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COMPLEMENTARY PROTECTION IN AUSTRALIA

DECISIONS OF THE HIGH COURT, FEDERAL COURT & FEDERAL CIRCUIT COURT

2019 onwards

This table is current to 31 August 2021

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. Key High Court decisions are also listed. The decisions are organised by court, in reverse chronological order, from 2019 onwards. Decisions from 2012 (when the complementary protection regime commenced in Australia) to 2014, 2015-2016, 2017 and 2018 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, but which may be relevant in the complementary protection context. For example, the list may include cases which clarify a point of law relating to Australia's *non-refoulement* obligations, considered in the context of visa cancellation and extradition.

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

FEDERAL COURT OF AUSTRALIA

Case	Decision date	Relevant paragraphs	Comments
CKL21 v Minister for Home Affairs [2021] FCA 1019 (Unsuccessful)	27 August 2021	18 (proposed grounds of review), 51–58 (disposition of ground 3), 59–68 (disposition of ground 4), 69–77 (disposition of ground 5)	Snaden J dismissed an application for judicial review of a decision of the Minister not to revoke the cancellation of the applicant's refugee visa. Relevantly, the third ground of appeal alleged that the Minister's decision was legally unreasonable or failed to consider and apply the correct law, namely by failing to weigh the legal consequences of section 197C of the *Migration Act* when considering the 'possibility that [the applicant] may be refused a protection visa because of the ineligibility criteria' or the effect of the applicant being possibly stateless on his future period in immigration detention. The fourth ground of appeal alleged that the Minister failed to exercise jurisdiction and/or perform his statutory task by failing to consider, and deferring to a future protection visa application, the applicant's representations about Australia's non-refoulement obligations as 'another reason' for revocation. Relatedly, the fifth ground alleged that the Minister failed to perform his statutory task by failing to give proper, genuine, and realistic consideration to, or to engage in an 'active intellectual process' with, the applicant's representations about the fear of harm he would suffer if he had to return to South Sudan as 'another reason' for revocation. Snaden J rejected these three grounds of review and dismissed the appeal.
Minister for Immigration, Citizenship, Migrant Services and Multicultural	23 August 2021	Kerr and Mortimer JJ: 58–59 (common legal issue in both appeals), 60 (two other legal	The Full Court considered, and unanimously dismissed, two appeals that raised a common legal issue. Each turned on consideration by a decision-maker of the question of whether a visa holder was a person who

Affairs v FAK19 [2021] FCAFC 153 (Unsuccessful)		issues raised by FAK19's appeal), 75–177 (disposition of common legal issue), 178–186 (disposition of FAK19's two other legal issues) Allsop CJ: 1 (agreeing with Kerr and Mortimer JJ), 1–32 (general comments about the Full Court's practice of reconsidering, and departing from, previous Full Court authority)	engaged Australia's international non-refoulement obligations and, if so, what legal role this fact played in the performance by the decision-maker of the task of deciding whether to cancel the visa held by the person, or to revoke the cancellation of a visa held by that person. FAK19's appeal raised two other legal issues. The first was a challenge to the finding of the AAT below that the fact that FAK19's circumstances engaged Australia's non-refoulement obligations should be given less weight because FAK19 was able to apply for a protection visa and have those issues addressed during that process. The second was a contention relying on the reasons of Kenny and Mortimer JJ in *WKMZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 55. FAK19 contended that the AAT erred in its response to his contention that he was likely to be indefinitely detained—specifically, the Tribunal's finding that his detention would not be "indefinite", because section 198 of the *Migration Act*, read with section 197C, imposed an obligation to remove FAK19 from Australia as soon as reasonably practicable. In dismissing the appeals, Kerr and Mortimer JJ (Allsop CJ agreeing at [1]) affirmed the correctness of the line of previous Full Court authority established by *Ali v Minister for Home Affairs* [2020] FCAFC 109; 278 FCR 627, *Ibrahim v Minister for Home Affairs* [2019] FCAFC 89; 270 FCR 12 and *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96; 248 FCR 456. Allsop CJ additionally provided general comments about the Full Court's practice of reconsidering, and departing from, previous Full Court authority.

CGS19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 968 (Unsuccessful)	17 August 2021	21–22 (grounds of appeal), 23–31 (disposition of ground 1), 32–46 (disposition of ground 2), 47–56 (disposition of ground 3)	Rangiah J dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to grant the appellant a protection visa. On appeal to the Federal Court, the appellant advanced three grounds of appeal. The first ground alleged that the AAT failed to understand and examine the persecution of the appellant based on his membership of an ethnic group by conflating and failing to differentiate his membership of an ethnic group with membership of a criminal group, giving rise to jurisdictional error. The second ground alleged that the AAT misapplied the relevant principles when making an adverse credibility finding. The third ground alleged that the AAT conflated the findings under the refugee criterion with the complementary criterion. The appellant submitted that these three errors involved misapplication of the relevant principles, failure to give genuine, proper or realistic consideration to the appellant's claims, or an absence of logic and an insufficient evidentiary basis for the making of the AAT's findings. Rangiah J rejected all three grounds and dismissed the appeal.
CNS18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 921 (Successful)	9 August 2021	30 (ground 1), 34 (ground 2), 36 (ground 3), 28 and 62 (ground 4), 30–35 (disposition of grounds 1 and 2), 51–61 (disposition of ground 3), 62 (disposition of ground 4)	Besanko J allowed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the appellants protection visas. On appeal to the Federal Court, the appellants advanced four grounds of review. The first ground alleged that the IAA constructively failed to exercise jurisdiction in that it failed to review the decision of the delegate. The particular failure alleged was that the IAA failed to review the claim by the appellants that they were

			stateless Muslims from Myanmar of unknown ethnicity. An aspect of this error was said to be that the IAA treated its finding that the appellants were not of Rohingya ethnicity as effectively determinative of whether they were stateless and/or would face persecution by reason of being stateless persons. Another aspect of this error was said to be that the IAA had dismissed the appellants' claim to be stateless on an unsound and incorrect basis. The second ground alleged that the FCCA misunderstood the first ground of judicial review before it and, as a result, its analysis of the ground was flawed. The third ground alleged that the FCCA erred in holding that the IAA's decision was not affected by jurisdictional error, when it should have held that the IAA's decision was affected by a material finding that was legally unreasonable, illogical or irrational in that (a) the IAA made a positive finding that the applicants were from an ethnic group that was not barred from citizenship in Myanmar; (b) the finding was ultimately based upon the combination of the Authority's findings that the review applicants were not of Rohingyan ethnicity and had not claimed to be of any other particular ethnicity; and/or (c) the finding ignored the fact that the applicants had expressly claimed not to know their ethnicity and that the suggestion that the applicants may have been of Rohingyan ethnicity was itself speculative, such that the resolution of that question against the applicants did not provide a rational basis to dismiss their claim that they were stateless persons of unknown ethnicity. The fourth ground alleged that the FCCA misunderstood the second ground of judicial review before it and, as a result, its analysis of the ground was flawed.

			Besanko J upheld ground 3 of the appeal and also appeared to uphold ground 1, although his Honour considered that the jurisdictional error alleged by ground 1 could be more directly characterised as a jurisdictional error of the type alleged by ground 3.
Uolilo v Minister for Home Affairs [2021] FCAFC 138 (Unsuccessful)	6 August 2021	Nicholas and Yates JJ: 26 (three new grounds of review), 32–59 (disposition of first new ground) Charlesworth J: 82 (agreeing with the refusal of leave), 83–87 (additional reasons)	The Full Court unanimously declined to grant leave to the appellant to introduce three new grounds of review against a decision of a single justice of the Court dismissing an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister refusing to grant the appellant a partner visa. Relevantly, the first new ground of review alleged that the AAT below erred in applying Ministerial Direction No 79 when purporting to assess international non-refoulement obligations arising from the appellant's claims, in circumstances where (a) that was not a, or was not a valid, direction under section 499 of the *Migration Act* because it was inconsistent with the Act and thus in breach of section 499(2), or (b) alternatively, that aspect of the Direction was not a relevant consideration to a visa refusal. Nicholas and Yates JJ considered that this new ground (as well as the other two new grounds of review) lacked merit. Given this, and in light of the absence of any explanation by the appellant (other than a change in counsel) for his failure to advance any of the three new grounds below, their Honours refused leave to rely on any of these grounds. Charlesworth J (at [82]) agreed that there should be no grant of leave to introduce these three grounds of review and set out additional reasons explaining that leave should be so refused even if it could

			have been shown that one or more of these grounds had reasonable prospects of success.
DBX18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 897 (Unsuccessful)	4 August 2021	12 (proposed ground of review), 23–33 (disposition)	McKerracher J dismissed an application for an extension of time to appeal a decision of the FCCA dismissing the applicant's application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the applicant a Safe Haven Enterprise visa. The ground of review that the applicant sought to pursue alleged that the FCCA erred in not finding that the IAA committed jurisdictional error by constructively failing to exercise jurisdiction, and by failing to carry out its statutory task of review, in that it failed properly to try the application for judicial review. In particulars to this ground, the applicant alleged that the FCCA concluded (at [62] of its reasons) that the IAA had asked itself the correct questions with respect to both the refugee and complementary protection claims and had 'clearly undertook' its statutory task; that the FCCA's consideration of the application began at [49] of its reasons and only related to the first integer of the applicant's claim; and that the FCCA's reasons did not disclose a basis to support the conclusion either that the IAA had asked itself the correct questions, or that the IAA had clearly undertaken its statutory task. McKerracher J, after reviewing the decision of the FCCA as a whole, considered that no error was demonstrated in the way the FCCA expressed its conclusions, or the reasoning giving rise to those conclusions. His Honour concluded that, in light of the absence of error at an impressionistic level and the considerable delay in pursuing the application for the extension of time, the application must be refused.

BWY17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 860 (Unsuccessful)	29 July 2021	30–31 (grounds of review), 32–40 (disposition of grounds 1 and 2), 41–48 (disposition of ground 3)	Snaden J dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the appellant a Safe Haven Enterprise visa. On appeal to the Federal Court, the appellant advanced three grounds of review. The first ground alleged that the FCCA erred in finding that, to the extent the IAA erred in asserting that new claims made by the appellant were never made, the error was not jurisdictional. The second ground alleged that the FCCA ought to have found that, in relying on the absence of particular claims and evidence, the IAA misconstrued and misapplied section 473DD of the *Migration Act* and consequently failed to have regard to material relevant to its actual course of reasoning. Relevantly to grounds 1 and 2, the IAA's decision proceeded upon the bases that (1) the appellant did not raise '… any claim that he or his family have come to the adverse attention of the Sri Lankan authorities or any other group on account of his uncle's profile or prior LTTE activities', and (2) the appellant did not raise '… any claim that he or his family have come to the adverse attention of the Sri Lankan authorities or any other group on account of his mother's disappearance'. The third ground alleged that, in the alternative, the FCCA erred in not finding, and ought to have found, that the IAA had unreasonably failed to exercise or consider exercising its power under section 473DC of the Act to invite the applicant to give new information concerning the so-called 'data breach'. Snaden J rejected all three grounds of review and dismissed the appeal.

PKZM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 845 (Successful)	27 July 2021	2–3 (grounds of review), 26–68 (disposition of ground 1), 72–88 (disposition of ground 2), 96–111 (disposition of ground 3)	Anderson J allowed an appeal against a decision of the AAT affirming a decision of a delegate of the Minister not to revoke the cancellation of the applicant's refugee visa. On appeal to the Federal Court, the applicant ultimately relied on three grounds of review. The first ground alleged that the AAT (a) failed genuinely to consider representations by the applicant with respect to prolonged or indefinite detention, and (b) failed to consider prolonged or indefinite detention as a legal consequence of the decision and/or failed to correctly understand the *Migration Act* or its operation. The second ground alleged that the AAT failed to consider representations with respect to the impact on Australia's reputation as a consequence of its decision. The third ground alleged that the AAT misunderstood the Act or its operation with respect to how non-refoulement claims are assessed under section 501CA(4) as compared to the protection visa process. Anderson J concluded that all three grounds of review were established and made orders quashing the AAT's decision and requiring the AAT to redetermine the applicant's application for review according to law.
SZQKE v Minister for Immigration and Border Protection [2021] FCA 833 (Unsuccessful)	26 July 2021	1–2 (introductory comments), 17 (ground of review), 20–35 (disposition)	Davies J dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of an adverse Independent Treaties Obligations Assessment (ITOA) conducted by an officer (the 'assessor') in the Minister's Department. The assessor was not satisfied that the appellant had a well-founded fear that he would be persecuted for reasons of his Shia religion, Hazara ethnicity, or imputed political opinion or that there was a real risk he would suffer significant harm if he returned to Afghanistan and, thus, was not a person to whom

			Australia had non-refoulement obligations. The assessor's lack of satisfaction was based in part on country information taken from the sources referenced at footnotes 80–89 and 97 of the ITOA report. The sole ground of review advanced in the Federal Court was that the FCCA erred in finding that there was no denial of procedural fairness in failing to put country information to the appellant for comment during an ITOA interview under the non-statutory processing regime. The appellant also sought leave to adduce fresh evidence, comprising the documents referred to in footnotes 80–89 and 97 of the ITOA report and an email exchange between Professor William Maley and the appellant's solicitor on 24–25 September 2020, forwarding an email from Qayoom Suroush to Timor Sharan dated 5 May 2015. Davies J refused leave to adduce the fresh evidence and dismissed the appeal.
CZT16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 819 (Successful)	21 July 2021	36–37 (ground of review), 45–73 (disposition)	Halley J allowed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to grant the appellants protection visas. On appeal to the Federal Court, the appellants advanced a single ground of review, namely that the FCCA erred (a) in finding that the material conclusions which led to the decision of the AAT were arrived at by a logical process of reasoning, and (b) in failing to find that the AAT's decision was affected by jurisdictional error because it was materially affected by illogical or irrational reasoning. The appellants developed their ground of appeal in their written submissions as follows:

			2. … In determining that the Appellants would not face a real risk of significant harm if removed to Albania, the Tribunal relied upon illogical or irrational reasoning. In particular, the Appellants contend: a. *first*, that it was not open to a logical or rational Tribunal to conclude that the First Appellant and her mother were 'equally' responsible for the events which led to the First Appellant's fear of harm; or b. *second*, that it was not open to a logical or rational Tribunal to conclude that the First Appellant and her mother would be 'equally' at risk because they were 'equally' responsible, without addressing whether they would be viewed in that way by their prospective attackers. 3. As a result, the Tribunal's decision was affected by jurisdictional error. Respectfully, the primary judge erred in finding to the contrary. Halley J concluded that the Tribunal had committed jurisdictional error and allowed the appeal.
BCE20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 124 (Successful)	16 July 2021	25 (sole ground of review), 27–42 (disposition)	The Full Court unanimously allowed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister refusing an application for a protection visa. On appeal to the Full Court, the appellant advanced a single ground of review: that the FCCA erred by not finding that the AAT had failed to consider and determine an integer of the

			appellant's claim, including by (a) erroneously holding that the integer in question was predicated on him not being able to access adequate medical care for his mental illness, (b) erroneously holding that it (the FCCA) was not taken to any other information that made out the appellant's claim of social isolation consequent upon his conversion disorder (which, the appellant alleged, was to engage in merits review rather than to determine whether a clearly articulated integer of the appellant's claim had been disposed of), and (c) erroneously holding that the claim was dealt with in a more general finding set out elsewhere. The Full Court concluded that the AAT's decision was the product of jurisdictional error and that the FCCA was wrong to conclude otherwise.
DPK17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 776 (Unsuccessful)	9 July 2021	23 (grounds of appeal), 25–38 (disposition of ground 1), 39–47 (disposition of ground 2)	Snaden J dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to grant the appellant a protection visa. On appeal to the Federal Court, the appellant advanced two grounds of review. The first ground alleged that the FCCA erred in failing to find that the AAT erred in its statutory task in that it did not 'deal with' country information relating to laws targeting transgender (cf homosexual) persons in Malaysia, in circumstances where the AAT accepted that the appellant was a transgender person. The second ground alleged that the FCCA erred in failing to find that the AAT erred by failing to take into account a relevant consideration or failed to ask the right question, namely whether the real risk of mental (cf physical) harm occasioned by the anticipated conditions on return for the appellant could amount to significant harm for the purposes of section

			36(2)(aa) of the *Migration Act*. Snaden J rejected both grounds of review and dismissed the appeal.
ALO19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 760 (Unsuccessful)	8 July 2021	3 (grounds of review), 15–22 (disposition of first pressed ground of review)	Anderson J dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to grant the appellant a protection visa. On appeal to the Federal Court, the appellant advanced three, but pressed only two, grounds of review. Relevantly, the first pressed ground alleged that the FCCA fell into error by failing to find that the Tribunal misapprehended or misapplied the test in relation to "complementary protection". Anderson J concluded that no jurisdictional error had been established in this respect and rejected this ground of review.
EWQ17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 778 (Unsuccessful)	8 July 2021	64 (grounds of review), 87–101 (disposition)	Banks-Smith J dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the appellant a Safe Haven Enterprise visa. On appeal to the Federal Court, the appellant advanced four grounds of review. The first ground alleged that the FCCA erred by not finding that the IAA's decision was affected by jurisdictional error because the IAA carried out the review in circumstances where the Secretary of the Department had not provided all of the material it was required to give the IAA under section 473CB of the *Migration Act*. The second ground alleged that the FCCA erred by not finding that the decision of the IAA was affected by jurisdictional error because, contrary to section 473DB(1) of the Act, the IAA did not consider all of the material given to it by the Secretary under section 473CB. The third ground alleged that the FCCA erred by not finding that interviews dated

			16 February 2013 and 27 January 2017 were defective or inadequate, such that the IAA did not have all relevant information before it. The fourth ground alleged that the FCCA erred by not finding that the IAA erred in failing to consider exercising the discretion under section 473GB(3)(b) by failing to reveal to the applicant (and invite him to comment upon) a non-disclosure certificate issued under section 473GB. Banks-Smith J rejected each of these grounds and dismissed the appeal.
TNVP v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 726 (Unsuccessful)	1 July 2021	309 (grounds of review), 40–51 (disposition of ground 2), 61–65 (disposition of ground 4)	Stewart J dismissed an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to revoke the cancellation of the applicant's partner visa. Relevantly, the second ground of review alleged that, in the context of assessing Australia's non-refoulement obligations, the AAT erred when assessing the reasonableness of the applicant's relocation in India. Additionally, the fourth ground of review alleged that the AAT erred when considering the immediate legal and factual consequences of non-revocation. By way of particulars to this ground, the applicant alleged that the Tribunal concluded that the applicant would not necessarily be removed from Australia or indefinitely detained because it was possible for him to apply for a protection visa, and that the AAT failed to consider that (a) the applicant's claims concerning non-refoulement obligations may not be considered even if he applied for a protection visa, and/or (b) the applicant might be refused a protection visa because he was excluded under relevant character provisions. Stewart J rejected both grounds 2 and 4 and dismissed the appeal.

FPK18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 723 (Unsuccessful)	30 June 2021	10 (proposed ground of review), 59–67 (relevant legal principles), 68–75 (disposition)	Banks-Smith J dismissed an application for an extension of time to appeal a decision of the FCCA dismissing the applicant's application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the applicant a Safe Haven Enterprise visa. The ground of appeal that the applicant sought to pursue, and that was not raised in the FCCA, alleged in effect that the FCCA erred in failing to find jurisdictional error in circumstances where the Secretary of the Minister's Department failed to consider the relevance of, and provide material to, the IAA under section 473CB of the *Migration Act*, and in circumstances where such material could have affected the outcome of the review. The applicant contended that the Secretary should have considered and taken a reasonable view as to whether any other file notes or audio record of a discussion between the delegate and the second delegate or the uncle's Departmental file were relevant, and failed to do so, or unreasonably determined that the material was not relevant. Banks-Smith J considered it to be in the interests of justice to refuse the extension of time. Her Honour did not consider the appeal on the proposed new ground would have any real prospect of success.
CDN16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 699 (Unsuccessful)	25 June 2021	53 (grounds 1 and 4), 56 (grounds 2 and 3), 76–93 (disposition of ground 1), 94–97 (disposition of ground 4), 98–110 (disposition of grounds 2 and 3), 111–113 (CDS16 and CDT16's proposed	Kenny J dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the IAA that had affirmed a decision of a delegate of the Minister to refuse to grant CDN16, his wife (CDS16), and their child (CDT16) Safe Haven Enterprise visas. Before the Federal Court, four grounds of appeal ultimately were advanced. The first ground alleged that the FCCA erred in not finding that the IAA

		ground of review), 124–147 (disposition of CDS16 and CDT16's proposed ground of review)	erred by failing to consider submissions and claims that the wife would suffer serious harm or significant harm as a Tamil woman. The second ground alleged that the IAA failed to consider the husband's individual claims made in his application, and noted in particulars that (a) the husband made a number of claims about why he would be harmed on return to Sri Lanka, one of these claims being that he would be harmed because of entering a mixed marriage with a woman associated with the LTTE, and (b) the IAA failed to consider the facts applicable to the husband individually to assess eligibility on its own but considered it in line with the wife's individual claims. The third ground alleged that the IAA failed to consider section 424A(1) of the *Migration Act*, and noted in particulars that (a) the IAA made an adverse decision against the claims made by the husband affirming the decision made by the Department without giving any notice under section 424A(1) as required by legislation to address 'credibility', and (b) the IAA rejected the husband's claims 'in relation to failed asylum seeker [sic] taking into account the external report of DFAT than the legislation [sic]' (arguing that, by failing to apply the legislation, the IAA made a jurisdictional error by not considering the significant harm that would give rise to the complementary protection criteria). The fourth ground alleged that the FCCA erred in not finding that the IAA erred by failing to consider the relevant category of UNHCR Guidelines about Tamils at risk of harm in Sri Lanka due to sheltering or supporting LTTE personnel or having family links with a person who sheltered or supported LTTE personnel. This ground

			alleged further, and alternatively, that the IAA erred by misapplying the 'real chance' test. Grounds 2 and 3 were not raised in the FCCA. Kenny J considered that these grounds lacked merit and her Honour refused leave to raise them on appeal. Kenny J also rejected grounds 1 and 4. CDS16 and CDT16 also sought to raise another ground of review, alleging that the FCCA erred by not finding that the IAA's decision was affected by jurisdictional error in that the IAA failed to carry out its jurisdiction by failing to consider significant evidence and/or a claim raised on the materials. Specifically, they alleged that the claim/evidence not considered was that the child would be at risk of harm if the child's parents were incarcerated upon return to Sri Lanka in the context of the parents having departed illegally. Kenny J, however, considered that this proposed ground would likely fail even if her Honour granted leave to rely on it.
ENC18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 686 (Unsuccessful)	24 June 2021	24 (ENC18 ground of appeal), 29–32 (disposition of ENC18's ground of appeal), 49–50 (END18 grounds of appeal), 56–66 (disposition of END18's grounds of appeal)	Middleton J dismissed two appeals from a decision of the FCCA dismissing two separate applications for judicial review of two separate AAT decisions affirming decisions of a delegate of the Minister not to grant the appellants protection visas. The respective appellants (ENC18 and END18) were in a same-sex relationship and had been for some years prior to arriving in Australia, and Middleton J considered it convenient to proceed, as the FCCA did, by hearing and determining the appeals together.

