COMPLEMENTARY PROTECTION IN AUSTRALIA

DECISIONS OF THE FEDERAL COURT & FEDERAL CIRCUIT COURT

2015 16

Last updated 14 December 2016

This is a list of decisions of the Federal Court of Australia and the Federal Circuit Court of Australia that are relevant to complementary protection. The decisions are organised by court, in reverse chronological order, from 2015 onwards. Decisions from 2012 (when the complementary protection regime commenced in Australia) to 2014 are archived on the Kaldor Centre website.

The list does not include all cases in which the complementary protection provisions have been considered. Rather, it focuses on cases that clarify a point of law directly relevant to the complementary protection provisions.

The list may also include cases in which the complementary protection provisions have not been directly considered,

			Ground 4: 'There was a constructive failure to exercise jurisdiction because the Assistant Minister was presented with a submission to consider exercising her s 501(1) discretion (the submission) that was misleading or that otherwise vitiated her exercise of discretion' (para 35). *Particulars of Ground 4:* 'The submission extracted from the sentencing remarks of his Honour Judge Gamble in DPP v [DEY16] ... in a manner which caused the Minister to be presented with half-truths' (para 35). *Ground 5:* 'The Assistant Minister failed to have regard to the legal and factual consequences of the decision' (para 35). *Particulars of Ground 5:* 'The Assistant Minister, in finding that any protection obligations owed in respect of the applicant had "no bearing" on his visa application because "any harm he may face in his country of nationality could only take place after he has been removed from Australia" (decision record, [16]), did not have regard to the fact that any such removal would breach international and domestic law (see Minister for Immigration and Citizenship v SZQRB [2013] FCAFC 33). The Assistant Minister, in giving weight to the fact that the applicant's complementary protection claims "can be considered separately" (decision record, [16]), did not

‘The immediate legal consequence of a decision to refuse an application for a visa is that an applicant in Australia, such as this applicant, is not given permission to remain. The present applicant does not have any other visa: cf s 501F.

			(para 91). 'The circumstances of this case are relevantly indistinguishable from those under consideration in NBMZ' (para 91). 'As already observed, numerous requests for Ministerial intervention had been previously made under s 48B and s 417. All had failed. The Reasons do not lend any support to an assumption that the Minister would determine to exercise the discretion under s 48B (or s 417) differently in the future. The possibility that there might be a further successful request for Ministerial intervention was, at best, speculation: cf NBMZ [2014] FCAFC 38; 220 FCR 1 at [4] (Allsop CJ and Katzmann J) and [129] (Buchanan J)' (para 94). 'Further, this case cannot be distinguished from NBMZ on the basis that the applicant had not been assessed as a person to whom Australia owed protection obligations: cf Jaffarie [2014] FCAFC 102; 226 FCR 505. In Jaffarie [2014] FCAFC 102; 226 FCR 505 at [128] White J explained that, in his view, there was a difference between the applicant in that case and NBMZ because "[a]lthough the present applicant has asserted that his life will be endangered if he is returned to Afghanistan, he has not sought a protection visa. Australia's obligation of non-refoulement has not been enlivened. In that circumstance, the legal consequence of the Minister's decision is more likely to be deportation rather than indefinite detention ...". Furthermore, his Honour found (at [129]) that the

applicant had not established that the Minister failed to have regard to the consequence of his decision. There is no mention of NBMZ in the joint judgment of Flick and Perram JJ in Jaffarie' (para 95).

'In the present case, however, the applicant was facing indefinite detention since the applicant claimed to satisfy the complementary protection criterion in s 36(2)(aa) of the Migration Act, a proposition enhanced by the fact that the applicant's son was assessed as being a person to whom Australia owes protection obligations on the basis of his father's claim; but the Minister repeatedly declined to act under s 48B to allow the applicant to make an application for a protection visa on that basis' (para 95).

'The decision of the Full Court in Ayoub [2015] FCAFC 83; 231 FCR 513 does not support the proposition that NBMZ should be distinguished from the present case. The Court in Ayoub held that the Minister had in fact considered the prospect of indefinite detention as a consequence of cancelling the applicant's visa and Australia's non-refoulement obligation: Ayoub at [17]. In addition, although the applicant claimed to fear for his and his family's safety if returned to Lebanon, he did not claim to be a refugee and had not applied for a protection visa: Ayoub at [16]. The Full Court held that indefinite detention was not a consequence of the decision under challenge in that case, since, by reason of s 501E,

			above, the applicant was barred from making a future application for a protection visa' (para 96). 'The Assistant Minister was required to take into account the legal consequences of her decision. In the circumstances of the applicant this included indefinite detention, as a result of ss 189, 196 and 198 of the Migration Act and Australia's obligations under the Refugees Convention, CAT and ICCPR. The Assistant Minister could not lawfully ignore this consideration: NBMZ at [17], [137]' (para 97). 'Jurisdictional error is therefore clearly shown' (para 98).
Minister for Immigration and Border Protection v SZVCH [2016] FCAFC 127 (Dowsett, Kenny, Siopis, Besanko and Mortimer JJ) (Successful)	14 September 2016	3, 4, 7-12, 27, 30-39, 44 and 144	This case relates to: whether 'having regard to *SZGIZ* [2013] FCAFC 71; 212 FCR 235 and the relevant provisions of the Migration Act, it was permissible (or necessary) for the delegate to consider the first respondent's claims not only by reference to the criterion in s 36(2)(aa), which was the basis for his second valid application [illegible]

an application for a protection visa on 1 March 2010. A delegate of the appellant Minister refused this application on 11 June 2010. The Refugee Review Tribunal (now the Administrative Appeals Tribunal) affirmed the delegate's decision not to grant SZVCH a protection visa on 27 June 2011' (para 7).

'On 18 March 2014, SZVCH made a second application for a protection visa. In an accompanying letter of the same date, his migration agent stated that this application was "expressly made in reliance only on s 36(2)(aa)"' (para 8).

'A delegate of the Minister refused this second application on 10 June 2014. The decision record showed that the delegate did not limit consideration of the visa applicant's claims to s 36(2)(aa) (the complementary protection criterion) but also considered these claims under s 36(2)(a) (the Refugees Convention criterion). The delegate was not satisfied that Australia had protection obligations' pursuant to s 36(2)(a) or s 36(2)(aa)' (para 9).

'The Tribunal affirmed this decision on 28 August 2014. In so doing the Tribunal expressl EMC P8 Augus1

hearing letter to the Tribunal dated 12 August 2014' (para 10).

'SZVCH successfully applied to the Federal Circuit Court for judicial review of this decision. The learned Federal Circuit Court judge held that: (1) the effect of the decision of the Full Court of this Court in *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71, 212 FCR 235 was that s 48A of the Migration Act prevented a visa applicant making a valid application "in respect of a particular criterion in circumstances where an application in respect of that criterion had already been determined" but that s 48A did not prevent a valid application "in respect of a particular criterion which was not the subject of a previous application": *SZVCH v Minster for Immigration & Anor* [2015] FCCA 2950 (PJ) at [24]. His Honour held that, in the circumstances of this case, SZVCH could therefore only make a valid application in respect of a claim under s 36(2)(aa) but that it was open to the Minister's delegate to consider this valid visa application by reference to both the criteria in s 36(2)(a) and (aa): PJ, [25]-26]. His Honour concluded that, since the Tribunal was bound to review a contested decision "in its entirety", then the Tribunal was obliged to consider the a

			primary judge erred in holding that the Tribunal was required or permitted to consider whether SZVCH satisfied not only the criterion in s 36(2)(aa) but also the criterion in s 36(2)(a). In a third (and expressly alternate) ground, the Minister affirmed that the primary judge erred "in failing to find that the visa application made by [SZVCH] on 18 March 2014 was invalid by reason of the operation of s. 48A" of the Migration Act' (para 12). 'The primary question on this appeal is whether, having regard to *SZGIZ* [2013] FCAFC 71; 212 FCR 235 and the relevant provisions of the Migration Act, it was permissible (or necessary) for the delegate to consider the first respondent's claims not only by reference to the criterion in s 36(2)(aa), which was the basis for his second valid application, but also by reference to the criterion in s 36(2)(a), which could not have supported a valid application. This is the question raised by the first and second grounds of the Minister's notice of appeal. The answer to this question, assuming *SZGIZ* to have been correctly decided, lies in the reasoning of the Full Court in that case and in the other relevant provisions of the Migration Act, such as ss 47 and 65(1)' (para 27).' In *SZGIZ* 'the Court concluded that the definition in s 48A(2) operated by reference to "the situation where an application is made for a visa which has as one of its criteria any of the four criteria set out in s 36(2)". Secondly, the Court also relied (at [36]) on the use of the word "further" in s 48A(1) in the phase "further application for a protection visa", which it considered

criterion in s 36(2)(aa), which was the basis for his second valid application, but also by reference to the

protection visa application was based. A second protection visa application based on s 36(2)(a) would

AQP15.29 280.9e(e)4 311f i			application for a protection visa, relying upon any relevant criteria upon which the applicant has not previously relied unsuccessfully, then s 48A would be deprived of much of its apparent effect. It would apply only if a potential applicant had already unsuccessfully relied upon all other criteria. It is clear that in *SZGIZ*, the Full Court did not so decide. Further, it is not easy to see how s 50 would operate, were the respondent's approach to be adopted' (para 3). 'Finally, I note that in *SZGIZ* the Full Court identified the need to construe the legislation, having regard to Australia's international obligations. Having regard to those obligations and common humanity, it seems unlikely that Parliament, in adopting the complementary protection criteria, intended that a person in Australia, who would face serious harm if deported from Australia, should be denied Australia's protection, merely because he or she had previously unsuccessfully claimed to be a refugee. However it seems likely that Parliament intended that s 48B would provide a sufficient mechanism for dealing with that problem' (para 4).

The applicant submitted six grounds of appeal (para 5).

Ground 1:
'The Federal Circuit Court should have found that the RRT failed to comply with s 425 of the Migration Act' (para 5).

Particulars of Ground 1:
'The Federal Circuit Court should have found that the Tribunal failed to give the appellant the opportunity to present information and arguments at a hearing concerning the critical issues of whether a family member would provide surety to enable him to be bailed in the event that he was charged for illegally departing Sri Lanka' (para 5).

Ground 2:
'The Federal Circuit Court erred in not finding that the

			account the PAM 3 Protection Visas complimentary protection guidelines when it made a finding on whether the treatment that the applicant would face if detained on return to Sri Lanka would be intentionally inflicted' (para 5). *Ground 3:* 'The Federal Circuit Court should have found that the RRT failed to take into account a relevant consideration' (para 5). *Particulars of Ground 3:* 'The applicant repeats the particulars to ground 2' (para 5). *Ground 4:* 'The Federal Circuit court should have found that the RRT erred in its understanding of the definition of degrading treatment or punishment and thereby failed to lawfully answer the question of whether the applicant was owed complimentary protection obligations' (para 5). *Particulars of Ground 4* 'degrading treatment or punishment is defined to mean an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable. The Tribunal found that the conditions which the applicant faced were a result of neglect and under-resourcing. That neglect and under resourcing was a result of the action or omission of the Sri Lankan Government, as was the impending action of placing the applicant in

			those conditions. The Federal Circuit Court should have found that the RRT erred as it should have considered whether the Sri Lankan Government's neglect and under resourcing of its prisons was deliberate so as to cause extreme humiliation of those incarcerated there' (para 5). *Ground 5* 'The Federal Circuit Court should have found that the RRT applied an incorrect test of whether the applicant was owed complimentary protection obligations as it did not address the question of whether the action of placing the applicant in detention would be with knowledge of conditions there which could cause extreme humiliation or pain and suffering' (para 5). *Particulars of Ground 5:* 'The federal Circuit Court should have found that the RRT erred in failing to address the question of whether or not intention to inflict extreme humiliation or pain and suffering could be inferred from the knowledge of the Sri Lankan Government of the conditions in its prisons when it took action in detaining him in those prisons on remand' (para 5). *Ground 6:* 'The Federal Circuit Court should have found that the RRT erred in its understanding of the definition of cruel or inhuman treatment or punishment and thereby applied an incorrect test of whether the applicant was owed complimentary protection obligations' (para 5).

			what would happen to the applicant if returned to Sri Lanka, that he would be granted bail after a short time on the basis that a family member would be a guarantor. Pertinent extracts from the proceedings at the hearing before the Tribunal have been placed in evidence on the application. These disclose that, at a general level of abstraction, the Tribunal made reference both on 8 December 2014 and 19 February 2015 to the prospect of the returnees being held on remand for a short period of time before being brought back before a court where they would be released on bail' (para 7). 'There is no reference on either occasion to the particularity of "released on bail" on the basis that a family member would stand as guarantor. The Tribunal did make reference on the second occasion, ie. 19 February 2015, to a then very recently released Department of Foreign Affairs and Trade Country Report in respect of Sri Lanka dated 16 February 2015 in which one finds at para 528, a sentence which says: Sometimes returnees then need to wait until a family member comes to court to collect them. The Tribunal also made reference to the requirement in most cases for a family member to act as guarantor. So it is not a matter where the Tribunal has made a finding in the absence of information' (para 8). 'Rather the point is that the precision of most cases has been translated into what would happen *in this* case. The short point for the applicant is that, it thereby became personal. Even though it was conceded that the applicant's then agent had had possession of the

			Country Report and was offered an opportunity to make submissions after the 19 February 2015 hearing, that was an unfocused opportunity and unfocused in the sense that the Tribunal did not make any reference to the finding subsequently made that *this* applicant would have bail granted upon a family member standing as guarantor. The argument then is, that this descended below that level of general abstraction, of country information in respect of which there was no obligation to provide an opportunity to be heard and, instead, descended into the intimate personal of what would happen in relation to the applicant' (para 9). The Court held that there was an arguable case raised in respect of ground one (para 9). 'The other grounds in one way or another, centre around whether or not a guideline was observed by the Tribunal' (para 10). 'At para 15 of attachment 1 to the Tribunal's Reasons, there is a generic reference to s 499 of the Act and to Ministerial Direction No. 56 made under that section, which requires the Tribunal to take account of policy guidelines issued by the Department, being PAM3: Refugee and humanitarian – Complementary Protection Guidelines, and PAM3: Refugee and humanitarian – Refugee Law Guidelines. Working one's way through that guideline, one comes to proposition that the Tribunal ought to have regard to such of the international jurisprudence concerning the Refugee Convention, as is pertinent to particular issues raised on

[2016] FCA 363			'The appellant alleges that the Federal Circuit Court erred in rejecting the second ground of review advanced before that Court, namely that the Tribunal had denied the appellant procedural fairness and had thereby committed jurisdictional error' (para 37). *Consideration of Ground 1:* The Court held that 'Federal Circuit Court Judge was correct in determining that there had been no breach of procedural fairness in the proceedings before the Tribunal. Ground One of this appeal must therefore fail' (para 42). *Ground 2:* 'Ground Two alleges that the Federal Circuit Court erred in failing to find that the Tribunal committed jurisdictional error in making findings concerning the effectiveness of domestic violence laws, practices and policies in Vietnam that were, to adopt the phrase preferred by the appellant's Counsel, not reasonably open on the materials before it' (para 45). *Consideration of Ground 2:* 'The Tribunal's conclusions about the protection afforded by the Vietnamese authorities to victims of violence were expressed to have been based wholly on the sources of country information referred to in its reasons' (para 66).

