRT characterised the conditions in prison as ócramped, uncomfortable and unpleasantô, the RRT had ignored the country information referred to in the migration agentôs submission as to the prison conditions in Sri Lanka. However, the Court found that none of the reports cited suggested that there was any particular deprivation of life or any *intentional* mistreatment involving torture or cruel or inhuman treatment or punishment as is required in the definition of significant harm as defined in s.36(2A) and s.5(1) of the Act (para 89). As such, the Court concluded that the RRTôs findings and conclusions in relation to complementary protection were open to it on the basis of the evidence and materials before it.

ósignificant harmô;

- considered that it was óunlikelyô that the applicant would be imprisoned upon his return; and concluded that, because it was óunlikelyô that the applicant would be imprisoned, there were not substantial grounds for believing that the applicant would suffer significant harm as a direct and foreseeable consequence of being returned to Iran (para 12).

The applicant sought judicial review on the basis that the Reviewer misapplied the test relating to complementary protection (para 14). He argued that there was a real risk that he would be imprisoned in Iran upon return, and that imprisonment would constitute ósignificant harmô. He argued that the requirement of óreale imminenceô was not a requirement of the test (para 15).

			significant harm in s.36(2)(aa). The question of óreal riskô in s 36(2)(aa) is to be determined by reference to the same risk threshold as applicable to s.36(2)(a) (para 17). The Court set out the arguments made by the applicant and the respondent Minister, extracting quotes from authoritative decisions, including *Chan Yee Kim v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, *Minister for Immigration and Ethnic Affairs v Guo & Anor* (1997) 191 CLR 559, *Minister for Immigration and Citizenship v Anochie* (2012) 209 FCR 497, and *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505. After this review of the authorities, the Court found that the Reviewer had applied the incorrect test, stating (at para 82): óOn a fair reading of the Reviewerôs reasons it does not disclose what precise test was applied in the reasoning process, however, in an assessment of the language used it appears that the balance of probability test was the approach adopted, although the words ñbalance of probabilitiesò does (*sic*) not appear on the face of the Decision Record. The language used is ñunlikelyò which means not generally and the language leaves open that there is a real possibility that the applicant will be imprisoned on his return to Iran. That language is consistent with the High Court decisions in *Chan* (supra) and *Guo* (supra). It is also consistent with his Honour Flick J in the decision of *SZRCI* where he stated you need not show that it is probable that it will occur.

It simply needs to be a real risk, not negligible and not insignificant. The language that has been used is consistent with the departmental policy at the time as evidenced by the Full Federal Court decision in *SZQRB* that a balance of probabilities test was departmental policy in complementary protection cases at that time.ô

			Degrading treatment and inability to survive or subsist The applicant contended that he had squarely raised his inability to subsist if he was returned to Afghanistan. This inability was centred on discrimination against Shia Muslims, as well as not having the assistance of a family network to help gain employment (para 12). The claims explicitly raised before the Tribunal centred on the religious and ethnicity attributes of the applicant allegedly resulting in discrimination warranting the engagement of Australiaôs protection obligations under the Convention (para 20). The Court found that the question of the applicantôs capacity to survive or subsist in Afghanistan was not squarely raised before the Tribunal (para 22). *Application of wrong test by requiring a Convention nexus* The Court found that the Tribunal had properly applied the complementary protection provisions (para 36). The findings of fact with respect to the Convention claims were global in the sense that they were also applicable to the claim for complementary protection (paras 31, 35). The Court dismissed the application for judicial review.
SZSUW v Minister for Immigration & Border	12 May 2014	50ï8	This case relates to:

Protection & Anor [2014] FCCA 940 (Judge Emmett) The Court dismissed the application for judicial review.			The applicant was a citizen of India, of Sikh faith and ethnicity. He claimed to fear harm from a money lender in India (paras 2, 21). In the considering the applicantôs claims for complementary protection, the Tribunal had accepted that the applicant and his family felt under pressure to repay their loans, even if the applicant had exaggerated the amount owing (para 41). The Tribunal did not accept that the applicantôs family was on the verge of default or that the money lender would increase pressure on the applicantôs family in the event that the applicant returned to India. Further, the Tribunal did not accept that any pressure on the applicantôs family to repay their loans, or even the threat of legal action including foreclosure of the parentsô house, amounted to ósignificant harmô. Nor did the RRT accept that such pressure would amount to ócruel or inhuman treatment or punishmentô or ódegrading treatment or punishmentô as defined by the Act (para 42). The Tribunal acknowledged that complementary protection might be extended to people indebted to loan sharks in some circumstances, however this was not such a case (para 43). Two grounds of review were argued (paras 47ï9): The Tribunal erred in law in failing to apply the correct test for the grant of a protection visa. The Tribunal adopted the incorrect test, that being óreal riskô of significant harm, as opposed to the óreal

findings it made and against which it assessed whether the applicant met the refugee criteria in s.36(2)(a) (para 56).

As such, this ground failed.

The applicant claimed the Tribunal had failed to consider the following aspects of his claim:

The Court found at each instance that the Tribunal had

business

The Court rejected the first ground on the basis that the

			The Court concluded that the Tribunal had erred in failing to determine whether the applicantôs modified conduct was influenced by the threat of harm he faced, which was inconsistent with the ICCPR, before finding that the applicant did not face a real risk of significant harm. That error could be characterised as failing to apply the correct legal test or failing to consider a relevant consideration, or as a constructive failure to exercise jurisdiction (para 68). *Minister for Immigration and Border Protection v SZSWB* [2014] FCAFC 106 (22 August 2014) The Full Court overturned the FCCAôs decision. The Minister argued that óthe issue of whether the visa applicant could or should modify his behaviour did *not* arise because the Tribunal made no relevant finding on that matter and indeed, the visa applicant did not express any desire to resume cigarette trading in the event that he was returned to Iranô (para 29). As a result, the Full Court was required to identify the *basis* on which the visa applicantôs application for complementary protection was made (para 30). Adopting the dicta in *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1, the Court observed: óAs the Full Court said in *NABE (No 2)* at [62], ñ[w]hatever the scope of the Tribunalôs obligations it is not required to consider criteria for an application never

			would do if returned to Iran. There were no asserted or established facts on which to found the claim.ô The Court allowed the appeal.

Real risk

The Court began by considering the second ground first. It accepted the applicantôs submissions on the general principles governing the construction of óreal riskô (set out at paras 21ï2).

On this point, the Court found that the considerations relied on by the Tribunal (i.e. the applicantôs past travel along the route and the main targets on the route) were not capable of excluding the real risk necessarily arising from the Tribunalôs finding that the applicant faced ódangerô (para 29).

The applicantôs experiences as a taxi driver had been limited to a period of two to three months (para 30). The Court hard regard to the dicta in *Minister for Immigration v Guo* (1997) 191 CLR 559 that óThe extent to which past events are a guide to the future depends on the degree of probability that they have

			the applicant might give rise to future harm (para 32). Further, the question whether the applicant had óany of the characteristicsô of the ómain targetsô was not the question presented by the applicantôs complementary protection claim, namely, whether the applicant faced a real chance of significant harm as a taxi driver irrespective of who might happen to be targeted (para 33). The Tribunal was further required to consider whether there was a risk of significant harm to taxi drivers who were not targeted (para 34). As such, the Tribunal fell into jurisdictional error (para 36). *Application of s 36(2B)* The Court accepted the applicantôs contention in general terms that the Tribunal also erred in rejecting the applicantôs claims on the basis that he would be able to change his occupation on his return to Afghanistan (para 37). As stated in *Minister for Immigration v SZSCA* [2013] FCAFC 155, the Tribunal cannot require an asylum seeker to behave in a particular manner (para 38). While it was open to the Tribunal to find that the applicant was not in fact a member of the particular social group of taxi drivers as he claimed, or that, although he had been a member, he would not rejoin that group in Afghanistan if he returned there, the Tribunal did not in fact make either of those findings

			(para 41). In any case, the Tribunal did not clearly, and in terms of the statutory provisions, address s.36(2B) because its consideration miscarried in relation to the general issue of óreal riskô (para 43). On the basis of its finding with respect to the ground relating to óreal riskô, the Court found the Tribunal had fallen into jurisdictional error.
MZZES v Minister for Immigration & Anor [2014] FCCA 758 (Judge OôDwyer) The Court dismissed the application for judicial review.	17 April 2014	20ï39	This case relates to: the meaning of ósignificant harmô; threats The applicant claimed to be a stateless citizen of Indian Tamil ethnicity. However, a copy of a passport

police (para 8). The applicant also feared harm as a failed asylum seeker (para 9).