			ENC18's sole ground of appeal was that the FCCA fell into error by failing to find that the AAT failed to have regard to important evidence in respect of her claims for protection and/or acted unreasonably in finding that she had a 'private' nature. Middleton J rejected this ground, concluding that the analysis taken by the FCCA was correct and the AAT had enough probative evidence to find, as it did, that ENC18 did not have the relevant fear of serious harm amounting to persecution or significant harm. END18 advanced two grounds of appeal. The first ground alleged that the FCCA fell into error by failing to find that the AAT failed to have regard to important evidence in respect of END18's claims for protection and/or acted unreasonably in finding that she had a 'private' nature. In this respect, END18 (like ENC18) also claimed to have lived discreetly in Malaysia, including because of her fears of the religious police. The second ground alleged that the FCCA fell into error by failing to find that the AAT had failed to have regard to an integer of END18's claims arising from her fear of harm as a woman who 'dressed like a man'. Middleton J was not persuaded that the AAT had committed jurisdictional error and rejected both of these grounds.
GOS18 v Minister for Immigration Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 662 (Successful)	21 June 2021	2 (grounds of appeal), 26–39 (disposition of ground 1A), 40–51 (disposition of grounds 1B, 1C, and 2)	Jagot J allowed an appeal against orders of the FCCA dismissing the appellant's application for judicial review of a decision of the IAA that had affirmed the decision of a delegate of the Minister refusing to grant the appellant a temporary protection visa. On appeal to the Federal Court, the appellant contended that the primary

			judge erred by not finding that the decision of the IAA was affected by: (1A) jurisdictional error, in that it did not lawfully consider the application of section 473DD(b)(ii) of the *Migration Act* in considering whether to admit new information into the review, being the appellant's claim that she held a fear of return to Sri Lanka based on her husband's profile; (1B) illogicality, irrationality or legal unreasonableness, because on the materials it was not reasonably open to the IAA to find that the appellant could reasonably be expected to know the details of her husband's claims; (1C) legal unreasonableness in that the IAA failed to consider whether to get the files of the appellant's husband and their son from the Department of Home Affairs under section 473DC(1) of the Act, or unreasonably failed to get those files; and (2) jurisdictional error by the IAA making unreasonable or illogical findings as to the appellant's credibility and claims, or alternatively by failing to give proper, genuine and realistic consideration to the appellant's claims. Jagot J concluded that the appellant should be given leave to raise ground 1A in the proposed amended notice of appeal and that the appeal should be allowed on that ground. Her Honour rejected grounds 1B, 1C, and 2.
EHV18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 649 (Unsuccessful)	15 June 2021	2 (ground of appeal), 39–66 (disposition)	Beach J dismissed an appeal against a decision of the FCCA dismissing the appellant's application for judicial review of a decision of the IAA that had affirmed a decision of a delegate of the Minister to refuse to grant to the appellant a Safe Haven Enterprise visa. Before the Federal Court, the appellant complained, as part of a

			reformulated ground of appeal that Beach J permitted to be put, that there was a constructive failure to exercise jurisdiction by the IAA in that it failed to consider and determine the reasonableness and practicability of the appellant relocating to Kabul. This issue arose under the complementary protection criterion invoking ss 36(2)(aa) and (2B) of the *Migration Act 1958* (Cth). Beach J concluded that the new ground of appeal was not made out and dismissed the appeal.
EXT20 v Minister for Home Affairs [2021] FCA 629 (Unsuccessful)	11 June 2021	37 (grounds of review), 38–72 (disposition)	O'Bryan J dismissed an application for judicial review of a decision made personally by the Minister under section 501CA(4) of the *Migration Act* not to revoke the cancellation of the applicant's partner visa. The applicant made three core complaints about the Minister's decision. The first complaint (reflected in ground 1) was that the Minister failed to resolve a substantial and clearly articulated claim that the applicant faced a real risk of harm if returned to the Democratic Republic of the Congo (DRC). The second complaint (reflected in ground 4) was related to the first complaint. It alleged that the Minister failed to consider the applicant's claims to fear harm upon any return to the DRC outside of the non-refoulement context and particularly to consider the claims in the context of the impediments to the applicant upon return to the DRC. The third complaint (reflected in ground 3) was that the Minister erred by failing to notify the applicant of the issues set out at paragraphs 70, 72, 74, 76, 80 and 81 of the Minister's reasons for decision (relating to the Minister's concerns about the lack of detail in the applicant's representations concerning the applicant's and his family's circumstances and about the applicant's failure to

			provide any supporting evidence or information of his claims and the absence of credible country information to support his representations about past events) and giving the applicant an opportunity to respond to those issues. O'Bryan J rejected each of these complaints and dismissed the application for review.
DYI16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 612 (Unsuccessful)	11 June 2021	33 (grounds of review), 42–82 (disposition), 83–84 (conclusions)	Wheelahan J dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to grant the appellant a protection visa. On appeal to the Federal Court, the appellant sought leave to advance two different grounds of review to those advanced below. They alleged that the primary judge erred by failing to find that the AAT failed to determine the review application according to law and hence its decision was vitiated by jurisdictional error because: (a) in its treatment of the appellant's legal representative's evidence about the contents of a telephone conversation between her and the appellant's supervisor (Ahmed Essa) at the United Nations Food and Agricultural Organisation ('UNFAO'), concerning the threats to the appellant by the Taliban, the AAT constructively failed to exercise its jurisdiction by failing to make an obvious inquiry about a critical fact, the existence of which was easily ascertainable; and/or (b) in making adverse credibility and other findings against the appellant, the AAT placed considerable weight on correspondence from Mr Marcell Stallen, International Project Manager at UNFAO and, in doing so, the AAT fell into jurisdictional error by:

			(i) not complying with section 424A of the *Migration Act* by not providing clear particulars of the Stallen correspondence and not ensuring that the appellant understood the relevance of the Stallen correspondence to the review; and/or (ii) failing to conduct the review in the manner required by the Act by unreasonably failing to fully disclose, or provide further information of, the Stallen correspondence. Wheelahan J considered the weight of relevant discretionary considerations relating to the grant of leave to raise new grounds on appeal, including especially the merits of the new grounds, pointed against leave being given. As such, his Honour refused the appellant leave and dismissed his appeal.
BFMV v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 573 (Unsuccessful)	2 June 2021	35–38 (grounds of review), 39–58 (disposition)	Nicholas J dismissed an appeal against a decision of the AAT affirming a decision of a delegate of the Minister not to revoke the cancellation of the appellant's refugee visa. On appeal to the Federal Court, the appellant advanced two substantive grounds of review. The first ground was that the AAT failed to give proper, genuine, and realistic consideration to the non-refoulement obligations which it found to be owed to the applicant and that, for this purpose, it was not sufficient for the AAT merely to find that 'the immediate consequence of non-revocation did not necessarily include a non-refoulement because the applicant could apply for a protection visa' without acknowledging that the decision not to revoke the cancellation had the 'prima facie or possible effect' that the applicant would be refused a protection visa and removed from Australia. The second

			ground was that the AAT failed to give consideration to the potential damage to Australia's international reputation in the event that the applicant was deported in breach of Australia's non-refoulement obligations. Nicholas J rejected both grounds of review and dismissed the appeal.
CRE16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 563 (Unsuccessful)	28 May 2021	15 (ground of review), 23–35 (disposition)	Murphy J dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to grant the appellant a protection visa. On appeal to the Federal Court, the appellant argued that the FCCA erred in not finding that the AAT had failed to consider the whole of his claim with respect to travel on the Thal-Parachinar road, even assuming the road to be open, and that the decision of the AAT was affected by jurisdictional error for that reason. Murphy J, however, was not persuaded that the fact that the AAT did not expressly state that it had considered and rejected the appellant's claim that he would face a risk of harm if he travelled on the Thal-Parachinar road meant that it did not do so. Rather, the appropriate inference was that the AAT understood that claim and its finding on that issue was subsumed into its findings of greater generality in relation to the risk of harm the appellant would face on return to Kurram Agency. As such, his Honour dismissed the appeal.
AXE16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 557 (Unsuccessful)	21 May 2021	13 (grounds of review), 19–27 (disposition of both grounds of review)	Rares J dismissed a decision of the FCCA refusing the appellant constitutional writ relief in respect of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the appellant a protection visa. On appeal to the Federal Court, the appellant relied on two grounds of review, namely that the primary judge erred,

			first, in not finding that the IAA committed a jurisdictional error in relation to assessing whether the appellant could relocate to Kabul (see sections 5J(1)(c) and 36(2B)(a) of the *Migration Act*), and, secondly, in applying the test for ascertaining jurisdictional error as requiring "extreme" illogicality, as opposed to illogicality, in the IAA's reasons. Rares J rejected both grounds and dismissed the appeal.
DLB19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 504 (Unsuccessful)	14 May 2021	13–14 (ground of review), 47–52 (disposition of relevant aspect of ground of review)	Markovic J dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister refusing to grant the appellant a Safe Haven Enterprise visa. Relevantly, on appeal to the Federal Court, the appellant argued that the primary judge erred by failing to find that the IAA unreasonably failed to deal with the applicant's claim that "GR"'s emergence as President of Sri Lanka posed a threat to him as it could bring back the situation in Sri Lanka which prevailed when he was extorted. Markovic J rejected this argument, as well as the other, refugee-specific argument on appeal, and, as such, dismissed the appeal.
EAI16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 506 (Unsuccessful)	14 May 2021	12–22 (legislative scheme), 44–81 (disposition of ground 1), 82–95 (disposition of ground 2), 96–97 (concluding comments)	Katzmann J dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister refusing to grant the appellant a Safe Haven Enterprise visa. On appeal to the Federal Court, the appellant advanced two grounds of appeal. The first ground alleged that the primary judge erred in failing to find that the IAA had not complied with section 473DE of the *Migration Act*. Katzmann J noted that, to succeed, the appellant needed to establish that section 473DE applied in that information contained in the appellant's

			statement from 2013 was 'new information' within the meaning of section 473DC; that, if it were, the new information would be the reason, or part of the reason, for affirming the delegate's decision; and that, had the information been provided to the appellant, it could have made a difference to the outcome of the review. The second ground alleged that the primary judge erred in not finding, and ought to have found, that the IAA failed to consider the appellant's claim to have himself (that is, independently of the company of a person identified as "V") provided help and assistance to the LTTE. At the conclusion of his Honour's reasons, Katzmann J observed that, while he was persuaded that the 2013 statement was 'new information' within the meaning of section 473DC of the Act, he was not satisfied that the primary judge erred in concluding that the IAA did not comply with the obligation in section 473DE. Neither was his Honour satisfied that the primary judge erred in his disposition of the appellant's allegation that the IAA failed to consider a claim that he had provided aid to the LTTE, independently of his uncle "V". It followed that the appeal was required to be dismissed.
Trang (formerly named as AZL20) v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 1) [2021] FCAFC 72 (Unsuccessful)	5 May 2021	Rares and O'Callaghan JJ: 3 (two grounds of review below), 21 (third ground of review discerned by primary judge), 24 (notes the repetition of first two grounds during the present appeal), 25–30	The Full Court unanimously dismissed an appeal against a decision of a single justice of the Court refusing constitutional writ relief in respect of a decision of the AAT affirming a decision of a delegate of the Minister not to revoke the mandatory cancellation of the appellant's visa. On appeal to the Full Court, the appellant advanced the same two grounds of review that he had advanced before the primary judge. The first ground alleged that the AAT had erred by failing to consider matters that the appellant had raised in his

		(disposition of both grounds of review) Wheelahan J: 32 (agreeing that the appeal should be dismissed), 35 (dealing with third ground of review below)	representations under section 501CA(3) of the *Migration Act* as being a reason to revoke the cancellation of his visa, irrespective of whether those matters actually engaged Australia's non-refoulement obligations. The second ground alleged that the AAT erred by incorrectly assuming that it (the Tribunal) did not need consider the existence or otherwise of any non-refoulement obligations since they could be considered in the event that the appellant applied for a protection visa, given that the criteria for a protection visa under section 36(2) of the Act substantially differed from, and did not reflect, Australia's non-refoulement obligations. Rares and O'Callaghan JJ (Wheelahan J agreeing at [32]) rejected both grounds of review. (Note that the primary judge referred to a third ground of review, not in the originating application, that had been argued during the hearing pursuant to leave. The appellant based that ground on the decision of Mortimer J in *Omar v Minister for Home Affairs* [2019] FCA 279 (which was affirmed on different grounds in *Minister for Home Affairs v Omar* [2019] FCAFC 188; (2019) 272 FCR 589), with which Logan J in *ATX19* [2019] FCA 1423 had disagreed. The primary judge considered it was unnecessary to grant leave to the appellant to withdraw his concession that Logan J's decision was correct because of the absence of any claim before the Tribunal, at the conclusion of the hearing, in which Australia's non-refoulement obligations were raised.)
FMA17 v Minister for Immigration, Citizenship, Migrant Services and	5 May 2021	42–43 (five grounds of review), 59–69 (relevant statutory provisions),	Kenny J dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the IAA affirming a decision of a delegate of

Multicultural Affairs [2021] FCA 456 (Unsuccessful)		70–73 (disposition of ground 1), 74–78 (disposition of ground 2), 79–89 (disposition of ground 3), 90–93 (disposition of ground 4), 94–102 (disposition of ground 5)	the Minister not to grant the appellant a Safe Haven Enterprise visa. On appeal to the Federal Court, the appellant advanced five grounds of review. The first alleged that the IAA fell into jurisdictional error in not considering relevant considerations, including claims, integers of claims, or material questions of fact or information. Specifically, the appellant alleged that (a) the IAA did not consider all the material and information in the appellant's submission received by the IAA on or about 3 November 2017, including country information and a claim that because of his work for a TNA member of parliament, the appellant may be imputed with a connection to the LTTE, and (b) the IAA did not consider whether the appellant may suffer harm while in detention, simply as a person in detention. (Ground 1(b) was not pressed.) The second ground alleged that the IAA fell into jurisdictional error in that it did not give procedural fairness to the appellant. This failure was particularised as the failure to consider the material and information in the 3 November 2017 submission, and the failure to give him an interview. The third ground alleged that the IAA fell into jurisdictional error in interpreting or applying the law. In particulars, the appellant said that the IAA: (1) erred in its application or interpretation of section 473DD of the *Migration Act* when it did not consider the material and information in the 3 November 2017 submission, including the LTTE imputation claim and the country information discussed in connection with ground 1; and (2) erred in interpreting or applying section 473DC when it did not give the appellant an interview. The fourth ground alleged that the IAA did not exercise its powers lawfully in that it failed to invite

			evidence from the appellant or from the TNA politician about the appellant's claims that he assisted the politician and the consequence of that involvement with the politician. The fifth ground alleged that the IAA fell into jurisdictional error in that it acted unreasonably or made findings without logically probative material. The particulars to this ground were non-specific, being "the Particulars to the other Grounds". The particulars to grounds 1 to 4 indicated that the following issues potentially arose: whether the decision not to invite the appellant to an interview pursuant to section 473DC was legally unreasonable; whether the IAA unreasonably failed to consider whether to exercise the power under section 473DC to get new information from the TNA politician; and, having regard to the discussion at the hearing, whether the IAA's findings with respect to the police complaint reports were unreasonable or made without logically probative material. Kenny J concluded that none of these five grounds were made out and, as such, her Honour dismissed the appeal.
MB v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 442 (Unsuccessful)	30 April 2021	65–66	The Court dismissed the Pakistani applicant's application for an order in the nature of a writ of habeas corpus. In the course of dismissing the application, however, the Court accepted a submission advanced by the applicant that he was entitled to have his claims for protection in respect of Nauru determined and, if found to be well founded, not to be refouled to Nauru. The Court accepted that, as defined by s 5(1) of the Migration Act, Australia's non-refoulement obligations include those arising because Australia is a party to the Refugee Convention and/or the ICCPR as well as any obligations accorded by customary international law as

			are of a similar kind: *Ibrahim v Minister for Home Affairs* [2019] FCAFC 89. The Court observed that those obligations extend to Nauru as they do to any other nation. The Court was entirely unpersuaded by the Minister's submission that the scheme of the Migration Act requires a conclusion that any claims the applicant might seek to advance that he is owed non-refoulement obligations with respect to Nauru could not stand in the way of his being taken to Nauru pursuant to s 198AD of the Migration Act. Having had the benefit of full argument on the subject, the Court was satisfied that the applicant's submission must be accepted that the omission in s 197C of the Migration Act of a reference to s 198AD was not open to being dismissed as a mere drafting oversight. That was so notwithstanding the Migration Act does not provide a statutory mechanism to determine such a claim. That the need to do so was not anticipated is hardly surprising. The Court took it to be a matter of common knowledge within the meaning of s 144 of the *Evidence Act 1995* (Cth) that the large influx of unauthorised maritime arrivals which prompted the passage of Part 2 Division 8 Subdivision B of the Migration Act did not include those fleeing from either of the two countries later designated as regional processing countries. That a statutory mechanism had not been provided for did not mean the right to have such a claim determined did not exist. Indeed, the proposition that an assessment of the applicant's claims would be capable of being administratively facilitated if required was the

			foundational premise of one of the Minister's submissions.
BHL19 v Commonwealth of Australia [2021] FCA 462 (Unsuccessful)	29 April 2021	1–5 (introductory comments), 6–13 (issues raised by interlocutory application), 14–20 (statutory scheme for detention and removal), 21–42 (issue 1: power), 43–81 (issue 2: whether there existed a serious question to be tried), 82–91 (issue 3: balance of convenience), 92–94 (conclusions)	Wigney J dismissed an interlocutory application seeking relief in the nature of a writ of habeas corpus or, alternatively, a mandatory injunction directing the Commonwealth to release the applicant from detention forthwith. His Honour noted that the application raised thorny issues about the statutory scheme in the *Migration Act* for the mandatory detention and removal of unlawful non-citizens from Australia. His Honour also noted that those issues are particularly acute in the case of unlawful non-citizens in respect of whom Australia owes international non-refoulement obligations, but whose applications for protection visas have been refused, as was the case here. The interlocutory application raised three issues for determination. The first issue was whether the Court had the power to order that the applicant be released from detention on an interlocutory basis and before the Court determined whether the applicant's detention was lawful or unlawful on a final basis. The second issue, which only arose if it were found that the Court had the power to grant the interlocutory relief sought, was whether the applicant had established a prima facie case or serious question to be tried that his ongoing detention was unlawful. The third issue, which only arose if the applicant were found to have established a prima facie case or serious question to be tried as to the unlawfulness of his detention, was whether the balance of convenience favoured the grant of the interlocutory relief sought.

			In setting out the statutory scheme for detention and removal established by the *Migration Act*, as well as in determining the second issue identified above, Wigney J discussed the relevance of section 197C of the Act, providing that, for the purposes of removal from Australia under section 198, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen. Wigney J concluded that the Court had the power to grant the interlocutory relief sought by the applicant and that the applicant had demonstrated that there existed a serious question to be tried in respect of the lawfulness of his ongoing detention. His Honour concluded, however, that the applicant had not demonstrated that the balance of convenience favoured the making of an order for his release prior to the Court determining on a final basis whether his detention was, in fact, unlawful. It followed that the applicant's interlocutory application must be dismissed.
AOU21 v Minister for Home Affairs [2021] FCAFC 60 (Unsuccessful)	27 April 2021	115–219	This matter concerned two proceedings heard together. One was an appeal from orders of the FCCA made on 16 December 2020. The other was an application in the present Court's original jurisdiction for orders in the nature of mandamus, habeas corpus, as well as declaratory and other associated relief. The Court unanimously dismissed the appeal. In the course of doing so, however, the Court explained the relationship between ss 197C, 198AD, 198AE and 198AH of the Migration Act (see especially [115]–[117]). The Court noted that, in its terms, s 197C does not apply to the duty under s 198AD(2).

BQQ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 427 (Unsuccessful)	27 April 2021	33–55	The Court dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister refusing to grant the Iranian appellant a protection visa. The sole ground of appeal was that the primary judge erred in concluding that the appellant was accorded a hearing adhering to s 425(1) of the Migration Act. In rejecting this ground of appeal, however, the Court also noted that there was no jurisdictional breach of s 420. The Court observed (at [43]) that '[t]his provision is facultative, not restrictive… [a]nd in the present context, it cannot be used indirectly as a basis for the source of any jurisdictional error.'
Perera v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 403 (Successful)	22 April 2021	38–47 (disposition of ground 1), 55–61 (disposition of ground 3)	The Court quashed a decision of the Minister made personally to under s 501CA(4) of the Migration Act not to revoke the cancellation of the Cuban applicant's Class BC Subclass 100 Spouse visa. The Court upheld ground 1 of the appeal but dismissed ground 3. Ground 1 asserted that the Minister erred in law by (a) failing to address the merits of the applicant's case, or (b) making a legally unreasonable or irrational decision, by ignoring relevant material, or making a finding based on no evidence. Specifically, the applicant alleged: that he would be effectively stateless and denied re-entry into Cuba (the applicant's submission included and referred to a document published by the Canadian Immigration and Refugee Board of Canada titled *Cuba: Treatment by authorities of failed asylum seekers that have returned to Cuba, including treatment of family members that remained in Cuba* (2014 –

			2016) ('the Canadian document')); that the Canadian document described Cuban policy towards citizens who had left the country and stated that the policy since 14 January 2013 allows Cubans to stay outside of Cuba for "up to two years" without losing their rights as a citizen; that the applicant left Cuba in 1996 and had not returned to Cuba since that date; that the Minister noted the title of the Canadian document only related to asylum seekers and therefore did not apply to the applicant; and that the Minister found that there "is no evidence before" him to indicate that the applicant had lost his Cuban citizenship or that he would not be permitted re-entry to Cuba, despite the content of the Canadian document. Ground 3 asserted that the Minister failed to give proper, genuine and realistic consideration to (a) Australia's non-refoulement obligations owed to the applicant, and (b) the real possibility that, as a consequence of cancelling his visa, the applicant would be held in detention indefinitely.
BDF17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 401 (Unsuccessful)	22 April 2021	55–68, 70–73, and 83–84 (relevant statutory provisions and consideration of relevant authorities)	The Court dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister refusing to grant the Sri Lankan appellant a protection visa. In doing so, however, the Court helpfully summarised the principles relating to the application of s 473DD of the Migration Act, which imposes restrictions on the circumstances in which the IAA can consider new information pursuant to 473DC (see especially [55]–[68]; see also [70]–[73], and [83]–[84]). On appeal, the appellant had alleged (1) that the

			primary judge erred in failing to find that the IAA misconstrued and misapplied s 473DD in relation to four pieces of new information provided by the applicant, and (2) that the primary judge erred in failing to find that the IAA's decision that there were exceptional circumstances under s 473DD(a) of the Act to consider the DFAT 2017 country information report on Sri Lanka — but that there were not exceptional circumstances to consider the new Sri Lankan country information provided by the applicant — was legally unreasonable in the circumstances of this case.
CZA19 v Federal Circuit Court of Australia [2021] FCAFC 57 (Successful)	21 April 2021	23–40 (ground 1)	The Court unanimously agreed to grant the Polish applicant relief pursuant to s 39B of the *Judiciary Act 1903* (Cth) in respect of a decision of the FCCA dismissing his application for an extension of time under s 477(2) of the *Migration Act 1958* (Cth). The Court rejected ground 1 of the appeal to the present Court but upheld ground 2, concluding that the nature and character of the application for an extension of time had been so fundamentally misunderstood by the FCCA below as to lead to the conclusion that the FCCA judge was not dealing with the matter as placed before the Court. Relevantly, however, the Court considered, but ultimately rejected, a submission advanced by the applicant in the context of ground 1 that alleged that the AAT misapplied the test in s 36(2B)(b) by failing to consider whether the applicant could avail himself of effective protection from the specific harm that the AAT accepted he faced, namely harm from organised crime figures.
WKMZ v Minister for Immigration, Citizenship,	19 April 2021	Kenny and Mortimer JJ: 32–37 (general	The Court dismissed an appeal against a decision of a single judge of the FCA dismissing an application for