			'The Tribunal's statement at [62] of its reasons that "the reports are varied on [the law's] effectiveness" has no support in the country information materials the Tribunal considered: none of the information contained any statement or opinion to the effect that the laws were effectively implemented by the Vietnamese authorities. Nor was there contained in the country information any statistics from which the Tribunal could independently and indirectly infer that domestic violence laws in Vietnam were effectively implemented. The country information relied upon by the Tribunal states that the Vietnamese Government did not publish statistics recording the incidence of arrest, prosecution and conviction of perpetrators' (para 86). 'Generally speaking, it may be open to the Minister (or, on review, the Tribunal) to cherry pick from among various sources of country information so as to form, by its own evaluation of the selected material, its own conclusions of fact. It may also be accepted that, as a general rule, an administrative decision that involves the weighing and evaluation of countervailing considerations is not a decision amenable to interference by a Court on judicial review merely because the Court might evaluate the considerations differently or accord different considerations more or less weight than that accorded by the Tribunal' (para 87). 'However, the material before the Tribunal did not contain conflicting statements as to the effectiveness of

domestic violence laws in Vietnam so that the

‘The Tribunal stated to the appellant, in the course of its hearing, that there was “no evidence” that the Vietnamese police do not act on reports of domestic violence. The conclusion ultimately reached by the Tribunal indicates that it reasoned from that premise to a conclusion that the Vietnamese authorities could and would act on reports of domestic violence (including threats of domestic violence) that might be made by the appellant. It may well have been open to the Tribunal to

an applicant for a protection visa has a well-founded fear of persecution for the purposes of the Convention as required by s 36(2)(a) of the Act' (para 96).

'The phrase "real risk" necessarily invo ` tc ¢ p

Vietnamese law in the appellant's particular circumstances' (para 99).

In conclusion, the Court held that 'the Federal Circuit Court Judge erred in rejecting the appellant's submissions as being nothing more than an attack on the merits of the Tribunal's decision. There is appealable error in the Federal Circuit Court's failure to identify that the country information referred to in the Tribunal's reasons was not reasonably capable of supporting its findings on factual matters critical to the

‘The applicant is a citizen of Sri Lanka and is of Tamil ethnicity. He is from Udappu, a small Tamil village in a predominantly Sinhalese district in the North Western Province of Sri Lanka. He worked as a fisherman with his father before his departure for Australia’ (para 4).

The Tribunal found that the applicant did not meet the criteria of s.36(2)(a) of the Act (paras 17-23).

The Tribunal also found that ‘the applicant was not entitled to complementary protection.

Federal Circuit Court which appears to completely misunderstand and misstate the findings of the Tribunal on the credibility of the applicant: see [29] of the Federal Circuit Court reasons. The Tribunal found the applicant to be credible and accepted in all substantive matters the account he gave to the Tribunal of what had happened to him at the hands of the Sri Lankan Navy officers. Paragraph [29] assumes the opposite to be the fact. What is then said by the Federal Circuit Court at [30] of its reasons seems to proceed from the misstatement in [29]. At the hearing, the Minister's counsel, understandably, could offer no explanation for these paragraphs in the Federal Circuit Court reasons' (para 35).

'If that is, mistakenly, how the Federal Circuit Court considered the Tribunal approached the applicant's claims, then its misapprehension may have affected its consideration of his entire judicial review claim. While, as the Minister's counsel submitted in oral argument, this might technically mean the correct order is to remit the judicial review to the Federal Circuit Court to determine again, the most cost and resource effective

applicant's Art 1A claim. I accept, as the Minister's counsel developed in oral submissions, that there are authorities of this Court which suggest that in a particular circumstance, the overlap between a person's claim under Art 1A of the Refugees Convention, and her or his claim to complementary protection may be so complete that disposal of the former means the latter can be disposed of with only brief reasons, but whether this is such a case is a matter to be determined in the appeal' (para 36).

Third, 'it is arguable that the Tribunal's approach to the

			the Tribunal already had (and referred to), then the additional press articles were capable of affecting the strength of the applicant's claims about the targeting of Tamil fishermen by the Sri Lankan Navy, and thus were capable of being material to the Tribunal's consideration of the risks faced by the applicant, given that it accepted he would return to his traditional fishing occupation' (para 37). 'There will be a referral for pro bono legal assistance under r 4.12 of the Federal Court Rules 2011 (Cth) in favour of the applicant so that he can be properly advised and represented on the appeal, and so that the Court can have the benefit of full legal argument by both parties' (para 39).

Minister's delegate not to grant a protection visa. In the Tribunal, all three decisions were made by the same Tribunal member; and in the FCCA, all three applications were determined by the same judge' (para 1).

'Each of the current appellants appealed from the relevant judgment of the FCCA' and 'the two grounds of appeal were the same in each appeal' (para 18)

Ground 1:

'The primary judge erred in law in holding that the expression "intentionally inflicted" in the definitions of "

apply") had not been overtaken by the Full Federal Court's decision in *SZQRB* [2013] FCAFC 33; (2013) 210 FCR 505 at [70], [99], [313]; alternatively, the

reference to “purpose” or “reason” in the definition of “cruel or inhuman treatment or punishment”. Reference to the two definitions shows that they each depend on an identical concept — an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted; but that to constitute “torture” there is an additional element — the act or omission must either occur for a purpose mentioned in paragraphs (a) to (d) or a reason described in paragraph (e) of the definition of “torture”’ (para 42).

			element confines the scope of the definition of "torture", but does not change the meaning of the words "intentionally inflicted"' (para 43). 'Intention at common law' – 'A substantial part of the appellants' argument relied on what they submitted was the common law concept of "intention", which they submitted supported their argument that the expression "intentionally inflicted" in the relevant definitions in s 5(1) of the Migration Act should be construed to require something less than actual subjective intent' (para 44). 'There are, as the primary judge noted, difficulties in drawing on cases of criminal responsibility to give meaning to an expression that forms part of a definition in the complementary protection provisions of the Migration Act. Plainly enough, the statutory context and purposes of the law are entirely different' (para 45). 'Bearing these difficulties in mind, it is nevertheless instructive to consider the discussions of intent in the criminal law to which the Court was referred' (para 46). 'It seems to us that *R v Ping* is persuasive because it concerned the interpretation of relevantly the same concept as the relevant definitions in s 5(1) of the Migration Act (the intentional infliction of severe pain and suffering), albeit in a different context (the prosecution of an accused under a State criminal statute). The Court's reasons were not only consistent with the authorities but, more particularly, as the Court itself said, reflected the natural and ordinary meaning of

			the words of the legislation, which are the same in this case. The natural and ordinary meaning of intentional infliction is actual subjective intention by the actor to bring about the victims' pain and suffering by the actor's conduct. Cf. *Tillman v Attorney-General (NSW)* [2007] NSWCA 327; 70 NSWLR 448 at [106] and *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* [2008] HCA 5; 233 CLR 259 at [31]' (para 59). 'Relevance of international jurisprudence' – 'We do not accept the appellants' contention that the jurisprudence concerning Art 7 of the ICCPR or equivalent Art 3 of the European Convention assists in resolving the meaning of the contested expressions in the relevant definitions in s 5(1) of the Migration Act' (para 60). 'The general principle of construction that courts construe statutory provisions implementing Australia's obligations under a treaty consistently with that treaty is therefore of limited application in the context of the complementary protection provisions of the Migration Act. In particular, that principle cannot assist in the construction of the intention element in the relevant definitions in s 5(1) since that element does not exist in the ICCPR concepts of "cruel, inhuman or degrading treatment or punishment": see Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (2nd revised ed, NP Engel, Publisher, 2005) at 161. We are not therefore persuaded that the jurisprudence on Art 7 of the ICCPR or Art 3 of the European Convention is relevant to this issue of

subject to the qualification that where any applicable provisions of the complementary protection regime adopt the standards of one of those treaties, then it will be necessary to consider the relevant treaty provisions and any relevant jurisprudence: see, for example, paragraph (e) of the definition of “torture”, paragraphs (c) and (d) of the definition of “cruel or inhuman treatment or punishment”, and paragraphs

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			and Ethnic Affairs (1997) 190 CLR 225' (para 71). 'McHugh J also held in *Applicant A* that persecutory conduct could not of itself define a particular social group, saying (at 263) that: [P]ersons who seek to fall within the definition of "refugee" in Art 1A(2) of the Convention must demonstrate that the form of persecution that they fear is not a defining characteristic of the "particular social group" of which they claim membership. If it were otherwise, Art 1A(2) would be rendered illogical and nonsensical. It would mean that persons who had a well-founded fear of persecution were members of a particular social group because they feared persecution. The only persecution that is relevant is persecution for reasons of membership of a group which means that the group must exist independently of, and not be defined by, the persecution' (para 72). 'The appellants' senior counsel sought to distinguish *Applicant A* 190 CLR 225 by submitting that in the present appeal the appellants did not fear the penalty for illegal departure under the Sri Lankan legislation, but they feared the processes relating to the illegal departure – namely, the prison conditions when in remand. Also, the appellants' senior counsel posited that persons who sought to leave Sri Lanka illegally might have other things in common and be perceived as part of a group apart from the fear of being charged. The reasons of the Tribunal, however, did not provide any support for this latter contention' (para 73). 'In the present context, a group described as "persons

		who left Sri Lanka illegally" is relevant only because the members of the group are liable to prosecution under Sri Lanka's *Immigrants and Emigrants Act* and therefore at risk of being held in prison on remand. The primary judge rejected (at [65]) a related submission, on the basis that "given the Tribunal's finding that the Immigrants and Emigrants Act is applied to all persons who depart Sri Lanka illegally, it cannot be said that the 'essential and significant reason' for the enforcement of the statute against the applicant would be a Convention reason"' (para 74). 'The appellants' attempt to distinguish between fear of the penalty and fear of related processes does not remove the difficulties identified by Dawson and McHugh JJ in *Applicant A* 190 CLR 225. The Tribunal's finding (at [73]) that the Sri Lankan legislation "is being applied to all persons who have departed Sri Lanka illegally ... regardless of ethnicity" meant that the group of "persons who left Sri Lanka illegally" whose fear arose only from processes related to the enforcement of that legislation was not capable of constituting a particular social group. The Tribunal did not find that the supposed social group had any existence independent of the fear of harm, and nothing in [85] and [86] of the Tribunal's reasons provides any support for the appellants' contention. If the appellants feared the processes related to enforcement of the law, they did so because of the non-discriminatory enforcement of generally applicable legislation; and this fear of persecution did not arise from a common characteristic having an existence independent of the

enforcement of the law' (para 75).

'In these circumstances, *Minister for Immigration and Citizenship v SZNWC* [2010] FCAFC 157; (2010) 190 FCR 23

persons who have been refused protection visas, they will (under Sri Lankan law and by Sri Lankan authorities) be arrested and then either “tortured”, or otherwise subjected to significant harm in the form of cruel or inhuman treatment or punishment, or in the form of degrading treatment or punishment, because they will be put in a Sri Lankan prison. Those consequences will follow, it was argued, from the application and operation of the Immigrants and Emigrants Act of Sri Lanka, which makes illegal

			notions. In my view, this argument does not arise for consideration on the facts of the present case and it need not be addressed in this case. In the present case, the argument could not succeed on the factual findings made by the RRT, whatever construction is adopted' (para 98). 'As I read the decisions of the RRT (constituted by the same member in each case), the critical findings were that any potential "anxiety and discomfort" ([79] in the earlier extract) did not amount to a level of harm which met the physical or mental elements of the definitions and so could not be regarded as intentional conduct which satisfied the definitions. In my view, it would be better to consider the second aspect in a case where it was potentially decisive, not indeterminative' (para 99). 'The appellants' arguments of construction depended very substantially upon an invitation to construe the requirements of s 36(2)(aa) in a way which is "consistent with" international law and, in particular, the International Covenant on Civil and Political Rights ("the ICCPR"). In *Minister for Immigration and Citizenship v MZYYL* [2012] FCAFC 147; (2012) 207 FCR 211, a Full Court said that although s 36(2)(aa) establishes criteria "that engage" Australia's obligations under the ICCPR, the requirements in s 36(2)(aa) (unlike s 36(2)(a)) are self-contained' (para 101). 'Secondly, in any search for a proper construction the judgment of the Queensland Court of Appeal in *R v Ping* [2005] QCA 472; [2006] 2 Qd R 69 would

command attention and respect. That was a criminal

Queensland Criminal Code involves rejection of the foundation of the appellants' construction arguments in the present case. Whether the same approach should be adopted to the construction of s 36(2)(aa) of the Act is an important question. It need not be answered at present, but it is noteworthy that *R v Ping* was referred to in *Zaburoni*

application has been finally determined' (para 22).

'The proceedings below were adjourned at the appellant's request pending delivery by the Full Court of its decision in *SZSSJ*. In that case, the Full Court ultimately upheld the appeal, holding that s 197C (which came into force on 16 December 2014) did not operate retrospectively with the result that, once the appellant had made his claim for *non-refoulement*, he had an accrued right within the meaning of s 7(2) of the Acts Interpretation Act 1901 (Cth). As a consequence, that right could not be removed until any *non-refoulement*3.99 Tm0 g[( )] TJETQq444.29 81.144 280.9

question in applying country information

‘Notwithstanding the concession with respect to ground one, the first respondent rightly submitted that that did not necessarily dispose of the appeal. First, s 197C played no part in the assessor’s reasons. Secondly, the first respondent did not rely upon s 197C before the Court below but rather submitted that there was no error made in the reasons given by the assessor which would vitiate the assessment and provide a basis for the grant

			with a high risk profile assessor" was clearly open to the assessor on the evidence and no legal error is apparent. As a result, while the appellant took issue at the hearing with the opinions expressed in the UNHCR Guidelines and the DFAT report and considered that persons outside those categories were still at risk of persecution or significant harm, this Court has no jurisdiction to interfere with the assessor's findings as to the weight to be given to that evidence; nor does this Court have jurisdiction to consider whether, having regard to the evidence, there was a real chance that the appellant might suffer persecution for a Refugees Convention reason or significant harm engaging Australia's complementary protection obligations if returned to Sri Lanka' (para 34). 'It follows that ground two of the notice of appeal cannot succeed' (para 35). 'The appellant sought an adjournment on the ground that the appeal raised the same issue as to the construction of s 197C of the Act as the appeal from the decision in *SZSSJ* is listed before the High Court on 7 June 2016. The first respondent opposed the grant of an adjournment' (para 36). 'First, the adjournment was sought shortly before the appeal was listed for hearing, despite the High Court having granted special leave to appeal in *SZSSJ* on 11 March 2016. Secondly and more importantly, it will be recalled that ground one of the notice of appeal is that the primary judge erred in his construction of s 197C of

			the Act in holding that that provision operated retrospectively to the detriment of the appellant (s 197C is set out at [21] above). Despite the grant of special leave to appeal in *SZSSJ*, the first respondent was content for this appeal to proceed on the assumption that the decision of the Full Court was correct in holding that s 197C did not operate retrospectively. No issue was therefore taken by the first respondent with the Court's jurisdiction to determine these proceedings. As the first respondent stated in an email to the Registry in response to the foreshadowed adjournment application and confirmed in oral submissions, the first respondent accepts that the Court has jurisdiction to review the subject ITOA as a consequence of which the appellant would not be assisted by holding the matter over pending the outcome of the High Court proceedings in *SZSSJ*. In these circumstances, I did not consider that it was in the interests of justice to grant the adjournment' (para 38). 'For these reasons, the appeal must be dismissed with the appellant to pay the first respondent's costs as agreed or taxed' (para 42).
ABAR15 v Minister for Immigration and Border Protection [2016] FCA 363 (Charlesworth J) (Successful)	13 April 2016	1, 17-18, 22, 27-31, 34-36 and 38	This case relates to: the operation of an interlocutory injunction to restrain the deportation of an applicant before the final determination of their complementary protection claim. The applicant was a citizen of Viet Nam (para 1). 'She applied for an interlocutory injunction restraining

			the first respondent from deporting her to Viet Nam pending the determination of her appeal' (para 1). 'The respondent opposed the making of any order that would delay the applicant's removal from Australia for any length of time' (para 17). In order to grant of an interlocutory injunction 'the Court must be satisfied that there is a serious question to be tried and that the balance of convenience favours the grant: *Australian Broadcasting Authority v O'Neill* [2006] HCA 46; (2006) 227 CLR 57 (*O'Neill*)' (para 18). 'The applicant claims to be a person who is at real risk of suffering significant harm if she is returned to Vietnam. The Tribunal held, and the respondent did not contest before me, that she is in fact the victim of domestic violence and that she does in fact fear for her safety' (para 22). 'Whether she is in fact a person who is at real risk of serious harm is a question that might yet be decided in her favour should she succeed on her appeal. If an injunction is not granted, the prejudice that may be suffered by the applicant is potentially grave. It far outweighs the administrative inconvenience that might be suffered by the respondent if an injunction is not granted' (para 22). The applicant's counsel 'referred to the fact that evidence was adduced before the Federal Circuit Court

interrelated: where the balance of convenience strongly

interlocutory injunction pending the outcome of the appeal can presently be demonstrated: rule 1.32 of the Federal Court Rules 2011' (para 34).