The applicant raised three grounds of review, two of which related to complementary protection:

The Tribunal erred by failing to consider whether

there has to be immediacy in respect of the threat to cause that mental anguish that might amount to

			as to whether the threat *per se* constituted significant harm. The Court accepted that there would be circumstances where a threat, in itself, could constitute significant harm; but only in particular circumstances could a threat be caught by the statutory description. In this case, the question of whether the threat *per se* constituted significant harm did not arise. The applicantôs claim was never along the line that he feared that should he be returned to Sri Lanka, he would be threatened again and that such a threat would be torture, or the cause of significant harm (para 29). The Court rejected the first ground. In essence, the second ground asserted that the Tribunal erred in making a finding that the policeman would not carry out the threat to kill the applicant, in circumstances where there was no evidence to support this finding (para 32). The Court found that several factors were significant on this point: the policeman knew of the affair for six months prior to his wife and the applicant departing for Saudi Arabia and did nothing about it, and there was a window of opportunity between October 2011 and February 2012 when the policeman could have followed through on his threat. Further, the threat was made to the policemanôs wife as well, but there was no evidence of it having been followed through in respect of her. It was open, therefore, for the Tribunal to make a finding of fact that the policeman would not follow through on his threat (para 37).

			The Court dismissed the application for judicial review.
SZSVT v Minister for Immigration & Anor [2014] FCCA 768 (Judge Barnes) The Court dismissed the application for judicial review.	17 April 2014	62ï82	This case relates to: the meaning of degrading treatment or punishment in s 5(1) of the Act; use of international materials. The applicant claimed to fear harm as a stateless Faili Kurd from Iran (para 2) without citizenship or identity papers (para 6). He claimed that as a stateless Faili Kurd he was subjected to discrimination and harassment in Iran, that he had no legal right to work, had restricted freedom of movement, no access to health care and that he was not able to purchase property. He claimed Faili Kurds were targeted by the Iranian authorities for ill treatment. He claimed that he had been detained and assaulted by the Basij, a paramilitary group, on two occasions on one of which the Basij broke his shoulder (para 6). The applicant argued one ground of review (para 27): the Tribunal constructively failed to exercise its jurisdiction in that it did not consider an integer of the applicantôs claims for complementary protection, namely that the discrimination on the grounds of race experienced by the applicant of itself amounted to ñdegrading treatment or punishmentò as defined in s 5(1) of the Act because this discrimination was on the basis of race and therefore, and in the circumstances, inherently degrading. This is to be distinguished from the differential treatment actually meted out to Faili Kurds and to the applicant considered in isolation

			from its racial basis to which the Tribunal limited its review. The applicant made the following arguments: In interpreting ódegrading treatment or punishmentô in s 5(1), the explanatory memorandum could be taken into account (para 32). The explanatory memorandum made it clear that the criteria and obligations in relation to the concept of ódegrading treatment or punishmentô were defined by specific reference to Article 7 in the ICCPR (para 33). As such, Article 7 of the ICCPR was to be applied in the context of the s.5(1) definition of ódegrading treatment and punishmentô (para 35) As the ICCPR did not contain any definitions of the concepts contained in Article 7, it was relevant to have regard to jurisprudence in relation to Article 3 of the European Convention on Human Rights 1950 (ECHR) which is in similar terms to Article 7 of the ICCPR (para 36). The European jurisprudence in relation to Article 3 of the ECHR which existed at the time of the Act introducing the complementary protection regime formed part of the context of that amendment and should be assumed to be within the intention of the parliament (para 37). This made it relevant to consider the the jurisprudence of the International Court of Justice, the European Court of Human Rights and the European Commission of Human Rights in relation to the ICCPR and the ECHR (para 38). On these bases, the applicant argued that both the

definition of degrading treatment or punishment in s.5(1) of the Act and the international jurisprudence was concerned with humiliating treatment (para 40).

Case law showed that discrimination based on race *could*, in *certain* circumstances, of itself amount to degrading treatment within the meaning of Article 3 of the ECHR (paras 41ï2).

There was some articulation or expression in the material before the Tribunal of a claim of differential treatment of Faili Kurds on the basis of race such that the applicantôs claims included as an integer the claim that race of itself rendered the differential treatment of Faili Kurds degrading. The Tribunal failed to consider this integer of the applicantôs claims in the context of determining whether there was differential treatment amounting to degrading treatment within the s.5(1) definiti) def

			separate finding by the Tribunal on whether, in the circumstances of the case, race could render the differential treatment experienced by the Applicant degrading (para 49). With respect to the definition of ódegrading treatment and punishmentô, the Court observed (para 62): ó[A]s a matter of statutory construction é , whether or not regard is had to international jurisprudence é the s.5(1) definition could encompass differential treatment of a kind that caused and was intended to cause extreme humiliation because of the racial basis for that treatment, even if the same treatment on some other ground would not satisfy the definition. However it is not necessary in these proceedings to determine whether, and if so the extent to which, it is to be accepted as a legal principle that the racial nature of differential treatment would render that treatment degrading in certain circumstances. It is not contended that all racial discrimination of itself amounts to degrading treatment or that all claims of racial discrimination necessarily include, as an integer of the claims, a claim to that effect. The difficulty that faces the Applicant is that it has not been established that the asserted claim was raised squarely or clearly on the material before the Tribunal.ô As to the latter issue, the Court noted that, where a claim had not been expressly advanced, a Tribunal would be obliged to consider it only in circumstances where the unarticulated claim had been raised ósquarelyô on the material available before the Tribunal

(para 46).

The Court found that it had not been established that a claim as pleaded (i.e. degrading treatment on the basis of race) was either expressly raised by the applicant or arose clearly or squarely on the material before the Tribunal such as to give rise to an obligation on the part of the Tribunal to address such claim (para 64) (details of the applicants claims are discussed at paras 2, 66, 70ï5).

as it rejected his claims for refugee status, i.e. having found that there was no real chance of serious harm for Convention reasons, the Tribunal concluded that there were no substantial grounds for believing that there was a real risk he would suffer significant harm on the same facts (para 9).

The applicant asserted two grounds of review, one of which related to complementary protection (para 10):

> that the Tribunal had applied an incorrect test when determining the Applicantôs claims pursuant to the complementary protection provisions (s.

was required was a detailed review of the factual findings.

On review, the Court found that the Tribunal had undertaken considerable analysis of the Convention based claims. The applicant had not shown further facts or circumstances that would have been necessary to consider in making the findings with respect to complementary protection (para 30).

With respect to the different tests of óreal chanceô and óreal riskô, the Court noted (para 32):
óTo the extent that the different tests utilise the different form of words ñreal chanceò and ñreal riskò, there is nothing that has been identified in the case put by the Applicant, nor the findings made by the Tribunal in this case, from which one could conclude that any possible difference in the nuanced meanings of those two phrases (which must very significantstla-2(s)4(p) c(t w2π

			MZZIB v Minister for Immigration & Anor [2014] FCCA 756 (16 April 2014) (see para 4).