Migrant Services and Multicultural Affairs [2021] FCAFC 55 (Unsuccessful)		comments), 38–39 (Australia's international non-refoulement obligations), 40–42 (relevant legislative provisions), 43–49 (Ministerial Direction No 79), 50–106 (relevant authorities), 107–112 (conclusion on the authorities), 113–124 (operation of ss 197C and 198 in relation to visa decision-making), 125–136 (reconciling Direction No 79), 137–146 (AAT's reasoning on these matters), 147–153 (lawful basis for AAT's fact-finding), 154–162 (alternative argument about AAT's reasoning), 163–164 (overall conclusion) Abraham J: 165 (expressing agreement with the reasons of Kenny and Mortimer J)	judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to revoke the cancellation of the appellant's Global Special Humanitarian Visa. However, the Court considered a ground of appeal alleging that the primary judge erred by failing to find that the decision of the AAT was affected by jurisdictional error when the AAT reasoned that 'there is only a low risk that Australia will breach its non-refoulement obligations' in respect of the appellant, the learned primary judge having: (a) misconstrued ss 197C and 198 of the *Migration Act 1958* (Cth); and (b) wrongly found that Direction No. 79 was evidence before the AAT of a lawful policy position of the Minister. Kenny and Mortimer JJ delivered the majority judgment. Abraham J expressed agreement with the reasons of the Kenny and Mortimer JJ, noting (at [165]): > I agree with the reasons at [147]-[152] which address the ground of review raised in this case. Those reasons are sufficient to dispose of this matter. The appellant has not established the ground of appeal. However, as reflected in the joint reasons there is no ground of review directed to indeterminate detention or that the Tribunal failed to address such a consideration. In those circumstances, which had the consequence that the parties did not address what amounts to indeterminate detention, and did not have an opportunity to provide submissions in relation to

			MNLR which was delivered after the hearing in this matter, it is unnecessary to express a view, and I prefer not to do so.
DHJ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2) [2021] FCA 364 (Unsuccessful)	16 April 2021	23–32	The Court dismissed an appeal against a decision of the FCCA affirming a decision of the IAA which, in turn, affirmed a decision of a delegate of the Minister refusing to grant the Pakistani appellant a temporary protection visa. On appeal, the appellant contended that the FCCA erred in not finding that the IAA constructively failed to exercise its jurisdiction by returning or failing to take into account the contents of a 97-page letter dated 18 September 2016 sent to the Authority by the Appellant's migration agent, which contained submissions and new information (the 'First Submission'). The present Court, however, was not satisfied that the IAA constructively failed to exercise its jurisdiction by returning or failing to take into account the contents of the First Submission. The Court also rejected the contention of the appellant that the Authority misunderstood either the relevant Practice Direction or the First Submission.
BQHJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 372 (Unsuccessful)	16 April 2021	63–77 (ground 3)	The Court dismissed an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to revoke the cancellation of the Afghani applicant's visa. Relevantly, however, the Court considered (but ultimately rejected) the applicant's third ground of appeal, which alleged that the AAT below erred in failing to consider evidence relevant to the issue of whether non-refoulement obligations were owed to the applicant. Specifically, the applicant submitted that "the Tribunal was unable to

			reach a lawful conclusion about whether or not the applicant may be identified as having returned from a Western country without having considered Mr Ghulam's evidence".
DIN20 v Minister for Home Affairs [2021] FCA 331 (Unsuccessful)	9 April 2021	43–57 (alleged illogicality and irrationality) 58–60 (IAA's alleged failure to consider part of the appellant's case)	The Court dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the Sri Lankan appellant a Safe Haven Enterprise Visa. The appellant's sole ground of appeal was that a finding by the Authority that he was not considered by the Sri Lankan authorities to be a member or an affiliate of the Liberation Tigers of Tamil Elam (LTTE) was illogical or irrational, or in some way involved a fundamental misconstruction or misunderstanding of the evidence. It was submitted that this error vitiated the Authority's lack of satisfaction that the appellant satisfied the criteria for the grant of the visa. There was no dispute between the parties about the orthodox legal principles relating to allegations of illogicality or irrationality in decision-making. However, the Court found that it was far from illogical or irrational for the Authority to conclude that, in the absence of any prolonged detention or interrogation of the appellant about his personal activities, it was not satisfied that the Sri Lankan authorities considered that he had significant links to the LTTE or was of any ongoing interest for that reason. There was no illogicality or irrationality in the Authority relying on the appellant's short detention as indicative of the SLA's and CID's lack of suspicion of him as having an

			association with the LTTE. In the Court's view, it was the most natural conclusion which could have been drawn from the evidence. The Court also rejected, in a straightforward manner, the appellant's claim that the Authority did not have regard to his evidence that he was interrogated by the Sri Lankan authorities as to his involvement with the LTTE in addition to "T"'s involvement in that organisation. The Authority specifically took into account the appellant's claim that the Sri Lankan authorities regarded him as associated with the LTTE ([4] and [16] of the Authority's reasons), and it did not misstate the appellant's evidence in that regard. It correctly identified that the appellant was "mainly" questioned about T rather than the appellant's direct involvement. No argument advanced by the appellant or important part of his evidence was overlooked.
EBP19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 332 (Successful)	8 April 2021	14–21 (relevant statutory provisions and principles), 27 (ground 1), 36–57 (disposition of ground 1)	The Court allowed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the five Sri Lankan appellants Safe Haven Enterprise Visas. By Ground 1 of their notice of appeal, the appellants contended that the FCCA should have found that the IAA had failed to apply s 473DD of the Migration Act properly when concluding that the Negombo Magistrate's Court report could not be considered as new information. This was so because the IAA had determined the "exceptional circumstances" criterion in s 473DD(a) without reference at all to the subpara (b) criteria, let alone considering them first, as *AUS17* indicates is necessary.

			The submission was, in effect, that the IAA had failed, in its application of s 473DD, to consider all the relevant circumstances including the question of whether either of the two subpara (b) criteria was satisfied. In addition to *AUS17*, the appellants relied upon *AQU17* at [7]-[8], [11]-[12] and *BBS16* at [102], [104]. The Court concluded that, in summary, it seemed that the IAA commenced consideration of the potential utility of the Magistrate's Court report to an assessment of the first appellant's claims. However, the IAA concluded that consideration without addressing the terms of either of the subpara (b) criteria. In particular, it did not express any view about whether the Magistrate's Court report could have been provided to the Minister before the delegate made the decision under s 65 and did not express any conclusion about whether the report contained "credible personal information" in the sense explained by Bromberg J in *CSR16* at [41]-[42], nor whether it was capable of affecting the consideration of the first appellant's claims in the sense discussed by the plurality in *Plaintiff M174*. It was noteworthy that the IAA did not express any conclusion about the Magistrate's Court report in terms of its credibility. Instead, the matter which seems to have been decisive in its consideration was its view that the report did not indicate "any ongoing adverse interest in the first [appellant]", as though that was conclusive of the report's potential significance, when plainly it was not. Having expressed that conclusion, the IAA moved immediately to express its lack of

			satisfaction that there were exceptional circumstances justifying considering the report. The Court also concluded that this error was material.
BFM16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 312 (Successful)	31 March 2021	134–159 (ground 1), 170–191 (grounds 4(a) and (b)), 192–197 (concluding comments)	The Court set aside a decision of the Minister made in exercise of his power under s 501A(2) of the Migration Act to refuse to grant the applicant a Protection (Class XA) visa, despite an earlier decision made by the AAT setting aside a decision of a delegate of the Minister to refuse to grant the applicant a protection visa pursuant to s 501(1). Relevantly, the applicant alleged that: in his assessment of the national interest the Minister failed to take into account the fact that Australia would be in breach of its international obligations as a consequence of the steps that would occur upon refusal of the visa by him (ground 1); and the Minister acted unreasonably and failed to engage in an active intellectual process in considering the legal and practical consequences of his decision as he (a) failed to consider in any way the purpose of the Parliament in enacting s 36(1C) as its expression of the nation's non-refoulement obligations in respect of the acceptable danger to the Australian community of a refugee, other than by his using the generic description of "international non-refoulement obligations" in his reasons, and (b) failed to consider the practical consequences for the applicant of being returned to his country of origin (grounds 4(a) and (b)). The Court upheld grounds 1 and 4(b). By way of conclusion, the Court noted that a number of cases have reiterated what was said by Allsop CJ (with whom Markovic and Steward JJ agreed) in *Hands v Minister for Immigration and Border Protection* [2018]

			FCAFC 225; (2018) 267 FCR 628 at [3] (emphasis added by the present Court): By way of preliminary comment, it can be said that cases under s 501 and the question of the consequences of a failure to pass the character test not infrequently raise important questions about the exercise of Executive power. **Among the reasons for this importance are the human consequences removal from Australia can bring about.** Public power, the source of which is in statute, must conform to the requirements of its statutory source and to the limitations imposed by the requirement of legality. Legality in this context takes its form and shape from the terms, scope and policy of the statute and fundamental values anchored in the common law: *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1 at 5 [9]; *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 264 CLR 541 at [59]. The consequences of these considerations are that **where decisions might have devastating consequences visited upon people, the obligation of real consideration of the circumstances of the people affected must be approached confronting what is being done to people. This obligation and the expression of its performance is not a place for decisional checklists or formulaic expression**. Mechanical formulaic expression and pre-digested shorthand expressions may hide a lack of the necessary

			reflection upon the whole consideration of the human consequences involved. **Genuine consideration of the human consequences demands honest confrontation of what is being done to people.** Such considerations do not detract from, indeed they reinforce, the recognition, in an assessment of legality, that those entrusted with such responsibility be given the freedom of lawful decision-making required by Parliament. While this case concerned a decision under s 501A of the *Migration Act*, in the present Court's view, those remarks applied with equal force with respect to determination of the national interest and the exercise of the discretion enlivened by that consideration. In the Court's view, the Minister signally failed to meet these standards in this case. The Court recognised that the *Migration Act* (as amended by the 2014 Amendments) does not expressly require the Minister to refrain from exercising the discretion in s 501A in breach of Australia's obligations to other countries not to refoule non-citizens who meet the criterion in s 36(2)(a) or (2)(aa) and who are not excluded by reason of the criterion in s 36(1C). However, the Reasons (and to a significant extent, the discussion in the submission for decision) were formulaic and contained no recognition: that the solemn assurances had recently been made by two Ministers with responsibility for immigration (including the then-current Prime Minister and the Minister who made this

			decision); that there may be consequences for the national interest of breaching the Convention and those solemn assurances; or of the true basis of non-refoulement obligations owed in respect of the applicant. The Court observed that the frequent incantation of the term "international non-refoulement obligations" or "non-refoulement obligations" in discussion in the submission for decision and in the Reasons obscured more than it revealed in circumstances where there was no recognition that those obligations were owed to other nations. The Reasons revealed that, in purporting to exercise a discretion enlivened by the national interest consideration, the Minister did not properly understand the basis of the finding in the 2017 AAT decision with respect to the applicant. The Minister failed to recognise that the applicant's "fear" was "well-founded" and refused to consider alternative management options at the time he decided to refuse a protection visa despite two Tribunals having found protection obligations were owed under the *Migration Act*.
ESQ18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 44 (Successful)	26 March 2021	15 (grounds of appeal), 17 (general observations about ground 1), 38–46 (disposition of ground 1), 47–48 (general observations about ground 2), 66–72 (disposition of ground 2)	The Full Court unanimously allowed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister refusing an application for a protection visa. On appeal to the Full Court, the appellant advanced two grounds of review. The first ground alleged that the FCCA below erred in failing to find that the IAA's failure to consider whether

			to exercise its discretion to seek further information under section 473DC of the *Migration Act* was legally unreasonable. This ground of appeal related to the appellant's claims under Australia's complementary protection obligations in section 36(2)(aa) of the Act. In respect of those protection obligations, the appellant, under this ground of appeal, highlighted the different conclusions reached by the delegate and the IAA about the place in Afghanistan where he was likely to live should he return there, or be removed there, and complained about the primary judge's failure to accept his contentions that the IAA committed jurisdictional error in its decision with respect to his claims about those obligations. The Full Court rejected this ground of review. The second ground of review alleged that the FCCA below erred in failing to find that the IAA failed to consider the risk of harm the appellant would face in Afghanistan as a failed asylum seeker from a Western country. In substance, the appellant submitted that the IAA failed to discharge its statutory function because it decided not to consider an unarticulated claim. The Full Court considered that this ground should be allowed having regard to (i) the circumstances in which the unarticulated claim was identified by the delegate, (ii) the manner in which it was dealt with by the IAA, and (iii) the reasons why the primary judge found there had been no error of law.
BYX17 v Minister for Immigration, Citizenship, Migrant Services and	23 March 2021	44–49 (disposition of ground 3)	The Court dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the IAA affirming a decision of a delegate

Multicultural Affairs [2021] FCAFC 41 (Unsuccessful)			of the Minister refusing to grant the Afghani appellant a Safe Haven Enterprise Visa. However, the Court considered a ground of appeal alleging that the primary judge erred by failing to find that the IAA erroneously applied a relative rather than objective approach to the question of the safety of the city of Mazar-e-Sharif, and the reasonableness of relocating there (ground 3).
DBX16 v Minister for Immigration and Border Protection [2021] FCA 238 (Successful)	22 March 2021	26–36 (detailed consideration of relevant statutory provisions), 56–73 (ground 1), 74–104 (ground 2), 105–115 (ground 3)	The Court allowed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the Sri Lankan applicant a temporary protection visa. The Court rejected grounds 1 and 3 of the appeal, but upheld ground 2, subject to several additional observations. *Grounds of appeal* By ground 1 of the appeal, the appellant argued that it was legally unreasonable for the Authority not to have considered whether to exercise its discretionary power under s 473DC to get new information, and that this gave rise to jurisdictional error. The Court rejected this ground of appeal. Ground 2 asserted that the FCCA below erred in failing to find that the IAA's decision was tainted by jurisdictional error on the ground that there was no logical, rational or probative basis for the IAA's lack of satisfaction that three arrest warrants produced by the appellant were genuinely issued. The Court upheld this ground of appeal, subject to several additional observations.

			Ground 3 asserted that the FCCA below erred in failing to find that the IAA's decision was tainted by jurisdictional error on the ground that the IAA misapplied the statutory criteria for the consideration of "new information" provided by an applicant as set out in s 473DD(b)(ii) of the Act, or alternatively took into account an irrelevant consideration and/or made a critical finding of fact for which there was no evidential support. The Court rejected this ground of appeal.
MNLR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 35 (Unsuccessful)	16 March 2021	1 (Perram J expressing agreement with the reasons and orders of SC Derrington J), 47–114 (Wigney J: disposition of ground 1), 115–128 (Wigney J: disposition of ground 3), 145–162 (SC Derrington J: disposition of ground 1), 163–171 (SC Derrington J: disposition of ground 3)	The Full Court unanimously dismissed an appeal against a decision of a single judge of the FCA dismissing an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to revoke the cancellation of the Iraqi appellant's Global Special Humanitarian visa. Relevantly, however, the appellant had argued on appeal (1) that the primary judge erred in failing to find that the AAT failed to consider the prospect of indefinite detention arising from international non-refoulement obligations owed to the appellant (ground 1), and (2) that the primary judge erred in failing to find jurisdictional error arising from the AAT's alleged failure to consider Australia's reputation if in breach of its international non-refoulement obligations (ground 3). SC Derrington J (Perram J agreeing) and Wigney J rejected both grounds of appeal, although their Honours differed in their reasons for doing so.
ATS17 v Minister for Immigration, Citizenship, Migrant Services and	16 March 2021	15–28 (ground 1), 29–34 (ground 2)	The Court dismissed an appeal from a decision of the FCCA dismissing an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to grant the Iranian appellant a

Multicultural Affairs [2021] FCA 226 (Unsuccessful)			protection visa. Relevantly, however, the Court considered in detail (though ultimately dismissed) grounds 1 and 2 of the appeal. Ground 1 asserted that the FCCA below erred in finding that the oral evidence of Pastor Piper and the "materials he produces" were not "information" the Tribunal was required to "give" to the appellant under section 424A of the Migration Act and ought to have found that the Tribunal committed jurisdictional error in failing to do so. When pressed for particularisation of the "information" which was said to have engaged the operation of s 424A, the appellant specified it as being: (a) the Piper Relevant Oral Evidence; *or* (b) the Website Material. Hence, it was necessary to consider both categories of information for the purposes of considering whether the FCCA was in error in not reaching the conclusion that the Tribunal failed to comply with the procedural requirements of s 424A. Ground 2 of the appeal asserted that the FCCA below erred in not finding, and ought to have found, that the Tribunal committed jurisdictional error by failing to "invite" the appellant under s 425 of the Act in relation to the oral evidence of his pastor and the "materials he produces". The Court noted that this ground was only faintly pressed, and it sufficed to note that the Tribunal's appraisal of Pastor Piper's evidence was not an issue dispositive of the review in the sense identified in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152. The Minister correctly submitted that this

			ground amounted to, and amounted to below, an assertion that the Tribunal was required to give the appellant a running commentary on its evaluation of the evidence. The Court noted that it was clear that the Tribunal was under no such obligation; nor was it obliged to identify the significance of its questions, including the observations it made that the appellant's response to questioning as to why he converted from Islam to Christianity "sounds like it comes from someone who might have Pastor Piper's approach". The appellant was plainly on notice of the issues dispositive of the review, including by: (a) the delegate's rejection of the appellant's credibility and his claimed commitment to Christianity; and (b) the Tribunal's questioning of the appellant including as to matters centrally relevant to the question of the genuineness of his commitment to Christianity.
DSN16 v Minister for Immigration and Border Protection [2021] FCA 202 (Unsuccessful)	12 March 2021	51–57 (disposition of proposed ground 3), 80–108 (disposition of ground 1)	The Court granted the Sri Lankan appellant leave to rely on proposed ground 3 of the appellant's notice of appeal but ultimately dismissed all grounds of appeal inclusive of ground 3. The appellant had sought to appeal a decision of the FCCA dismissing an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the appellant a Safe Haven Enterprise Visa. *Proposed ground 3* The appellant sought leave to rely on a proposed ground 3. It was not in issue that that contention had not been advanced before the FCCA. It was as follows:

			The IAA lacked jurisdiction in respect of [DSN16] because he is not a 'fast track applicant' by reason that he was not, at that time, an 'unauthorised maritime arrival'. He lost this status because the Minister exercised his personal, non-compellable power to grant [DSN16] a visa, which made him a lawful non-citizen under the *Migration Act* 1958 (Cth) (the Act). Despite the parties' comprehensive submissions, the Court did not purport to do justice to the arguments advanced. That was because it became clear during oral argument that the parties' submissions effectively mirrored those that they as respective counsel had filed in proceeding number VID692/2019, *BXT17 v Minister for Home Affairs & Anor* (*BXT17*) (another case included in these case summaries) in respect of a virtually identical proposed appeal ground. It was therefore agreed during the hearing that the Court would hear oral argument with respect to Grounds 1 and 2, and it would then adjourn until after the Full Court had delivered judgment in *BXT17* for consideration on the papers (unless either party sought a further oral hearing) as to whether the Court ought grant the appellant leave to rely on proposed ground 3, and if so whether it should be upheld. The Full Court, constituted by Markovic, O'Callaghan and Anastassiou JJ, delivered judgment in *BXT17* on 12 February 2021 (*BXT17 v Minister for Home Affairs* [2021] FCAFC 9; 'BXT17 Full Court'). Its reasons, delivered per curiam, revealed that BXT17 was granted

			leave to advance an appeal ground substantially identical to proposed Ground 3 in this appeal. His appeal had been dismissed. In that circumstance, both parties in the present case were content for the Court to deal with the matter on the papers. The solicitor for the appellant also responded that the appellant accepted that ground 3 could not be upheld in light of the reasoning in BXT17 Full Court being binding upon a single judge of the Court but formally maintained his application for leave to rely on proposed ground 3 "so that, if BXT17 is ultimately overturned by the High Court, he can revive his claim to the benefit of the same ground in this case." The Court was satisfied that, as at the time ground 3 was proposed, and as at the time submissions were advanced in this Court by the parties, it had arguable merit. The Court was also satisfied that the Minister suffered no prejudice by reason of that ground not having been advanced in the Court below. As such, the present Court granted leave. However, as the appellant conceded, the Full Court's decision in *BXT17* required the present Court to conclude that Ground 3 must be dismissed. *Ground 1* Ground 1 asserted that the FCCA below erred by failing to find that the IAA was in error by failing to evaluate an integer of the protection claim of the appellant, namely the risk of relevant harm to him as a result of

			being Tamil on return to Sri Lanka. The present Court was satisfied that the IAA did fall into error by failing to give consideration to a plainly articulated claim based on the appellant being at risk of harm as a member of the Tamil minority. However, the Court was not satisfied that the appellant had established that the error was material.
CPP17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2) [2021] FCA 199 (Successful)	11 March 2021	69–94	The Court granted leave to rely on, and upheld, grounds 1, 3, and 5 of the Vietnamese appellant's notice of amended appeal. The appellants had sought to appeal a decision of the FCCA dismissing the appellants' application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister refusing to grant the appellants protection visas. Relevantly, proposed ground 3 asserted that the FCCA below erred in law in failing to determine jurisdictional error on the part of the IAA, being a failure of natural justice. Specifically, the appellants alleged that, on a critical integer of a claim for protection, as the claim in respect of domestic violence was, it was required of the IAA that it put its concerns (as to what would occur if the applicant/primary appellant returned to Vietnam) directly to the applicant/primary appellant, rather than rely on inference from what was or was not discussed at arrival interviews. The Court noted that a claim for complementary protection based on the risk of the first appellant suffering domestic violence at the hands of her second husband if she returned to Vietnam was made by the appellants and that claim needed to be addressed. It was reasonable to assume that the first appellant was in a

			position to provide information about the risk. It was true that the first appellant did not claim to fear harm from her second husband during the arrival interview or in her protection visa application process, but the fact was that the circumstances were such that both the Authority and the primary judge went on to draw conclusions about the ongoing risk based on, in the Court's opinion, slender circumstantial evidence about the home being empty and the house being broken into. The limited information itself raised a number of questions and it was reasonable to suppose that the first appellant would have at least some information which would throw light on the relevant issues and which she could have been invited to provide to the Authority under s 473DC(3). In the Court's view, it was legally unreasonable for the Authority not to exercise the power in s 473DC to get new information from the first appellant about the risk of ongoing domestic violence. As such, the Court granted leave to the appellants to raise ground 3 of their notice of amended appeal, and the Court upheld this ground.
NWQR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 30 (Unsuccessful)	10 March 2021	25–28 (ground 1)	The Full Court dismissed an appeal against a decision of a single judge of the FCA dismissing an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to revoke the cancellation of the Tongan appellant's bridging visa. Relevantly, however, by ground 1 of his amended notice of appeal, the appellant contended that the primary judge erred because the appellant was entitled to, but was unable to obtain, legal representation before the primary judge. Specifically, counsel for the appellant on appeal submitted that the appellant was

			impecunious and therefore unable to afford legal representation and was disadvantaged by reason of being in immigration detention and his limited education to year 10 and low IQ. Counsel pointed out that, by contrast, the Minister was represented by experienced counsel and solicitors, in order to identify the inequality between the two litigants. In the alternative, counsel for the appellant contended that the primary judge erred in failing to stay the hearing until he was afforded legal representation, equality of arms and a fair hearing, although no argument was developed in support of this contention. In support of ground 1, Mr NWQR relied upon Ch III of the *Commonwealth Constitution*, the decision of the High Court in *Dietrich v The Queen* [1992] HCA 57; (1992) 177 CLR 292 at 326 (Deane J) and 362 (Gaudron J), the common law of procedural fairness, and "customary international law, which has been adopted or incorporated into the common law of Australia" citing relevantly *Dietrich* at 321 (Brennan J) and *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 at 42 (Brennan J). The Full Court, however, rejected ground 1 at paragraphs [26]–[27] of its reasons.
BYH19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 157 (Successful)	3 March 2021	29–35 and 40–42 (disposition of ground 1), 50–55 (disposition of ground 2)	The Court allowed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to grant the Pakistani appellant a protection visa. Relevantly, the Court upheld both grounds 1 and 2 of the appeal.