'Such an order ensures that the Court's processes are not frustrated by the short notice given to the applicant of her impending removal and the consequential short notice afforded to her in arranging legal representation and preparing for the hearing of her application for interlocutory relief' (para 34).

'This is not to ignore the express words of s 198(6) of the Act which impose an obligation to remove from Australia persons falling within its purview. Rather, it is to recognise that the appeal (or any subsequent proceedings) may well determine that the applicant is no such person. If the decision of the Tribunal is found to involve jurisdictional error, then it is to be regarded as no decision at all: *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; (2002) 209 CLR 597 at 614, [51]. It would follow in that event that the applicant's application for a Protection Visa is not an application that has been finally determined within the meaning of subs 198(6) and she is not "liable" to be removed as stated in the Removal Notice' (para 35).

'The respondent opposes the interlocutorypplicȧ 4

			'This appeal is brought in the Court's appellate jurisdiction. The Court has in previous matters granted injunctions restraining the removal of non-citizens pursuant to s 198(6) of the Act pending the determination of an appeal: *SZVXC v Minister for Immigration and Border Protection* [2015] FCA 1041; *AEF15*' (para 38).
SZUYK v Minister for Immigration and Border Protection [2016] FCA 216 (Farrell J) (Unsuccessful)	7 March 2016	2, 25, 32-37 and 39	This case relates to: whether the Tribunal adequately considered the applicant's complementary protection claim. The appellant was a citizen of Bangladesh (para 2). The appellant submitted one ground of appeal: 'His Honour erred in finding that the Tribunal findings with respect to the Appellant's claims to fear returning to Bangladesh because he is Hindu were dispositive of the Appellant's claims' (para 25). The particulars of the ground of appeal were that 'His Honour erred in paragraph [45] of the decision in holding that the Appellant's response to country information put to him during the hearing meant that the Tribunal did not have to give independent consideration of the Appellant's claim in reference to

Refugee Convention (even though fear of persecution based on political affiliation would have such a nexus)' (para 32).

The Court rejected 'the submission that taking into account whether there are political or economic dimensions in assessing the risk of persecution to a person because they are Hindu was to "bind up" the assessment under the complementary protection criterion with Convention-related thinking' (para 32).

The Court did not accept that 'the Tribunal asked itself the wrong question' (para 32).

'On a plain reading of the Decision Record at [53], the appellant responded to the coun(e)4(poli)-3(ti)-3(c)4(a)4(

any claims that could not be disposed of by reference to the refugee criterion alone" and "neither did he advance any claim that required consideration pursuant to the complementary protection criterion' (para 35).

'In light of the detail of the appellant's claims, the country information and the findings of the Full Court in

SZSLG v Minister for Immigration and Border Protection [2016] FCA 207 (Logan J) (Unsuccessful)	26 February 2016	1, 11, 19, 21-

The appellant ‘emphatically disagrees with the conclusions reached by the Tribunal on the subject of relocation’ (para 21).

into what are just matters of relative factual merit or, related to that, credibility. If there is some basis rationally and logically expressed for a particular factual conclusion, it is for this Court to observe the limits of judicial power in this case and not interfere with evaluative factual conclusions reached by the Tribunal for all of the reasons expressed by Sir Gerard Brennan in *Attorney-General (NSW) v Quin* [1990] HCA 21; (1990) 170 CLR 1 at 35-36’ !

			Tribunal did address, correctly, the relocation issue which was necessary for it to address, having regard to its conclusion about the appellant facing significant harm as defined' (para 28). In concluding, the Court dismissed both grounds of the appeal (para 30).
AAH15 v Minister for Immigration and Border Protection [2016] FCA 104 (Katzmann J) (Unsuccessful)	18 February 2016	1, 28, 53, 58, 70-71, 78, 82-85	This case relates to: the scope of the application of s.36(2)(aa) of the Act The applicant was a citizen of Sri Lanka (para 1). The applicant submitted four grounds of appeal. Only ground 4 was relevant to the complementary protection provisions. Ground 4 'involved a challenge to the Tribunal's reasoning at [44] concerning whether, for the purposes of s 36(2)(aa) of the Act, there were substantial grounds for believing that, as a necessary and foreseeable consequence of the appellant's removal from Australia to Sri Lanka there is a real risk that the appellant would suffer significant harm (as defined in sub-s (2A)' (para 71). 'For the same reasons as it rejected the claims in relation to s 36(2)(a), the Tribunal rejected the appellant's claim that there were substantial grounds for believing that, as a necessary and foreseeable consequence of the appellant being removed from Australia to Sri Lanka, there was a real risk that he

			would suffer significant harm because of his Tamil race, because of any imputation of pro-LTTE or anti-government political opinions, because he is a young Tamil male, or because he sought asylum in Australia. Specifically, it said (at [44]) that it was "not satisfied that there is evidence of mistreatment" of persons in the position in which the appellant was likely to find himself on his return, such that it amounts to torture, arbitrary deprivation of life, or intentional mistreatment involving torture or cruel or inhuman treatment or punishment or the extreme humiliation required for an act or omission to be degrading treatment or punishment amounting to significant harm as contemplated by s.36(2A) ...' (para 28). The particulars of ground 4 detailed that the 'Tribunal erred by failing to consider whether, as a result of his illegal departure from Sri Lanka, harm would be intentionally inflicted upon him during his consequent detention' (para 71). 'The appellant submitted that the absence of express findings as to whether or not gaolers who lock prisoners in cells know that because of the conditions in the cell "pain or suffering may result" shows that the Tribunal committed jurisdictional error, presumably because the Tribunal might infer intention to cause pain or suffering from knowledge that pain or suffering might ensue' (para 78). 'But mere pain or suffering would not have been enough to satisfy the definition of significant harm in

any event. Each of the circumstances listed in s 36(2A) which would satisfy the definition of significant harm requires more' (para 78).

AMA15 v Minister for			knowingly inflicted' (para 82). 'Having regard to the Tribunal's conclusions in [44]', the Court did not accept that 'there is any sound basis to argue that the Tribunal failed to give consideration to these matters' (para 83). The Tribunal did not accept 'the underlying premise of the submission that there was an obligation on the Tribunal in the circumstances of this case to consider whether an intention to inflict severe pain or suffering should be inferred' (para 83). Leave to argue ground 4 was refused and grounds 1, 2 and 3 were dismissed (paras 53, 58, 70, 84) In concluding, the Court dismissed the appeal with costs (para 85).

2. ‘RRT has denied me procedural fairness by failing to provide adequate reasons for the finding of a fact’.
3. ‘Tribunal unfairly refused to offer me protection saying my case was not covered by the Convention’.
4. ‘The Tribunal under evaluated the risk of serious harm that I will face if going back to China’ (para 19).

decision to the extent it included findings on matters that were not relevant to the criteria upon which the visa the subject of the valid application could be granted. The Tribunal exercised the powers and discretions conferred on it by the Act, as it was entitled to do. It considered the delegate's decision in that context (para 48).

The Court noted 'that the Tribunal recorded in its decision at [8] and [9] that it told the appellant that it was proceeding on the basis that it would only consider his claims pursuant to s 36(2)(aa). To the extent it differed from the approach of the delegate, the appellant was on notice of that. In those circumstances it cannot be said that there was in that regard any breach of s 425 of the Act' (para 49).

The Court accepted 'the submission of the Minister that Driver J erred in his finding in SZVCH in relation to this issue' (para 50).

The Court held that the 'appellant should be granted leave to raise grounds 3 and 4. The issues that arise for consideration in relation to these grounds in light of the recent decision of Driver J including whether, as the Minister submits, Driver J erred in his findings in SZVCH makes those grounds arguable. They do not lack merit. There is no prejudice to the Minister in permitting the grounds to be agitated. However, having

			relied for his s 36(2)(a) claim' (para 32). 'It is also correct that the appellant's migration agent had made submissions after the Tribunal hearing about the economic difficulties for the appellant in returning to Sri Lanka, contending it would be very difficult for him to subsist, and to do so safely. However these submissions were clearly directed to the terms of s 91R (as it then was) and the appellant's s 36(2)(a) Convention claim' (para 33). 'Even if the Tribunal had not couched its analysis in the first and last sentences of [115] by reference to Convention attributes, the first matter on which the appellant has relied would not have been germane to the Tribunal's consideration of the criteria in s 36(2)(aa)' (para 36). 'The confusion in the expression in [115], especially in the first and last sentence, stems in my opinion from the kind of claims the Tribunal was considering under this subheading. They were self-evidently claims relating to s 36(2)(a) because they revolved around the appellant's Tamil ethnicity and a political opinion (being pro-LTTE) which he claimed would be imputed to him. It is not at all clear why or how the Tribunal considered it needed to examine these claims against s 36(2)(aa)' (para 38). 'Perhaps the better way to read [115], and this is a generous reading in the Tribunal's favour in the face of reasons which, it must be said, are lacking in clarity, is

			that it was asking itself two questions. First, whether the discrimination of which the appellant spoke in his evidence met the threshold of s 36(2A), and the Tribunal decided it did not. Second, whether there were substantial grounds to believe the appellant would be attacked again as he was in 2011, and the Tribunal decided it was not satisfied he would be, although it had accepted this attack did meet the threshold in s 36(2A)' (para 38). In concluding, the Court dismissed the appeal (para 51).
AZABF v Minister for Immigration and Border Protection [2015] FCAFC 174 (North ACJ, Collier and Flick JJ) (Unsuccessful)	4 December 2015	3, 22, 26-27 and 30	This case relates to: the scope of the application of s.36(2)(aa). The applicant was a citizen of Albania (para 3). The appellant submitted the following: - 'The appellant lodged his second application for a protection visa on 30 May 2014, and sought to rely upon paragraph 36(2)(aa) of the Act which was not in force at the time of his first application'. - 'Accordingly, the appellant sought to rely upon a different criterion to that on which he relied in his first application for a protection visa'. - 'The new s 48A(1C) clearly prohibits further applications for protection visas in circumstances where a claim for "complementary protection" could have been made, but was not'. - 'In this case the appellant could not have made an application for a protection visa based on the complementary protection provisions at the time of his first application for a protection visa. The statutory

The applicant submitted two grounds of appeal.

Ground 1:

whether there is a real risk that the non-citizen will suffer significant harm if the person concerned were returned to her or his country of nationality – a question which is of its nature directed towards what might

‘The appellant also submits that the primary judge erred in finding in the context of ground 3 of the judicial review application alleging error in the Tribunal’s findings on the complementary protection claim’ that ‘It is clear that the Tribunal made findings that that law and the detention and questioning that would follow would be as a result of a non-discriminatory enforcement of the law, and that it was a law of general application and was not enforced for any Convention-based reason. In those circumstances, ground 3 is

			(para 44). In concluding, the Court dismissed the appeal with costs (para 45).
Ayoub v Minister for Immigration and Border Protection [2015] FCAFC 83 Flick, Griffiths and Perry JJ (Unsuccessful)	12 June 2015	1-4, 6, 8, 11, 15-16, 20, 27-29 and 57	This case relates to: whether the Minister must give consideration to 'the issue of *non-refoulement*' and 'the prospect of indefinite detention' when exercising the discretion conferred by s 501 of the Act (to cancel a visa) The applicant, Mr Ayoub, was a citizen of Lebanon (para 1).

			Minister for Immigration and Border Protection [2015] FCA 24, (2015) 144 ALD 342' (as detailed below at pages 30 to 33 of this table) (para 6). The applicant appealed the decision of Federal Court to the Full Federal Court on the following grounds: 1. 'the primary Judge erred in finding that the Minister was not obliged to give the issue of *non-refoulement* any consideration and in finding that the prospect of indefinite detention need not be considered', 2. 'the Minister failed properly to take into account a "mandatory relevant consideration, being the risk of future harm to the Australian community if the appellant were to remain in Australia"', and 3. 'the Minister's consideration of the risk of future harm to the Australian community was affected by irrationality and/or unreasonableness' (para 8). All three grounds were rejected by the Court (para 8). The Court's consideration of grounds 2 and 3 are not relevant to an analysis of Australia's *non-refoulement* obligations. *Consideration of Ground 1*

The substance of ground 1 was ‘that when exercising the discretion conferred by s 501 of the Migration Act the Minister must give consideration to: “...the issue of *non-refoulement*”; and “...the prospect of indefinite detention...”’ (para 11).

The Court ‘noted that the concept of *non-refoulement* has its origins, not in s 501 of the

The Court held that ‘a consideration by the Minister in the present case of Australia’s “*non-refoulement* obligations” may not have been a consideration of matters irrelevant to the decision to be made. But, having pursued that line of inquiry to some extent, his consideration was not thereafter to be elevated to the position that he was required to do more than properly consider the claims being made and the factual material being relied upon by Mr Ayoub. In the present proceeding, the Minister gave genuine consideration to the claims being made and was not required to undertake further inquiries or solicit further information such that he could make a decision as to whether the return of Mr Ayoub to Lebanon – assuming that decision were to be taken – would be in breach of Australia’s obligations’ (para 27).

protection visa' (para 28).

As to whether 'an identification of those tasks which remained to be discharged if a "complete" analysis of Australia's "*non-refoulement* obligations" was to be undertaken, the Appellant was unable to identify any information he had advanced for consideration which was not taken into account. And, short of requiring the Minister to make further inquiries and possibly to make further findings of fact by reference to materials not presently placed before him, the Minister had "completed" the tasks presently required of him' (para 29).

'For this Court to require the Minister to do more would hav

(a) ‘the Minister applied the wrong test in considering Australia’s non-refoulement obligations under s 22(3)(b)’ of the *Extradition Act 1988* (Cth) (“Extradition Act”)’; and

(b) ‘the determination that Mr Francuziak should be surrendered was sufficiently irrational, capricious or so unreasonable that no reasonable person could have made it so as to be an unreasonable abuse of power in the relevant sense’ (para 1).