SZTFI & Anor v Minister for Immigration & Anor [2014] FCCA 740

(Judge Manousaridis)

The application was

			complementary protection (para 35). The applicant claimed that the Tribunal did not consider his claim that upon his return to the ACN he would be considered as spy. This was because the Tribunal considered the application on the basis that the óapplicantôs fear of harm [in the ACN] relates solely to his concern that a political opinion might be imputed to himô. The asserted error was that the Tribunal considered the spy claim only by reference to the Convention nexus of imputed political opinions whereas the spy claim was based on matters that extended beyond imputed political opinions (para 36). The Court accepted that the Tribunal had based its reasoning on the view that the applicantôs claim was based solely on imputed political opinion (paras 39ï41). However, the Court noted that the Tribunal had been correct to do this, as the applicant had not asserted that his claim was based on any other reason (para 42). As such, the Court concluded (para 43): óThe Tribunalôs statement that the ñapplicantôs fear of harm [in the ACN] relates solely to his concern that a political opinion might be imputed to himò does not reflect an erroneous belief on the part of the Tribunal that the applicantôs claim for complementary protection was to be assessed only by reference to Convention-based fears of harm. It reflects the Tribunalôs correct view that all of the applicantôs claims for protection, whether based on the Convention or on complementary protection, were based on the applicantôs fear of being imputed with political opinions hostile to the regime of the ACN.ô

			The application was dismissed.

			The Tribunal reasoned that the applicant would not be subjected to cruel and inhuman treatment or degrading treatment because first, the risk of detention only arose on a weekend or public holiday, and secondly, the likely period of his detention in prison would only be for a few days. It was in my view a necessary part of that reasoning that the conditions in prison were not so bad that a detention for a brief period would amount to cruel and inhuman or degrading treatment and that the chance of the applicant being detained for a prolonged period of time was remote (para 44). The Tribunal reasoned that the likely period of time that the applicant would be held in prison, if at all, and the known conditions of that detention, were not such as to satisfy the test for significant harm (whether that harm would be inflicted intentionally or otherwise). The Court found that this reasoning was open to the Tribunal (para 47). The Tribunal had further found that returnees would stay in Negombo prison until a bail hearing was made available. Further, a family member would be required to provide surety (para 51). The Tribunal concluded that a family member would be able to provide surety and the risk of the returnee being detained for more than a few days was remote (para 52). The applicant contended that the óissues arising in relation to the decision under reviewô within the meaning of s.425 of the Act therefore included the issue whether the applicant had a family member who would be able and willing to provide surety in the manner or in the amount required for the applicantôs bail so as to cause him to be

released from Negombo prison (para 53). The Court did not accept this. According to the Court, the essential and significant issue upon which this aspect of the review turned was the Tribunalôs view, drawn from country information, that the applicant would be held in prison for only a short time if at all pending the granting of bail, which would be very likely to be granted, and the applicant would be unlikely to be given a custodial sentence for the offence of having left Sri Lanka unlawfully. The Court did not accept that the relevant

			they would only be detained for a short time in remand until being granted bail, and that they would not be subject to a custodial sentence for the offence of leaving Sri Lanka unlawfullyô (para 14)
MZNN & Anor v Minister for Immigration & Anor [2014] FCCA 74 (Judge Jones)	22 January 2014	55ï70	This case relates to:

			The Court observed that the directive in s 91R(3) does not apply to the assessment of complementary protection under s 36(2)(aa) (para 59). It was evident that the Tribunal had applied s 91R(3) in considering the applicantsô Convention claims. The issue was whether the Tribunal had failed to take into account the second integer of the applicantsô claims, i.e. their conduct in Australia, for the purposes of the complementary protection claim as well. The Court found that the Tribunal had failed to take into account the second integer of the applicantsô claims, i.e. that their religious conduct in Australia would come to the attention of the authorities in Iran and as a consequence they would suffer significant harm (para 74). The bare fact that the Tribunal did not mention s 91R(3) while failing to take into account this conduct did not remedy the absence of findings of fact regarding the applicantsô claims that their conduct in Australia would come to the attention of the authorities in Iran (para 79). As a result, the Tribunal fell into jurisdictional error (para 80). The Court also considered the application of s 91R(3) in *SZSEQ v Minister for Immigration & Anor* [2014] FCCA 645 (4 April 2014) at paras 68ï78. In that case, the Court found that the Tribunal had correctly dealt with the complementary protection claims (though affirming that the restriction in s 91R(3) did not apply to complementary protection claims).
MZZKM v Minister for	17 January 2014	23ï27	This case relates to:

whether it was reasonable for the applicant to relocate internally within Pakistan.

The applicant was a Shia Muslim man from Pakistan. The Tribunal had found that ótherе was a real chance that the applicant would face serious harm now or in the reasonably foreseeable future if he was to return to various places in Pakistan for convention reasonsô [3].

SZATV with respect to the Refugee Convention, and as

Pakistan or, if one reads the comment at p.24 of the transcript together with the reasons, potentially, the

			clearly to the poor security situation in Ghazni province. Indeed at [134] the Tribunal found that Ghazni province is one of the most volatile in the country with attacks by insurgents against civilian targets, government representatives and international forces. The situation is one which apparently affects Hazaras and Pastuns alike. It was apparent, therefore, that the risk facing the applicant in Ghazni province was one of violence not personally directed to him as an individual but nevertheless a risk of being caught up in violence directed towards people in the province which included the applicant.ô (para 78, footnotes omitted) óThe Assessor needed to consider whether the applicant faced a risk of harm which was greater than that faced by the people of Afghanistan generally. The answer to that question is not inevitably in the negative. It was, in my view, open to the Assessor to consider whether the risk faced by a Hazara Shiôa resident of Ghazni province was greater than that faced by the population of Afghanistan generally, including residents in other provinces in Afghanistan. If the risk facing the applicant in Ghazni province was greater than the risk facing residents of other provinces, the Assessor would need to consider whether that risk could be said to be personal to the applicant (as a resident of an especially violent province).ô (para 79) The Court found that the applicant had been deprived of the possibility of a successful outcome due to the Assessorôs failure to consider section 36(2B)(c) of the Act, and therefore granted the relief sought (paras 67,

			76).
SZTDM v Minister for Immigration & Border Protection (No 2) [2013] FCCA 2060 (Barnes J)	5 December 2013	51ï76	This case relates to: section 91R(3) (ócontrivedô refugee claims) The subject of this application for judicial review was a decision of the RRT in relation to an applicant from China. The applicant filed the application outside the time limit prescribed in s 477(1) of the Act, and hence sought an extension of time to seek review of the RRTôse

			protection was affected by jurisdictional error. In reaching this conclusion, the Court noted that it was ónot in dispute that s.91R(3) of the Act does not apply to the complementary protection criterionô (para 53). The Court found: óIn my view it can be inferred that the Tribunal disregarded the Applicantôs conduct in Australia pursuant to s.91R(3) of the Act for all purposes. However, given the Tribunalôs acceptance of some of the Applicantôs claims about his activities in Australia, it was incumbent on it to engage with the test for complementary protection and to consider the evidence about the Applicantôs activities in Australia in the context of that provision. It did not do so. It failed to apply the correct test and fell into error in the manner contended for in ground 1(a) in the further amended application.ô (para 76) *Extension of time* (paras 90ï3) The Court was satisfied that it would be in the interests of the administration of justice to grant the applicant an extension of time to file the application (para 91). Although the applicant had not provided a satisfactory explanation for the delay in filing the application, the Court found that there was óstrong merit in one of the grounds relied on such as to establish jurisdictional errorô and that there would óclearly be a significant effect on the Applicant if the extension of time were not to be grantedô (para 90). Moreover, there was óno suggestion of any prejudice to the First Respondent in granting an extension of timeô (para 90). The Court also

			considered óthe interests of the public at large, not only in the proper resolution of these matters, but also in the Tribunal carrying out its function without falling into jurisdictional errorô (para 90). Having regard to these considerations, the Court granted an extension of time to file the application (para 92). Moreover, having found that the RRTôs decision was affected by jurisdictional error (see above), the Court quashed the RRTôs decision and directed the RRT to determine the matter according to law (para 92).
WZASD v Minister for Immigration & Border Protection [2013] FCCA 1940 (Lucev J)	29 November 2013	47ï50	This case relates to: relocation (reasonableness) This was an application seeking judicial review in relation to the recommendation of an Independent Protection Assessor (IPA) to the Minister that the applicant not be recognised as a person to whom Australia owed international obligations (para 3). The Court considered five grounds of review advanced by the applicant, and accepted two of these grounds (grounds 4ï5). *Ground 4: Procedural fairness* (paras 38ï42) Relevantly, the applicant claimed that he had been assaulted in Afghanistan by two Pashtun men at his uncleôs behest, because the applicant sought to make an inheritance claim against his uncle (para 6). The IPA accepted that these events occurred (para 7). However, the IPA asserted that if the applicant were to return to Afghanistan, he would suffer no further harassment unless he provided details of his location to his uncle,

which the IPA considered to be unlikely (para 38). The IPA also asserted that the applicant could pursue the inheritance claim without disclosing his location to his uncle (para 38).