			By ground 1 of the appeal, the appellant submitted that the Tribunal failed to give real, genuine and proper consideration to the appellant's claim that the Taliban placed a bomb outside his uncle's house to intimidate him into paying money and/or engaged in illogical or irrational reasoning in relation to the same. This ground of appeal turned on a newspaper article the appellant provided to the Tribunal. The Tribunal found that the appellant's claim about the bomb allegedly placed outside his uncle's house "was tenuous, somewhat contradicted by available independent evidence, otherwise unsupported and somewhat far-fetched" because, inter alia, (1) there were no houses mentioned in the article; and (2) the article did not suggest that the bomb was laid to intimidate an individual who lived across the road from the petrol station after he refused to give money to the Taliban. The appellant submitted that the Tribunal erred in respect of both limbs of its reasoning. By ground 2 of the appeal, the appellant submitted that the Tribunal erred by failing to consider relevant parts of a DFAT Country Information Report dated 20 February 2019 regarding Pakistan in determining that the appellant would not face a real chance of persecution in Pakistan and could access state protection on his return.
Matson v Attorney-General (Cth) [2021] FCA 161 (Unsuccessful)	3 March 2021	135	This extradition decision principally concerned the principles relating to res judicata, *Anshun* estoppel, and abuse of process. Relevantly, however, at [135], the Court did note that:

			… the respondents are correct in submitting that, while Australia is a signatory to the ICCPR, it has not been enacted so as to become part of Australian domestic law: see *Teoh and Tajjour* to which reference was made earlier. Accordingly, any non-compliance with the ICCPR could not, by itself, make the applicant's extradition unlawful.
DDH16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 101 (Unsuccessful)	17 February 2021	7–11	The Court rejected the Sri Lankan appellant's application for leave to rely on a proposed amended notice of appeal and four affidavits in the present proceedings. The applicant had sought to appeal a decision of the FCCA dismissing an appeal against a decision of the AAT affirming a decision of a delegate of the Minister not to grant the appellant a protection visa. On appeal, the appellant argued, among other things, that: the AAT below had been constituted by a female member and with a female interpreter; this had been procedurally unfair on the appellant who had felt ashamed to tell the Tribunal of the details of his rape by the two soldiers; the Tribunal ought to have done more to elicit details of the rape from the appellant; in addition, when the issue of the sexual assault was reached, this was some four and a half hours into the Tribunal hearing, and it was reasonable to suppose that the appellant had been cross-examined up hill and down dale by that point and was wearied by the experience, a circumstance which could only have been aggravated by the translation difficulties with the interpreter (and her gender); and the appellant was not made aware that his rape claim would not be believed by the Tribunal

			and the Tribunal member conflated the issues of assault and rape. In essence, the appellant argued that it was not a hearing which was procedurally fair for the appellant. The present Court noted that the difficulty with the argument in this form was that it was not run at trial and it was not appropriate now to permit this argument to be raised on appeal. The Court considered how much of this ground could be rescued from this difficulty but the answer was that, since the Court did not really understand what the ground meant, this was difficult. It was particularly difficult because the Court did not see how the matters which appeared in the ground (or in the submissions) had anything to do with s 425 of the Migration Act. The Court observed that this provision has been interpreted as requiring that there be a real hearing: *Minister for Immigration and Multicultural and Indigenous Affairs v SCAR* [2003] FCAFC 126; 128 FCR 553 ('*SCAR*'). Consequently, the provision has been held to be engaged where the standard of interpretation at a hearing is such that one can say that a hearing has not really occurred: *Minister for Immigration and Citizenship v SZNVW* [2010] FCAFC 41; 183 FCR 575 ('*SZNVW*') at [73]. So too, where a hearing is affected by the fraud of some third party, it is s 425 of the Act which has been held to be engaged. The effect of the fraud deprives the hearing which took place of the quality of being a hearing: *SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35; 232 CLR 189.

			The Court noted that it had some difficulties with the reasoning in *SCAR* which the Court explained in *SZNVW* at [75]-[83]. But, even taking the most generous view of s 425 of the Act and the *SCAR* line of cases, the Court did not see how the above argument – whatever it was – could be accommodated under the canopy of s 425. As such, the Court rejected this argument.
XAD (by her litigation guardian XAE) v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCAFC 12 (Unsuccessful)	16 February 2021	147–148	The Full Court dismissed an appeal and a cross-appeal against a declaration made by a single judge of the FCA that the Minister had made a decision in mid-May 2019 to consider exercising the power under s 46A(2) to lift the bar; that the appellant had been entitled to, but denied, procedural fairness in relation to that consideration; and that that failure affected the validity of the assessment by the Minister in August 2019 not to lift the s 46A(1) bar. In dismissing the appeal and cross-appeal, however, the Court considered a contention, somewhat faintly pressed by the respondents, that the primary judge had been wrong to consider that substantive assessments of the appellant's protection claim and a further assessment of new information relevant to the appellant's father were "needed". The submission was that this was an error of law, given that s 197C of the Migration Act makes irrelevant, for the purposes of s 198, the fact that Australia may owe non-refoulement obligations in respect of unlawful non-citizens. In the Full Court's view, however, the primary judge was not to be understood as having made the rather elementary mistake which the respondents' submission attributed to

			him. Instead, the primary judge was doing no more than making the point that an assessment of the protection claims of the appellant and of the new information relating to her father were yet to be undertaken and that these circumstances provided part of the context making it unsurprising that the Minister had requested that the full brief canvass the options of him lifting the applicable bars so as to allow those assessments to be made.
BXT17 v Minister for Home Affairs [2021] FCAFC 9 (Unsuccessful)	12 February 2021	166–174 (disposition of proposed ground 3)	The Court dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the Lebanese appellant a Safe Haven Enterprise Visa. Relevantly, however, the Court considered a proposed ground of appeal alleging that the IAA below failed to apply the statutory definition of cruel or inhuman treatment or punishment when considering how the appellant would be mistreated as a severely mentally ill person if he was homeless in Lebanon by replacing the objective test required by the Migration Act with its own subjective assessment (proposed ground 3).
EDB16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 69 (Unsuccessful)	5 February 2021	36–45	The Court dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the Sri Lankan appellant a Safe Haven Enterprise Visa. Relevantly, however, the Court considered a ground of appeal (ground 2) alleging that the FCCA below had erred in finding that the IAA had not erred in interpreting or applying the law relating to complementary protection.

			The appellant submitted that, in determining that the appellant did not have a real chance of persecution, or a real risk of significant harm, on return to Sri Lanka, the Authority misinterpreted or misapplied the legal test it was required to apply. This was said to be because, unless finding with a high degree of certainty that there had been a definite and enduring cultural change away from violence and torture, the Authority could not have reached such a conclusion if it had correctly understood and applied the important principle from *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 ('*Chan*'). It was then submitted that the Authority, in effect, was requiring something greater than a real chance of persecution, or a real risk of significant harm, and thus failed to act within its jurisdiction. The Court noted that a real chance of persecution or a real risk of significant harm was sufficient to establish a claim for protection and the grant of the SHEV. "A real chance is one that is not remote, regardless of whether it is less or more than fifty per cent.": *Chan* at 398 (Dawson J); see also 389 (Mason CJ). The Court observed that appellant's argument essentially was that the Authority must have misinterpreted the "real chance" test and required too high a degree of likelihood of future harm, because that was the only explanation for the Authority's conclusion, having regard to the fact that the Authority accepted some of the appellant's claims about historical events in his life.

			The primary judge rejected this argument. Her Honour said (at [49]), and in the Court's view correctly, that "[t]he mere fact that the Authority made findings accepting the [Appellant's] account of events does not mean, on that basis alone, that there was a 'real chance' of the events or any harm occurring on return". Her Honour also noted that: (a) the Authority assessed what occurred in the past and determined whether, in light of them, there was a real chance of harm in the future; (b) the Authority used language, and reasoned in a manner, which showed that it understood the meaning of a real chance of harm. (c) the Authority considered the Appellant's individual circumstances and concluded, informed by country information, that he did not have the requisite profile to give rise to a real chance of harm. The present Court noted that past events are informative of future harm but they are not controlling or determinative. In *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (1997) 191 CLR 559, the High Court recognised (at 575) that "what has occurred in the past is likely to be the most reliable guide as to what will happen in the future", but their Honours also recognised (at 574) that "[p]ast events are not a certain guide to the future". Here, in the present Court's view, nothing in the Authority's treatment of the appellant's claims

			suggested that, in carefully evaluating his claims, it misunderstood the test it was to apply or failed to apply the correct test. It was open (and it did not provide a sufficient basis to infer a misinterpretation of the legal test to be applied) for the Authority to find, looking forward as at 15 December 2016, that there was not a real chance of harm. This remained so despite the Authority's finding that, in 2007 and 2012, events occurred in the appellant's life which were most regrettable, having regard to (to adopt the Authority's words in one context) "the length of time that has elapsed since the events of 2012". Ground 2 was not made out.
EAT17 v Minister For Home Affairs [2021] FCA 68 (Successful)	5 February 2021	57, 63–73	The Court upheld an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the Sri Lankan appellant a Safe Haven Enterprise Visa. Relevantly, by ground 2 of his appeal, the appellant argued that the FCCA erred in failing to find that the IAA made a jurisdictional error by failing to consider, pursuant to its complementary protection assessment under ss 36(2A) and 36(2B) of the Migration Act, whether it would be reasonable for the appellant to relocate to an area of Sri Lanka where there would not be a real risk that he would suffer significant harm. At the outset of disposing of ground 2 of the appeal, the Court noted that the IAA below did reach the conclusion that the appellant did not face a real risk of serious harm because it considered that the appellant could avoid that risk, localised to Trincomalee, by

			relocating to Jaffna where the IAA erroneously believed his parents resided. This conclusion was necessarily based on relocation and that consideration was dispositive of the IAA's decision. It was clear, therefore, that the foundation for the grounds of appeal was established. After referring to sub-ss 36(2)(aa) and (2B) of the Act, the Court noted that the reasonableness of an applicant's relocation from the habitual place of residence where he or she is at risk of significant harm to another place within the receiving country expressly falls for consideration under the assessment of complementary protection. As the Full Court noted in *CRY16* (at [66]): > We consider it to be significant that what is reasonable, in the sense of "practicable", in terms of relocation must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality: *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40; 233 CLR 18 at [24]. In the present case, in the Court's view, the Authority's reasons disclosed no assessment of the reasonableness of relocation to any place other than the appellant's habitual residence in Trincomalee. At their highest, the reasons could be interpreted as proceeding on the premise that the reasonableness of the appellant's

			relocation to Jaffna (where he made no specific claims to fear harm) could be found in the fact that his parents resided there. But that fact was incorrect. Despite clear evidence recorded in the appellant's record of arrival interview that his parents lived in Mullaitivu and that he had never lived in Jaffna, the Authority found otherwise. This error dispelled any possibility of an inference that the Authority properly considered the reasonableness of the appellant's relocation. The Minster conceded that this factual error was made, but submitted that it was immaterial in that, given the risk of harm was strictly localised to Trincomalee, it could not matter whether the appellant were to relocate to Jaffna or Mullaitivu where his parents in fact reside. The Court observed that this submission should be rejected. The prospect of relocation away from Trincomalee was central to the Authority's overall decision to affirm the delegate's decision. It was therefore required under s 36(2B) to identify a suitable place of relocation and then consider the reasonableness of that relocation. In his regard, the Authority's finding that there was 'no evidence before [it] to indicate that the [appellant] is unable to live with his parents and siblings in Jaffna' was unsatisfactory. In circumstances where the issue of relocation did not arise before the delegate, an absence of evidence about any inability to relocate to another place could not support a finding that it was necessarily reasonable to relocate to that place. The Court noted that this conclusion would be the same regardless of whether the Authority had in fact

			correctly referred to Mullaitivu instead of Jaffna. More fundamentally, the absence of evidence as to relocation was indicative only of the fact that the appellant had not been afforded the opportunity to address the issue. The Court concluded that the Authority failed to consider a relevant consideration required by the Act. As noted in *CSZ16* (at [6]-[10]), consideration of the reasonableness of relocation to a particular place can require a consideration of different or lower risks of harm to the appellant than is required to meet the general standard for protection. As Greenwood J noted in *DQA17* (at ([106(34)]): > ... in the relevant case, subject to the *content* of the claims of an applicant and the way in which the *particular circumstances* of the visa applicant are framed and identified, it *may* be relevant to consider a question of whether the visa applicant is exposed to, or at risk of, a class of harm which may not fall within the description 'significant harm', in the proposed place of relocation. That consideration is engaged by the question of what would be 'reasonable'. (Emphasis in original.) Here, the appellant claimed to fear harm *throughout* Sri Lanka on the basis of his Tamil ethnicity and imputed association with the LTTE, as well as on the basis of being a failed asylum seeker with this profile. These claims were supported by accepted genuine historical experiences of serious harm at the hands of the CID in Trincomalee. In these circumstances, it was realistically

			possible (in the sense that it was not improbable or fanciful) that, had the Authority considered the reasonableness of relocation to another place, which potentially could have involved consideration of lesser risks of harm, the Authority could have reached a different conclusion. As such, ground 2 of the appeal was made out.
Kwatra v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 58 (Successful)	4 February 2021	29–47 (ground 1)	The Court upheld an appeal against a decision of the AAT affirming a decision of a delegate of the Minister refusing to revoke the mandatory cancellation of the Indian applicant's Class BB Subclass 155 Five Year Resident (Permanent) visa. Relevantly, in the context of ground 1 of the appeal, the primary issues for determination were whether a sufficiently clear claim was made by the applicant concerning dangers to his health arising from the COVID-19 pandemic, such that the AAT fell into error by failing to consider and address it and, if so, whether that error was material. The Court noted that the fact that the claim was both significant or substantial and clearly raised, and that it was not addressed in the Tribunal's reasons, left open the inference that the claim was not considered by the Tribunal. The Court inferred that the Tribunal failed to consider the applicant's claim to fear harm due to COVID-19 in India as it was required to do. Further, as to materiality, the Court was satisfied that a different decision might have been made had there been active intellectual engagement with the claim in compliance with the conditions on the existence of the Tribunal's power. Accordingly, the error was material and

			properly characterised as jurisdictional. Ground 1 of the review was upheld.
CJC16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCA 50 (Unsuccessful)	3 February 2021	40–53 (ground 3)	The Court dismissed an appeal against a decision of the Federal Circuit Court dismissing an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister refusing to grant the Sri Lankan appellant a protection visa. Relevantly, however, by ground 3 of the appeal, the appellant had contended that the FCCA below erred in failing to find that he was denied procedural fairness, or alternatively, that the AAT acted in breach of s 425 of the Migration Act by taking into account translated evidence from a hearing in which the AAT accepted that the interpreter had not been able to convey the appellant's evidence accurately. The background to this ground arose from the three tranches of hearing conducted by the AAT. The first hearing was a false start because the appellant's representative was unable to attend. The second was of significance because the interpreter withdrew from the hearing after about two and a half hours. The third was the substantive hearing.
AFD21 v Minister for Home Affairs [2021] FCA 4 (Unsuccessful)	22 January 2021	[23]–[28] (whether the Minister should have separately considered whether Australia's obligations of non-refoulement were engaged in respect of the applicant, rather than defer that question for later consideration in the context of a potential	The Court dismissed an appeal against a decision of the Minister declining to revoke the mandatory cancellation of the Burundian applicant's Class AH Subclass 101 Child (permanent) visa. Relevantly, however, the Court discussed the Minister's duty to consider Australia's international non-refoulement obligations and the applicant's claims of harm. *Non-refoulement and materiality*

		protection visa application), [29]–[38] (whether the Minister was obliged to consider whether the applicant's removal from Australia would offend Australia's obligations of non-refoulement), [39]–[53] (whether the Minister failed to give genuine consideration to significant representations and evidence advanced by the applicant as to a claimed "reason" why the cancellation decision should be revoked, including to the effect that the applicant may be killed in Burundi if he were to be returned there, and made an error of the kind identified in *Minister for Home Affairs v Omar*), [54]–[65] (whether the Minister's conclusion that the applicant would "integrate back" into Burundi society had no	In issue in this aspect of the Court's judgment was whether the Minister should have separately considered whether Australia's obligations of non-refoulement were engaged in respect of the applicant, rather than defer that question for later consideration in the context of a potential protection visa application. The Minister contended that, even if there was some error in the way that he approached the question of Australia's obligations of non-refoulement, it was not apparent — which is to say that the applicant could not establish — that any such error was material to his ultimate conclusion. The Court noted that, even assuming that the Minister should have been understood to have wrongly conflated Australia's obligations of non-refoulement with the criteria that condition the grant of protection visas, it could not be said that that error was material to the non-revocation decision. On the contrary, the applicant's contention struck as very much hypothetical. There was nothing in the submissions that he advanced in support of the revocation of the cancellation decision that suggested that his predicament, though apt to engage Australia's obligations of non-refoulement, might nonetheless not have been sufficient to satisfy the criteria upon which any subsequent protection visa application would turn (such that the Minister might have been drawn to a different conclusion had they been considered in the earlier context). It was, of course, for the applicant to establish that any such error (assuming that there was one) was material to the outcome that he hoped to impugn.

		foundation in evidence/was legally unreasonable)	On the other hand, however, assuming that the Minister was obliged to consider the engagement of Australia's obligations of non-refoulement, that obligation was not discharged. For the reasons identified in *Ali* (at 426 [101]), the Minister would, in that circumstance, be taken to have erred by failing to consider (or by, in effect, deferring any consideration of) that question. That error (if there was one) would have been material, in the sense that, had he turned his mind to the issue and concluded that those obligations *were* engaged, the Minister might conceivably have been drawn to a different conclusion as to whether or not there was "another reason" that warranted revocation of the cancellation decision. *Whether non-refoulement obligations were raised as "another reason"* The next issue was to determine whether the Minister was obliged to consider the issue of non-refoulement. If he was, then his failure to do so would impugn of the non-revocation decision as a product of jurisdictional error. If he was not, then no such error could be shown. The Court concluded that the Minister's failure in this case to address the question of non-refoulement was not reflective of jurisdictional error. The engagement of those obligations was not something that the applicant raised as a reason for which he contended that the revocation of the cancellation decision was warranted, nor was it a matter that arose with the requisite clarity

			upon the material with which the Minister was furnished. The Minister was not obliged to consider it. It was of no moment that his failure to do so was the product of any statutory misunderstanding. It followed that this ground of challenge to the non-revocation decision failed. *Failure to consider representations as to harm* The applicant contended that the Minister failed to give genuine consideration to significant representations and evidence advanced by the applicant as to a claimed "reason" why the cancellation decision should be revoked, including to the effect that the applicant may be killed in Burundi if he were to be returned there, and made an error of the kind identified in *Minister for Home Affairs v Omar* [2019] FCAFC 188. The Court in the present case did not accept that the Minister's reasons were "clearly inadequate" or otherwise betrayed his having not "meaningfully engage[d]" with the applicant's claims. Whether the Minister here failed to consider a representation that was advanced in support of the revocation of the cancellation decision was a question of fact, which, in the usual course, was to be established as a matter of inference. The Court noted that an inference that the Minister failed to consider what the applicant submitted — including that he faced the prospect of death upon return to Burundi — was less open to be drawn in circumstances where the Minister's reasons were thorough and disclosed at least some consciousness of

			what was put. Likewise, the Court considered that it should be slower to infer an absence of consideration of a contention that lacks specificity or detail than it might otherwise be in the case of one advanced with greater particularity: *Ogbonna v Minister for Immigration and Border Protection* [2018] FCA 620; (2018) 261 FCR 385, 405 [62] (Thawley J). The Minister's reasons for the non-revocation decision, insofar as they addressed the issue presently in focus, were, on any view, pitched at a level of generality. It was also not in doubt that his reasons assumed more than a passing resemblance to other cases (and, in that sense, might fairly be described as "formulaic"). No doubt it was for those reasons that the applicant sought to attach an adjective — "meaningful" — to his criticisms of the Minister's consideration of his contentions. Nonetheless, the facts here did not warrant the drawing of an inference that the Minister overlooked or otherwise failed to consider (or meaningfully consider or engage with, etc) the submissions that the applicant advanced. The Court affirmed that a finding that a Minister "... has not engaged in an active intellectual process will not lightly be made and must be supported by clear evidence, bearing in mind that the judicial review applicants carry the onus of proof": *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; (2017) 252 FCR 352, 364 [48] (Griffiths, White and Bromwich JJ); see also *CAR15*, 149-150 [76] (Allsop CJ, Kenny and Snaden JJ), *GBV18,* 219 [32]

			(Flick, Griffiths and Moshinsky JJ) and *CTB19*, [15] (McKerracher, Kerr and Wigney JJ). In *Applicant WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 184; (2003) 236 FCR 593 (French, Sackville and Hely JJ), the Court held (at 604 [47]) that an: ...inference that the [decision maker—in that case, a tribunal] has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. The Court observed that the facts before it did not warrant the drawing of an inference that the Minister failed to consider (or to meaningfully consider or engage with, or to give "real consideration" or "genuine consideration" to, or otherwise to take account of, in any of the other ways that the authorities describe) the contentions that the applicant advanced as to what might happen to him if he were removed from Australia. It was far more likely that the Minister simply did not accept that the risks to which the applicant adverted (and of which the Minister was, on any view, conscious) gave rise to "another reason" for the purposes of s 501CA(4)(b)(ii) of the Act: in other words, that he addressed the applicant's contentions in the manner that the Full Court described in *Buadromo* (at 332 [46]). That being the case, it was not appropriate

			to — and the Court did not — infer any want, on the Minister's part, of relevant consideration of the point. *The "integration" finding* The applicant sought to make much of the difficulties that would befall him if he were returned to Burundi. In the reasons published in support of the non-revocation decision, the Minister made the following observations: [28] In coming to my decision about whether or not I am satisfied that there is another reason why the original decision should be revoked, I have had regard to the impediments that [the applicant] will face if removed from Australia to his home country of Burundi in establishing himself and maintaining basic living standards. [29] [The applicant] is a young man of 24 years who does not suffer from any diagnosed medical or psychological conditions, although he has a history of alcohol and cannabis abuse. [30] I note [the applicant] has advised that he has no known family members or support in Burundi. I accept that he will face financial and practical hardship in establishing himself and maintaining basic living standards, and will undergo a period of adjustment, at least initially, until he is integrated back into its society.