Ground 1 - Application of the wrong test

The applicant argued that ‘circumstances where the Minister was advised of “reports of o þ ẋ ɾ

so’ (para 23).

It was ‘

			of corrupt prison officials' (para 43). The Court held 'the Departmental Advice correctly and fairly summarised Mr Francuziak's contentions, correctly identified the test to be applied' under s.22(3)(b) of the Extradition Act and 'considered the proper question, which was whether there was evidence of institutionalised conduct constituting torture in Poland' (para 43). The Court held that the 'Department did not err in suggesting that it was open for the Minister to be satisfied that Mr Francuziak would not be subjected to torture of the nature falling within the scope of the CAT were he surrendered to Poland' (para 45). Therefore, ground 1 was dismissed (para 46). *Ground 2 - Legal unreasonableness or irrationality* Mr Francuziak accepted 'that the Departmental Advice acknowledged that various reports pointed to instances of ill-treatment of inmates by police officers and prison guards' (para 49). The applicant argued, 'however, that no assurance had been given by Poland that it had eradicated such behaviour or that it could ensure that Mr Francuziak would not be incarcerated in an institution where such conduct had occurred' (para 49).

‘In relation to the delay issue, Mr Francuziak submitted to the Minister that the Polish parole system operated so slowly that applications to be considered for parole could be pending for years’ (para 50).

‘Mr Francuziak submitted that the time which he had spent in custody in Poland together with his time on remand in Australia constituted more than half of the length of the sentence to be served in Poland’ (para 51).

‘The Department Advice suggested that those matters did not constitute a sufficiently compelling basis to consider that his extradition would be totally incompatible with huma-0047000c26.14 280.9s..14g-900

			totally incompatible with humanitarian considerations.' The Court held that 'Mr Francuziak's submissions were fairly before the Minister' and 'there was also detailed consideration as to why it was open to the Minister to be satisfied that Mr Francuziak's circumstances were not exceptional in the Art 3(4) sense and his circumstances were not incompatible with humanitarian considerations' (para 68). Therefore, the Court held that 'it is a reasonable inference, having regard to the detailed consideration in the Departmental Advice that, although Mr Francuziak's submissions were brought to the Minister's attention, it did not appear to Australia that the total incompatibility referred to in Art 3(4) of the Treaty was established' (para 68). 'In those circumstances there is no obligation whatsoever for Australia to seek, or for Poland to give, the assurances identified by Mr Francuziak in his submissions. Even mutual consultation, if it does occur, does not dictate an obligation to give assurances and undertakings' (para 68). The Court held that there was 'nothing raised in the matters cited, taken alone or considered together with the other matters drawn to the Minister's attention, that are 'exceptional' (para 68). 'In relation to Mr Francuziak's submissions as to assurances regarding time in custody, the extradition

1. ‘The primary judge erred in holding at [28]-[33] of the judgment below (J), that the respondent tribunal (Tribunal) properly applied the “real chance” test to the appellant’s claims. The primary judge ought to have held that the test was wrongly applied’ (para 2).

2. ‘The primary judge erred in holding at J[39]-[42] that the Tribunal properly considered the appellant’s claims under the complementary protection regime in s 36(2)(aa) of the Migration Act 1958 (Cth). The primary judge ought to have held that the claims were not properly considered’ (para 2).

3. ‘The primary judge erred in holding at J[56]-[57] that the appellant did not claim that the persecution that he had experienced in the past and apprehended in the future took the form of repression of behaviour about which he desired to be more open. In particular, the primary judge overlooked the fact that the applicant had made an express submission in writing to that effect to the Tribunal (at CB 137)’ (para 2).

The appeal was allowed on grounds 1 and 3, but

			event, the truth or falsity of which the Tribunal could lawfully find was unnecessary to assess' (para 39). The appellant submitted 'in line with *Rajalingam* that the Tribunal was required to take into account the possibility that the claimed past events comprising the hypothesis had occurred in assessing whether he had a well-founded fear of persecution if returned, i.e., that he had rejoined SA1, was still serving within it when he departed, and had left without the permission or knowledge of SA1' (para 40). 'First, the appellant submitted that the Tribunal was plainly uncertain as to the truth of those matters' (para 40). 'Secondly, the appellant submitted that those matters were crucial to his Asserted Claim' (para 40). The appellant submitted 'that that claim was not addressed by the Tribunal. As such, he submits that the Tribunal erred in a jurisdictional sense in failing to consider a scenario that justified his claim that his country of nationality would consider him to be either a failed asylum seeker, a spy or someone with opinions opposed to the regime' (para 41). The Court agreed with the applicant's submissions and held that 'the appropriate inference to draw is that this significant aspect of the appellant's claims has, with respect, been overlooked by the Tribunal' (para 48).

			Consideration of Ground 2 The appellant argued 'that the primary judge ought to have found that the Tribunal erred in considering the appellant's alternative claim for complementary protection under s 36(2)(aa) of the Act on the basis that, if returned, he would be charged as a spy and face significant harm as a result' (para 49). The 'appellant submitted that there had been a constructive failure to exercise jurisdiction because the Tribunal assessed the claim to fear persecution as a suspected spy erroneously only by reference to the Convention nexus of imputed political view' (para 54). As such, the appellant submitted 'that the Tribunal conflated the tests of persecution and complementary protection: *SZSSM v Minister for Immigration* [2013] FCCA 1489 at [98]' (para 55). The Court held that appellant's submissions did not 'correlate with any "substantial, clearly articulated claim" by the appellant; nor is it a claim which squarely arose on the material before the Tribunal' (para 56). The Court took into account that 'account that the appellant was legally represented before the Tribunal and made detailed submissions as to the basis on which he claimed to fear harm if returned to his country of nationality: *SASHK v Minister for Immigration and Border Protection* [2013] FCAFC 125; (2013) 138 ALD 26 at [37] (Robertson, Griffiths and Perry JJ)'

(para 57).

The Court held that ‘Tribunal was correct to view the spy claim as being based only on the appellant’s concerns that he would be imputed with a political opinion hostile to the regime of the country of nationality’ (para 57).

The Court held, ‘the Tribunal did not erroneously assess the spy claim only by reference to the Convention criteria; rather all of the appellant’s claims for protection, Convention based and for complementary protection, were ultimately based on the appellant’s fear of being imputed with political opinions hostile to the regime of his country of nationality. In these circumstances, the Tribunal was entitled to proceed on the basis that the appellant’s claims to fear persecution as a spy failed for the same reasons as his claim to fear being imputed with an anti-regime political opinion in the context of his Convention claim’ (para 57).

However, w
‘it follows from the correlation between the two claims that my findings allowing the appeal on ground 1 may have consequences for the consideration of this claim’ (para 57).

Consideration of Ground 3

Ground 3 turned ‘upon whether the Tribunal was required to consider whether, if the appellant were returned to his country of nationality, he would keep his

			political views to himself because of a fear of persecution' (para 58). The Court held that the Tribunal did not consider 'why the appellant has in the past, and might be expected in the future, to keep his political views to himself and whether his conduct in so doing was influenced by the threat of harm if those views were exposed' (para 82). Therefore the Court held that the Tribunal 'failed to consider properly the issue of "real chance" and fallen into jurisdictional error' (para 82). The Court held that the 'Tribunal erred in this way by its focus upon whether the authorities might impute to the appellant a political opinion (which he in fact holds) which the Tribunal described as his sole claim, as opposed to his claims insofar as they relate to his actual political opinions' (para 82). In concluding, the Court 'allowed the appeal with costs' (para 83).
SZUNZ v Minister for Immigration and Border Protection [2015] FCAFC 32 Buchanan, Flick and Wigney JJ (Unsuccessful)	13 March 2015	1, 7, 14, 20-22, 25-26, 35-36, 39, 67-71, 121 and 126-127	This case relates to:

error on the part of the RRT or legal error on the part of the FCCA' (para 39).

Reasons for Judgment – Flick J:

His Honour held that 'it would be difficult for any factual conclusion to be reached that a person was an (sic) "habitual resident" of a country simply because he lived in that country with his mother as a child and for such a short period of time. After having left Western Sahara, the Appellant advanced no claim regarding any continuing connection. His links with Western Sahara – either by reason of his factual connection with that area or by reason of his legal rights – were properly characterised as "uncertain"' (para 67).

Further, His Honour detailed that the 'Tribunal's

and the ‘primary judge did not limit his consideration of potential jurisdictional error by the Tribunal in the

Protection Guidelines" and "PAM3: Refugee and humanitarian – Refugee Law Guidelines" – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration' (para 10).

The applicant submitted that the Tribunal 'did not explain whether it dealt with the guidelines and country information at some other part of its reasons (in fact, it did not); nor did it explain whether it regarded some parts or all of the guidelines to be irrelevant to the task it was required to perform' (para 11).

The applicant questioned 'how could the Tribunal have complied with the requirement that it take into account the two guidelines and country information, even if only to dismiss them as irrelevant, if it had not apparently turned its mind to them at all?' (para 12).

The Court considered the decision of *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 in which it was held that 'the effect of s 430(1) is that the Court is entitled to infer that a matter not mentioned in the Tribunal's reasons was not considered by it to be material' (para 15).

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			be material to its decision' (para 15). However, the Court held that the 'inference in *Yusuf* is not mandatory' and 'the manner in which a statement of reasons is drawn, or even its surrounding context, may provide material which detracts from, or even displaces, the inference' (para 19). For example, the Court held that 'there may be country information which was available to the Tribunal which is so obviously relevant that it is unthinkable that the Tribunal would not have referred to it if it had actually considered it' (para 19). The Court held that there was no such information available in the applicant's case (para 19). Therefore, the first argument failed (para 21). *Second argument* 'The applicant contended that the failure by the Tribunal to turn its mind to the relevance of the guidelines or the country information infringed s.420(2)(b)' of the Act (para 25). The Court referred to its reasoning, as detailed above, 'that the Tribunal did not fail to consider the relevance of the material'. The Court held that 'even if that had been shown, this would not establish a breach of s 420 and, in any event, a breach of s 420 does not necessarily constitute a jurisdictional error' (para 26).

			That is, 'the provision is facultative, not restrictive and does not prescribe any particular procedure: *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 628 [49] per Gleeson CJ and McHugh J; *Minister for Immigration and Citizenship v SZKTI* [2009] HCA 30; (2009) 238 CLR 489 at 497 [21]' (para 26). *Third argument* The applicant's third argument was that the second respondent's (Refugee Review Tribunal) 'decision was affected by making an erroneous finding or reaching a mistaken conclusion in a way that affected the exercise or purported exercise of the Second Respondent's power which amounted to jurisdictional error and invalidated the decision of the Second Respondent' (para 27). The Court held that 'both matters complained about were, in fact, considered by the Tribunal' (para 33). Therefore, the third argument failed (para 35). The application 'to amend the application for leave to appeal and the application for leave to appeal' was dismissed with costs and the 'first respondent's application to lead fresh evidence' was also dismissed (para 36).
SZSZP v Minister for	24 February 2015	2, 16, 20 and 22-23	This case relates to:

Immigration and Border Protection [2015] FCA 110 Perram J (Successful)			Whether the Tribunal failed to adequately deal with the applicant's complementary protection claim There were three issues before the Court: 1. 'Did the Tribunal fail to deal adequately with the issue' of complementary protection (Ground 1)'; 2. 'Did the Tribunal fail to deal adequately with the appellant's claim to be a member of the particular social group constituted by young Tamil men from East or North Sri Lanka who had departed Sri Lanka illegally (Ground 2)'; and 3. 'Should the appellant be permitted to raise a fresh ground of appeal to the effect that the Tribunal erred in concluding that a short time in detention could not constitute significant harm or serious harm for the purposes of the complimentary protection provisions ('Proposed Ground 1A')' (para 2). The appellant argued 'that the Tribunal had failed to consider the abduction of his cousin as part of its treatment' of his complementary protection claim (para 16) The Court agreed that there was 'no express reference' by the Tribunal to 'the abduction of the cousin', but it

			was ‘clear that the claim was rejected because the Tribunal reasoned from its conclusions on his protection claim that there was no risk of harm to him’ if he returned (para 16). The Court agreed that ‘the Tribunal did not consider the appellant’s claim that his cousin had been abducted in considering the issue’ of complementary protection and in that circumstance, the Tribunal ‘failed to conduct the review it was bound to perform which is a jurisdictional error’ (para 20). The Court did not consider the remaining points before the Court but did outline that ‘had it been necessary’, the Court ‘would have rejected the claim that the Tribunal had overlooked dealing with the appellant’s claim to belong to the particular social group of young Tamil males from East or North Sri Lanka who departed illegally’ (para 22). The Court detailed that ‘a fair reading of the Tribunal’s reasons’ showed this had been dealt with (para 22). The Court outlined that ‘it would have permitted the appellant to raise Ground 1A’ although the Court ‘would have rejected it’ (para 22). The appeal was allowed with costs. The orders of the Federal Circuit Court were set aside and in lieu thereof the Court ordered: 1. Order absolute in the first instance for a writ of certiorari to quash the decision of the

			Refugee Review Tribunal of 29 May 2013; 2. Order absolute in the first instance for a writ of mandamus directed to the Refugee Review Tribunal to determine the applicant's review application according to law; and 3. The second respondent to pay the applicant's costs (para 23).
Ayoub v Minister for Immigration and Border Protection [2015] FCA 24 Nicholas J (Unsuccessful)	30 January 2015	1, 6-12 and 24-5	This case relates to: whether *non-refoulement* obligations apply to an applicant who has not applied for a protection visa or raised a claim which would enliven Australia's protection obligations The applicant (Mr Ayoub) was a citizen of Lebanon. He 'sought judicial review of a decision of the respondent (the Minister) to cancel his spouse visa pursuant to s 501(2) of the *Migration Act 1958* (Cth) (the Act) on the basis that he did not pass the character test' (para 1). It was not disputed that Mr Ayoub did not pass the character test (para 6). My Ayoub arrived in Australia on 1 April 2001. 'He was found guilty of an offence in 2003 and convicted of further offences in 2004, none of which required him to serve prison time. However, on 17 February 2009 Mr Ayoub was convicted of unlawfully detaining Raymond Zhang without his consent and in order to obtain a financial gain for which Mr Ayoub was sentenced to seven years imprisonment, with a non-parole period of

On 16 May 2014 the Minister cancelled Mr Ayoub's visa (para 10). The Minister, in his statement of reasons, detailed that 'while I note Mr AYOUB's claim to fear return to Lebanon, I also consider that the existence of a *non-refoulement* obligation does not preclude the cancellation of a person's visa. This is because Australia will not necessarily remove a person, as a consequence of cancelling their visa, to a country in respect of which a *non-refoulement*

FEDERAL CIRCUIT COURT OF AUSTRALIA

Case	Decision date	Relevant paragraphs	Comments
BRY15 v Minister for Immigration & Anor [2016] FCCA 3188 (Judge Manousaridis) (Unsuccessful)	9 December 2016	19, 25-29 and 31	This cases relates to: whether the Tribunal failed to comply with Ministerial Direction Number 56 in contravention of s 499(2A) of the Act; and whether the Tribunal failed to take into account a relevant consideration in relation to the complementary protection criteria The applicant filed three grounds of review. Only grounds 2 and 3 considered the application of the complementary protection criteria. *Ground 2:* 'The Tribunal failed to comply with Ministerial Direction Number 56 in contravention of s 499(2A) of the Act' (para 19). *Particulars of Ground 2:* (a) 'Similarly (sic) to the findings in ARS15 v Minister For Immigration & Anor [2015] FCCA 2135, the Tribunal failed to take into account the PAM 3 Protection Visas complementary protection guidelines when it made a finding on whether the treatment that applicant would face on being detained in Sri Lanka was degrading treatment or punishment or was cruel or

			'The facts in ARS15 are distinguishable from those of the case before me. First, as I have already noted, when referring to the country information that was detailed in the delegate's decision and also in the submissions made by the applicant's agents, the Tribunal said it had "considered that information including PAM3 guidelines". Thus, unlike the Tribunal in ARS15, the Tribunal expressly referred to its having considered the PAM3 guidelines when it referred to country information. Second, the Tribunal before me referred to the conditions in Negombo prison being cramped and probably unsanitary. That indicates an engagement with Direction 56 not apparent in the Tribunal's decision in ARS15' (para 25). The Court was 'not satisfied the Tribunal did not take into account Direction 56' (para 26). *Ground 3:* 'The Tribunal failed to take into account a relevant consideration in relation to complementary protection' (para 27). *Particulars of Ground 3:* 'In Portorreal v Dominican Republic, Comm No 188/1984, UN Doc CCPR/C/OP/2 (5 November 1987) was a decision in which there was close analysis of the conditions to which the person was exposed for no more than 50 hours, but nonetheless there was a finding of a violation of Article 7. Those conditions are similar to those that obtain in Negombo Prison in Sri Lanka' (para 27).