The Court accepted the applicantôs submission that the IPA had denied the applicant procedural fairness (para 42). This was because óthe applicant was not given an opportunity to deal with the allegation that pursuing the Inheritance Claim if he were to return to Afghanistan would not necessitate his whereabouts being revealed to his uncleô (para 41). The Court held that óthis proposition is itself adverse to the applicant, and results in a conclusion adverse to the applicantô (para 39). Hence, there was óan obligation on the IPA to put the matter to the applicant in such a way as to give him a sufficient opportunity to give evidence or make submissions about the issue é because that issue was in part determinative of the question as to whether the Minister might have grounds to believe that the applicant would or would not suffer significant harm if returned to Afghanistan.ô (para 39)

Ground 5: Relocation (paras 47ï50)
Relevantly, the IPA found that it was not necessary to consider the issue of relocation, in part because the

contrary to s 36(2B)(a) of the Act (para 50). The Court held that this conclusion was related to the Courtôs conclusion in relation to procedural fairness (ground 4):

óHad the IPA afforded the applicant procedural fairness by giving the applicant an opportunity to respond to the issue of whether or not his location would have been disclosed in the event that he pursued the Inheritance Claim upon return to Afghanistan, it might also have been the case that any possibility that the applicantôs location might have been disclosed as part of any adjudicative process on the Inheritance Claim process (either directly to the uncle, or indirectly through the current owners), would have necessitated the IPA considerin5004Cgwoudd-3( )5(not)3( )] TJ3(h)-5(not)w

			affected by jurisdictional error (in respect of grounds 4 and 5), the Court ordered that the Minister be restrained from relying on the IPAôs recommendation.
SZRZM v Minister for Immigration & Border Protection [2013] FCCA 2018 (Nicholls J)	28 November 2013	29ï128	This case relates to: threshold of risk for complementary protection distinction between refugee and complementary protection criteria This was an application for judicial review in relation to two recommendations made to the Minister as to whether to ólift the barô to enable the applicant (from Iran) to apply for a protection visa (para 35; s 46A(2) of the Act). One recommendation was made by an Independent Protection Assessment Reviewer (the reviewer) that the applicant not be recognised as a person to whom Australia had protection obligations (para 1). This recommendation was made prior to the implementation of the complementary protection provisions and hence related solely to the refugee provisions (para 45). The other was a departmental assessment and recommendation that the applicant did not meet the Ministerôs Guidelines for protection in Australia (para 1). This was made after the implementation of the complementary protection provisions, and hence related to both refugee and complementary protection provisions (paras 55ï6). The applicant advanced four grounds of review. Three of these grounds were relevant to complementary protection (grounds 1ï3), of which two grounds were accepted by the Court (grounds 2ï3). *Grounds 2(a) and 3* (paras 66ï111)

The applicant submitted, inter alia, that the departmental assessment adopted the wrong standard of proof, by applying a ómore likely than notô test (para 19, grounds 2(a) and 3). The Court held, and the Minister did not dispute, that this was the wrong test, applying *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 (paras 72ï3). Nonetheless, the

			where there has been a finding that the applicant is not a refugee (*SZQRB* at [71] per Lander and Gordon JJ).ô (para 103) óIn this context, therefore, it is available to the decision maker to apply findings of fact made in the Refugees Convention assessment to the complementary protection assessment. (*SZSGA v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCA 774 (ñ) at [55] ï [56] per Robertson J and *SZSHK v Minister for Immigration and Border Protection* [2013] FCAFC 125).ô (para 104) óHowever, in my respectful view, the import of what was said in *SZSFK* (and *SZSGA*) is to provide a caution that those factual findings, if these are to be relied upon subsequently in the complementary protection assessment, must derive from the facts presented, and be free in the initial assessment of Refugees Convention concepts such as ñserious harmò or ñpersecutionò not found in the complementary protection suite of relevant elements (*SZSGA* at [55] ï [56] per Robertson J).ô (para 105) The Court found that ósome of the reviewerôs findings were plainly findings derived from the facts presented, and claimed, and the applicant's evidence about those factsô (para 106). The Court held that ósuch factual findings can be ñimportedò into and relied upon in the subsequent complementary protection considerationô (para 106).

However, the Court held:

ówThe difficulty, however, is where the reviewerôs

The Court rejected the applicantôs submission that the reviewer had erred in law by failing to consider, or have regard to, the complementary protection criterion (para 112).

The Court held:

óThe reviewer cannot be said to have failed to have taken into account a relevant consideration being, at the time of the conclusion of the reviewerôs assessment, a statutory provision that had not been enacted.ô (para 114)

Further, the Court rejected the applicantôs submission that s 35 of Schedule 1 of the *Migration Amendment*

			(unlike in [*SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71]), and cannot in the current circumstances, make such an application, s.35 of the Amendment Act is not of assistance to him.ô (para 120)
SZSPE v Minister for Immigration & Border Protection [2013] FCCA 1989 (Emmett J)	27 November 2013	44ï73	This case relates to: the meaning of ósignificant harmô whether harm arising from ómere negligenceô is sufficient to amount to ócruel or inhuman treatment or punishmentô or ódegrading treatment or punishmentô relevance of international jurisprudence The subject of this application for judicial review was a decision of the RRT in relation to an applicant from Turkey. The applicant advanced two grounds of review, both of which were rejected by the Court. Relevantly, one of these grounds of review was that the RRT had erred in its application of the complementary protection provisions by ófinding that the likely pain and suffering to be experienced by the Applicant during imprisonment in Turkey would not be ñintentionallyò inflicted because it would arise from ñmere negligenceòô (para 43). The applicant submitted that harm suffered by reason of ómere negligenceô could amount to ócruel or inhuman treatment or punishmentô or ódegrading treatment or punishmentô (para 45). In rejecting the applicantôs submission, the Court held: óA fair reading of the RRTôs decision record makes clear that the RRT understood that the complementary

			protection regime uses definitions and tests different from those referred to in International Human Rights Treaties. The RRT acknowledged it was therefore neither necessary nor useful to ask how the convention against torture or any of the other International Human Rights Treaties would apply to the circumstances of this case.ô (para 57) óThe RRT also acknowledged that the intention requirement introduced in the definition of ñ*cruel or inhuman treatment or punishment*ò and *treatment or punishment*ò in s.5(1) of the Act is not reflected in international jurisprudence. However, the RRT found that this did not mean s.5(1) of the Act should be read down or given a liberal interpretation to accord with the international jurisprudence. The RRT referred to the statement in the complementary protection training manual that ñ*demonstrating the intention of an unrepresented actor in a future act of ill* ô (para 58) óIn reaching that conclusion, the RRT thoroughly examined the authorities and counter arguments, but was ultimately not persuaded by them. In particular, the RRT referred to the judgment of Lander, Jessup and Gordon JJ in *Minister for Immigration and Citizenship v MZYYL & Anor* [2012] FCAFC 147 and found as follows:

definitions and tests different from those referred to in the international human rights tre
[20] it was therefore neither necessary nor useful to ask how the Convention against Torture or any other international human rights treaties would
ô (para 59)

óIn that context, the RRT found that mere negligence is insufficient to satisfy the definition in s.5(1) of the Act in light of the statutory requirement that such conduct must be inflicted intentionally.ô (para 60)

óThe RRT found that pain or suffering caused by overcrowding and other consequential problems in the Turkish prison system referred to in the applicantôs submissions, is not intentionally inflicted on prisoners, and therefore does not satisfy the definition of ñ*cruel or inhuman treatment or punishment*ò. The RRT also found that the overcrowding and other consequential problems were not ñ*intended to cause*ò extreme humiliation, as required by the definition of ñ*degrading* in s.5(1) of the Act.ô (para 62)