			[31] I acknowledge that [the applicant] is likely to experience practical and emotional hardship if he is removed from Australia and thereby separated from his mother sister and step-father. [32] I find that [the applicant] will have similar levels of access to any available medical or economic support services that are generally available to other Burundi citizens in a similar position as [the applicant], although I recognise that these may be of a lower standard than those available to him in Australia. The applicant complained that the conclusion recorded in [30] of those reasons — that the applicant would "... undergo a period of adjustment, at least initially, until he is integrated back into [Burundi] society" — was one for which there was no evidential basis. In the Court's view, however, the Minister's conclusion about the applicant "integrat[ing] back into [Burundi] society" could not be impugned as legally unreasonable, in the sense contemplated by authorities such as *Minister for Immigration and Citizenship v Li* [2014] FCAFC 1; (2013) 249 CLR 332 (French CJ, Hayne, Kiefel, Bell, Gageler JJ)) and *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 (Gummow A-CJ, Heydon J, Crennan J, Kiefel J, Bell J)).
CAQ19 v Minister for Immigration, Citizenship,	14 January 2021	32–34	The Court dismissed an appeal against a decision refusing to grant the Sri Lankan appellants Safe Haven

Migrant Services and Multicultural Affairs [2021] FCA 1 (Unsuccessful)			Enterprise Visas. Relevantly, however, the second ground of appeal asserted that the appellants did not hear the interpreter properly in the earlier Federal Circuit Court proceedings and could not properly engage in those proceedings. The Court noted at the outset that there was no evidence to support this ground of appeal. But even if there was evidence that the appellants could not hear the interpreter properly at the Federal Circuit Court hearing, that would not establish appealable error. The present Court referred to *SZRMQ v Minister for Immigration and Border Protection* [2013] FCAFC 142; (2013) 219 FCR 212 (at [9] per Allsop CJ, Robertson J agreeing) and *Singh v Minister for Immigration and Multicultural Affairs* [2001] FCA 1376; (2001) 115 FCR 1 (at [28] per Tamberlin, Mansfield and Emmett JJ). To use the words of the ground of appeal, the appellants were able to 'properly engage in the proceeding' though their solicitor. There was no reason to think that the appellants' solicitor was unable to communicate effectively with them before, during and after the hearing so that they were able to provide instructions as necessary and understand what had happened, let alone any evidence of a failure of communication.
CWY20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1855 (Griffiths J) (Successful)	23 December 2020	2-3, 70-140	The Court allowed the appeal, finding that Acting Minister fell into jurisdictional error by assessing the question of "national interest" on an erroneously narrow basis, which reflects unreasonableness and/or an incorrect understanding of the law and that the Acting Minister distorted his decision-making process by deferring his consideration of the implications of Australia breaching its international *non-refoulement*

			obligations to a later stage of the decision-making process relating to his residual discretion. "In my view, the Acting Minister fell into jurisdictional error by assessing the question of the national interest on an erroneously narrow basis. The error can be described alternatively as reasoning unreasonably or failing to act upon a correct understanding of the law. The Acting Minister's decision to, in effect, defer consideration of the significance of Australia breaching its international *non-refoulement* obligations to the last stage of his decision-making process (i.e. as to how his residual discretion should be exercised), meant that, when it came to weigh national interest considerations against other matters which were favourable to the applicant, the weighing was distorted. This was because the Acting Minister's assessment of the national interest could have been different if he had factored into his assessment of the national interest the implications of Australia acting in breach of its international *non-refoulement* obligations. In other words, if the Acting Minister had directly confronted this issue in the earlier stage of his decision-making when assessing the national interest, there was at least a possibility that he may have given different weight to the national interest when subsequently balancing it with other considerations which were relevant to the exercise of his residual discretion. Further, there was at least a possibility that the Minister may have reached a different conclusion on whether he was satisfied that the refusal was in the national interest and, if the precondition in s 501(2)(e) to the exercise of his power

			was not met, would not have progressed to consider his residual discretion." (Para 136)
EXW18 v Minister for Home Affairs [2020] FCA 1802 (Anastassiou J) (Unsuccessful)	16 December 2020	51-57	The Court dismissed the appeal of a Pashtun, Sunni, Muslim Pakistani appellant considering whether the risk of being targeted for extortion constituted a real risk of significant harm.
BVT20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 222 (Allsop CJ, Moshinsky and O'Callaghan JJ) (Unsuccessful)	10 December 2020	1, 12, 48, 67-94	The Court dismissed the appeal of a Fijian appellant, considering whether the complementary protection provisions are capable of application where a visa applicant claims he or she will suffer psychological harm if returned on the basis of a past act in the home country, and finding that an act or omission that is wholly in the past is not capable of engaging the complementary protection criterion in the Migration Act. "The principal issue raised by this appeal is whether the "complementary protection" provisions in the Migration Act 1958 (Cth) are capable of application where an applicant for a protection visa claims that he or she will suffer psychological harm if returned to his or her home country on the basis of an act that occurred in the past in the home country." (Para 1). "Having regard to the text, legislative history and context, as discussed above, we consider the preferable construction to be that an act or omission that is wholly in the past is not capable of engaging the complementary protection criterion in the Migration Act. Notwithstanding the use of the present tense in the definition of "cruel or inhuman treatment or

			punishment", the overall tenor of the provisions is that they are forward-looking. That feature strongly suggests that the provisions are concerned only with an act or omission that takes place (or continues to take place) in the future. The legislative history, as discussed above, does not suggest otherwise. Thus, we consider this to be the better construction having regard to the text of the relevant provisions and the legislative history. This is not to say that a past act or omission may not be relevant in assessing whether there is a real risk that the visa applicant will be subjected to an act or omission constituting cruel or inhuman treatment or punishment in the future. Nor is it to say that an act or omission in the future may not represent a continuing act or omission that started in the past. However, we consider that there needs to be an act or omission in the future to engage s 36(2)(aa), read with s 36(2A)(d) and the definition of "cruel or inhuman treatment or punishment" in s 5(1) of the Migration Act. On the facts of the present case, as found by the Tribunal, the threat to the appellant was wholly in the past. As we have explained, the Tribunal did not accept that the threat was continuing, and the whole thrust of the Tribunal's reasons is to the contrary. It follows that no error is shown in the Tribunal's approach or in the primary judge's conclusion." (Para 86)
CLI16 v Minister for Immigration and Border Protection [2020] FCA	10 December 2020	41-57	The Court allowed the appeal of a Bangladeshi appellant, associated with the with Jamaat-e-Islami (**JI**), an Islamic political party in Bangladesh, finding that the

1769 (Anastassiou J) (Successful)			Tribunal fell into jurisdictional error for failing to engage in the "fact-intensive analysis" required when assessing whether relocation within Bangladesh was reasonable and practicable. I" consider that the Tribunal fell into error by failing to engage in the "fact-intensive analysis" required when assessing whether relocation within Bangladesh was reasonable and practicable. It was not apt to compare the Appellant's circumstances in Australia, in which he lived without family support, to those that he would experience in an unfamiliar part of Bangladesh. It was also not sufficient for the Tribunal to dispose of the issue by concluding that the Appellant's family would be able to travel to visit him, without having identified the area in question and considered whether it was reasonable for the Appellant to reside in that area. The Tribunal had to engage with issues such as whether relocation to a place closer to the Appellant's home village might have facilitated more frequent contact with his family but might have led to a greater risk that the Appellant would come to the attention of his persecutors. Or, alternatively, whether relocation to a place further from the Appellant's home village would allow the Appellant to maintain, as a matter of practicality, a connection with his family. The failure to do so means that the Tribunal fell into jurisdictional error." (Para 47) "While there is no error in respect of this aspect of the Tribunal's reasoning, it fortifies the conclusion at [47] above, that the Appellant's concerns about family

			support were not adequately considered by the Tribunal. There is a dissonance between the Tribunal finding, on the one hand, that the Appellant would be able to avoid the risk of harm from AL members by moving to an area far away from his home area, yet, on the other hand, assuming that the Appellant would be visited and supported by his family. While relocation and ongoing family support are not necessarily mutually exclusive, it was necessary for the Tribunal to consider the practicality of ongoing family support at the place to which the Appellant may relocate. In the absence of an identified area or region to which the Appellant may relocate, any realistic and practical assessment of the reasonableness of such a location was rendered theoretical. Accordingly, the Tribunal erred in failing to consider the question of whether there was an area to which the Appellant might relocate reasonably." (Para 55)
FDQ18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1735 (White J) (Unsuccessful)	2 December 2020	74-84	The Court dismissed the appeal of an Iranian appellant and in doing so considered whether the authority failed to consider the cumulative effect of the appellant's personal circumstance in his claim for complementary protection.
CPJ16 v Minister for Home Affairs [2020] FCAFC 212 (Unsuccessful)	27 November 2020	62-66 (ground 1), 67-68 (ground 2)	The New Zealander appellant appealed against a decision to dismiss her application for judicial review of a Ministerial decision made pursuant to s 501A(3) refusing to grant the appellant a protection visa. The appellant advanced five grounds of appeal. Three alleged that her immigration detention was internationally unlawful under the ICCPR (ground 3); that the primary

			judge below was biased (ground 4); and that the Minister, in exercising his power under s 501A(3), had failed to consider the legal consequences of his decision (namely, the appellant's indefinite detention) (ground 5). Relevantly, the other two grounds of appeal alleged that the Minister's decision was invalid because it was identical to an earlier decision that had been quashed in previous judicial review proceedings (ground 1) and that the Minister committed a jurisdictional error because he had failed to consider Australia's international non-refoulement obligations (ground 2). As to ground 1, the Court unanimously rejected the appellant's argument on the basis that there was nothing precluding the Minister from exercising his power under s 501A(3) to refuse to grant the appellant a protection visa, which was a separate power to that exercised in the original impugned decision (made pursuant to s 501A(2)). Interestingly, however, Jagot and Griffiths JJ (SC Derrington J agreeing) acknowledged the appellant's sense of grievance arising from the Minister's decision in circumstances where the Minister had accepted that the appellant's removal from Australia would breach Australia's international non-refoulement obligations. Their Honours also noted, *obiter*, that the Minister's approach of treating Australia's non-refoulement obligations as simply one relevant consideration in determining whether to grant a protection visa — that may be outweighed by other relevant considerations such as the national interest — seemed inconsistent with a statement by the previous

			Minister for Immigration and Border Protection in a second reading speech that: > Asylum seekers will not be removed in breach of any non-refoulement obligations identified in any earlier processes. The government is not seeking to avoid those obligations and will not avoid these obligations… Their Honours appeared to suggest that a complaint of procedural unfairness was not unavailable in these circumstances, although the applicant did not advance such a complaint. As to ground 2, the appellant had relied on the decision of a single judge of the Federal Court in *BAL19* to argue that the Minister was precluded from refusing to grant her a protection visa pursuant to s 501A(3) after having found that the appellant met the complementary protection criteria in s 36(2)(aa). Jagot and Griffiths JJ (SC Derrington J agreeing), however, concluded that the appellant's argument was untenable in circumstances where the Full Federal Court had overruled this aspect of *BAL19* on two previous occasions (*KDSP* and *BFW20*).
BYT19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1695 (Unsuccessful)	26 November 2020	30-37	The Indian appellant appealed against a decision of the Federal Circuit Court dismissing an application for judicial review of an AAT decision affirming a decision of a delegate of the Minister to refuse to grant the appellant a Permanent Protection visa (subclass XA-866). The appellant argued that the AAT did not consider his membership of a lowly caste and how that may affect the reasonableness of relocation in relation to the

			question of complementary protection. Indeed, having accepted that the appellant was exposed to a real risk of significant harm upon return to India, the appellant submitted that the AAT was required to assess whether relocation to a safe part of India was reasonable in the appellant's circumstances, and that that assessment should have properly considered whether the appellant's lower caste membership may affect his relocation in circumstances where the caste system is ubiquitous in India. The appellant submitted that the AAT only considered evidence regarding the caste system in India, and the appellant's status in that system, for the purposes of assessing the risk of harm to the appellant, and that the AAT did not consider that evidence for the purpose of assessing whether it was reasonable for the appellant to relocate within India. Anastassiou J concluded that the AAT's reasons, read as a whole, demonstrated that there was in fact an adequate and thorough consideration of the issue of whether it was reasonable for the appellant to relocate elsewhere than Punjab. The AAT summarised the appellant's claims in respect of the caste system. This included the appellant's principal submission on the issue, namely that there "is a caste system in India which is still bad and people get treated according to their caste, which put him and his family in a vulnerable position because he belongs to a certain caste" which is a lower caste in Indian society. The AAT then considered the facts and circumstances relevant to the appellant's caste, including that the appellant had spent "the first 20 years of his life living in different places in India". Having set out its factual

			findings, the AAT proceeded to note the relevant country information regarding the significance of caste in certain parts of India. These factual findings formed the basis for the AAT's conclusion that the appellant's caste had not been a "big determining factor in his life" to date. The AAT further noted that the appellant had been able to learn English, undertake tertiary study, secure employment and develop friendships with people from a wide variety of backgrounds in India. Taking into account this past history, the AAT did not accept that the appellant's caste would prevent him from developing relationships or being successful if he returned to India. In considering the complementary protection claim, the AAT began by referring to the 'reasons given above'. By this, the AAT expressed its intention to rely on earlier factual findings in respect of the appellant's refugee protection claim in respect of the complementary protection claim. The Court noted that this path of reasoning is consistent with the approach of the same Court in a number of earlier decisions, including *SZNCY*, in which Markovic J held at [49]: The Tribunal set out and applied the test for complementary protection under s 36(2)(aa) of the Act at [84]-[94] of its decision record. The issues which arise when considering the reasonableness of relocation as part of a complementary protection claim are the same in assessing claims for the purposes of s 36(2)(a) and s 36(2)(aa) of the Act. **It was open to the Tribunal to rely on its earlier factual findings in relation to that issue where the**

			same facts and circumstances were relied on by the appellants for both refugee and complementary protection claims: see *MZYXS v Minister for Immigration and Citizenship* [2013] FCA 614 at [37]; *DBE16 v Minister for Immigration and Border Protection* [2017] FCA 942 at [54]. (Emphasis added by Anastassiou J.) The AAT proceeded to consider whether relocation was reasonable in the appellant's particular circumstances. This included expressly referring to the appellant's language skills, education, qualifications, employability and, crucially, the fact that he had lived in various cities in India and did not particularly like living in Punjab (in part due to the issues with the caste system). These matters were inextricably tied to the appellant's concerns arising from the 'caste system' in India and his membership of a lowly caste. It followed that there was no error in the AAT's consideration of caste issues, a conclusion which was fortified by the evidence of the appellant himself. In substance, the appellant did not suggest that he would suffer any particular hardship by reason of relocation. To the contrary, he conveyed that the caste system had not substantially affected his life and that he had adapted to living throughout India and did not particularly want to return to Punjab.
DWX16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1688 (Unsuccessful)	23 November 2020	69-78 (general legal principles relating to complementary protection), 79-107 (disposition of the appeal)	The Iraqi appellant appealed against a decision of the Federal Circuit Court dismissing an application for judicial review of an IAA decision affirming a decision of a delegate of the Minister to refuse to grant the appellant a Safe Haven Enterprise visa. The appellant argued that the primary judge erred by failing to find that

			the IAA had applied the wrong legal test or failed to properly consider and assess the appellant's claims under the complementary protection criterion (s 36(2)(aa)). Specifically, the appellant contended that the IAA failed to consider his claim that if he were required to return to Iraq, he would be at risk of being arbitrarily deprived of his life in a terrorist attack or similar incident of violence (labelled here as 'the generalised violence claim'). He argued that such a claim was considered, although rejected by the delegate, and therefore it was a jurisdictional error for the IAA not to have so considered it. No issue was raised either below or on appeal concerning the IAA's rejection of the refugee criterion (s 36(2)(a)) insofar as the appellant sought to invoke it. Beach J rejected the appellant's contention as being based on a false premise. His Honour did not accept that the delegate had considered, and then disposed of, a generalised violence claim in the context of the complementary protection criterion. Therefore, no such claim had to be considered by the IAA in the context of the complementary protection criterion. His Honour also provides a summary of some of the relevant legal principles relating to complementary protection.
BLH15 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1588 (Unsuccessful)	4 November 2020	55-73 (fifth ground of appeal: procedural fairness)	The Tongan appellant appealed against a decision of the Federal Circuit Court dismissing an application for judicial review of an AAT decision affirming a decision of a delegate of the Minister refusing to grant the appellant a protection visa. Relevantly, the appellant's fifth ground of appeal alleged the primary judge erred in finding that the AAT had observed the requirements of procedural fairness. This argument had three particulars:

			• First, the delegate expressly found that the appellant's "ex-husband forced her to sleep with him at his house on several occasions after they had separated". • Second, the primary judge correctly held: "The delegate accepted that the Applicant was forced to have sex with her ex-husband after they separated. Nothing in the delegate's reasons indicated that her claim that she was forced to have sex with her ex-husband post-separation would be in issue before the Tribunal. Based on what the delegate found the Applicant would, and should, have understood that the central and determinative question on the review would be limited to an assessment of the risk or chance of future harm (see *SZBEL* at [43])." • Third, the primary judge erred in holding that "at the hearing the Tribunal raised its concern about the Applicant's claim that her ex-husband forced her to go back to his house for sex after they separated." The AAT did not suggest to the appellant that the sex she had with her ex-husband after they separated was anything other than forced, or that she was making it up. Moshinsky J dismissed this ground of appeal for three reasons. First, the AAT did not make a finding that the appellant had been willing to return with her ex-husband to the house until one occasion when she was accosted and beaten there by another woman. Rather, the AAT had regard to the fact that, "[i]n some contrast" to her earlier claim that on a number of occasions her ex-husband was able to force her to return to his house for

			the purpose of sexual intercourse, the appellant's "*description of the incidents* at the hearing *appeared to indicate* that she had been willing to return with [her ex-husband] to his house, until one occasion when she was accosted and beaten there by another woman" (emphasis added by Moshinsky J). Further, as the primary judge noted, the AAT's reference to the appellant's "description of the incidents" was clearly a reference to the evidence set out in the AAT's reasons. Second, the Tribunal put to, or sufficiently raised with, the appellant that, if her ex-husband had taken up with another woman at about this point and installed her in the house in the circumstances the appellant suggested, it was difficult to accept that the appellant's husband would have continued to force the appellant to go there for the purpose of sexual intercourse with him. The Tribunal recorded the fact that it had put this to the appellant. On the basis of that passage, Moshinsky J considered that the AAT did sufficiently raise with the appellant the difficulty the AAT perceived with her account. Third, the AAT's lack of satisfaction that the appellant had been subjected to domestic or sexual violence by her ex-husband after she left him in about 2006, was also based on the matters referred to in the AAT's reasons. Those concerns were put to the appellant during the hearing.
DGPZ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs	30 October 2020	51-58 (applicable legal principles), 59-76 (disposition of the appeal)	The Turkish applicant sought judicial review of a decision of the AAT affirming a decision of a delegate of the Minister under s 501CA(4) not to revoke the cancellation of the applicant's Class BB Subclass 155

[2020] FCA 1569
(Unsuccessful)
			Five Year Resident Return visa. The applicant argued that the AAT failed to consider, properly or at all, a substantial and clearly articulated submission of the applicant and thereby failed to afford the applicant procedural fairness and/or otherwise constructively failed to exercise its jurisdiction. This argument contained three particulars:
			• (A) The applicant made representations as to various reasons why the cancellation of his visa should be revoked and gave evidence in support of those representations. In particular, the applicant made representations supported by evidence to the following effect:
			  ○ (i) If returned to Turkey, the applicant faced a real prospect of a severe mental health relapse;
			  ○ (ii) The applicant faced a prospect of mistreatment in the form of physical confinement and other inhuman or degrading treatment in the course of treatment for any relapse in Turkey.
			• (B) The AAT accepted the representation particularised at (A)(i) above.
			• (C) The AAT failed to consider or resolve, properly or at all, the representation particularised in (A)(ii) above.
			Moshinsky J dismissed the appeal. After setting out the basic legal principles of procedural fairness applicable to decision-making, and after discussing the *Omar* line of authority, his Honour concluded that the applicant had not established that the AAT failed to consider, in the

			sense of a failure meaningfully to engage with, the applicant's mental health mistreatment claim. First, in the section of the AAT's reasons concerning international non-refoulement obligations, the AAT set out a detailed summary of the applicant's contentions that Australia's non-refoulement obligations were engaged and expressly considered the contention in the Amended Statement of Facts, Issues, and Contentions (ASFIC) at [142], which was the key paragraph relied on by the applicant in the present proceeding. Second, having summarised the applicant's submissions concerning international non-refoulement obligations, the AAT discussed the judgment of the Full Federal Court in *Omar*, indicating the AAT's awareness that "[a] decision-maker must meaningfully consider any clearly-articulated claims of harm, including those that may enliven Australia's non-refoulement obligations". While the question here was whether or not the AAT satisfied this requirement, it was nevertheless relevant to note that the AAT correctly understood its task. Thirdly, the AAT gave consideration to the applicant's contentions concerning his mental health issues and the treatment of such issues in Turkey. While the relevant extract from the AAT's reasons referred only to the applicant's submissions that services would be "withheld" and that he may suffer serious harm "if imprisoned" and did not refer to mistreatment in the course of mental health treatment, nonetheless, this needed to be read in the context of the AAT's earlier

			reasons, which discounted the weight of the material concerning mistreatment. Fourth, the AAT expressed conclusions regarding the applicant's relevant contentions *generally,* including the claim that he would suffer mistreatment if his mental health relapsed. In the context of the AAT's summary of the applicant's relevant contentions, the AAT's conclusions here were fairly read as being addressed to all of those contentions. Fifth, the AAT gave further consideration to the treatment of those with mental health issues in Turkey, in the section of its reasons concerning the extent of impediments if removed. The Tribunal relied on a DFAT Report as providing the most up-to-date and authoritative description of the treatment of those with mental health issues in Turkey. It was open to the AAT to rely on this report in preference to the non-government organisation report (of 2013) as described in the July 2014 *Daily News* article. The AAT further considered the nature of the mental health services available in Turkey. Those paragraphs constituted further engagement with the issue of the treatment of those with mental health issues in Turkey. Sixth, while the applicant's submissions in the present proceeding focused on the claim that the applicant would suffer mistreatment if his mental health relapsed in Turkey, this was just one of many contentions advanced on behalf of the applicant in the section of the ASFIC concerning international non-refoulement obligations.