‘As noted by Judge Street in ARS15, Portorreal “

			obligations because he conflated the questions arising in that respect with those arising under the Refugees Convention' (para 9). 'Subject to one possible exception, I am not satisfied that the assessor failed to distinguish between the different tests involved. That exception concerns the claim that the applicant faced harm because he had left Iran on a false passport. The assessor dealt with this claim in the context of the Refugees Convention on the basis that persecution does not arise from the non-discriminatory application of a law of general application. However, as I have noted, generally speaking, discrimination is not necessary in order to give rise to non-refoulement obligations under the ICCPR and CAT. Thus, at first view, there is an argument that, if the assessor had properly understood and distinguished the differences between the two tests, he would have separately considered the false passport claim' (para 46). 'The answer is that there is a qualification to the general rule provided by s.36(2B) of the Act which states: (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that: ...(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally' (para 47). 'The effect of this provision is that the penalty imposed for breaking the law of a country that applies generally cannot amount to significant harm within the meaning

			set out in the Tribunal's own words might exceed the proper limits of judicial review' (para 26). The Court held that the 'Tribunal did fall into the error identified by the applicant. By failing to disaggregate the effect of s.91R(3) from its consideration of the complementary protection criterion the Tribunal limited its consideration of that criterion and so constructively failed to exercise its jurisdiction' (para 27).
AGX16 v Minister for Immigration & Anor (No.2) [2016] FCCA 3070 (Judge Riley) (Unsuccessful)	16 November 2016	1, 12, 16, 18 and 20-26	This case relates to: whether the Tribunal failed to apply the correct test in evaluating the applicant's complementary protection claim or failed to consider an integer of that claim (para 12) The applicant sought 'an extension of time in which to seek judicial review of a decision of the Refugee Review Tribunal' (para 1). *Ground* 1. The Tribunal failed to apply the correct test in evaluating the applicant's "complementary protection" claim or failed to consider an integer of that claim (para 12). *Particulars* (a) 'Complementary protection criteria differ from Convention criteria, perhaps most significantly because there is no requirement that the exposure to harm be for any reason' (para 12). (b) 'The Tribunal accepted that there was "sporadic

violence" in the country that would continue to cause difficulty after the withdrawal of foreign forces in 2014 ([53])' (para 12).

(c) 'The Tribunal's response to the applicant's claims to fear harm by reason of the planned withdrawal was that the withdrawal would not lead to any "targeting" ([37]-[40]) nor any "persecut[ion]" ([53])' (para 12).

(d) 'Targeting and persecution form no part of the test for complementary protection. In circumstances where the Tribunal accepted that violence would occur after the withdrawal, but did not give any separate consideration to the distinct issues that arise in relation to the complementary protection claim, error is manifest' (para 12).

(e) 'This inference is confirmed by the observation that under the heading "Complementary protection obligations", in [62], the Tribunal mentions that the applicant is a Hazara Shia and will not be exposed to a risk of harm "merely because of his background"; in [63], the Tribunal mentions that the applicant lacks an actual or imputed political opinion connected with his return from a foreign country. These matters are irrelevant to complementary protection and would not be expected if the Tribunal were applying the correct test; it might be asked, rhetorically, why mention these matters if the correct test was being applied?' (para 12).

Consideration

‘

			made a finding that there was sporadic violence. This was an argument based on the allegation that the ground clearly arose from the materials. However, the fact is that the Tribunal's finding was that the violence was "in the country", rather than in Kabul' (para 25). The application was dismissed (para 26).
MZAJD v Minister for Immigration & Anor [2016] FCCA 2697 (Judge Wilson) (Successful)	20 October 2016	2, 15, 22, 37- 39, 42, 44, 48 and 65-66	This cases relates to:

			complementary protection claim' (para 44). *Consideration of Ground 2* 'In essence, the applicant complained that the Tribunal failed to give him an opportunity to adduce evidence and present argument as to whether the applicant lacked any role or standing in his district which would have caused him or enabled him to organise a protest concerning the Pakistan Army dumping bodies in his home village within 24 hours' (para 48). The Court held that the second ground was made out (para 65). The Court made orders quashing the decision of the Tribunal made 30 June 2014' and directed 'that this matter be remitted to the Tribunal for rehearing before a differently constituted Tribunal. The Minister must pay the applicant's cost' (para 66).
APK15 v Minister for Immigration & Anor [2016] FCCA 2190 (Judge Driver) (Unsuccessful)	16 September 2016	11, 39 and 42-43	This case relates to:

			‘The second ground (and probably also the first ground, although it is not strictly necessary to decide) is established in that the Assessor fell into error in considering whether the applicant would be prosecuted for breaching the Sri Lankan Immigrants and Emigrants Act because he considered the likely outcome rather than the process that would lead to that outcome’ (para 39). ‘The difficulty with the Assessor’s analysis is that he did not connect the outcome to the process of detention. In particular, he did not consider whether the applicant would be detained at Colombo Airport, whether he would be detained on remand at Negombo Prison, whether he would be charged with breaching the Immigrants and Emigrants Act (in circumstances where there would be no record of his departure from the country at any time), whether he would be held on remand pending an appearance before a magistrate and, if so, how long that detention would be, given that the applicant has no relatives in Sri Lanka who could post surety for him if required. While the applicant may well not be held criminally responsible for his illegal departure because of his age, that is suggestive of the ultimate outcome of a process that could take some time. The applicant’s fear concerns what might happen to him in the meantime’ (para 42). This error is similar to the error identified in *SZQPA v Minister for Immigration & Anor* [2012] FMCA 123

			(Tribunal) denied the applicant procedural fairness. The claimed failure to accord procedural fairness is said to have consisted in the Tribunal's deciding the application for review without the applicant having access to certain information relating to the Department of Immigration and Border Protection's (Department) inadvertently making available for access from the Department's website information about the applicant's detention' (para 1). 'The second question is related to the first; and that is whether the Tribunal failed to undertake the review of the applicant's case by conducting the review without the applicant's having access to information relating to the Department's making available information relating to the applicant's detention' (para 2). *Consideration of Ground 1:* 'The first ground of application stated in the amended application is that the applicant was not given a fair hearing as was required by s.422B and s.425 of the *Migration Act 1958* (Cth) (Act). The basis of that ground is that the applicant had requested, but has not received, from the Department the information which the Full Federal Court in *SZSSJ v Minister for Immigration and Border Protection* held that the Minister was obliged to give to persons who were potentially adversely affected by the data breach. That appears to be a reference to "the full circumstances of the Data Breach, including by not being provided with the unabridged KPMG report" referred to by the Full

Federal Court in SZSSJ (Claimed Information)' (para 14).

'Ground 1 fails for a number of reasons. First, it is premised on the proposition that the applicant claimed

			Australia. It is difficult to see how, in those circumstances, the Claimed Information could have been "relevant and significant" to the review' (para 19). Third, it is not suggested the Tribunal held the Claimed Information. It was open to the applicant to request the Tribunal under s.427(3)(b) of the Act to summon a person to produce documents in relation to the data breach. It may be the Tribunal would have refused such application, given the applicant's having elected not to answer the Tribunal's question whether he was claiming he would be subjected to harm as a result of the data breach. In any event, it cannot be said the Tribunal acted unfairly, or made any jurisdictional error, by not considering information that was not in its possession, or by not considering a request that was not made to it that it should summon the Department to produce information that was not in the possession of the Tribunal (para 20). 'The applicant in the case before me was not offered an ITOA assessment. In its letter dated 23 December 2014, however, the Department informed the applicant that if he had any protection claims in relation to the data breach, it was the applicant's responsibility to submit those claims to the Tribunal. Just as in *Minister for Immigration and Border Protection v SZSSJ*, therefore, the applicant before me was given notice of the data breach and of the means by which the applicant could pursue a claim that, because of the data breach, Australia owed the applicant protection obligations. Further, given the Tribunal was prepared to assume that

the data breach in fact identified the applicant as having sought protection in Australia, and the applicant was not prepared to inform the Tribunal of the harm the applicant feared would or might occur to him as a result of the data breach, it is not possible to say how the availability to the applicant of the unabridged KPMG report and any other Claimed Information could have assisted the applicant' (para 25).

obligations as a re

memberships, when considering the complementary protection criteria

The applicant was a citizen of Afghanistan (para 7).

The applicant submitted the following ground of review:
'The Tribunal fell into jurisdictional error when it failed to consider whether the applicant was:
(a) a member of a particular social group consisting of "failed asylum seekers", "returnees from the West" or an Afghani who lived illegally in Pakistan for a prolonged period (13 years);
(b) at risk of harm due to being a failed asylum seeker, returnee from the West and/or an Afghani who lived illegally in Pakistan for a prolonged period (13 years) when considering whether the applicant was a person

those targeted are people associated with government or security institutions": CB 191 at [45]. The Tribunal found that there was "no credible evidence" that the applicant "as a Pashtun Sunni or for any other reason he has suggested or which arises from the credible evidence ... would be targeted for a Convention reason for systematic and discriminatory harm that would constitute persecution should he return to his village in Paktia"': CB 191 at [45]' (para 53).

'The Tribunal went on to find that any risk he might face was one of generalised violence arising from general insecurity and not one faced by the applicant personally, and in those circumstances the risk was not a real risk for the purposes of the complementary protection criterion: CB 191 at [45]' (para 53).

'The Court has several difficulties with the Tribunal's

			which might cause significant harm by reason of membership of those particular social groups' (para 54). 'The Tribunal did not examine the possibility that a person long absent from their village, and possibly not conforming to the social mores of the Taliban in an insecure and dangerous area, might be the subject of harm caused by an act of violence which was not targeted in the sense referred to in the country information. The necessity for the Tribunal to do so, arises from its own finding at CB 190 at [41] that:... In my view, anyone in the applicant's village, including any Taliban present in the area, would know that he had not been there for more than twenty years' (para 54). 'The Tribunal simply did not examine or consider the applicant's particular circumstances as a person returning to his home village after more than 20 years, including a prolonged period in Pakistan. It did not address the question, for example, given that the Taliban would know of the applicant's return to the village (as found by the Tribunal at CB 190 at [41]), as to whether or not he might be seriously harmed because he might obviously have been a returnee from the West or from Pakistan, and as such, might fall under suspicion of being associated with government or security institutions' (para 55). 'The Court notes that the Tribunal said that there was no credible evidence that, as a Pashtun Sunni or for any other reason suggested by the applicant, that the applicant will be targeted in a manner which would

cause harm. It might be said that that general conclusion was one which covered all of the matters arising from the Applicant's May 2015 Submissions and the Applicant's June 2015 Submissions, and otherwise, and consistent with the longstanding principles arising from *Minister for Immigration & Ethnic Affairs v Wu Shan Liang & Ors* [1996] HCA 6; (1996) 185 CLR 259; (1996) 70 ALJR 568; (1996) 136 ALR 481; (1996) 41 ALD 1, that this Court should not engage in merits review. Such a suggestion ignores the fact however that the general conclusion reached by the Tribunal involves the applicant being "targeted", and fails to consider whether he might be harmed by local Taliban or other insurgent groups as a consequence of his membership of the identified social groups' (para 56).

'The applicant's membership of the particular social groups, and the particular circumstances in which he was returning to his village, including his absence of more than 20 years, required the Tribunal in determining whether the real risk was not one faced by the applicant personally, to consider the possible personal harm that the applicant might suffer by returning to his village, and in effect, being a stranger in a strange land. The Tribunal did not do this, and approached the matter at a greater level of generality, and in the Court's view, therefore failed to consider the actual claim made by the applicant' (para 56).

'The conclusion reached above means that the Tribunal Decision is affected by jurisdictional error: *Dranichnikov*; *Htun*; *M51'* (para 57).

might occur to the applicant whilst in jail. Once that approach is understood, it can readily be seen that the Tribunal's conclusion about the first (2 weeks in jail) was not determinative of the entire issue and, in particular, was not determinative of the question of whether or not the applicant might suffer significant harm while being in prison as a consequence of the poor prison conditions' (para 13).

Second issue: compliance with Min2l0d-3(e)4(rial-4(o D

			‘Further, the applicant’s second point lacks an important factual element. The Guidelines relevantly say that where humiliation, pain or suffering has been knowingly inflicted, an intention to inflict those matters may be inferred. That is a fairly obvious statement. However, the difficulty here is that the Tribunal did not accept that there was any knowing infliction of humiliation or pain or suffering. Rather, the Tribunal found that the prison conditions were a result of a number of things including indifference, that is, indifference to the prison conditions. Indifference to a state of affairs may or may not include knowledge about that state of affairs’ (para 22). ‘More importantly, even if the Tribunal implicitly found that the authorities were aware of the conditions, it does not follow that they were aware of all the pain and suffering that might be caused by those conditions and, even if they were, there is a difference between that awareness and knowingly inflicting that harm as opposed, for example, to simply exposing the detainee to the risk of such harm’ (para 22). ‘In light of that, the Tribunal’s finding that the prison conditions were, in part, brought about by indifference does not carry the force suggested by the applicant’ (para 23). ‘For those reasons, the fact that the Tribunal did not state that it had regard to the Guidelines, or state whether or not it had considered whether the

			indifference of the authorities of the prison conditions in Sri Lanka could give rise to the inference of subjective intention does not satisfy me that the Tribunal failed to "take into account" those guidelines. Accordingly, this ground fails' (para 24). 'There is no jurisdictional error in the Tribunal's decision and the application must be dismissed' (para 25).
SZURV v Minister for Immigration & Anor [2016] FCCA 1371 (Judge Dowdy) (Unsuccessful)	24 June 2016	1-3, 26-28 and 33-39	This case relates to: whether the applicant's earlier protection visa application was rendered invalid by the introduction of complementary protection criteria from 24 March 2012 The applicant was a citizen of Lebanon (para 1). The applicant sought 'constitutional writs to quash what he terms the purported decision (purported decision) of the Respondent, the Minister for Immigration & Border Protection (Minister) made on 24 June 2014 to the effect that the application made by him on 23 June 2014 for a Protection (Class XA) visa (second Protection visa application) was not a valid application under the *Migration Act 1958 (Cth)* (Migration Act). He further

The Court rejected the ‘argument and submissions that the earlier Protection visa application was rendered invalid by the introduction of complementary protection criteria from 24 March 2012’ (para 26).