óGround 1 is a misstatement of the RRTôs findings in suggesting that it found that pain and suffering would

			pain and suffering.ô (para 68) Hence, the Court dismissed this ground of review.
SZSFF v Minister for Immigration & Border Protection [2013] FCCA 1884 (Lloyd-Jones J)	22 November 2013	39ï54	This case relates to: risk of generalised violence risk faced by the population generally

country will not, of itself, be sufficient to engage a non-refoulement obligation for all people who may be returned to that country. However, where serious human rights violations in a particular country are so widespread or so severe that almost anyone would potentially be affected by them, an assessment of the level of risk to the individual may disclose a sufficiently real and personal risk to engage a non-refoulement obligation under the ICCPR and/or CAT. As such, s.36(2B)(c) does not necessitate in all cases that the individual be singled out or targeted for any particular reason. What is ultimately required is an assessment of the level of risk to the individual and the prevalence of serious human rights violations is a relevant consideration in that assessment.ô (para 34)

The Minister also submitted that s 36(2B)(c) of the Act ósshould be construed consistentlyô with s 424A(3)(a) of the Act, a provision containing similar phrasing (paras 35ï8). Section 424A(3)(a) provides that s 424A(3) does not apply to information óthat is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a memberô. The proper construction of s 424A(3)(a) has been considered in a number of authorities:

óA line of authority has suggested that s.424A(3)(a) contained a two part test, requmoeri hapl p

[SZSSM v Minister for](#)			*Indigenous Affairs* [2004] FCAFC 82; (2004) 80 ALD 559 at [14] Giles and Conti JJ (with Allsop J (as he then was) agreeing at [21]) found that the subsection should be construed to preclude s.424A obligations arising, except where the Tribunal relies on information specifically about the applicant or another person. The Court thus found that the words ñ*and is just about a class of persons of which the applicant or other person* emphasise how specific the information must be to the applicant (or another relevant person). *VHAP* was applied by a differently constituted Full Court in *Minister for Immigration and Multicultural and Indigenous Affairs v NAMW & Ors* [2004] FCAFC 264; (2004) 140 FCR 572 at 586-587. Beaumont J accepted the appellant (Minsterôs) submissions that: *64. The provision, as was held in VHAP, imposes one test and does not contain two disjunctive elements; that is to say, the provision is referring to information that is not specifically about an applicant or another person (such as a witness) but* *persons of which an applicant or the other person is* See further *QAAC of 2004 v Refugee Review Tribunal* [2005] FCAFC 92, at [1], [2], [26]-[30].ô (para 37) The Court held that the submissions submitted on behalf of the Minister (paras 32ï8) correctly responded to the applicantôs claims (para 49).

Immigration & Border Protection [2013] FCCA 1489 (Driver J)			relocation (reasonableness) risk of generalised violence risk faced by the population generally The subject of this application for judicial review was a decision of the RRT in relation to an applicant from Pakistan. The Court allowed the application, on two bases. *Relocation* (paras 81ï91) The RRT accepted that there was a real chance that the applicant would suffer serious harm due to his Shiôa Muslim religion in his home district and more generally, the Kurram Agency (para 81). However, the RRT found that the applicant could avoid the risk of persecution by relocating to Karachi, and that it was reasonable for the applicant to do so (para 82). The Court found that the RRTôs decision in relation to relocation was affected by jurisdictional error, similar to the error identified by the Court in *MZYQU v Minister for Immigration* [2012] FCA 1032: ó[A]s was pointed out by the Federal Court in *MZYQU*, a decision maker cannot ignore or discount a claimed risk of harm in considering the practicability of relocation, by the simple expedient of finding that the risk is not ñserious harmò as defined in s.91R of the Migration Act. By extension of that reasoning, neither could the Tribunal ignore or discount harm by reference to the other limitations in s.91R, in particular because the risk is not Convention related or that the

applicant would not be personally targeted. The Tribunal noted at [73] the risk of generalised violence in Karachi but discounted it as being ñethnicò and ñpolitically linkedò in part. The Tribunal needed to take into account the risk of generalised violence facing the applicant in Karachi in considering the practicability of him relocating there.ô (para 88)

óIn my view, the Tribunal fell into a similar error as that identified by the Federal Court in *MZYQU* and this amounted to a jurisdictional error.ô (para 89)

óIn considering the practicality of relocation, the Tribunal discounted the risk of violence which did not engage [s 91R(1) of the Act], either because of a lack of a Convention nexus, or because of a lack of systematic and discriminatory conduct.ô (para 90)

Complementary protection (paras 97ï104)
In rejecting the applicantôs complementary protection claim, the R 415.36 26q444.22 97.86 iC334001C0015.64

protection issue as it applied to the question of whether

			recognised as a person to whom Australia had protection obligations, either under the Refugee Convention or the complementary protection criteria. The applicantôs application was based on three grounds. The Court accepted one of these grounds, relating to the way in which the assessor dealt with the applicantôs complementary protection claim. In that respect, the applicant made two claims: that the assessor failed to assess the óreceiving countryô according to law, as required by the Act (paras 101ï2); and that the assessor failed to distinguish between the refugee and complementary protection criteria (paras 90ï9). The Court found that jurisdictional error was made to the extent that the assessor failed to assess the óreceiving countryô according to law (para 89). The óreceiving countryô in relation to a non-citizen (set out at s 5(1) of the Act) is required to be ódetermined solely by reference to the law of the relevant countryô (s 5(1) of the Act; para 101). The applicant submitted that the assessorôs finding that Iran was not a óreceiving countryô for the purpose of s 36(2)(aa) of the Act, and that there was no receiving country in the circumstances of the case because the applicant was stateless, was not made in accordance with law (para 100). The Court accepted this submission: ó[T]he assessor did not find the receiving country as

required by s.5(1) of the Act in this case. In her analysis, the assessor made no reference to any relevant law of Iran to determine, for the purposes of whether

there were no substantial grounds for believing that there was a real risk of significant harm to the applicant ófor the reasons given aboveô (para 90). On this basis,

protection visa application claimed, inter alia, that he feared harm because he would be an undocumented child in Iran (paras 4, 11). In this case, the Court held that the RRT had made an error of law in its decision:

óI am not satisfied that the Tribunalôs findings in relation to the situation for the Applicant as an undocumented child are such that the Tribunal sufficiently addressed the claim that the Applicant had a well-founded fear of persecution as an undocumented child in Iran, or that it sufficiently considered the complementary protection criterion in that respect.ô (para 77)

This is because the RRT had accepted, on the basis of the applicantôs fatherôs evidence, that the applicantôs

			national father would not be ñ*the same*ò as for an undocumented foreign national or Faili Kurd. The Tribunal made no finding as to what the position would be for a person in the position of an undocumented child of an Iranian national father, in particular in relation to access to education and medical services.ô (para 70)
MZZKJ v Minister for Immigration & Border Protection [2013] FCCA 1770 (Whelan J)	21 October 2013	24ï41	This case relates to: relocation (reasonableness)

However, the RRT found that the applicantôs claims were localised to the Punjab, and that there would be no real risk of significant harm to the applicant in Mumbai or Delhi. The RRT further found that it would be reasonable for the applicant to relocate to such places, in accordance with s 36(2B) of the Act, such that there was taken not to be a real risk of significant harm (para 25). The RRT considered the following factors to support its conclusion that relocation would be reasonable (para 30):

> the applicantôs age;
> the applicantôs flexibility and adaptability shown by travelling to Australia;
> the applicantôs fluency in Hindi and English; and
> the applicantôs year 12 qualification in India and employment in Australia.

In this case, the Court found that the RRTôs decision in relation to relocation was affected by jurisdictional error. This is because the Court was not satisfied that the RRT correctly applied the test for determining whether relocation was reasonable (para 40).