			While the AAT was obliged to consider each substantial and clearly articulated contention, it was important to keep in mind that the AAT was dealing with *all* of the contentions set out in that section of the ASFIC, not only the mental health mistreatment claim.
DWJ18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1484 (Unsuccessful)	15 October 2020	58-73 (determination of first proposed ground of appeal), 81-86 (determination of second proposed ground of appeal)	The Sri Lankan appellant appealed against a decision of the Federal Circuit Court dismissing an application for judicial review of an IAA decision affirming a decision of a delegate of the Minister to refuse to grant the appellant a Safe Haven Enterprise visa. The appellant sought leave to rely on a draft amended notice of appeal. The draft amended notice of appeal contained two proposed grounds of appeal. The first was that, in rejecting the appellant's claim that he was arrested and detained by the SLA, taken to a camp, beaten and tortured, detained for two or three days and he then escaped, the IAA failed to consider the appellant's evidence and the integers of that claim or otherwise made unreasonable findings. The second was that, in considering whether the appellant faced a real risk of serious or significant harm, the IAA failed to take into account his mental health. In refusing leave to rely on the draft amended notice of appeal, Markovic J concluded that both proposed grounds of appeal had no merit. As to the first, her Honour made five observations. First, the IAA explicitly considered and rejected the appellant's claim in his post interview submissions that inconsistencies and omissions in his evidence were explained by his trauma. The IAA did not reject the appellant's claim to be suffering trauma. Rather it found that the trauma and its

			potential impact did not explain or overcome its concerns with the appellant's credibility and the lack of consistency or plausibility in his evidence. Second, the IAA referred to the appellant's claim that inconsistencies and omissions in his evidence could be explained by the trauma he was suffering. It was not necessary for the IAA to refer to every piece of evidence and, more particularly, to refer to the additional evidence given by the appellant to that same effect. Third, the evidence given at the protection visa interview by the appellant that he cut his arm without knowing what he was doing did not rise to the level of a claim that his mental health issues were caused by his mistreatment and harassment at the hands of the SLA. Fourth, the appellant's contention that the IAA erred in not addressing his evidence to the delegate that "maybe" the SLA wished him to join their team was untenable. There was no clearly expressed claim which arose from the material before it that the Authority was required to address: *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2001] FCA 1178 at [58]. In any event, even if such a claim was made, it was implicitly rejected by the IAA where it concluded that the appellant was not of particular interest to the SLA. Fifth, no clearly articulated claim was made by the appellant that his mental health issues arose from his treatment at the hands of the SLA nor did the appellant claim, as was the case in *AGA16*, that due to his medical condition experiencing further instances of mistreatment would cause serious or significant harm. As such, there was no occasion, in assessing the seriousness of harm to the appellant, for the IAA to

			consider his personal vulnerabilities, namely his mental health. As to the second proposed ground of appeal, Markovic J observed that by accepting that any detention would be challenging and stressful for the appellant, the IAA took into account his particular circumstances and concluded that it would not amount to serious harm. The IAA referred to its finding that the appellant may be detained for a short period at the airport or at a prison and, on the evidence before it, accepted that a brief period of detention would be difficult for the appellant but noted that it was not satisfied that the appellant "has any vulnerabilities that would preclude a short period of detention". Further, the IAA had previously referred to and taken into account the appellant's claimed trauma. In those circumstances, it was not possible to conclude that the IAA failed to consider the appellant's claim that he had suffered trauma and the effect of that trauma on his being detained for a short period at the airport or in a prison on his return.
AZL20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1490 (Unsuccessful)	15 October 2020	35-43 (legal principles governing the exercise of the power under s 501CA(4) and the attendant duty to consider representations made in support of a revocation request), 51 (disposition of first ground of review), 52-53 (disposition of	The Vietnamese applicant sought judicial review of a decision of the AAT affirming a decision of a delegate of the Minister under s 501CA(4) not to revoke the cancellation of the applicant's Class BF Transitional (Permanent) visa. The applicant advanced two grounds of review. The first was that the AAT's decision was vitiated by jurisdictional error by failing to consider the matters (including factual matters) raised by the applicant in his representations made under s 501CA(3) as being a reason for revoking the visa cancellation decision and irrespective of whether these matters

		second ground of review), 54 (disposition of "third" ground of review)	engaged any of Australia's non-refoulement obligations. Jackson J noted that this appeared to be an alleged error of the kind that was identified by the Full Federal Court in *Omar First Instance*: *Minister for Home Affairs v Omar* [2019] FCAFC 188. The second ground of review alleged jurisdictional error on the basis that the AAT misunderstood the law in performing its task by incorrectly assuming that the existence or otherwise of non-refoulement obligations would be considered in the event that the applicant made an application for a protection visa, given that the criteria for a protection visa under s 36(2) substantially differ from, and do not reflect, Australia's non-refoulement obligations. Jackson J noted that this appeared to be an alleged error of the kind identified in *Ibrahim v Minister for Home Affairs* (2019) 270 FCR 12 at [112]-[113]. Jackson J rejected both grounds of review. As to ground 1, his Honour started by setting out the principles governing the exercise of the power under s 501CA(4) and the attendant duty to consider representations made in support of a revocation request. His Honour also discussed in detail the reasoning in *Omar First Instance*, *AXT19*, and *Ibrahim*. In the final analysis, his Honour concluded that the matters now relied on as representations about reasons for revoking the visa cancellation decision were in fact not the subject of representations about non-refoulement obligations before the AAT. To the extent that there were relevant representations about reasons to revoke the cancellation aside from non-refoulement – about the prospect of indefinite detention during a protection visa application

			and about impediments the applicant may face on return to Vietnam – they were considered. The second ground of review relied on differences between non-refoulement obligations and the statutory protection visa criteria. Jackson J noted that there was no suggestion in the AAT's reasons that it conflated the two. Rather, it decided not to consider non-refoulement obligations at all, because they were not the subject of a clearly articulated claim. To the extent that the AAT thought that non-refoulement obligations need not be addressed because they could be the subject of a subsequent protection visa claim, it did so on the basis of the concession by counsel that in *AXT19*, Logan J was probably correct in holding that *Omar First Instance* was clearly wrong. As Jackson J had already explained, *AXT19* is based on Full Court authority about the relevance of a non-citizen's eligibility to apply for a protection visa and neither it nor *Omar First Instance* engage with the differences that were the subject of *Ibrahim* and which are the subject of this ground of review here. As such, to the extent that the AAT relied on *AXT19*, Jackson J did not consider that that displayed any misunderstanding of the statute of the kind identified in *Ibrahim*. Even if the contrary were the case, no jurisdictional error arose because the alleged misunderstanding was not material. A third ground of review, which was not put in the originating application but which was the subject of leave given at the hearing, was to the effect that *Omar First Instance* is correct and the AAT erred in accepting

			a concession to the contrary. However, even assuming that *Omar First Instance* is correct, as Jackson J indicated, his Honour noted that an error of the kind identified in that case can only occur if representations about non-refoulement with a serious and substantive basis in fact in law have been made. Here, they were not. That conclusion made it unnecessary to grant leave to the applicant to depart from any concession about *Omar First Instance* that was made before the AAT. Whether that concession was correct or not, it could not assist the applicant here.
XFKR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 167 (Unsuccessful)	6 October 2020	82-92 (appellant's submissions on ground 4), 102-110 (disposition of ground 4)	The appellant, a Myanmar citizen, appealed against the primary judge's decision to dismiss an application for judicial review of an AAT decision affirming the decision of a delegate of the Minister not to revoke the cancellation of the appellant's Refugee and Humanitarian (Class XB) visa subclass 200 (Refugee). Relevantly, the fourth ground of appeal alleged that the AAT proceeded on an erroneous assumption of law as to the manner in which Australia's non-refoulement obligations would be considered if the appellant applied for a protection visa. Specifically, the appellant argued that the AAT made an error of the kind identified in *Ali v Minister for Home Affairs* [2020] FCAFC 109 by failing to appreciate the qualitative difference in the manner in which the question of Australia's international non-refoulement obligations would be considered as between the processes in s 501CA(4) and s 65 of the Act. This ground contended that the AAT erred by considering that "any concerns [the appellant] has in relation to non-refoulement obligations or risks of harm he may face if he returned to Myanmar can be addressed

			by a protection visa application and the detailed review that occurs when an application of that sort is assessed". The Court rejected this ground, and all other grounds, of appeal. It distinguished *Ali* in at least three ways. First, unlike the position in *Ali*, the AAT here did not defer consideration of protection claims. Rather, the AAT accepted that non-refoulement obligations did arise but observed that it could not determine whether or not that will occur on the limited evidence and the time available for its consideration. Second, while the AAT found that, on the limited evidence before it, the appellant may face harm if returned to Myanmar and also equally faced hardship if indefinitely detained, it also noted two matters: (1) the AAT did "not have the benefit of an ITOA or the full (and much needed) body of evidence one would expect (and which an applicant deserves) in a protection visa hearing"; and (2) the AAT could "only assess the often limited evidence before it in determining any risk of harm to XFKR" and, before the Tribunal, "that evidence was indeed scant". Third, the AAT found, on the "scant" evidence before it, that the consideration of non-refoulement obligations "did not outweigh the primary considerations". The AAT then assessed that the consideration of non-refoulement obligations was "tempered" by the prospect of a protection visa application which would allow for a "full and detailed analysis" of the appellant's protection claims. As such, the AAT meaningfully engaged with the appellant's representations concerning Australia's non-

			refoulement obligations and relating to the risk of harm to the appellant if he were returned to Myanmar: see *AXT19* at [53] (per Flick, Griffiths and Moshinsky JJ). The AAT's discussion of the relevant representations and the limited evidence in connection with those representations demonstrated that the AAT brought an active intellectual process, and gave proper, genuine and realistic consideration, to these matters: see *AXT19* at [53]. While the AAT here referred to the "prospect of a protection visa application that would allow for a full and detailed analysis of XFKR's protection claims", in the context of the AAT's reasons, that observation did not detract from the proposition that the AAT meaningfully engaged with the relevant representations and the evidence presented in connection with those representations: see *AXT19* at [54].
CPJ16 v Minister for Home Affairs [2020] FCA 1408 (Unsuccessful)	2 October 2020	78-93 (the argument that the Minister was required to grant a protection visa)	The New Zealander applicant sought judicial review of a decision made personally by the Minister pursuant to s 501A(3) to set aside a decision of the AAT and refuse the applicant's application for a protection visa. Among other things, the applicant appeared to argue that her circumstances had been found by the AAT to engage Australia's non-refoulement obligations, to meet the criterion in s 36(2)(aa), and not to engage s 36(1C). Therefore, she contended, having accepted these matters in his reasons for decision, the Minister was obliged to grant her a protection visa. (Insofar as the applicant relied on s 36(2C), Mortimer J noted that there was no relevant difference.) Mortimer J rejected this ground of appeal. Her Honour noted that the argument had some commonalities with

			the qualification expressed by the Full Federal Court in *BFW20*. However, given the other findings in *BFW20*, and also in *KDSP*, these observations could not be said to qualify either the availability of the power in s 501A or the availability of one or more paragraphs within s 501(6) in the exercise of the power under s 501A. Rather, the qualifying observations in *BFW20* are directed at the matters which might be relevant to the exercise of any discretion to refuse a protection visa under s 501 and, in her Honour's opinion, are equally applicable to the "override" refusal power in s 501A. Therefore, to the extent that the applicant contended that the Minister was *required* to grant her a protection visa, she was incorrect. The effect of *BFW20* and *KDSP* is that the suite of powers in ss 501, 501A, 501B, 501BA and 501F (and for that matter, s 501C and s 501CA, which are beneficial provisions) are available in respect of protection visas. That necessarily renders the "character test" in s 501(6) applicable to the exercise of those powers. The Minister is able to (and indeed must, as a necessary component of exercising any of these powers) consider whether she or he is satisfied the person does not pass the character test, by reason of any of the matters set out in s 501(6), not only whether a person has a "substantial criminal record" as defined in s 501(7). Mortimer J then observed that, in circumstances such as the applicant's, one way in which the overlap between the two sets of provisions may need to be reconciled and addressed is for a decision-maker to take into account (that is, actively engage with) the fact that the applicant is accepted to meet the core criterion for a

			protection visa, and falls outside the mandatory "character" refusal terms of s 36(1C). Her Honour noted that these may well be important factors which weigh against discretionary refusal of a protection visa, given the objects and purposes of such a visa. Indeed, they are likely to be "a fundamental element" (see *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 333) in the exercise of any discretion to refuse a protection visa. Her Honour was prepared to conclude that, if that be the correct analysis, then, in the circumstances of this particular decision and after careful reflection, the Minister in his reasons did engage with these issues and did recognise that some weight should be attached to these facts, even if he did not do so in terms.
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v CTB19 [2020] FCAFC 166 (Unsuccessful)	1 October 2020	15 (the legal principles relating to s 501CA(4) and the duty to consider representations), 29-39 (disposition of grounds 1, 2), 40-45 (disposition of ground 3)	The Minister sought judicial review of the primary judge's decision to set aside a decision of the AAT affirming the Minister's earlier decision not to revoke the mandatory cancellation of the Iraqi respondent's offshore humanitarian visa. In substance, the Minister advanced three grounds of appeal: (1) that the primary judge erred in concluding that the AAT did not properly consider the respondent's representations about the harm that he feared would be inflicted upon him (outside of the *non-refoulement* framework) on his return to Iraq because the Tribunal failed to make a conclusive finding on that issue; (2) that the primary judge erred in reasoning that the content of the duty to consider representations implied in the exercise of the power under s 501CA(4) to revoke mandatory visa cancellations includes a requirement to assess or quantify the fear of harm or to assess the likelihood or severity of

			the harm; and (3) that the primary judge did not properly engage with the question of materiality advanced by the Minister. The Court rejected all three grounds of appeal. Relevantly, as to grounds 1 and 2, the Court referred to recent authorities of the Full Federal Court (*Omar*, *GBV18*, *AXT19*, *EVK18*, and *DMQ18*) and succinctly stated the relevant legal principles governing the exercise of the power under s 501CA(4) to revoke mandatory visa cancellations and explaining the content of the duty to consider representations made in support of revocation of a cancellation decision (see [15]). The Court acknowledged that the AAT had a 'difficult' task in considering whether the risk of the respondent being killed if removed to Iraq was a matter which weighed to a lesser or greater extent in its evaluation of all the statutory factors to be taken into account under Direction 65 (e.g. the extent of the risk to the Australian people). But it was a task that was required to be undertaken. The Court accepted that it was not necessary for the AAT to have quantified the risk to the extent of a precise numerical percentage, and such a quantitative assessment was not indicated as a statutory requirement of the statute. Yet a meaningful qualitative assessment was clearly necessary. Here, the AAT did not appear to consider whether there was a real (i.e. meaningful) possibility or risk that the respondent would be killed. Rather, the Tribunal was equivocal about the basic question of his risk of being killed.

			As to ground 3, the Court concluded that the primary judge was correct in finding that, if the AAT had properly engaged with the respondent's representation about the risk of harm on return, it could have reached a different conclusion.
AMO18 v Minister for Home Affairs [2020] FCA 1403 (Greenwood J) (Successful)	29 September 2020	28-74	The Court allowed the appeal of three applicants from the Philippines who claimed they would suffer a real risk of significant harm based on, respectively, of being a divorcee and the family members of a divorcee. In doing so, the court also examined the relationship between s 36(2)(aa) and s. 36(2B)(b) of the *Migration Act 1958* (Cth).
CZW20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1380 (Griffiths J) (Successful)	24 September 2020	12-37	The Court set aside Ministerial decisions relating to a Dinka, Christian South Sudanese applicant and ordered his release from immigration detention. In doing so, the Court discussed the duty to consider Australia's non-refoulement obligations, including the Full Court's decision in *Ali v Minister for Home Affairs*.
BFV18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1362 (Successful)	23 September 2020	54-64 (error in the application of s 473DD in the context of the appellant's claim regarding the tattoo)	The Iraqi appellant appealed against a decision of the Federal Circuit Court dismissing an application for judicial review of an IAA decision affirming a decision of a delegate of the Minister to refuse to grant the appellant a protection visa. Relevantly, the third ground of appeal alleged that the IAA had misconstrued or misapplied s 473DD (regulating the IAA's power to consider new information in exceptional circumstances in the context of a fast track reviewable decision) or had otherwise failed to consider (a) information regarding the appellant's "un-Islamic" relationship and (b) a claim regarding the appellant's tattoo.

			Charlesworth J upheld this ground of appeal insofar as it related to the tattoo claim. First, the IAA erred in applying s 473DD because the IAA failed to identify the significance of the tattoo (and the submissions made in relation to it) to the appellant's claims. Second, the IAA's reasoning did not contain any conclusion as to whether or not the existence of the tattoo or its implications was information that "was not and could not have been" provided to the delegate within the meaning of s 473DD(b)(i). The appellant's asserted fear of the consequences of revealing the tattoo to the delegate appeared to have been accepted by the IAA as a matter of fact, and yet no consideration was given as to whether the appellant's explanation was sufficient to satisfy the first of the two alternate conditions in s 473DD(b). Third, the IAA erred in its application of s 473DD(b)(ii). Fourth, the existence of the tattoo was not a claim. It was an objective fact that was capable of affecting the IAA's determination of the appellant's extant claim to be a person associated with views hostile to radical Islamic ideals. Fifth, the IAA incorrectly concluded that the information provided to the delegate had not included any claim that the appellant "would in any way be considered a non-conformist in Iraq". The claim advanced by the appellant was that he was "moderate and now secularised". That claim had previously been supported by evidence that the appellant strongly opposed Islamic ideals and that he was in fact hostile to the goal of establishing an Islamic state under Sharia law. The claim before the delegate was to the effect that the

			appellant's religious and political beliefs were non-conformist. Sixth, in determining whether there were no exceptional circumstances warranting consideration of the information, the IAA gave no consideration to the explanation the appellant had advanced for not revealing the existence of the tattoo to the delegate. That explanation appeared to have been accepted by the IAA, if only for the purpose of supporting its conclusion that the appellant was able to conceal the tattoo with his clothing if he feared the consequences of revealing it. The reasons of the IAA indicate that no consideration was given to the question of whether the explanation for not revealing the tattoo at an earlier time constituted an "exceptional circumstance" within the meaning of s 473DD(a) of the Act.
CSZ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 156 (Jagot, Charlesworth and Snaden JJ) (Unsuccessful)	18 September 2020	1-23	The Court dismissed an appeal from an applicant from Afghanistan, noting that it "is unlikely that in evaluating the reasonableness of the appellant relocating to Kabul the IAA would have excluded from its consideration the issue to which it had given such extensive consideration. Nothing in the IAA's reasons suggests that the IAA believed that the issue of harm, be it significant harm or not, from generalised violence in Kabul was not relevant to its evaluation of the reasonableness of the appellant relocating to Kabul. Accordingly, it should not be inferred that the IAA 'stopped its evaluation of the general risk of violence' that the appellant would face in Kabul after considering whether the appellant had a well-founded fear of significant harm." (Para 22)

AJL20 v Commonwealth of Australia [2020] FCA 1305 (Successful)	11 September 2020	1–3 (introductory comments), 10 (summary of reasoning), 11–94 (proper construction of provisions of *Migration Act* authorising detention), 95–128 (lawfulness of applicant's detention from 26 July 2019 to 27 November 2019), 129–171 (lawfulness of applicant's detention from 28 November 2019 to date of judgment)	There were two proceedings before Bromberg J here. The first in time was a proceeding commenced in the Federal Court on 9 April 2020 in which the applicant claimed damages for having been falsely imprisoned by the Commonwealth. The second proceeding was commenced in the FCCA and transferred to the Federal Court by an order made on 27 May 2020. By that proceeding the applicant sought relief requiring the Commonwealth to release him from detention. In each proceeding, the applicant asserted that his detention by the Commonwealth since 26 July 2019 had been and remained unlawful. In relation to the proceeding which raised false imprisonment, the only issue for determination presently was whether the applicant's detention since 26 July 2019 had been unlawful. It was not in contest that if the applicant's detention was unlawful he was falsely imprisoned and liability for that tortious conduct would be established. Bromberg J concluded that, since 26 July 2019, the applicant's detention by the Commonwealth had been unlawful and ordered his release from detention, with the false imprisonment claim to be listed for further hearing as to damages. Relevantly, the decision analyses the requirement under section 197C of the *Migration Act* that non-refoulement obligations are irrelevant to the obligation to remove an unlawful non-citizen under section 198.
Guclukol v Minister for Home Affairs [2020] FCAFC 148	4 September 2020	26-72	The Court dismissed the appeal of a Turkish applicant requesting the revocation of a cancellation decision. In doing so, the Court considered whether the Minister failed to take into consideration a relevant factor when determining there was "another reason" to revoke the

(Katzmann, O'Callaghan and Derrington JJ) (Unsuccessful)			cancellation decision, such as Australia's non-refoulement obligations, and discussed departmental practice and the *Omar* decision.
FDC19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1231 (Abraham J) (Unsuccessful)	26 August 2020	70-84	The Court dismissed an application for judicial review of an AAT decision affirming a decision to cancel the Zimbabwean applicant's bridging visa. The Court found that no jurisdictional error arose. However, the Court considered whether the AAT erred by failing to accord procedural fairness by failing to fully consider non-refoulement evidence and failing to warn the applicant that his failure to fully address non-refoulement would be fatal to the consideration of his application.
Margach v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1238 (Moshinsky J) (Unsuccessful)	26 August 2020	39-46	The Court dismissed an application for judicial review of a decision of the Minister for Immigration cancelling the UK applicant's Return (Residence) visa. The Court found that no jurisdictional error arose. However, the Court discussed the issue of whether the Minister failed to act on a correct understanding of the law, in that he was wrong to think the applicant's protection claims would be "fully" considered through a protection visa application. The applicant had argued that: he made a substantive claim (or raised a substantive issue) that his removal to the UK would contravene ICCPR Art 7 (prohibition of torture or cruel, inhuman or degrading treatment or punishment); the Minister proceeded on the basis that such a claim could be "fully" considered through the making of a protection visa application; that understanding was incorrect because there are relevant differences between the international obligations and the criteria for a protection visa; due to that misunderstanding, the Minister did not consider the

			claim (or issue); and, here, the Minister's decision was affected by jurisdictional error (see [3]).
BPL20 v Minister for Home Affairs [2020] FCA 1207 (Moshinsky J) (Unsuccessful)	20 August 2020	59-72 (first issue), 73-89 (second issue)	The Court dismissed an application for judicial review of a decision of the Minister for Home Affairs declining to revoke the cancellation of the Chinese applicant's Resident Return Five Year visa. The Court found that no jurisdictional error had been established. However, the Court discussed the issues of: (1) whether the Minister erred by failing to consider a significant and clearly articulated claim raised by the representations made by or on behalf of the applicant relevant to the question of Australia's international non-refoulement obligations or statutory protection obligations as "another reason" to revoke the cancellation decision, namely mental harm to the applicant if he were forced to return to China, especially in light of the applicant's ongoing, long-term mental illness, and (2) whether the Minister failed to make any finding on: (a) the question whether the applicant was owed non-refoulement obligations under the ICCPR; (b) the question whether the applicant was owed protection obligations under s 36(2); or (c) the process by which those obligations would in fact be considered in the case of the applicant.
DXQ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1184 (Steward J) (Successful)	18 August 2020	53-60 (ground 1), 61 (ground 2)	The Court upheld an appeal against a decision of the FCCA dismissing an application for judicial review of an AAT decision affirming a decision to cancel the appellants' protection visas. A jurisdictional error arose because it was unclear whether the AAT below appreciated that the best interests of the appellants' children was a primary consideration to be weighed

			against the appellants' non-compliance with the Migration Act (ground 1). More relevantly, however, the Court considered, for the sake of finality, the separate ground of appeal (ground 2) concerning whether, for the purposes of considering the risk of harm to the appellants if they were to be returned to Iran, the Department failed in preparing its International Treaties Obligations Assessment (ITOA) to ask why the appellants did not, when in Iran, assert their cultural or political rights as ethnic Arabs; whether the Department should have so asked; whether this failure to ask rendered the ITOA legally invalid; and whether it was thus an error for the AAT to have adopted its contents. The Court found that no jurisdictional error was established here. The failure by the ITOA decision-maker to ask a question about why the appellants had not asserted their cultural or political rights as ethnic Arabs in Iran did not render the AAT's reliance upon the ITOA's conclusions legally erroneous. In any event, if the AAT did err in relying upon the ITOA, that error was not material in circumstances where the Tribunal had rejected the credit of each appellant on this issue.
AUE16 v Minister for Immigration and Border Protection [2020] FCA 1168 (Bromberg J) (Successful)	14 August 2020	7-41	The Court quashed a decision of the AAT affirming a decision not to grant the Pakistani appellant a protection visa. The Court found that the AAT fell into jurisdictional error because the appellant's claim to fear significant harm as an activist and a member of the Awami National Party in the context of forthcoming elections in his home region, was not meaningfully considered by the AAT ([39]).
BDS20 v Minister for Immigration, Citizenship,	14 August 2020	40-53 (threshold question), 54-57	The Court dismissed an application for judicial review of a decision of the AAT affirming a decision not to

Migrant Services and Multicultural Affairs [2020] FCA 1176 (Stewart J) (Unsuccessful)		(substantive ground of review)	revoke the cancellation of the applicant's Global Special Humanitarian visa. The Court found that no jurisdictional error had been established. However, but for the conclusion that the Minister's power under s 501CA(4) was not enlivened in this case because the applicant failed to make representations in accordance with the invitation, i.e. within the 28 day time limit imposed under s 501CA(3)(b) read with reg 2.52(2)(b) of the *Migration Regulations 1994* (Cth)) (the 'threshold question'), the Court would have quashed the AAT's decision and remitted the matter to the Minister for reconsideration. The Court noted that 'whilst the Minister considered the level of harm faced by the applicant should he be returned to Sierra Leone, at no stage was there any consideration of which, if any, non-refoulement obligations was owed in respect of the applicant by reason of s 36(2) of the Act or any wider obligation, and nor was there any consideration of the consequences of returning the applicant to Sierra Leone in breach of Australia's treaty obligations' ([56]).
Uolilo v Minister for Home Affairs [2020] FCA 1135 (Katzmann J) (Unsuccessful)	7 August 2020	62-92 (issue of relevance of non-refoulement obligations), 93-118 (issue of impediments and risk of harm in Samoa)	The Court dismissed an application for judicial review of a decision of the AAT affirming a decision not to grant the applicant a Partner (Migrant) visa. The Court found that no jurisdictional error had been established but, relevantly, the Court discussed the issues of (1) whether the AAT erred in finding that Australia's non-refoulement obligations were irrelevant and (2) whether the AAT failed to consider 'entirely' the impediments and risk of harm in Samoa 'outside the concept of non-refoulement and the international obligations framework'.