‘The Applicant, at the time that he made his earlier Protection visa application, had a relevant “right” by virtue of s.65(1) of the Migration At to be granted the visa he applied for if the Minister was satisfied under s.65(1): see *Re Minister of Immigration; Ex Parte Cohen* [2001] HCA 10; (2001) 177 ALR 473 per McHugh J’ (para 27).

‘It was a substantive right of a quasi-judicial nature to have his earlier Protection visa application visa dealt

			that had been made before 28 March 2012, but not finally determined before that date' (para 33). 'To accept the argument made for the Applicant in this case would produce a patently unintended, incongruous and absurd result. Its acceptance would seem to mean that legislation designed to give applicants for protection visas an additional ground for protection had the effect of invalidating applications for Protection visas made earlier than 24 March 2012 which had not yet been dealt with at that date. Such a result would lead to the opposite to what Item 35 sought to achieve. Such a construction would not be to prefer one that "would best achieve the purpose or object of the Act: s.15AA of the *Acts Interpretation Act*": see generally the decision of the Full Court of the Federal Court in *JJ Richards and Sons Pty Ltd v Fair Work Australia* [2012] FCAFC 53 ([49]-[52])' (para 34). 'The validity of the earlier Protection visa application was preserved by the combined force and effect of s.2(2) and s.7(2) of the Acts Interpretation Act 1901 (Cth) (the Acts Interpretation Act)' (para 35). Further, 's.13 of the Legislative Instruments Act 2003 (Cth) (now since March 2016 the *Legislation* Act) applies the Acts Interpretation Act to instruments such as the Regulations' (para 36). 'At the date being 13 February 2012 that the Applicant made his earlier Protection visa application he had a substantive right to have it dealt with in accordance

			with the provisions of the Migration Act in force at that time. His right in that respect was protected and preserved under s.7(2) of the Acts Interpretation Act (and also, to the extent necessary, under the Regulations) so that the amendment to the Migration Act introducing the complementary protection criteria did not affect the previous operation of the Migration Act or the validity of the earlier Protection visa application and the Applicant's accrued right to progress the same' (para 37). There 'was no expression of a "contrary intention" for the purposes of s.2(2) of the Acts Interpretation Act in the complementary protection legislation to the effect that visa applications such as the earlier Protection visa application were in some way invalidated' (para 38). This is 'is consistent with the decision of the High Court in *Esber v The Commonwealth* [1992] HCA 20; (1992) 174 CLR 430 where at 440 – 441 the majority comprised of Mason CJ, Deane J, Toohey J and Gaudron J said: Once the appellant lodged an application to the Tribunal to review the delegate's decision, he had a right to have the decision of the delegate reconsidered and determined by the Tribunal. It was not merely "a power to take advantage of an enactment". Nor was it a mere matter of procedure; it was a substantive right. Section 8 of the Acts Interpretation Act protects anything that may truly be described as a right, "although that right might fairly be called inchoate or contingent". This was such a right. It was a right in existence at the time the 1971 Act was

			million. The Vietnamese authorities requested the issue of an Interpol “red notice” which described the applicant’s offence as “appropriating property through swindling”. According to the “red notice” the law covering the offence is article 139(4) of the Criminal Code of Vietnam and the maximum penalty for the offence is 20 years imprisonment’ (para 5). ‘Before the delegate and the Tribunal the applicant claimed that there was a real risk that he would suffer significant harm if he were returned to Vietnam. He asserted that the risk of significant harm arose from a number of factors: first, the offence carried the death penalty and that bank officials had been sentenced to death for a similar offence involving a lesser sum of money some years before and so it is likely the applicant will be tried, convicted and subjected to the death penalty, secondly, that he would be killed in prison by corrupt officials or others associated with his fraud so that he would be arbitrarily deprived of his life, thirdly, he was likely to be subjected to ill-treatment, abuse or bad conditions in the Vietnamese prison system amounting to cruel or inhuman treatment or punishment and, fourthly, he would likely be identified by the Vietnamese authorities as seeking protection in Australia as a result of a “data breach” by the Department of Immigration and Border Protection in 2014 when the applicant’s personal details and details of his detention were inadvertently made available on the internet for a short period of time’ (para 6). ‘The Tribunal in dealing with the second ground found

that, in view of the applicant's lack of credibility, there was no substantial evidence to support the applicant's claims' (para 7).

'In dealing with the third ground the Tribunal found that while the prison conditions in Vietnam were poor those conditions did not amount to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment. In reaching that conclusion the Tribunal had regard to a US Department of State report on human rights practices in Vietnam and UK Border Agency reports dealing with prison conditions in Vietnam. In my view these conclusions, based on the Tribunal's own assessment of the applicant's credibility and country information properly exposed and explained, were open to it' (para 7).

'In relation to the fourth ground the Tribunal concluded that%d

			death penalty applied to the offence outlined in the "red notice" namely article 139 of the Criminal Code of Vietnam. Article 139(4) has carried the death penalty in the past but, based on advice from the Australian embassy in Vietnam, the Tribunal concluded that the death penalty for this offence was abolished in 2009. Apparently the applicant's own lawyer in Vietnam had confirmed this was so' (para 9). 'Embassy advice confirmed that the death penalty remained for another offence: article 278(4)(a) relating to official corruption or "*crimes relating to position*". The Tribunal said that it had no substantial grounds for believing the applicant will be charged with that offence and there was nothing to suggest he held an official position. It concluded that there was no real risk that the death penalty will be carried out on the applicant' (para 10). 'Given that the crime allegedly committed by him appears to have involved the co-operation of officials of a state bank there must be a possibility of the officials involved in the fraud being charged under article 278(4)(a) and accessorial liability being imposed on the applicant. In that event there may be a possibility the applicant will be subjected to the death penalty' (para 11). 'The uncontested facts of this case, involving a large fraud carried out with the connivance of officials of a state owned bank, would appear to raise the risk of charges being laid which carry the death penalty.

[2016] FCCA 1345 (Judge Antoni Lucev) (Unsuccessful)	141, 148-149, 155-158, 176 and 189-194	jurisdictional error in making the pre-removal clearance decision on 9 February 2015 by d su8 51444.29 79.944 280.97 442.87 reW*nBT1 (

Furthermore, some of those affidavits have been the subject of objections, which have been dealt with above: see [7]-[14] above. Finally, the hearing of this matter went for most of the day from 11.04am to 4.20pm. The hearing was therefore longer than is the case for a typical hearing of a judicial review application in migration proceedings, which might normally take anywhere between half an hour to two hours' (para 109).

'In the above circumstances the prejudice to the Minister in terms of costs in this case is considerably more than would usually be the case, and therefore weighs against the grant of an extension of time in which to file the application' (para 110).

The impact on the applicant of a failure to extend time for making the application will be negligible, as, for reasons set out below, the application has no reasonable prospect of success because no jurisdictional error is established (para 111).

'As to the interests of the public at large, there is nothing in the matter able to excite the interests of the public at large, such as to warrant the exceptional exercise of the Court's discretion to extend time for the making of the application' (para 112).

Merits of Tribunal Decision

Ground 1 –Tribunal failed to consider whether it was

			area in Beshood, Maidan Wardak province, to Kabul 'The applicant, and his family, had relocated to Kabul from Beshood, and then, after they had relocated, sold the family farm in Beshood. There is no doubt, and the Tribunal found, that there had been past persecution in relation to, in particular, the death of the applicant's father at the hand of the Kuchis, and it was seemingly this which had resulted in the family moving to Kabul in 2009. Having relocated to Kabul, the applicant, and the family, then moved to Iran, but were deported after six months, and returned to Afghanistan, but not to Beshood, but to Kabul. Thus, the family relocated to Kabul, not once, but twice, within the space of approximately one year. Moreover, his family (that is his mother, two older brothers and two sisters) remain in Kabul living in a Hazara area, with his mother and sisters at home, and one older brother in school, and the other older brother working in a grocery shop: CB 174 at [43] and CB 175 at [47]-[50]. In all the above circumstances the Court's view is that the issue of relocation does not arise in this case' (para 118). 'Having regard to the foregoing the Court is of the view that: a. the relocation principle does not apply in this case; and b. even if it does apply the Tribunal has considered whether it was reasonably practicable for the applicant to relocate from his former home area in Beshood to Kabul. It follows that ground 1 is not made out' (para 122).

			Ground 2 – Tribunal failed to consider whether, as a resident of Maidan Wardak province, or a person likely to travel through that province, the applicant faced a risk of harm which was greater than that faced by the people of Afghanistan generally 'In circumstances where the Tribunal has set out, and understood the applicant's claims, referred to relevant country information concerning the claims made, and reached a conclusion with respect to the issue of general violence in the country and the chance of the applicant being caught up in that general violence, it cannot, in the Court's view, be said that the Tribunal has not undertaken the task of assessing whether the applicant faced a risk of harm greater than that faced by the people of Afghanistan generally when traveling through Maidan Wardak province' (para 135). Ground 3 – Tribunal treated 'serious harm' as required by s.91R(1)(b) of the Migration Act as the only level or kind of harm which could affect the reasonableness of the applicant's re-establishment or resettlement in Kabul 'Grounds 3 fails because ground 1 was not made out, and the issue of relocation did not arise for the Tribunal to have to consider' (para 141). Ground 4 – Tribunal failed to consider whether the applicant could reasonably be expected to remain in Kabul and not travel outside Kabul to return to his

			surviving member of a family previously persecuted by the Taliban 'The Tribunal made findings that the applicant did not have a well-founded fear of persecution or that there was a risk of serious harm to him if he returned to Afghanistan. In so doing, the Tribunal by making a general finding in relation to the general submissions put to it, made a finding which covered whether or not the applicant would have a well-founded fear of persecution at the hands of the Taliban if returned to Beshood. In those circumstances, the finding that there was not such a well-founded fear of persecution or risk of serious harm in Afghanistan was a general finding which subsumed the necessity to make any particular finding with respect to Beshood or Maidan Wardak province' (para 155). 'As to the claim that the applicant had a well-founded fear of persecution by reason of being a member of a particular social group, being a surviving member of a family which had previously been persecuted by the Taliban, no such claim was made by the applicant before the Tribunal (or before the Delegate it appears) in circumstances where the applicant was legally represented, and put extensive submissions to the Tribunal, both before and after the Tribunal hearing. Further, both in those circumstances and generally, it cannot be said that this is a claim which so obviously arises on the materials that it ought to have been considered by the Tribunal' (para 156).

			‘For the above reasons, ground 5 is not made out’ (para 157). *Further grounds* The further grounds in relation to the pre-removal clearance are as follows: <u>Further Ground 1</u> ‘The Department of Immigration made a jurisdictional error in making the pre-removal clearance decision on 9 February 2015 by denying the applicant procedural fairness’ (para 158). <u>Particulars of Further Ground 1</u> 1. ‘The Department of Immigration noted that the applicant, at the time of writing, had not provided any new information to indicate that he would be at risk of being arbitrarily deprived of his life, or have the death penalty carried out on him, or be subjected to torture or to cruel, inhuman or degrading treatment or punishment on return to Afghanistan as a necessary and foreseeable consequence of his removal from Australia. 2. The applicant was never asked to provide any new information regarding the matters listed in particular 1 above. 3. The applicant has new information regarding the matters listed in particular 1 above’ (para 158). <u>Further Ground 2</u>

The Department of Immigration made a jurisdictional error in making the pre-removal clearance decision on 9 February 2015 by failing to have regard to a relevant consideration' (para 158).

Particulars of Further Ground 2

1. The Tribunal accepted DFAT advice that the main targets on the road to Ghazni, and nationally, were people employed by or with direct links to the Afghan Government or the international community ([112]).
2. The applicant is a person with a direct link to the international community as a result of his time in Australia and being issued with a Certificate of Identity

			consideration of the other factors leads to the same result, because: a. there is prejudice to the Minister; b. there is no public interest in the matter; c. the failure of the applicant to make out any of the grounds of the application means that the application lacks merit in any event and has no prospects of success, and the Court should not therefore extend time: *SZSDA* at [39] per Foster J; and d. the PRC Decision is incompetent' (para 194).
SZVKH & Ors v Minister for Immigration [2016] FCCA 1032 (Judge Manousaridis) (Unsuccessful)	6 May 2016	1-3, 17-20, 23-28	This case relates to: whether previous applications for protection visas that the applicants had lodged were not a valid applications because 'the complementary protection criterion prescribed by s.36(2)(aa) of the Act was introduced into the Act after they had lodged their Protection visa application, but before that application was finally determined' (para 3). 'The applicants apply for judicial review of a decision of a delegate of the respondent (Minister) made on 27 October 2014 that an application for a Protection (Class XA) visa (Protection visa) the applicants lodged with the Minister on 21 October 2014 was not a valid application' (para 1). 'The delegate relied on s.48A of the Migration Act 1958 (Cth) (Act) for deciding the application was not a valid application for a Protection visa. In broad terms, s.48A(1) of the Act provides that a non-

a Protection visa that has been refused may not make a further application for a Protection visa while the non-citizen is in the migration zone' (para 2).

'There is no issue the applicants are non-citizens, and that the applicants, while in the migration zone, had previously lodged applications for Protection visas that had been refused. The first three applicants claim, however, that the previous application for Protection visas they had lodged was not a valid applications because the complementary protection criterion prescribed by s.36(2)(aa) of the Act was introduced into the Act after they had lodged their Protection visa application, but before that application was finally determined. Because the previous application the applicants lodged was not a valid application for a visa, s.48A of the Act did not apply because that section applies only where an applicant had previously made a valid application' (para 3).

'The applicants accept that the form by which the Original Protection visa application was made was an approved form of application at the time it was lodged. They submit, however, that, with the introduction into the Act of s.36(2)(aa), the form by which the Original Protection visa application was made ceased to be an approved form – it had become "defunct" – and, for that

			that the two grounds of review stated in the further amended application fail. That is so because both grounds are premised on the proposition – which I have not accepted – that the Original Protection visa application was not a valid application' (para 20). 'Counsel for the applicants submitted that the form of the Original Protection visa application does not specifically refer to the complementary criterion that came to be included in s.36(2)(aa) of the Act, or otherwise suggest that the person completing the form could apply for protection on the basis of that criterion. The first three applicants, therefore, did not have the capacity to articulate on the form a claim based on complementary protection' (para 23). 'The questions the prescribed form asked of the first three applicants included why they had left their country, what they feared may happen to them if they went back to that country, and who the first three applicants thought may harm or mistreat them. As Judge Smith said in SZUZM, each of these questions "was capable of eliciting a response that could have given rise to a claim to meet the criterion in s.36(2)(aa) of the Act"' (para 24). 'Counsel also submitted that, when the Amending Act came into effect, the Minister was obliged to issue correct and current forms. Counsel did not identify the source of that asserted obligation. In any event, even if such obligation existed, the extent of such obligation must be assessed against the effect of item 35 of

of persecution within the meaning of the Convention is whether there is a real chance that the claimed persecution may occur. A real chance is one that is not remote, insubstantial or far-fetched and may be statistically less than 10 per cent' (para 16).