In reaching this conclusion, the Court first held:

ó The First Respondent correctly identified that the test for relocation, with respect to the complementary

when considering the reasonableness of relocation in the complementary protection context are the same as those which arise in the refugee context.ô (para 24)

The Court then drew attention to the following problems with the RRTôs reasoning in relation to relocation:

> It was ónot clear [to the Court] why the age of the Applicant was relevant unless it was taken to be an indication of his capacity to live away from his familyô (para 30).
>
> It was ódifficult to ascertain how the Tribunal concluded that the Applicant had shown that he was ñflexible and adaptableò in coming to Australia, when he had essentially left a situation of five years of abuse only with the assistance of his brother and came here to live with himô (para 36; see also para 32).
>
> It was also ódifficult to ascertain how the Tribunal concluded that the Applicant was fluent in English and Hindiô (para 34). Although the applicant indicated on his protection visa application that he spoke, read and wrote English and Hindi, he gave evidence before the RRT with the assistance of an interpreter and told the RRT that he knew a ólittle bitô of English (para 34). Moreover, on the basis of his test results in the International English Language

			jurisdictional error.ô (para 26)
SZSIB v Minister for Immigration & Border Protection [2013] FCCA 1413 (Raphael J)	23 September 2013	12ï16	This case relates to: the meaning of ósignificant harmô *Wednesbury* unreasonableness

			such. When one considers the penalties that might be invoked by Australian courts for what some may consider to be minor infractions of breach of public order or creating graffiti a penalty such as that imposed in Iran for what Iranian society considers to be an insult against its guiding philosophy, Islam, is not intuitively so seriously disproportionate to allow the views of the assessor expressed here to be considered absurd.ô (para 16, footnotes omitted)
MZZIG v Minister for Immigration, Multicultural Affairs & Citizenship [2013] FCCA 1236 (Burchardt J)	6 September 2013	16ï30	This case relates to: relocation (reasonableness) The subject of this application for judicial review was a decision of the RRT in relation to relocation, in the context of both the applicantôs refugee and complementary protection claims. The RRT had dismissed the applicantôs protection claims on the basis that it was reasonable for him to relocate to another part of Pakistan. In coming to this conclusion, the RRT ófocussed its considerations of the question of relocation and its practicability wholly on the claims advanced by the applicant as to specific harm, namely his ethnicity, his religion and imputed political opinionô

suffered as a child. The Court considered whether this amounted to jurisdictional error:

óIt probably would have been better if the Tribunal had

			decision-makers on relocation for the purposes of dealing with the complementary protection criterionô (para 12). Ultimately, however, the Court held: ó13. [The words of section 36(2B)(a)] suggest that some area needs to be identified. However, I see no reason why the area cannot be identified in one of the two ways I have described, namely, either the identification of particular safe localities or the delimiting of a local area of risk which results in the conclusion that the rest of the country is safe é ô Hence, the application was dismissed.
SZRUT v Minister for Immigration & Anor [2013] FCCA 368 (Driver J)	15 July 2013	25ï7	This case relates to: c) the meaning of ósignificant harmô On whether criticism of the applicant amounted to ósignificant harmô, the Court held: óI accept that ñcriticismò simpliciter could not amount to ñsignificant harmò given the definition of this term in ss.5 and 36(2A) of the Migration Act.ô (para 26)

SZRTN v Minister for Immigration & Anor [2013] FCCA 583 (Judge Nicholls)	21 June 2013	40ï50	This case relates to: the meaning of ócruel, inhuman or degrading treatmentô; and whether consideration of international instruments is required when applying the CP regime in the Act. The applicant was from Western Samoa. He was taken by his family to New Zealand at the age of 2 years, and then his father brought him to Australia around the age of 5. Shortly thereafter, his father abandoned him, after

whether the applicantôs ósocio-economic rightsô could amount to such treatment (para 23).

Further, the applicant asserted that the Tribunal failed to understand the meaning of ósubstantial grounds for believingô (as it appears in s.36(2)(aa) of the Act) also and failed to have regard to the Complementary Protection Training Manual (Manual), which would have assisted in the Tribunalôs understanding of ósubstantial grounds for believingô (para 24). With respect to this, the applicant submitted that the test was ósomething less than the balance of probabilitiesô, however, from the Tribunalôs decision record, it was not clear what threshold the Tribunal had applied (para 25).

In considering the applicantôs claim, the Tribunal had

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Discrimination

The Minister accepted that discrimination was not an element of the complementary protection regime (para 64). The Court found that the Tribunal dealt extensively with the matter of discrimination because, on a plain reading of the applicantôs claims, discrimination was, in essence, the basis on which the applicant had said he would suffer significant harm if he were to return to Samoa (para 66). As this was the basis of his claim for complementary protection (para 68), the Tribunal had had to deal with it (para 71).

Balance of probabilities

The applicant argued that ósubstantial grounds for believingô meant a standard that was ósomething less than the balance of probabilitiesô (para 54). The Minister agreed dispute that the Tribunal would have fallen into error if it had applied a balance of probabilities test (para 55): *Minister for Immigration and Citizenship v SZQRB* (2013) 296 ALR 525. However, the Court found that the Tribunal did not fall into the error of applying this test (para 56).

International jurisprudence and the Manual

The applicant further claimed that the Tribunal did not

international jurisprudence, and its failure to have regard to the Manual, which discussed that jurisprudence, revealed that the Tribunal was not in a position to find that the applicant was ónot eligibleô for complementary protection because it did not consider ówhat complementary protection means, not just what it says in the Actô (para 41).

The Court found that the definition of ósignificant harmô was exhaustively contained in the Act. Further, the ótechnicalô meanings of phrases, derived from academic studies, do not assist in light of the definition in the Act

BZACF & BZACG v Minister for Immigration & Citizenship (No.2) [2013] FCCA 486 (13 June 2013)	13 June 2013	6ï16	This case relates to: commencement of complementary protection provisions The Court considered whether the RRTôs decision to affirm a decision not to grant the applicants a protection visa was affected by jurisdictional error because the RRT did not consider the applicantsô claims against the complementary protection criterion. Relevantly, item 35 of Schedule 1 to the *Migration Amendment (Complementary Protection) Act 2011* (Cth) provides that the complementary protection provisions apply, inter alia, to óan application for a protection visa é that is not finally determined (within the meaning of subsection 5(9) of [the Act] before [24 March 2012]ô. The Minister conceded that: a. óin [*Minister for Immigration and Citizenship v*

officio when s.36(2)(aa) of the Act commenced on 24 March, 2012;
d. one of the effects of *SZQOY*, implicit from the reasoning of all three judges of the Court is the proposition that a matter before the Tribunal is ñno longer ... subject to any form of review under Part ... 7ò, and hence ñfinally determinedò for the purpose of s.5(9) of the Act, only when the Tribunalôs decision is unable to be recalled by the Tribunal member; and
e. as the Tribunalôs decision in the present matter

recommendation of the Independent Protection Assessor to the Minister that the applicant, from Iran, not be recognised as a person to whom Australia had protection obligations. The application was allowed on two grounds, one of which was relevant to complementary protection. (The other ground was that the Reviewer erred by failing to deal with a particular social group claim.)

			em=0&synonyms=0&query=%22complementary%20protection%22 - fn119, the Reviewer accepts that there is discrimination against undocumented stateless Faili Kurds, but found that he did not accept that the treatment amounts to persecution for the purposes of the Convention. The question remains, however, whether the treatment is ñsignificant harmò for s.36(2)(aa) purposes; b. At [52], the Reviewer accepts that the applicant was apprehended and beaten, but concludes that this was because he was part of a public gathering and not for a Convention reason. The reason for the harm, however, is irrelevant to the consideration required by s.36(2)(aa); c. At [52], the Reviewer also finds that there was no subjective fear on the part of the applicant. Section 36(2)(aa), however, imposes no ñsubjective fearò requirement; d. At [53]-[54], the Reviewer accepts that the applicant was assaulted but rejects the Convention claim on the basis that he was assaulted because he shouted at the police (and not for a Convention reason). The reason for the harm, however, is not relevant to the s.36(2)(aa) inquiry; e. At [55], the Reviewer accepts that the applicant was beaten, but rejects the Convention claim on the basis that he was beaten because he was selling goods illegally. Again, the reason for the harm is not relevant to s.36(2)(aa);