FAK19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 1124 (Charlesworth J) (Successful)	7 August 2020	26-63	The Court quashed a decision of the AAT not to revoke the cancellation of the Afghani applicant's Resident Return Five Year visa. The Court found that the AAT fell into jurisdictional error: (1) the AAT ought to have understood the applicant's representations to assert that a consequence of not revoking the cancellation decision would be that he must be returned to his home country in circumstances that would give rise to a breach by Australia of its non-refoulement obligations under international law; (2) the AAT treated the subject of Australia's non-refoulement obligations as synonymous with the applicant's fulfilment of the criterion for a protection visa; (3) by treating the concepts as synonymous the AAT failed to give genuine consideration to, and intellectually engage with, a reason advanced by the applicant for revoking the cancellation decision; and (4) this error was material and so properly characterised as jurisdictional.
WKMZ v Minister for Home Affairs [2020] FCA 1127 (O'Callaghan J) (Unsuccessful)	7 August 2020	8, 9-33	The Court dismissed an application for judicial review of a decision of the AAT affirming a decision not to revoke an earlier decision to cancel the applicant's Global Special Humanitarian visa. The Court discussed whether the AAT misunderstood the effect of s 197C and/or made a finding not supported by the evidence, when it found that 'there is only a low risk that Australia will breach its non-refoulement obligations in respect of the Applicant' ([8], [17], [32]). The Court found that no jurisdictional error had been established.
KYMM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs	28 July 2020	45-70 (merits review and non-refoulement obligations), 90-93 (concluding remarks)	The Court dismissed an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister for Home Affairs not to revoke an earlier decision to cancel the applicant's Global

[2020] FCA 1069 (Mortimer J) (Unsuccessful)			Special Humanitarian visa. The Court provided some discussion of, but declined to answer the 'more "complex" questions' relating to, how the AAT should approach merits review of a refusal to revoke a visa cancellation where there are contentions made by an applicant about the harm she or he might face on return to her or his country of nationality, or about whether Australia's non-refoulement obligations are engaged ([45]). Additionally, by way of concluding remarks, the Court raised concerns about the 'systemic issue' of a considerable amount of time being occupied in the AAT by questions about whether the applicant was a citizen of a particular country, and questions about what the factual circumstances would be on his return. The Court observed that: 'Those who advise the Minister, and his Department, should be encouraged to ensure that clear factual information about these matters is put before the Tribunal, so that its merits review function can be most effectively exercised' ([93]).
DGP20 v Minister for Home Affairs [2020] FCA 1055 (Moshinsky J) (Successful)	24 July 2020	32-44	The Court quashed a decision of the Assistant Minister for Home Affairs cancelling the Afghani applicant's Resident Return Five Year visa. The Court found that the Assistant Minister fell into jurisdictional error by incorrectly assuming that the existence or otherwise of non-refoulement obligations would be considered in the event that the applicant made an application for a protection visa. This error was material because there was a realistic possibility that, if the Assistant Minister had not made the error, he would have considered the submissions relating to non-refoulement obligations and, in that event, he may have come to a different conclusion.

DCM20 v Secretary, Department of Home Affairs [2020] FCA 1022 (Unsuccessful)	20 July 2020	55–62 (ground 2)	On 23 December 2019, the applicant requested that the first respondent, the Minister, exercise his power under s 351(1) of the Migration Act to substitute a more favourable decision for a decision of the (then) Migration Review Tribunal. The decision of the MRT given on 27 August 2013 had affirmed a decision of the Minister's delegate to refuse to grant the applicant a Resolution of Status (Subclass 851) visa. This was the applicant's fourth request for ministerial intervention. On 10 January 2020, the second respondent, the Assistant Director (Ministerial Intervention, Department of Home Affairs) signed a minute entitled "*Assessment of repeat request for intervention in accordance with the Minister's guidelines on ministerial powers (sections 351, 417, 501J)*" in which, after giving short reasons, she declined to refer the repeat request to the Minister. The applicant contended that the Assistant Director's "decision" was susceptible to judicial review and legally unreasonable, relying upon the reasoning in *Jabbour v Secretary, Department of Home Affairs* [2019] FCA 452; (2019) 269 FCR 438. The Secretary made a formal submission that *Jabbour* was wrongly decided but did not allege that the decision was plainly wrong. The Court concluded that the applicant had not established that the Assistant Director's "decision" was legally unreasonable and the application as dismissed. Relevantly, however, the Court discussed the applicant's protection claims in the context of disposing of the applicant's second ground of judicial review. The Court noted that there were essentially two limbs to

			ground 2, as developed in argument. Specifically, the applicant contended that, in finding that it remained open to the applicant to make a request under s 48B of the Migration Act where any claims related to Australia's non-refoulement obligations could be assessed, the Assistant Director's decision was legally unreasonable because: (1) the Assistant Director mischaracterised and failed to consider the applicant's claim of a significant personal threat to her if returned to Fiji, despite this being a relevant consideration under s 4 of the s 351/417 Guidelines; and (2) there was no evident and intelligible justification for the Assistant Director ignoring and disregarding her claims of significant personal threats because no reasons were given which explained why her claims were ignored. The applicant's claim was that there would be a significant threat to her personal security, human rights and dignity if she returned to Fiji by reason of her personal characteristics as a single woman of Indian ethnicity.
FEY17 v Minister for Home Affairs [2020] FCA 1014 (Greenwood J) (Unsuccessful)	16 July 2020	47-61 (discussion of sections 473DB, 473CB, 473DC, and 473DD), 70-76 (discussion of sections 424A and 424AA), 77-80 (discussion of correct test for determining complementary protection claims)	The Court dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister for Home Affairs refusing to grant the Bangladeshi appellant a protection visa. The Court provided a limited discussion of the correct test for determining complementary protection claims under s 36(2)(aa), but was not satisfied that a jurisdictional error had been established. Further, the Court provided a more extensive discussion of ss 424A and 424AA

			(two procedural rules contained in Pt 7 Div 4 of the *Migration Act 1958* (Cth)). Again, however, the Court concluded that no jurisdictional error had been committed. The Court also provided some commentary about the operation of ss 473DB, 473CB, 473DC, and 473DD (dealing with some of the IAA's powers and procedures regarding 'fast track reviewable decisions'), but once again found that no jurisdictional error arose.
AFD16 v Minister for Immigration and Border Protection [2020] FCA 964 (Perry J) (Successful)	10 July 2020	62-80 (jurisdictional error regarding psychiatric evidence), 95-117 (discussion of section 425)	The Court quashed a decision of the FCCA dismissing an application for judicial review of a decision of the AAT, which affirmed a decision of a delegate of the Minister for Immigration refusing to grant the Egyptian applicants protection visas. The Court also issued a writ of mandamus compelling the AAT to redetermine the matter according to law. The Court found that the AAT member fell into jurisdictional error because, in making adverse credibility findings, his reasons were illogical, irrational or unreasonable as, despite accepting a psychiatrist's mental illness diagnosis of one of the applicants, the member did not accept the symptoms which formed the basis on which that diagnosis was made. The AAT member comprehensively failed in any meaningful way (1) to have regard to what was said in the psychiatrist's report; (2) to bring his mind to bear upon the facts stated in the report and the opinions put forward and their ramifications; and (3) to appreciate who was expressing the opinions (an independent expert as opposed to the lay appellant). The Court also discusses the operation of s 425, one of the procedural rules contained in Pt 7 Div 4 of the *Migration Act 1958* (Cth), and whether the AAT extended the applicants a real opportunity to appear before the Tribunal.

CPJ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 980 (Rares J) (Successful)	9 July 2020	32-37 (general principles), 38-49 (failure to engage in an active intellectual process), 50-53 ("national interest criterion" error)	The Court quashed a decision of the Minister for Immigration refusing to grant the New Zealander applicant a protection visa. The Court also issued a writ of mandamus compelling the Minister to redetermine the matter according to law. The Court found that the Minister fell into jurisdictional error by failing to engage in an active intellectual process or to undertake a transparent and accountable reasoning process that would justify refouling a person in the applicant's position to face the real risk of being killed or seriously injured. The Minister also fell into jurisdictional error in his consideration of the "national interest criterion" because he treated the applicant as part of a cohort into the description of which he later found that she had not fitted.
MNLR v Minister of Home Affairs [2020] FCA 948 (Markovic J) (Unsuccessful)	8 July 2020	56-72, 76-86	The Court dismissed an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister for Home Affairs not to revoke the cancellation of the Iraqi applicant's Global Special Humanitarian visa. The Court provided a discussion of the *Omar* and *Omar Appeal* line of authority, and of the duty to consider representations made under s 501CA(3). The Court also rejected the applicant's argument that the AAT's decision was legally unreasonable for accepting that the applicant was owed protection obligations and at risk of being killed or otherwise seriously harmed if returned to Iraq, yet refusing to revoke the cancellation decision. The AAT's decision, while 'difficult', was a rational exercise of the AAT's power ([85]).
Ali v Minister for Home Affairs [2020] FCAFC 109	29 June 2020	23-118	The court allowed the appeal of an Ethiopian man of Oromo ethnicity and provided a discussion of

(Collier, Reeves and Derrington JJ) (Successful)			Australia's non-refoulement obligations, insofar as they relate to the Minister's functions under s 501CA(4) of the Act and cognate provisions. The court also discussed a line of relevant authorities in this area.
DQM18 v Minister for Home Affairs [2020] FCAFC 110 (Bromberg, Mortimer and Snaden JJ) (Successful)	25 June 2020	37-118	The court allowed the appeal of a man of South Sudanese ethnicity and set aside the Assistant Minister's non-revocation decision. In doing so, the court discussed failure to identify the country of return and to confront the objective reality of the circumstances to which a person is being compelled to return. "In all of the findings, or passages, about what might occur to the appellant on return, the country to which he would return is not identified. It is simply not possible to have any active intellectual engagement with what is likely to happen to a person on return if the country to which the person is to be returned is not identified. No assessment can be carried out about the circumstances, without identification of the country to which the Assistant Minister's "consideration" of the reasons put forward by the appellant is to be assessed." (Para 68) "VLA's submissions clearly implied the situation in South Sudan and Sudan was notoriously unsafe – "self-evident" was the term used. As the Full Court in *Omar* explained, a representation of that kind requires the decision-maker to identify and then confront the objective reality of the circumstances to which a person is being compelled to return; and then explain how this reality has, or has not, affected the exercise of power. The Assistant Minister did not undertake that task at all,

			and therefore failed to exercise the jurisdiction conferred upon him according to law. The fact that the appellant's representation was made as a general proposition, without detail, as were VLA's (although there was a general reference to country information) does not excuse the non-engagement required by the authorities. The situation was said by VLA to be notorious. That was a rational submission, in the circumstances." (Para 92) "We do not accept that the Assistant Minister was entitled to ignore the realities of the appellant's circumstances in the way he did. In the absence of any ITOA, in the absence of any decision about the appellant's nationality and which of Sudan or South Sudan would accept him, the prospect of indefinite detention was real. The Assistant Minister addressed the appellant's legal entitlement to apply for the protection visa and addressed the contents of Direction 75, which the Assistant Minister found was likely to require a delegate to consider any non-refoulement obligations owed to the appellant. However, this did not grapple with the realities of the appellant's situation. The appellant had a visa cancelled because he did not pass the character test and there had twice been no discretionary revocation of that cancellation. He had twice been found to pose such a danger to the Australian community that all other factors which might have tended in favour of him being allowed to remain in Australia were outweighed. The appellant's indefinite detention representation to the Assistant Minister was, rationally, based on an assumption that he was unlikely

			to be granted a protection visa, which would release him into the Australian community, being the very outcome that the Assistant Minister had decided should not occur. If the situation in whichever of Sudan or South Sudan the appellant could be returned to was such that Australia's international obligations might preclude removal, albeit that the appellant has no visa, then the reality for him would be indefinite detention. The Assistant Minister was required to confront this and deal with it in his reasons." (Para 109) "However, in this appeal, the assessment of materiality is straightforward, because there are two significant errors: the failure to consider the representation about safety and the failure to consider the representation about indefinite detention. Taken together, we are comfortably satisfied that the appellant was deprived of the realistic possibility of a different outcome on his request for revocation of his visa cancellation. That is especially so where the Assistant Minister did not even make a finding about which country the appellant would be removed or returned to, which infected several aspects of his reasoning process." (Para 118)
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20 by his Litigation Representative BFW20A [2020] FCAFC 121 (Allsop CJ, Kenny,	24 June 2020	1-2 (issues), 8 (*BAL19* wrongly decided), 23-43 (detailed discussion of *BAL19*), 109-160 (determination of the reserved question)	The Full Court considered the reserved question of: "Where an applicant for a safe haven enterprise visa satisfies the criteria in s 36 of the *Migration Act 1958* (Cth), can the grant of the visa be prevented by the exercise of the power conferred by s 501(1) to refuse to grant a visa to a person?"

Besanko, Mortimer, and Moshinsky JJ) (Successful in part)			The Full Court answered this question in the affirmative. To answer the question, it was necessary to consider the correctness of a decision of a single judge of the FCA in *BAL19 v Minister for Home Affairs* [2019] FCA 2189. The Full Court concluded that *BAL19* was wrongly decided insofar as it held that the power in s 501(1) to refuse to grant a visa cannot apply to an application for a protection visa under the Act. Although there does not appear to be any visible discussion of Australia's complementary protection regime, the decision is included in this list because the reference in the reserved question to s 36 of the *Migration Act* seems to be wide enough to capture the complementary protection criterion in paragraph 36(2)(aa). Also note that the Minister for Immigration is the appellant and that the appeal was successful in part.
DFTD v Minister for Home Affairs [2020] FCA 859 (Snaden J) (Unsuccessful)	23 June 2020	32-64	The court dismissed the application of an Indonesian man from the West Papua province involved with the Organisasi Papua Merdeka. The court accepted that it was, and remains, uncontentious that the applicant is a person in respect of whom Australia owes obligations of *non-refoulement* and discussed procedural aspects in relation to consideration of *non-refoulement* obligations.
DQA17 v Minister for Home Affairs [2020] FCA 864 (Greenwood J) (Unsuccessful)	19 June 2020	105-140	The court dismissed the appeal of an Afghanistan applicant. However, in doing so, the court discussion principles applicable to relocation extensively, including consideration of the extent to which an assessment of reasonableness for the purposes of s 36(2B)(a) in a claim under s 36(2)(aa) engages a

			consideration of a risk of harm or lack of safety in a proposed place of relocation where the harm is something other than "significant harm" for the purposes of s 36(2A) of the Act.
AYX16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 99 (Yates, Wheelahan and O'Bryan JJ) (Unsuccessful)	3 June 2020	65-93	In dismissing the application of Sri Lankan man of Tamil ethnicity, the court discussed procedural fairness in relation to the IOTA process, *non-refoulement* obligations and whether the assessor applied the wrong standard.
CMA19 v Minister for Home Affairs [2020] FCA 736 (Murphy J) (Successful)	29 May 2020	81-100, 152-164, 177-185	The court allowed the appeal of a Sri Lankan, Tamil applicant who had spent 5 years (15-20 years old) as a member of the Liberation Tigers of Tamil Eelam and actively engaged in the civil war in Sri Lanka. In doing so, the court found that the applicant was denied procedural fairness, discussed the duty to consider *non-refoulement* obligations and failure to give meaningful consideration to a clearly articulated significant claim. "I do not accept the Minister's submissions. In my view he failed to consider the applicant's claim that he faced a real risk of suffering arrest, detention, torture, sexual violence and death if returned to Sri Lanka by failing to engage in an active intellectual process in relation to that claim." (Para 152) "I do not accept the Minister's submissions. The Minister was under any implicit statutory duty to consider the merits of the applicant's visa application which included an obligation to give meaningful

			consideration to any clearly articulated and significant representations advanced by the applicant. In my view the Minister failed to consider the applicant's submissions on the central question as to whether the applicant acted under duress or involuntarily during his service with the LTTE." (Para 177)
BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 94 (Unsuccessful)	28 May 2020	220–248 (relevant paragraphs of Wigney J's dissent)	White and Bromwich JJ dismissed an appeal against a decision of a single judge of the FCA dismissing an application for judicial review of a decision of the Minister refusing to grant the Syrian appellant a temporary protection visa. The Minister did so in the exercise of the discretionary power under s 501(1) of the Act, after determining that the appellant had not satisfied him that he passed the character test contained in s 501(6)(d)(v). In dissent, however, Wigney J would have quashed the Minister's decision to refuse to grant the appellant a protection visa and would have ordered that the Minister determine the appellant's application for such a visa according to law. His Honour concluded that the Minister's reasoning concerning the effect that his decision would have, including the breach of Australia's international non-refoulement obligations, was flawed and unreasonable.
BHL19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 94 (White,	28 May 2020	122-170, 220-267	The court refused the application of a Syrian applicant. In an extensive dissent, Wigney J find legal unreasonableness, including by drawing on findings that *non-refoulement* obligations are owed to the applicant.

Wigney and Bromwich JJ) (Unsuccessful)			"I respectfully disagree. This is just such a case. I am firmly of the view that when careful and considered attention is given to the material that was before the Minister, and to all of the facts and circumstances of the case, the inescapable conclusion is that the Minister's decision in this case was plainly unjust, obviously disproportionate, and irrational. The conduct engaged in by the appellant many years ago in exceptional and extenuating circumstances could not, on any reasonable view, justify a decision the effect of which would be to condemn him to be returned to a country where it is accepted he may be persecuted, tortured, or killed." (Para 247)
APE16 v Minister for Home Affairs [2020] FCAFC 93 (Kenny, Wheelahan and Anastassiou JJ) (Successful)	27 May 2020	41-55	The Court allowed the appeal of an applicant from Papua New Guinea and in doing so considered the concept of a "home area" under internal relocation, the place where the applicant was likely to return and relocation.
EGH19 v Minister for Home Affairs [2020] FCA 692 (Griffiths J) (Successful)	25 May 2020	50-72	The Court remitted an appeal for reconsideration according to law finding that the court failed to give meaningful consideration to the applicant's submissions regarding complementary protection. "First, I do not accept the Minister's submission that his acceptance of the fact that the AAT had found that Australia owed protection obligations to the applicant should be viewed as an acceptance by him of the factual substratum for that finding. I would not draw that inference in this particular case, not least because, as

			has been repeatedly emphasised, there is no direct reference at all in either the Minister's statement of reasons or in the Department's Submission to the applicant's clearly articulated claims for complementary protection (as opposed to his refugee claims). Indeed, complementary protection is not even directly mentioned in either document, nor is there any reference in either document to the applicant's claim that there was a real risk of him being arbitrarily deprived of his life if he were returned to his home country. Even if it were to be assumed in the Minister's favour that he had personally read the AAT's comprehensive reasons for decision, there is nothing in his statement of reasons which indicates that he appreciated or understood that the AAT had upheld the applicant's claim for complementary protection and the basis upon which that conclusion had been reached, most notably with reference to the finding that there was a real risk that the applicant would be killed." (Para 54)
GCRM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 678 (Jackson J) (Successful)	20 May 2020	71-80	The Court allowed the appeal of a South Sudanese applicant finding failure to give adequate consideration to representations that he feared harm including death, torture, being held for ransom, destitution and homelessness, if returned to South Sudan.
CCF20 v Minister for Home Affairs [2020] FCA 676 (Kerr J) (Successful)	20 May 2020	60-98	The Court set aside a decision not to revoke the cancellation of a Somali applicant's visa and in doing so considered whether the Minister failed to give consideration to a clearly articulated significant representation relating to risk of harm which as in

			addition to factors assessed in an ITOA that had concluded Australia owed *non-refoulment* obligations.
AEM20 v Minister for Home Affairs [2020] FCA 623 (Successful)	12 May 2020	84–103 (ground 3), 104–117 (ground 4)	The Court quashed a decision made personally by the Minister to refuse to grant the Afghani applicant a Safe Haven Enterprise (Class XE) visa. The Court also issued a writ of prohibition, prohibiting the Minister and his delegates, servants and agents from acting upon, or giving effect to, the decision, and ordered that the applicant be released from immigration detention. Relevantly, the Court upheld grounds 3 and 4 of the applicant's appeal, which related to the applicant's protection claims and Australia's international non-refoulement obligations. Ground 3 asserted that the Minister failed to complete the exercise of his jurisdiction in that he failed to evaluate what he described as "additional protection claims", and was thus unable to take into account such evaluation in his consideration of whether to exercise his discretion pursuant to s 501(1) of the Migration Act. Ground 4 asserted that the Minister failed to engage in an active intellectual process, and acted in a manner that was legally unreasonable. Specifically, ground 4 alleged that the Minister could not have reasonably reached a conclusion that he may decide to grant the applicant a visa pursuant to s 195A of the Migration Act in view of reasons that he gave for refusing the applicant's application for a protection visa. That being so, Ground 4 alleged that the Minister failed to address the inevitable consequence of his refusal to grant the

			applicant's protection visa, that being that the applicant would have to be refouled as soon as reasonably practicable pursuant to ss 197C and 198 of the Migration Act because there was no reasonable basis on which the grant of any other visa could occur having regard to reasons that he gave for refusing the applicant's application for a protection visa. The Court noted that ground 4 challenged the legality of the Minister's remarks that Australia's non-refoulement obligations could be met by the exercise of the Minister's personal non-compellable power to grant a visa under s 195A.
AEM20 v Minister for Home Affairs [2020] FCA 623 (Katzmann J) (Successful)	12 May 2020	84-117	The Court quashed a decision made personally by the Minister to refuse to grant a Safe Haven Enterprise Visa to an Afghan applicant of Hazara ethnicity. In doing so. The Court discussed the Minister's active intellectual consideration of a clearly articulated risk of harm and the legality of the Minister's remarks that Australia's *non-refoulement* obligations could be met by the exercise of the Minister's personal non-compellable power to grant a visa under s 195A.
SZUJT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 612 (Perry J) (Unsuccessful)	8 May 2020	38-65	The Court dismissed the appeal of a Pakistani applicant of Hazara ethnicity Shia religion, but in doing so considered whether criteria in ss 36(2)(a) and (aa) had been conflated in relation to relocation and considered the approach to relocation more generally, including in relation to the applicant's children.
ERY19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs	4 May 2020	26-74	The Court allowed the appeal of a Chinese applicant to whom an Interpol notice applied and set aside the Minister's decision to refuse the applicant a protection visa. The Court considered the Minister's consideration