'The test of whether there is, within the meaning of s.36(2)(aa), a real risk of significant harm is the same as the test of whether there is a real chance of persecution' (para 17).

'The applicants had been living in Lahore before coming to Australia. The Tribunal considered evidence of the level of sectarian violence directed towards Shias in Pakistan, some supplied by the applicants and some from its own sources' (para 18).

'The test of whether there is a real chance or a real risk of harm is not a relative one. It is not determinative whether the risk in one place is "less severe" than the risk in another place. What matters is the actual level of risk in any particular place. The applicants contend that, at no point in its reasoning does the Tribunal make an absolute assessment of the level of risk the applicants would face in Lahore (although it accepts at [99] that the situation there is "extremely serious")' (para 20).

'To reach the conclusion that there is only a remote chance of harm based on a comparison of risk between Lahore and other places in the country is to apply a test that is not supported by the High Court in *Chan* or the Full Federal Court in *SZQRB*

relative risk within Pakistan rather than focusing on the degree of risk in Lahore itself. It was no answer to the applicants' claim that they would be worse off elsewhere in Pakistan. The Tribunal accepted that the situation in Lahore was "extremely serious" (whatever that might mean) and accepted that there was sectarian violence in Lahore (as elsewhere). What follows, however, is simply an examination of relative risk between Lahore and elsewhere rather than an analysis of the real risk in Lahore itself' (para 28).

			‘The applicants have succeeded in establishing error in respect of Ground 2 in their application and they should receive the relief they seek’ (para 32). *Ground 3:* ‘The Tribunal reached conclusions on the evidence before it that were so unreasonable that no reasonable Tribunal could have reached those conclusions’ (para 12). *Particulars of Ground 3:* ‘The Tribunal's findings of fact in relation to the motivation of anti-Shia terrorist groups in killing Shia professionals was specious and perverse to the extent that no reasonable Tribunal could have made such findings’ (para 12). *Consideration of Ground 3:* ‘The applicants submit that no reasonable decision maker could have concluded that Shia lawyers were not being targeted and killed because of their religion’ (para 38). ‘There is, in my opinion, much to be said for the applicants’ contention that the Tribunal’s reasoning at [92] was specious, in the sense of being superficially plausible but wrong. In my opinion, the Tribunal’s reasoning is based upon an unsupported assumption that

there is either no unifying factor drawing people at risk to Shia causes or Shia organisations or that, if there is a unifying factor, it is something other than the Shia religion. That assumption could hypothetically be tested to see if it is sound. For example, is there any evidence of non Shia lawyers being killed while working for Shia organisations or for Shia causes? Secondly, if there was evidence of non Shia lawyers being killed while working for Shia organisations or working on Shia causes, were they killed because of what they were doing or because they were taken to be Shia?' (para 44).

'Nevertheless, the Tribunal's reasoning, while dubious, is but one part of a detailed and comprehensive set of reasons that drew the Tribunal to a conclusion that it could not attain the level of satisfaction required for the purposes 1 449.45 332.59 Tu,1.Span /P /MC3D 1/Lang (e

The applicant was a citizen of Pakistan (para 3).

The applicant submitted two grounds of review.

Ground 1:

‘The decision of the Tribunal in RRT Case Number 1403721 was affected by jurisdictional error, being that the Tribunal failed to perform the requirement under s 424(1) of the Migration Act 1958 (Cth) in that the Tribunal got information it considered relevant, but did not have regard to that information in making the decision’ (para 5).

Consideration of Ground 1:

‘The applicant argued that the Tribunal in the present case made a jurisdictional error by considering that the chance of the applicant suffering significant harm in the Swat Valley was remote because 1.8 million people live there’ (para 8).

‘The Tribunal concentrated on the applicant’s Pashtun ethnicity. However, that was not relevant to the applicant’s claim in relation to arbitrary deprivation of life. His claim about arbitrary deprivation of life was based on random violench

same paragraphs. That is fine, as long as there is actually an intellectual engagement with both aspects of the matter' (para 14).

The Court was not 'persuaded that the Tribunal in this case did any more than determine that the applicant was not at risk of significant harm in the Swat Valley because he is just one person and the population of the Swat Valley is 1.8 million people. For the reasons described in DZADQ, that is a jurisdictional error' (para 22).

Ground 2:

'The decision of the Tribunal in RRT Case Number 1403721 was

			‘This is an application for an extension of time in which to file an application seeking review of a decision made by the Refugee Review Tribunal (“the Tribunal”). In that decision, the Tribunal affirmed a decision of the delegate of the first respondent not to grant the applicants protection visas’ (para 1). ‘The first applicant is a national of Lebanon. The second applicant is his now estranged wife. She is a national of Jordan. The third applicant is their first child, who was born on 18 October 2011, and who was two years old at the time of the Tribunal’s decision. The third applicant is a national of Lebanon’ (para 2). *Ground 1:* ‘The Refugee Review Tribunal erred by failing to consider the integer of separation from family members under s.36(2) of the Migration Act 1958 (Cth)’ (para 27). *Consideration of Ground 1:* ‘This ground was said to arise by reason of the facts that, if the second and third applicants were to be removed to their countries of nationality, the second applicant, the mother, would be removed to Jordan and the third applicant, her young child, would be removed to Lebanon and they would then remain separated from one another’ (para 28). ‘The second and third applicants argued that the

			Tribunal perfunctorily and wrongly concluded at [111] of its reasons for decision that: The separation of family members, and in particular the separation of young children (the third named applicant and his brother who was born subsequently in Australia) does not constitute persecution for a Convention reasons. (sic)' (para 29). 'The second and third applicants were correct to say that the Tribunal did not consider the questions of serious or significant harm arising from the separation of family members. The Tribunal did not consider those questions because it understood that it did not need to' (para 42). 'It is not a jurisdictional error to fail to consider an aspect of a claim that could not amount to serious or significant harm. The question for the court, therefore, is whether the Tribunal was correct in its understanding of the law relating to the separation of family members' (para 43). 'I proceed on the basis that *SZQOT* applies to this case, and that separation of family members is capable of constituting serious harm' (para 45). 'Consequently, as set out in the headnote of *SZQOT*, the Tribunal should have considered whether any psychological harm that might be suffered by the second and third applicants as a result of their separation would be a consequence of persecution for a Convention reason. It is not open to this court to conclude that any consideration of that question would

			necessarily be determined in the negative. It follows that the Tribunal has made a jurisdictional error, by failing to consider an integer of the claim, albeit one that was not raised expressly' (para 46). '*SZQOT* only applies to serious harm arising under the Convention. It does not apply to significant as harm as defined in the Act. The question of whether the separation of the second and third applicants could amount to significant harm as defined in the Act begins with *SZRSN*' (para 47). 'It seems to me that the reasoning in *SZRSN* may be not entirely correct. Section 36(2)(aa) of the Act provides that a person is entitled to a protection visa where: the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm' (para 49). 'That paragraph of the Act does not focus on the removal, as *SZRSN* does, but on the necessary and foreseeable consequences of the removal. Such consequences, in the present case, would include the possible consequence that the second and third applicants, being a mother and her young child, would suffer psychological harm, in their receiving countries, from being separated from each other' (para 50). 'Be that as it may. *SZRSN* was a decision on appeal from this court. As such, it is binding on this court,

			unless it is distinguishable. The second and third applicants argued that *SZRSN* was distinguishable from the present case because, in *SZRSN*, the person who was to be removed from Australia was the New Zealander father of children who would remain in Australia, whereas, in the present case, the mother and her young child would both be removed from Australia. Also, in *SZRSN* at [47], Mansfied J expressly relied on the context of that case, being that the removal of the New Zealander father from Australia, while his children would remain in Australia. Also, in *SZRSN* at [47], Mansfied J expressly relied on the context of that case, being that the removal of the New Zealander father from Australia, while his children would remain in Australia' (para 51). 'It seems to me that that is sufficient to distinguish *SZRSN* from the present case. In the present case, both the second and the third applicants, a mother and young child, would be removed from Australia and would possibly suffer significant harm in their respective receiving countries, being the possible psychological harm of being separated from one another' (para 52). 'By failing to consider this possibility, the Tribunal made the jurisdictional error of failing to consider an integer of the claim, albeit one that was not expressly raised' (para 53). *Ground 2:* 'The tribunal erred by failing to consider an integer of

the Second Applicant's claim, namely whether she was at real risk of significant harm in the form of mental suffering amounting to cruel or inhuman treatment by virtue of being separated from and / or denied access to her two young children, one of whom was only six months old' (para 54).

Consideration of Ground 2:

'For the reasons set out above, this ground must succeed' (para 55).

Ground 3:

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			Ground 5: 'The decision of the tribunal is affected by any error law' (para 77). *Consideration of Ground 5:* 'For the reasons set out above in relation to ground 1, this ground has merit' (para 78). *Ground 6:* 'Failed to take into account relevant considerations' (para 79). *Consideration of Ground 6:* 'For the reasons set out above in relation to ground 1, this ground has merit' (para 80). *Conclusion* 'Although the matter required an extension of time, it was listed for final hearing at the same time as the hearing of the extension of time application, in the event that an extension of time was granted. The extension of time has been granted. The matter was fully argued at the hearing. For the reasons explained above, the applicants' grounds have merit. The matter will be remitted for further hearing according to law. As the matter was procedurally unusual, I will hear the parties on the question of costs' (para 81).

ACT15 v Minister for Immigration & Anor [2016] FCCA 626 (Judge Young) (Unsuccessful)	23 March 2016	12, 31, 34-35, 37, 39-40, 42-43, 47-48 and 52-53	This case relates to: whether the 'the Tribunal misconstrued or misapprehended the complementary protection obligations arising under section 36(2)(aa) of the Migration Act 1958 as requiring a nexus with one of the five grounds of race, religion, nationality, membership of a particular social group or political opinion recognised under the Refugees Convention' (para 35) The applicant submitted four grounds of appeal (para 12). *Ground 1:* 'Ground 1 asserts jurisdictional error by reason of the Tribunal's failure to properly consider the applicant's claim to fear persecution by reason of his membership of a particular social group constituted by young male persons who have attempted to flee from Pakistan. It is asserted that the Tribunal thereby failed to consider a component integer of the applicant's claims and thus committed jurisdictional error. Although the Tribunal expressly rejected this part of the applicant's claim the applicant asserts that the Tribunal failed to give reasons for its conclusion and so, it should be inferred, has failed to properly consider it' (para 31). *Consideration of Ground 1:* 'I accept the first respondent's submission for the reasons set out in the passage from *WAEE*. First, the

			Tribunal's reasons are comprehensive and it has identified the claim, if only to reject it, and I am unwilling to infer, by reason of that fact alone, that the Tribunal has failed to properly consider it. Secondly, and more substantially, I consider that the Tribunal has given detailed consideration to the possible consequences of the applicant's attempt to "flee Pakistan" in the course of its consideration of the other claims and it was unnecessary to make a finding on the particular matter because it was subsumed in findings of greater generality or because a factual premise – the adverse consequences of the applicant's attempt to "flee from Pakistan" – upon which it rests have been rejected. In any event there was, in my view, no evidence or argument advanced beyond the bald claim that required further consideration by the Tribunal. This ground is rejected' (para 34). *Ground 2(a):* 'Ground 2(a) asserts jurisdictional error because the Tribunal misconstrued or misapprehended the complementary protection obligations arising under section 36(2)(aa) of the Migration Act 1958 as requiring a nexus with one of the five grounds of race, religion, nationality, membership of a particular social group or political opinion recognised under the Refugees Convention. The applicant asserts that this is apparent from a reading of the Tribunal's reasons for rejection of a complementary protection obligation at paragraph [87]' (para 35).

‘The Tribunal stated at paragraph 87 ‘I do not accept that there is a real risk that [the applicant] will be marginalised in Pakistani society as a Shia Muslim or that he will face discrimination for reasons of his religion amounting to “significant harm” as defined in subsection 36 (2A) of the Migration Act.... that he will suffer significant harm because he is a Shia Muslim..., because his father holds a senior position in the Post Office in Pakistan, because of any political opinion which you may hold or which may be imputed to him or because of his membership of any of the particular social groups which he and his representatives have suggested based on those circumstances’ (para 35).

Consideration of Ground 2(a):

The applicant made the ‘additional point that the reason for any harm is irrelevant to whether or not a complementary protection obligation arises and thus the Tribunal committed jurisdictional error by taking account an irrelevant consideration’ (para 37).

‘The applicant’s submissions misconstrue the Tribunal’s re

			'Nor can I see that it made any reference to this aspect of the applicant's fear in the earlier part of its analysis that could be said to have been relied upon in the complementary protection analysis' (para 39). 'Ground one was made out' (para 43). *Ground 2:* 'The Tribunal failed to comply with the requirements of the exhaustive statement of the natural justice hearing rule in Division 4 of Part 7 of the Migration Act 1958' (para 18). *Particulars of Ground 2:* 'The Tribunal's decision to affirm the decision under review was in part based on information concerning comments that the Applicant had made during an interview with the Minister's Department on 26 March 2013 (see para 30 of the Tribunal's decision). That information was not exempt from the operation of s424A of the Act. The Tribunal failed to give the information to the Applicant in the manner required by s424A or 424AA' (para 18). *Consideration of Ground 2:* 'In the current case the information in question is that the applicant discussed with his case officer at the Minister's department the prospect of being added to a woman's, who he described as his girlfriend, 457 visa

			Particulars of Ground 1: 'The Applicant had previously been refused a protection visa under s36(2)(a) of the Migration Act 1958. The Applicant then lodged a new application for a protection visa relying on s36(2)(aa). The Tribunal held that it was precluded from considering the grounds in s36(2)(a), and did not do so. The Tribunal misinterpreted s48A, which operates only to determine whether an application for a protection visa is valid, not what the Tribunal may and may not consider when making its determination.' (para 13). *Ground 2*: 'The Tribunal failed to give genuine consideration to, or dismissed without a rational justification, expert psychological evidence before it concerning the Applicant's psychological condition and its effect on his memory and ability to concentrate' (para 13). *Particulars of Ground 2*: 'The Tribunal had before it expert psychological evidence that the Applicant was suffering from Post Traumatic Stress Disorder, Adjustment Disorder, depression and other conditions which amongst other things affected his memory and concentration. The Tribunal summarily dismissed the reports without any intelligible explanation as to why they were not relevant to its findings concerning the Applicant's credibility, which were largely based on discrepancies concerning his memory of details of traumatic events that had occurred some 9 years previously' (para 13). *Ground 3*: 'The decision of the Tribunal was based in

part of assumptions concerning the actions of others that were unreasonable, lacking in evidence intelligibility, or not based on any evidence' (para 13).

Particulars of Ground 3: 'The Tribunal made findings as to the timeliness of police intervention in a shooting incident and the actions of third parties which it claimed undermined the Applicant's credibility concerning a central claim. The Tribunal referred to no evidence or basis for its understanding of what was a reasonable or expected timeframe for police intervention in those circumstances and gave no reason for rejecting the Applicant's explanation of those actions' (para 13).

Consideration of Ground 1:

The Court held that the decisions 'relied upon by the Minister correctly establish that if a visa application can only be validly made on the basis of the complementary protection criterion, there is in general no obligation on either the Minister or the Tribunal to consider the refugee criterion' (para 26).