92. At [72], the Reviewer makes a point of stating that the three recounted incidents of being apprehended and beaten were not systematic or targeted at the applicant.

			protection criterion) or it could have been a general reference intended to quantify the risk. The use of the word ñsystematicò is problematic. Decision makers need to clearly distinguish between statutory provisions which bear on the complementary protection criterion and those which do not. The use of language drawn from an irrelevant provision of the Migration Act at least creates confusion and may point to reviewable legal error. Further, the reliance by the Reviewer at [75] on unspecified ñfindings set out aboveò is particularly problematic. On its face, it appears to be a reference to all of the Reviewerôs findings, some of which were clearly irrelevant to the complementary protection criterion (such as a finding of a lack of Refugees Convention nexus with harm suffered by the applicant).ô (para 97)
MZXYN v Minister for Immigration & Citizenship [2013] FCCA 134	15 May 2013	5ï24	This case relates to:

			protection provisions are different, indicating at least some slight difference in the test that must be applied. Whilst there was not technically a denial of procedural fairness in this case, as the applicant did receive a hearing, the practical effect of the events is substantially the same. That is, as no-one addressed, nor turned their minds to the complimentary protection provisions, the circumstances are no different to a failure to hear the application on this aspect of the case.ô (para 22) óAs a result, I am not able to be satisfied that it would be certain that a rehearing would be futile in this case.ô (para 23) Hence, the Court remitted the matter to the RRT for rehearing (para 24).
SZRNY v Minister for Immigration & Citizenship [2013] FCCA 197 (Barnes J)	7 May 2013	69ï135	This case relates to: the point at which a visa application is ñfinally determinedò The subject of this application for judicial review was a decision of the RRT in relation to the appellant (a citizen of Pakistan) to affirm the delegateôs decision not to grant him a protection visa. The Court allowed the application. Relevantly, the appellant lodged his protection visa application in March 2010. After his application was refused, he sought review in the RRT. On 12 March 2012, the RRT affirmed the delegateôs decision. On the same day, the Tribunal wrote to the applicantôs former (that is, incorrect) address, notifying him of the decision

(although he had notified the RRT of a change of address in February 2012) (para 24). On the same day, the RRT also sent a copy of its decision to the Secretary of the Department of Immigration (para 24). On 28 May 2012, after the error had been identified, the RRT wrote the applicantôs correct address, notifying him of the decision (para 25). In between 12 March 2012 and 28 May 2012 (on 24 March 2012), the provisions in Schedule 1 to the *Migration Amendment (Complementary Protection) Act 2011* (Cth) came into operation.

Item 35 of Schedule 1 to the *Migration Amendment (Complementary Protection) Act 2011* (Cth) provides that the complementary protection provisions apply, inter alia, to óan application for a protection visa é that is not finally determined (within the meaning of subsection 5(9) of [the Act] before [24 March 2012]ô.

Section 5(9) of the Act provides that óan application under this Act is finally determined when é [inter alia] a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Part 5 or 7ô. The question in this case was whether the app

			when the Tribunal becomes *functus officio*) to be relevant: óAt the least, it is apparent that in *SZQOY* Logan J (with whom Barker J agreed) expressly considered relevant the question of when the Tribunalôs core function of review was complete and, in that context, regarded communication to the applicant as essential to completion of such core function. Such principle was treated as a necessary step towards the conclusion reached, having regard to the line of reasoning adopted. As a lower court in the hierarchy this Court must, of course, follow the decisions of the Federal Court.ô (para 132) óIn any event, even if this Court were not, strictly speaking, bound to follow the approach taken in *SZQOY* in the context of considering s.5(9) of the Act, in my view I should follow the clear expression of principle by the Federal Court. It can only be said that a delegateôs decision is no longer subject to any form of review by the Tribunal if the Tribunalôs core function of review has been completed.ô (para 133) óOn this basis, for the Applicantôs protection visa application to be no longer subject to any form of review by the Tribunal within s.5(9) of the Act it was necessary, at the least, that either the decision had been communicated to the Applicant or irrevocable steps had been taken to have that done in accordance with the notification provisions in the Act. That had not occurred in the present case before the Amending Act came into

force on 24 March 2012. Hence the application for review had not been finally determined within s.5(9) of the Act at that date.ô (para 134)

Australiaôs óprotection obligationsô. The purpose of this provision was to provide a statutory scheme giving effect to those obligations. In relation to the applicant, the obligation invoked was the *non-refoulement* obligation implied under Articles 2 and 7 of the ICCPR. Citing *Human Rights Committee General Comment No. 31*, the Court held that this was an obligation not to remove a person from their territory where there were substantial grounds for believing that there is a real risk of óirreparable harm é either in the country to which removal is to be effected or in any country to which the person may subsequently be removedô (para 61). The *non-refoulement* obligation was hence an obligation to afford protection to a non-citizen where the harm faced was that arising in the receiving country. In this case, the harm would stem from the applicantôs removal from Australia, not from his presence in NZ or any particular other country (para 62). Second, this interpretation was necessary if the exceptions under s 36(2B) relating to relocation (s 36(2B)(a) and state protection (s 36(2B)(b)) were to have any application: ó[I]f the risk of harm claimed by the non-citizen is, as suggested in the present case, the risk of degrading treatment as a consequence of removal from Australia (where his children reside), then the prospect of relocation to another area of Australia, or protection from a public authority, would be nonsensical.ô (para 63). Third, óif the relevant act were considered to be that of being removed, then

substantial grounds for believing that,

SZRSN v Minister for Immigration and Citizenship [2013] FCA 751 (6 August 2013).

In January 2014, the claimant sought re-

			Tribunal Member meant that the risk must go beyond a possibility. Rather, the Tribunal Member had intended to convey that the risk must go beyond a ómere possibilityô (para 25). On the meaning of óreal riskô, the Court held: óThe ñreal chanceò test has been well established under the provisions relating to the Refugee Convention, although for reasons that are less than clear the Government has used different words in s.36 than those that appear in the Refugee provisions. However the test appears to be substantially the same: see generally *Minister for Immigration and Citizenship v MZYYL* [2012] FCAFC 147.ô (para 19) *Ground 2: Failure to consider certain risks to applicant* (paras 26ï33) The Court rejected the applicantôs argument that the RRT had failed to consider the risks to the applicant in the initial stages of police custody, pursuant to enforcement of Decree 33 under Nigerian law (para 29). The Court also upheld the RRTôs determination that there was no real risk that the applicant would be arrested, detained or jailed under Decree 33: óThe Applicant argues that a proper reading of s.36 is to the effect that s.36(2)(A) defines significant harm by reference to the laws in force in the country, subject only in cases involving the death penalty to the consideration of whether or not the death penalty will

be carried out. Thus, the argument goes, if the laws of a

materials at the time of the application to the RRT. This obligation is not an ongoing obligationô (para 37). Hence, óthere was no obligation on the Secretary to provide this material to the Tribunal member and there can be no error by the Tribunal member for not having regard to material that was not before the Tribunalô (para 38).

Ground 4: Failure to apply the correct test under s 36(2B)(a) (paras 40ï6)

avoid harm by living outside the region ñas he did previouslyò, and therefore concluded that this was a ñreasonable optionò for the future.ô (para 38)

The RRT did not óinvestigate the actual circumstances of his temporary residences, domestic arrangements, and employment, over this period. It certainly did not explore in its reasoning whether the actual circumstances of his living ñfrom place to placeò could reasonably, or at all, be projected into t

findings that the applicant would face death threats from extremist groups if returned to Nepal (paras 31, 42). The Minister did not dispute this (para 42).

Thus, ótheapplicant has established a *prima facie* right

			not sufficient to establish positively the error which I have found, must at least leave the Court lacking in confidence that no conclusion could be reached by a differently constituted Tribunal other than that s.36(2B)(a) would apply to the applicant if he were removed to Nepal.ô (para 49) On this basis, the Court granted writs of certiorari and mandamus, quashing the RRTôs decision and requiring the RRT to determine the application according to law.
SZRJX v Minister for Immigration and Citizenship & Refugee Review Tribunal [2012] FMCA 1220 (Raphael FM)	5 December 2012	10ï20	

for the visa prescribed by the Act have been satisfied (65(1)(a)(2)) unless the Minister considers the complementary protection requirement in s.36(2)(aa). And it is accepted that this was not considered.ô (para 13).

The Court also noted that there was a óreal differenceô between the refugee criteria and complementary protection criteria (para 14).

Hence, the Court held that the RRTôs failure to give any consideration at all to the complementary protection criteria constituted a jurisdictional error on the part of the RRT, even though it was ócompletely understandable in the particular circumstances of this caseô (para 16).

Discretion not to refer matter back to RRT
The Minister also argued thatenrsangcourt shou3(hat)/L] :

			made by the applicant are either Convention related or, if they are not Convention related, may allow him to be granted the visa pursuant to the provisions of ss.36(2)(aa). The Tribunal may consider that if this applicant returns to China he will suffer significant harm. In my view none of the findings of this Tribunal are such that it can be said that a conclusion along these lines is so unlikely that the rehearing would be futile.ô (para 19). In these circumstances, the Court granted a writ of mandamus, directing the RRT to determine the application according to law (para 20).
SZQPA v Minister for Immigration [2012] FMCA 123 (Driver FM)	29 March 2012	37	[redacted]

or has been before this Court in relation to a report and recommendation of a Reviewer concerning the claims of an offshore entry person, the Minister remains free to exercise his power under s.46A of the Migration Act to permit such persons to apply for a protection visa.ô

This suggests that it may be easier for the Minister to permit offshore entry persons whose claims raise complementary protection issues to apply for a protection visa so that their claims can be considered in the same way as onshore claims, rather than via a

ADMINISTRATIVE APPEALS TRIBUNAL

Note: On 1 July 2015, the Refugee Review Tribunal (RRT) was merged with the Administrative Appeals Tribunal (AAT). RRT decisions can be found in the separate RRT table, archived on the Kaldor Centre website. Pre-1 July 2015 AAT decisions below relate to cases where a visa was cancelled or refused on character grounds (including exclusion cases).

Case	Decision date	Relevant paragraphs	Comments
JXVH and Minister for Immigration, Multicultural Affairs and Citizenship [2013] AATA 550	6 August 2013		

			Real risk of significant harm Mr Liang feared that if he returned to China, he would be charged and convicted of offences arising out of the course of conduct that led to him being charged and convicted in Australia, and that that would result in torture, degrading treatment and capital punishment (para 140). The AAT considered Articles 7 and 10 of the Criminal Law of the PRC, which the AAT held made it clear that the PRC considered that its judicial power extended to offences committed both inside and outside its geographical borders and in respect of offences for which a Chinese national had already been convicted and sentenced in a foreign country (paras 123, 141). The AAT also considered country information indicating that conditions in Chinese prisons were harsh and that there were incidents where detainees were tortured or killed (para 127). According to the AAT: ó141. The question is whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed to China, there is a real risk of Mr Liangôs suffering significant harm é The answer hinges on whether there is a real

			risk that he would be prosecuted in relation to his activities in relation to illegal drugs é ô *Drug activities for which Mr Liang had been convicted* In respect of those matters in relation to which Mr Liang had been convicted in Australia, the AAT held that there were no substantial grounds for believing that there was a real risk that Mr Liang would suffer significant harm (para 146). In reaching this conclusion, the AAT noted that the Australian authorities, including DFAT, the RRT and DIAC, reported that there were no recorded incidents of cases in which a Chinese national had been prosecuted in China in relation to offences arising from events for which he/she had already been convicted in a foreign country and served the sentence (para 143). There was one case decided in the UK (considered in *JC (double jeopardy: Art 10 CL) China CG* [2008] UKAIT 00036 (*JC*)) in which China could be said to have retried a Chinese national for an offence committed in Kuwait and for which the offender had been convicted and sentenced in Kuwait, although in that case, the offender had not served his entire sentence in Kuwait (paras 133, 143). The AAT also considered country information showing an increasing emphasis by the Chinese government on reducing drug trafficking and drug use (para 144). The AAT noted that the UK Upper Tribunal had held in *YF (Double jeopardy JC confirmed) China v Secretary of State for the Home Department, CG* [2011] UKUT 32

that political factors (which might include the

Article 347 of the Criminal Law of the PRC made it an

			The AAT held: ó156. I have already set out my reasons for coming to the view that Australiaôs non-refoulement obligations are raised in relation to Mr Liang. That on its own is not sufficient to determine the way in which I should exercise the discretion under s 501 of the Migration Act. It is one of the factors as the Direction makes provision for. Having regard to all of the factors, I have come to the view that the risk of future harm as a result of Mr Liangôs behaviour is at a level that is acceptable to the Australian community should he be permitted to remain in Australia. The risk of his reoffending is low ... At the same time, it is a foreseeable consequence of his returning to China that there is a real risk that he will suffer significant harm. It could be said that this follows naturally from the choices that Mr Liang made as a younger person but, if it were to follow, it would arise as a result of a course of conduct undertaken as part of his activities in Australia. That is a part of his life that I am satisfied arose from behaviour and values he has put behind him. In the circumstances, I have come to the view that the Australian community would tolerate that very low risk rather than exposing Mr Liang to a real risk of significant harm should he return to China.ô

"BHFC0H0H0H0H0H.04 Tn

Anochie v Minister for			not amount, in itself, to a decision to remove the applicant from Australia, because at any time prior to removal, it would be open to the Minister to exercise his power under s 195A of the Act to grant the applicant a visa of a particular class, if satisfied that it was in the public interest to do so.ô (para 45, footnotes omitted) Although this consideration assisted the applicant, the AAT was ultimately not satisfied that it outweighed the seriousness of the applicantôs ólong pattern of criminal offendingô (para 46). The AAT considered that the protection of the Australian community from criminal or other serious conduct óweighs heavily in favour of refusing the visaô and that it was not outweighed by other considerations (para 52). Hence, the AAT affirmed the decision under review.

Citizenship v Anochie [2012] FCA 1440. In that case, Perram J held that the AAT had erred in applying the óreal chanceô test in assessing Australiaôs *non-refoulement* obligations under human rights law. Hence, the case was remitted to the AAT (para 47).

However, in a subsequent and unrelated matter, the Full Federal Court held in *Minister for Immigration and Citizenship v SZQRB* [2013] FCAF 33 (Lander, Besanko, Gordon, Flick and Jagot JJ) that the óreal chanceô test was to be used in assessing Australiaôs *non-refoulement* obligations under human rights law, as defined in the complementary protection provisions of the *Migration Act 1958* (Cth).

Hence, in this case, the AAT referred back to the reasons expressed in its earlier decision in *Anochie v Minister for Immigration and Citizenship* [2012] AATA 234 as support for its conclusion that Mr Anochieôs removal would place Australia in breach of its *non-refoulement* obligations (paras 50ï2). This consideration, combined with the AATôs

			Minister for Immigration and Citizenship (2007) 96 ALD 53; [2007] FCA 910) and that such a risk would only be established where ñthe likely consequences for the applicant would be the deprivation of é fundamental rights: *Bustescu and Minister for Immigration and Multicultural Affairs* [2000] AATA 819 at [39] (*Bustescu*). ... [78] RCLN accepts that there must be a causal connection between the cancellation and return of the person to their original country of residence and the expected breach but submits that the test in *Bustescu* is wrong. It is not necessary to establish it is ñlikelyò there would be a deprivation of fundamental rights but rather a ñreal chanceò as explained by Mason CJ in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389; 87 ALR 412 at 418 ... [79] I agree with the contentions of RCLN on the construction of Direction 41 and the test to be applied to assess the threshold to engage Australiaôs international obligations. The question is, whether on the facts in this case, there would be a breach of those obligations if, as a consequence of cancellation of his visa, RCLN is removed from Australia and returned to Iran. If so, the decision of the delegate must be set aside.ô [emphasis added]