'It is, however, a significant further step to assert that there is a jurisdictional limitation on both the Minister and the Tribunal which prevents them from considering the refugee criterion where a valid visa application has been made on the basis of the complementary protection criterion' (para 26).

			inferences drawn by the Tribunal were illogical. The applicant's argument is that the Tribunal made assumptions about police and emergency response times in Dhaka. Those assumptions have not been shown to be incorrect. At its highest, the applicant complains that the Tribunal made assumptions without any evidentiary basis. The complaint of irrationality is, therefore, simply a repetition of the complaint that the Tribunal made a finding without evidence' (para 44). In concluding the Court held that 'the applicant has established that the decision of the Tribunal is affected by jurisdictional error' and made 'orders in the nature of the constitutional writs of mandamus and certiorari' (para 47).
MZAGW & Ors v Minister for Immigration & Anor [2015] FCCA 2857 Judge Hartnett (Successful)	23 October 2015	2, 4, 26-28, 30 and 32-7	This case relates to: the application of the real chance test with regard to

Ground 2:
'The Second Respondent wrongly applied the “real chance” test when considering the Applicant’s claims under s.36(2)(aa) of the *Migration Act 1958* (Cth) (‘the Act’)’ (para 2).

Consideration of Grounds 1 and 2:

‘The Applicant argued the Tribunal failed to consider what would occur to the Applicant if he were placed in a civilian jail rather than a military prison, as found by the Tribunal’ (para 26).

The Court accepted this argument (para 26).

‘The Applicant argued this was a wrong finding or presumption made by the Tribunal because the Tribunal presumed the Applicant would be treated as a current member of the LAF rather than as a former member and now civilian’ (para 26).

The Court accepted this argument (para 26).

‘The Applicant also argued the Tribunal failed to consider whether former LAF soldiers who will be imprisoned are a particular social group’. The Court held that ‘the claim was raised on the material and not considered’ (para 27).

‘The question as to whether there is a real risk that the

imprisoned in a civilian facility and exposed to FAI [Fatah al-Islam] members was not asked by the Tribunal. Yet it was a necessary and foreseeable consequence of the Applicant's return to Lebanon' (para 27).

The Court held that 'the Tribunal's finding that the Applicant would face his term of imprisonment in a military prison as opposed to a Lebanese civilian prison, is not supported by the evidence' (para 28).

'The Tribunal expressly rejected the Applicant's claim that he would be incarcerated in Roumieh prison rather than a military prison or detention centre'. The Court found that there 'was no proper basis for this finding' (para 30).

'Having found that the Applicant was likely to serve his sentence of imprisonment in a military prison, the Tribunal did not consider that the standard of the prison that the Applicant would be required to attend constituted a harm that would be of severity necessary to constitute torture, cruel or inhuman treatment or punishment; or degrading treatment or punishment within the meaning of the Act. As a consequence, the

The applicant was a citizen of Sri Lanka and sought review on the following two grounds:

Ground 1:

application of those principles to the fact-finding as to the applicant in respect of imprisonment and prison conditions' (para 6).

'The delegate's decision also referred to the DFAT reports concerning the impact of the Immigrants and Emigrants Act 1949,

SZUQZ v Minister for Immigration & Anor [2015] FCCA			11).

			'The Guidelines provide extensive guidance on the topic of prison conditions. The Tribunal was required by s.499(2A) to take this guidance into account if it was relevant to the matter before it' (para 30). 'The Tribunal accepted that the applicant would be detained in prison for a matter of days because of his illegal departure' (para 32). 'The Tribunal accepted the conditions in Sri Lankan prisons were poor and torture of detainees is commonplace' (para 33) 'The Tribunal made express reference to the Guidelines in the attachment section of its decision record. However, outside of this reference, the Tribunal does not expressly mention the Guidelines' (para 42). 'The Tribunal is not required in all cases to make reference to the contents of the Guidelines. It would only be in circumstances where the Tribunal considered that the Guidelines were relevant that it would be directed by the Ministerial Direction to take the Guidelines into account' (para 42). The Court held that the 'Tribunal must have been aware of the Guidelines. The Tribunal identifies the material it has taken into account pursuant to Direction 56 as being the contents of the Department of Foreign Affairs and Trade Country Information report: Sri Lanka 31 July 2013. This does not include the Guidelines. There is no

the Act but also that it caused such extreme humiliation. In effect, the Tribunal rejected the operation of the

on Refugee Convention grounds it automatically follows that the claim is required to be considered as a claim for

			'The Tribunal's "review" under s 414 of the Act miscarried insofar as the Tribunal failed to consider important evidence relied on by the applicant as to the conditions he faces in Sri Lankan prisons' (para 41). *Consideration of Ground 1:* This ground related 'to whether the Tribunal's review "miscarried" on the basis that it failed to consider the three particularised items of evidence in its consideration of whether the Applicant met the complementary protection criterion' (para 73). The Court held that it was 'satisfied that the Tribunal correctly identified and considered all the claims made by and on behalf of the Applicant (including in relation to the prospect of exposure to prison conditions and/or mistreatment in prison on return to Sri Lanka)' (para 116). Specifically, the Court held that the Tribunal 'was aware of and did not overlook the general information in the particularised items of information. Such general statements about prison conditions and the duration of periods of imprisonment in the information in question were not of such significance, materiality or importance to what would happen to the Applicant as a returned failed asylum seeker who had left Sri Lanka illegally as to require express consideration' (para 116). 'The Tribunal had regard to recent, detailed evidence,

including about the prospect of detention and/or imprisonment as well as conditions and treatment in detention, of specific relevance to the particular circumstances of the Applicant as a returnee to Sri Lanka who was a failed asylum seeker who had departed illegally. It did so in the context of considering whether the Applicant met the statutory criteria for a protection visa. In these circumstances, even if the particularised reports did tend to show that conditions in Sri Lankan prisons for prisoners generally did not meet international standards, the Tribunal did not err in

the ICCPR, unlike s.36(2)(a) of the Act, s.36(2)(aa) does not directly incorporate any international treaty obligation into domestic law (*MZYYL* at [18] – [20]). The definition of “

			Consideration of Ground 3: The Court held that in 'reading the Tribunal decision fairly and as a whole, I am satisfied that the Tribunal was aware of the broader claims made by the Applicant's advisor regarding the impact of laws in relation to illegal departure and prevention of terrorism and of his claim to fear being detained (on any basis)' (para 175). Ground 3 was not made out (para 176). *Ground 4:* 'The Tribunal failed to apply the "real chance" test' (para 177). *Consideration of Ground 4:* The applicant 'submitted that the Tribunal could only have reached the conclusion that he would be released from remand in a Sri Lankan prison after a number of days if it had found that he would be granted bail' (para 179) The Court held that 'it is apparent from its findings that the Tribunal understood and considered the issue of whether bail was routinely given, both generally and with respect to the Applicant. There is no suggestion that there was anything in the evidence before the Tribunal to suggest that bail would not have been given to the Applicant. The Tribunal found that the prospect

The Refugee Review Tribunal (Tribunal) considered the 'applicant's claims of discrimination as a Hazara Shia' but found he would not face a 'real risk' of significant

discrimination against Hazaras' and if there was a 'finding of no discrimination', the 'complementary protection claim fails' (para 78).

However, the Court held that there was a 'different factual basis to the racial basis claim and these further factual findings' were of 'the nature that render the different treatment degrading' (para 78).

The Court did not accept the applicant's argument that 'none of these findings' were 'contained in the Tribunal's Decision Record' (para 78).

The Court acknowledged that the Tribunal had 'not repeated all of the claims, together with all of the factual findings, that it made against the persecution claim' (para 92).

However, the Court held that the 'Tribunal had no obligation to do so' as discussed in *Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 184 (para 92).

SZTMQ v Minister for Immigration & Anor [2015] FCCA 381 Judge Cameron (Unsuccessful)			

			protection provisions, MZYYL had sought protection only under the Act's complementary protection provisions' (para 23). 'When it comes to applying the complementary protection test, it should be recognised that s.36(2B) does no more than provide a non-exhaustive list of potential bases for concluding that an applicant does not face a real risk of significant harm in a third country' (para 24). 'In this case, the Tribunal was not required to turn its mind to s.36(2B)(b) and state protection in the complementary protection context because it had already found, when considering the applicant's claims against the Convention tests, that he had not been truthful, that his allegations were not to be believed and that his adherence to Shia Islam did not provide a sufficient basis to fear a real risk of harm in Pakistan' (para 25). The Court held that 'in circumstances where the Tribunal had already rejected the applicant's factual claims before it turned to consider the question of complementary protection, s.36(2B)(b) did not have to be considered because the question of the availability of state protection had, by virtue of those antecedent findings, become irrelevant (para 25). Therefore, the Court held that Ground 2 was not made out (para 26)

Ground 1:
‘In deciding to affirm the decision of the First Respondent, the Tribunal/Second Respondent committed an error of law amounting to a jurisdictional error by failing to carry out its statutory function to review the decision as required by s.414’ of the Act (para 19)

significant harm on the basis of his history of being an alcohol trader (para 23).

Relying on *DZADC v Minister for Immigration & Anor (No.2)* [2012] FMCA 778 the applicant argued that 'after finding the applicant's claim to have been abducted and threatened not established, the Tribunal has not separately considered whether the established facts, namely that the applicant traded in alcohol and that, according to country information, the Taliban targets alcohol use and trading, give rise to a well-

the Tribunal, in the applicant's submission, has committed jurisdictional error and thus its decision should be set aside'(para 34).

The Court held that there was 'a critical problem in the Tribunal's reasons in that it failed to engage in a forward looking assessment of the risk faced by the applicant should he return to Kabul and either once again engage in delivering alcohol, or be identified from his past involvement' (para 42).

The Court held that the 'Tribunal fell into the same error as was identified' by the Full Federal Court in *Minister for Immigration v MZYTS* (2013) 136 ALD 547; [2013] FCAFC 114 at [46] and [62] (para 48).

'The Tribunal failed to complete the performance of its statutory task and hence there was a constructive failure of jurisdiction' (para 48).

Consideration of Ground 2

The applicant argued 'that the Tribunal's findings in respect of the claims arising from the applicant's involvement in the alcohol trade as well as his status as a failed asylum seeker were irrational and illogical' (para 51).

The Court noted that an unreasonable decision is akin to a decision which is 'e ƨ o lƧ

			he would be gaoled upon his return to Turkey because he was a conscientious objector and would face significant harm given the prison conditions' (para 47). In *SZSPE* the Tribunal found that pain or suffering caused by 'overcrowding and other consequential problems in the Turkish prison system' was not 'intentionally inflicted on prisoners', and therefore did not satisfy the definition of cruel or inhuman treatment or punishment (para 47). The Tribunal also 'found that the overcrowding and other consequential problems were not "intended to cause" extreme humiliation', as required by the definition of degrading treatment or punishment (para 47). In *SZSPE* Judge Emmett concluded 'that there was no error in the Tribunal's approach' and 'an appeal from Judge Emmett's decision was dismissed' (para 48). Based on *SZSPE,* the Court held that it was 'bound to find that the Tribunal did not err in concluding that "intentionally inflicted" connotes the existence of an actual, subjective, intention on the part of a person to bring about the suffering by his or her conduct' (para 49). Furthermore, the Court held that 'although the definition of "degrading treatment or punishment" is phrased slightly differently (the definition refers to an act or omission that "causes, and is intended to cause,

extreme humiliation") there is no reason to suggest that something less than actual, subjective, intent is required' (para 49).

The Court further explained that 'the relevant definitions in s.5(1) must be read harmoniously' (para 49).

The Court accepted the Minister's submissions that 'having found that any discomfort to which the applicant might have been exposed would not be intentionally inflicted (bearing in mind that it was likely that he would only be detained for a very short period of time and would not be targeted in the penal system), it was not open to the Tribunal to conclude that applicant might suffer "significant harm" as that term is defined' (para 50).

Second proposition

would carry out an act or omission’ (para 54).

January 2014 (para 3).

			Applicants were taken to have been notified of the decision at the time the notification letter was actually received on 15 March 2013 the Tribunal erred in holding that the review application was made out of time' (para 16). 2. 'The purported notification of the delegate's decision was invalid as the "*notification*" did not specify' that the applicant did not satisfy the complementary protection criteria (para 17). 3. 'The notification letter was not dispatched to an address identified in s.494B(4)(c) of the Act (or that the delegate made an error in dispatching it) so that by s.494C(7) the Applicant was taken to have received the notice when she actually received it' (para 18). Grounds 1-3 were not made out (paras 59, 75 and 99). With respect to ground 2, the Tribunal found that 'in the letter the delegate stated that he was not satisfied that the Applicant "*met the relevant criteria for the grant of* [a protection] *visa as set out in Australian migration law*". The delegate also referred to the attached decision record. The decision record (as part of the notification document) specified' that the applicant failed to meet either the Refugee Convention criteria or the complementary protection criteria' (para 75). The applicant's 'failure to meet one of these alternative criteria was the reason the visa was refused' (para 75).

real risk of suffering significant harm if she were to return to Bangladesh. It was open to the Tribunal to hold that view. The Tribunal was not satisfied the applicant had such belief; and it based that conclusion, not on the operation of s.91R(3) of the Act, but on the reasons the Tribunal had already given for finding that "*the applicant's involvement with the Christian churches in Australia was solely for the purpose of strengthening her protection visa application*". Those reasons were the Tribunal's credibility findings that were adverse to the applicant, the Tribunal's finding that the applicant did not convert to Christianity in Bangladesh, the applicant's inconsistent evidence about her attendance at church in Australia, and the letters of support which suggested the applicant only converted in 2012, being around the time the applicant lodged her protection vis

The applicants (wife, husband and two children) were citizens of Fiji (para 4).

The first applicant's (wife) 'claims to protection were

by a delegate of the respondent on 11 July 2012 (para 4).

The applicants sought review by the Refugee Review Tribunal (Tribunal) of the delegate's decision on 25 July 2012. The Tribunal affirmed the decision of the delegate on 2 April 2013 (para 4).

On 3 January 2014, the applicants sought to lodge a further application for a protection visas, expressly relying on s 36(2)(aa) of the Act (para 4).

By letter dated 3 January 2014, an officer of the Department of Immigration 'notified the applicants to the effect that their application for protection visas was not valid by virtue of s.48A of the Act' (para 4).

The applicants' argument before the Court was that the second protection visa ap[illegible]

			The Court held that the 'factual situation in the current case is different in a material particular to that in *SZGIZ*. While the "first" application for protection visas, made by the applicants in the current case, was lodged before the introduction of s.36(2)(aa) of the Act (as in *SZGIZ*), unlike as in *SZGIZ*, the first delegate's decision (and a relevant Tribunal decision) was made after the introduction of s.36(2)(aa) of the Act, and was considered by the delegate' (para 31). 'The application for the protection visa made by the applicant on 20 March 2012 advanced claims that gave rise, as at 24 March 2012, to the possibility that s.36(2)(aa) of the Act might be satisfied. That possibility was explored by the "first" delegate and rejected' (para 47). 'The applicant, therefore, was not, because of s.48A of the Act, able to make another application for a protection visa, given that she had previously been refused a protection visa after consideration of the likelihood of harm as against both of the criteria at s.36(2) of the Act' (para 48). Accordingly the applicants were 'unable to make a valid "second" application' (para 48). In concluding the Court held that there was 'no error in the "second" delegate's finding that the application made on 3 January 2014 was not valid' (para 49).

			The application before the Court was dismissed (para 49).