[2020] FCA 569 (Stewart J) (Successful)			of its decision in light of the Minister's acceptance that *non-refoulement* obligations were owed to the applicant.
Ahmed v Minister for Immigration, Citizenship and Multicultural Affairs [2020] FCA 557 (Kerr J) (Successful)	29 April 2020	48-149	The Court allowed the appeal of a Somalia applicant who established multiple jurisdictional errors and in doing so discussed risks posed to the applicant upon return and obligations and case law as they relate to consideration of *non-refoulement*.
DNQ18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 72 (McKerracher, Mortimer and White JJ) (Successful)	24 April 2020	47-63	The court allowed the appeal of a family of applicants from Sri Lanka, finding material jurisdictional error regarding a factual finding relating to the prosecution of children, which could have affected the satisfaction of refugee or complementary protection criteria.
DQU16 v Minister for Home Affairs [2020] FCA 518 (Reeves J) (Unsuccessful)	22 April 2020	8-16	The court dismissed the appeal of an Iraqi applicant who had sold alcohol discreetly and in doing so considered and discussed modifying behaviour. "Thus, those provisions focus on those persons who have failed to establish that Australia has protection obligations in respect of them under the Refugee Convention and ask whether they may suffer particular types of harm on their return to their home country which may contravene Australia's complementary protection obligations mentioned above. Accordingly, modifying behaviour to avoid the harm connected with persecution associated with one of the characteristics described in s 5J of the Act is inherently different to such a modification of behaviour directed to avoiding harm that is not connected with a characteristic of that kind but is instead directed to avoiding harm for

			complementary protection obligation purposes. In the former situation, the persecution continues to operate with respect to the characteristic, albeit indirectly. In essence, the harm compounds the persecution. However, in the latter situation, there is no relevant persecution at work and the modification is not connected with a characteristic of the kind defined in s 5J of the Act. It concerns, instead, persons who are returning to their home country as, to use a common description, "failed asylum seekers". Furthermore, it is directed to whether a particular kind of harm, namely significant harm, may be inflicted in those circumstances." (Para 14) "As Gageler J observed in *SZSCA*, the principle in *S395/2002* therefore has no application "to a person who would or could be expected to hide or change such behaviour in any event for some reason other than a fear of persecution" (at [37]), or "to a person who would or could be expected to hide or change behaviour that is not the manifestation of a Convention characteristic" (at [38])." (Para 15) "It follows that, in this matter, the Authority was not required to make an assessment with respect to the harm the first appellant avoided by modifying his behaviour as described in [39] of its reasons. It was required to assess whether the first appellant was likely to suffer significant harm in the terms expressed in ss 36(2)(aa) and 36(2B) of the Act on his return to Iraq as a failed asylum seeker. That is what it did. That is to say, it assessed that harm on the assumption that the

			first appellant would act rationally to avoid the harm that had been inflicted on him in the past for a non-persecutory reason, or reasons, unconnected with a Refugee Convention characteristic." (Para 16)
FCS17 v Minister for Home Affairs [2020] FCAFC 68 (Allsop CJ, White and Colvin JJ) (Unsuccessful)	21 April 2020	40-88	In considering the reasonableness of relocation as it relates to refugee status pursuant to the Act, the court also discusses and offers insights into relocation as it relates to complementary protection.
ACE17 v Minister for Home Affairs [2020] FCA 514 (Jackson J) (Successful)	21 April 2020	47-76	The court allowed the appeal of an Afghan applicant considering the distinction between the question of whether there is an area within the receiving country where an applicant will not suffer significant harm, and the question of whether it would be reasonable for the applicant to relocate to that area. "That is correct. But reading the Authority's reasons as a whole without an eye keenly attuned to error, it is clear that the Authority's discussion of the security situation in Kabul exclusively concerned whether the appellant would face a real chance of serious harm, or a real risk of significant harm, for the purposes of the refugee criterion and what the Full Court in *DFE16* described as the first aspect of the complementary protection criterion. So the Authority looked closely at whether the appellant would have any profile with insurgents in Kabul, either as a result of the political activities that had been imputed to him and his family in Logar, or as a result of his Tajik ethnicity or Sunni beliefs. The Authority found that he would not have that profile, and that was the basis of its conclusion that he

			did not face a real chance of serious harm for the purposes of the refugee criterion. When it came to the complementary protection criterion, the Authority was still addressing the first aspect of the question, that is the threshold question of real risk of significant harm, rather than the second aspect, of reasonableness of relocation." (Para 70) "The better inference, with respect, is that the Authority overlooked how the security situation might be relevant to the reasonableness of relocation, and overlooked the appellant's reliance on it in that context. That inference follows from the way the Authority has separated the question of reasonableness of relocation from the question of risk or chance of harm, and also from its all but exclusive focus on the question of the appellant's ability to subsist when it came to deal with the reasonableness question. In overlooking the potential relevance of the security situation in that context, the Authority failed to perform its statutory task and fell into jurisdictional error." (Para 75)
BSD15 v Minister for Immigration and Border Protection [2020] FCA 477 (Katzmann J) (Unsuccessful)	15 April 2020	52-80	In dismissing the appeal of a Tamil, Sri Lankan appellant, the court considered whether the absence of reference to complementary protection guidelines was significant and whether the concept of "significant harm was misunderstood or misapplied.
C7A/2017 v Minister for Immigration and Border	9 April 2020	82–90 (RRT's alleged failure to consider the consequences of refoulement), 92–103	The Court dismissed an appeal against a decision of the FCCA dismissing an application for judicial review of a decision of the RRT affirming a decision of a delegate of the Minister not to grant the appellants protection

Protection [2020] FCAFC 63 (Unsuccessful)		(RRT's alleged failure to consider the material from the UNHCR in Malaysia indicating that the first appellant was born in Malaysia to a Rohingya father and an Indonesian mother), 104–126 (whether legally unreasonable for primary judge to not engage with the appellants' submissions and the evidence upon which they relied re: first appellant's father's name and the appellants' capacity to reside in Indonesia)	visas. The appellants were a woman and her two sons, born on 21 November 2000 and 8 May 2009, who arrived in Australia by boat from Malaysia in February 2013. The first appellant claimed that she and her two sons were stateless Rohingya. She also claimed to fear that, if she were to return to Malaysia, she would be imprisoned for want of documentation, would not be allowed to legally enter Myanmar, and would be harmed by the authorities if she returned illegally. Relevantly, the Full Court considered in detail (but ultimately rejected) the appellants' contentions that the RRT below failed to consider the consequences of refoulement ([82]–[90]), that the RRT below failed to consider certain material from the UNHCR in Malaysia indicating that the first appellant was born in Malaysia to a Rohingya father and an Indonesian mother ([92]–[103]), and that it was legally unreasonable for the primary judge not to engage with the appellants' submissions and the evidence upon which they relied regarding the first appellant's father's name and the appellants' capacity to reside in Indonesia ([104]–[126]).
BJI17 v Minister for Home Affairs [2020] FCAFC 58 (Greenwood, McKerracher and Burley JJ) (Unsuccessful)	3 April 2020	15, 28-33, 37	In the context of four appeals heard together, the court considered contradictions, inconsistencies and temporal dimensions of "sets of information" related to the safety and suitability of the place of relocation.
Hernandez v Minister for Home Affairs [2020] FCA 415 (Charlesworth J) (Successful)	31 March 2020	14-68	The court quashed the Minister's decision, finding that an appellant from El Salvador established jurisdictional error as the Minister consider non-refoulement.

			"Had the Minister determined that Australia owed non-refoulement obligations to Mr Hernandez, that would be a factor capable of weighing in favour of revocation of the cancellation decision in the exercise of the discretionary power conferred by s 501CA(4). The existence of the obligation is clearly capable of furnishing "another reason" why the cancellation decision should be revoked. At the very least, it would be open to the Minister to conclude that Australia's reputational interests may be adversely affected by a decision resulting in the deportation of a person in contravention of Australia's obligations under international law. Accordingly, meaningful consideration of the issue may have made a difference to the ultimate outcome." (Para 63) "In my view, the error I have identified above is material, whether or not the Minister was conscious of the consequences of not deciding for himself the non-refoulement issue. If the Minister did correctly appreciate the consequence, it would be irrational to point to the protection visa application process as a reason not to decide the question, and ground 2 would be upheld. If the Minister did not appreciate the consequence, that may support a conclusion that the contentions underpinning ground 1 should be upheld, but I do not consider it necessary to go so far. It is sufficient to conclude that the decision was affected by jurisdictional error because of a material failure to consider the non-refoulement issue. The application for

			judicial review should be allowed on that additional basis." (Para 68)
DCC18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 395 (Wheelahan J) (Successful)	26 March 2020	34-40	The court quashed the Minister's decision, finding that a Sudanese appellant established jurisdictional error as the Minister concluded that it was unnecessary to determine whether non-refoulement obligations were owed in respect of the applicant, and did not give any consideration to the harm that the applicant claimed he might suffer. "I have set out the two material sections of the Minister's statement of reasons at [19] and [21] above. At [19] to [21] of the statement, the Minister concluded that it was unnecessary to determine whether non-refoulement obligations were owed in respect of the applicant, and did not give any consideration to the harm that the applicant claimed he might suffer. There was no discussion of the type of risks that the applicant had advanced, and which the Asylum Seeker Resource Centre had supported with the citation of several reports. Whatever relevance the applicant's representations had to the issue of non-refoulement, the representations also amounted to a straight-forward argument that the applicant would be harmed, and possibly be killed, if he were returned to South Sudan: *Ezegbe v Minister for Immigration and Border Protection* [2019] FCA 216; 164 ALD 139 at [36] (Perram J)." (Para 38)

			"As to [30] to [33] of the Minister's statement, while the Minister referred at [32] to the applicant's representation that his life would be in danger, and that he would be killed due to the ongoing civil war, and that he would face starvation and poverty, there is no consideration of these claims. The Minister did not make any findings of fact, including as to whether the feared harm was likely to eventuate. Indeed, in the following paragraph, [33], there appears to be no reference to these representations at all, still less evidence of any active intellectual process of engagement with them. The failure to consider significant matters raised by the appellant's representations was a failure to carry out the relevant function according to law: *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116; 263 FCR 531 at [75] (Colvin J), cited in *Omar* at [45]." (Para 39)
AJB18 v Minister for Home Affairs [2020] FCA 381 (Banks-Smith J) (Successful)	24 March 2020	55-79	The court allowed the appeal of a child applicant, born in Australia to Nepalese parents. In doing do, the court considered serious harm and significant harm, and the role of parents including in relation to mitigating harm. "Having carefully considered the reasons of the Tribunal and in particular what is said at [40], I consider that the Tribunal fell into error in the manner in which it carried out its statutory task. The identification of the period of the 'reasonably foreseeable future' was a matter for the Tribunal, having regard to the claims and the evidence. However, the Tribunal should have considered the particular fears as

			articulated on behalf of the child, assessed whether there was evidence to support them, considered the individual circumstances of the child and considered the circumstances of the country to which he would return. The generalised reference to the risk of not receiving or accessing 'a number of government services', or not having the same 'opportunities and rights', combined with the generalised reference to the child's 'basic needs' being met by his parents does not reveal a sufficient engagement with the claims or the task required." (Para 68) "The appellants appeared to accept through counsel that as part of the task of having regard to the particular circumstances of the child, the role of the parents may be relevant depending on the nature of the harm being considered. The real complaint, then, appears to be that the Tribunal referred to the role of the parents in a global sense, suggesting their support could meet or 'set off' the harm that might otherwise flow from denial of access to government services and other rights, even where such denied or diminished services or rights extend to matters such as access to education and the ability to travel overseas. The appellants submit that in order to properly undertake its task, the Tribunal needed to consider the discrete aspects of the claim and, had it done so, it would have found that the fears referred to in [40] could not be met by financial support of the child's parents, even assuming such support was to continue indefinitely. I accept that whilst financial support may well be relevant, it is not on its face an answer to the claims as a whole. Nor is it appropriate, practically

			speaking, to require parents to mitigate the risk of persecution where mere financial support cannot meet or mitigate the identified feared harm. It remained necessary for the Tribunal to consider and expose which of the claims it considered would be met by the parents' support as part of meeting the child's 'basic needs'." (Para 77)
EVK18 v Minister for Home Affairs [2020] FCAFC 49 (Flick, Griffiths and Moshinsky JJ) Unsuccessful)	24 March 2020	10-15	The court dismissed the appeal of a Jordanian appellant who claimed the Minister failed to resolve claims made, including in relation to fear or harm or grave danger and/or the impact upon mental health. In doing so, the Court discussed the relevance that a representation as to harm may assume. "But one particular aspect of this generally expressed principle is the necessity for the Minister (or an Assistant Minister) to give consideration to a "*representation*" which has been made as to the "*harm*" a visa holder may face if returned to a country of origin. One difficulty which was initially encountered in previous cases that have come before this Court arose because a representation as to "*harm*" may assume relevance to both a claim that that "*harm*" may provide "*another reason*" why a decision should be revoked (s 501CA(4)(b)(ii)), as well as giving rise to a consideration as to whether Australia owes non-refoulement obligations to the visa holder when considering a protection visa application. There is, however, a distinction between the two decision-making processes: *DOB18 v Minister for Home Affairs* [2019] FCAFC 63. Robertson J (with whom Logan J

			agreed) there identified that distinction as follows:" (Para 11)
FMN17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 326 (Steward J) (Successful)	16 March 2020	40-52	In allowing the appeal of a child applicant born to Pakistani parents, the court found that the Tribunal erred in failing to consider whether or not there was a "real risk" that the appellant would suffer "significant harm" from forcible marriage. "Here, the Tribunal did not make an attempt to determine what was likely to occur in the future as a result of its finding that there was a substantial risk that the appellant would be forcibly married. It did not appear to have considered the possibility that, for example, there was an equally substantial risk that if the appellant were to be forcibly married it might take place in a way that involved the imposition of extreme humiliation; that it might involve "threatening behaviour, abduction, imprisonment, physical violence, rape and in some cases murder", to use the language of the UK 2000 Home Office Working Group." (Para 48) "In that respect, the Tribunal was not required to make a positive finding, one way or the other, that the appellant would, if returned to Pakistan, be forcibly married in a way that would constitute one of the heads of "significant harm". Rather, the Tribunal was required to consider whether there was a "real risk" that the appellant would suffer "significant harm". The absence of specific evidence about the nature of such a forced marriage was no necessary barrier to a positive finding about the presence of that risk. The application of s.

			36(2)(aa) of the *Act* mandates the making of a prediction about the future. The prediction made here by the Tribunal was that there was a substantial risk of the appellant being forcibly married. In other words, there was a substantial risk that the appellant would face in Pakistan an "appalling evil", to use the language of Lord Brown of Eaton-Under-Heywood J.S.C. Such a finding required the Tribunal to consequently make a prediction about whether or not there was a "real risk" that the appellant would thereby suffer "significant harm". With great respect, it did not do this." (Para 50)
XFKR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 323 (Wheelahan J) (Unsuccessful)	13 March 2020	80-102	The court dismissed the appeal of an applicant from Myanmar, but in doing so considered the hierarchy between "primary" and "secondary" considerations, and the legal consequences of a decision including conclusions in relation to *non-refoulement* obligations.
FQD18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 313 (Katzmann J) (Unsuccessful)	12 March 2020	58-103	The court dismissed the appeal of Sri Lankan appellants, but in doing so considered sexual assault claims and significant risk of harm in the context of complementary protection obligations.
GBV18 v Minister for Home Affairs [2020] FCAFC 17 (Flick, Griffiths and Moshinsky JJ) (Successful)	25 February 2020	3, 9, 26-48	The court allowed the appeal of a South Sudanese applicant and in doing so discussed the consistency with the approach taken by the Full Court in *Minister for Home Affairs v Omar.* "For reasons which will shortly emerge, it is unnecessary to determine grounds 1, 2 and 4 because

			the appeal should be allowed on the basis of ground 3. In broad terms, this is consistent with the approach taken recently by the Full Court in *Minister for Home Affairs v Omar* [2019] FCAFC 188; 373 ALR 569. It should be emphasised that the primary judge here did not have the benefit of the Full Court's reasons for judgment in *Omar* when his Honour delivered his reasons for judgment in this matter on 29 July 2019." (Para 3) "The resolution of ground 3 turns in large measure on the extent to which the appellant raised his risk of harm if he were returned to South Sudan, independently of any *non-refoulement* obligations, as being "another reason" for revoking the visa cancellation decision and whether the AAT adequately addressed the issue in the relevant legal sense. The following matters relating to the material submitted by the appellant, or on his behalf, are relevant to assessing that issue (while acknowledging that a range of other matters were also raised by or on behalf of the appellant in support of his revocation request):" (Para 9) "The key relevant principles with reference to ground 3 may be summarised as follows: …" (Para 31) "*Omar* also provides helpful guidance on what is meant by the obligation of a decision-maker to "consider" a matter in the context of a judicial review (see at [35]-[37]). The reasons for judgment in the present case should be read as though those paragraphs were incorporated here. For convenience, the key relevant

			points may be summarised as follows." (Para 32)
ADH17 v Minister for Immigration and Border Protection [2020] FCA 53 (O'Bryan J)(Unsuccessful)	7 February 2020	35-49	In dismissing the appeal of a Chadian appellant the court discussed principles governing the application of s 36(2B)(c) of the Act. "The above cases illustrate that the proper construction and application of s 36(2B)(c) in various circumstances may not be straightforward. The exception juxtaposes the concept of a risk faced by the population of a country generally with a risk faced by the non-citizen personally. Each of *SZSPT* and *BBK15* support the conclusion that the phrase "faced by the population of the country generally" does not mean that the risk must be faced by everyone in the country. The question of when a risk is "general" and not "personal" for the purposes of s 36(2B)(c) may be difficult to determine, particularly if the risk is geographically located, as in *BCX16*. While *BCX16* concerned a risk in the capital city of a country (Kabul), questions might arise whether a risk is personal and not general for the purposes of s 36(2B)(c) if it exists in a wider geographic area, for example the northern half of a country compared with the southern half." (Para 42)

YNQY v Minister for Home Affairs [2020] FCA 56 (6 February 2020) (Moshinsky J) (Successful)	6 February 2020	44-54	The court allowed the appeal of a South Sudanese appellant who claimed that the Tribunal failed to consider whether the applicant would face certain forms of harm in South Sudan (independently of whether the risk of harm was of such a kind that Australia owed non-refoulement obligations with respect to the applicant). "At [165]-[167] and [172]-[176], the Tribunal considered the applicant's claims only through the lens of Australia's non-refoulement obligations, as implemented by the *Migration Act*. That the Tribunal considered the claims in this way is apparent from the emphasised portions of [165]-[167] and [172]-[176] (as set out earlier in these reasons) including, for example, the reference to "serious or significant Convention-related harm" in the last sentence of [165], and the references to "complementary protection" and "serious or significant harm within the meaning of the Act" in the last sentence of [167]. In these passages, the Tribunal did not, therefore, consider the applicant's claims *irrespective* of whether they engaged Australia's non-refoulement obligations (as implemented by the *Migration Act*). It is, however, clear that the applicant's claims were put on this (wider) basis. This was emphasised in the applicant's statement of issues, facts and contentions, in particular at [68] and [99]. In those paragraphs, the applicant explicitly acknowledged that some of the harms he would face could not solely be characterised as "serious" or "significant" harm, and submitted that the Tribunal was required to consider all

			of the levels and types of harm he would face." (Para 49) "It follows from the preceding paragraphs that the Tribunal did not deal with the applicant's claims set out in [47] above other than through the lens of Australia's non-refoulement obligations (as implemented by the *Migration Act*). The error in the present case is similar to that discussed by Perram J in *Ezegbe* at [27]-[28]. The claims referred to in [47] above were significant and clearly expressed representations. There is no issue between the parties that the Tribunal was required to consider all of the integers of the claims put by the applicant. For the reasons set out above, the Tribunal failed to do so. Had the Tribunal considered these claims, it may have affected its conclusion. Had the Tribunal considered, for example, the representation regarding "destitution and famine", it may have concluded that this was a factor weighing in favour of revocation. This could have affected its ultimate conclusion. The failure to deal with the applicant's claims constituted a jurisdictional error. It follows that the decision of the Tribunal should be set aside and the matter remitted to the Tribunal for determination according to law." (Para 53)
GLD18 v Minister for Home Affairs [2020] FCAFC 2 (Allsop CJ, Mortimer and Snaden JJ) (Unsuccessful)	5 February 2020	1-2, 31-58, 103	The court dismissed the appeals of two applicants, one from Nigeria and one from the United Kingdom, but in doing so discussed the meaning of "significant harm". "These two appeals, which were heard together, raise the same question about the nature and scope of the complementary protection criterion in s 36(2)(aa) of the

			Migration Act 1958 (Cth). The question is: can a person satisfy the criterion in s 36(2)(aa) if the harm she or he identifies arises because of separation from her or his family members, who – for one reason or another – will not in fact return with that person to her or his country of nationality?" (Para 1) "In our opinion, that question should be answered in the negative. In each case, the Federal Circuit Court was correct to reject the appellants' arguments on this matter. In each case, the Federal Circuit Court applied the decision of Mansfield J in *SZRSN v Minister for Immigration and Citizenship* [2013] FCA 751. The appellants in these appeals also sought to challenge the correctness of that decision. That challenge should fail." (Para 2) "The immediate observation to make, and the proposition with which the appellants' arguments failed to grapple in a satisfactory way, is that each category of harm looks to the conduct of an actor or perpetrator, and identifies the visa applicant as the subject of the conduct of that actor or perpetrator." (Para 31) "There are at least two separate issues arising from the appellants' contentions on grounds one and two: (a) the proper construction of the criterion in s 36(2)(aa), in terms of the circumstances in which the risk of significant harm must arise; and (b) whether physical or mental harm arising by reason

			of the separation of a family (relevantly, but perhaps not exclusively, of a parent from her or his children) and consequent upon the visa applicant's removal from Australia, can constitute "significant harm" for the purposes of the criterion in s 36(2)(aa), read with the definitions of significant harm in s 36(2A) and s 5(1)." (Para 33) … Judgement of Snaden J "With respect to those who think otherwise, I would be slow to conclude that "significant harm" extends no further, conceptually, than to harm that a visa applicant might endure at the hands of others. It might well be that an applicant could, for want of adequate mental health, subject him or herself to the sort of harm upon which complementary protection is premised. If, for example, there was a basis for thinking that a visa applicant, upon (and because of) his or her removal from Australia, would be inclined to self-harm, and that that inclination might extend to or beyond the standard of "cruel or inhuman treatment or punishment" (perhaps because it involved the intentional self-infliction of severe pain), there is no obvious reason why that might not qualify as a risk of the kind to which s 36(2)(aa) of the Act is directed." (Para 103)
ZYVZ v Minister for Immigration, Citizenship, Migrant Services and	24 January 2020	31-85	In dismissing the application of a Sri Lankan appellant the court considered s 36(2C) and in particular the non-political crimes of gang rape and abduction and "serious reasons for considering".

Multicultural Affairs [2020] FCA 28 (Colvin J) (Unsuccesful)			
CXO16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 17 (Wheelahan J) (Successful)	16 January 2020	29-52	The court allowed the appeal of an Afghan Shia Muslim appellant as the IAA did not examine the security situation in Kabul for the purposes of considering reasonableness of relocation. "The Authority's failure in the course of its review function under s 473CC of the *Migration Act* to consider the general security situation in Kabul for the purposes of evaluating the reasonableness of relocation was a failure to consider a significant objection to relocation which the appellant had squarely raised by the submissions made on his behalf to the delegate and to the Authority: see *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; (2004) 144 FCR 1 at [58], [60]-[61]. Those submissions were part of the framework set up by the objections of the appellant to relocation to Kabul: see, *SZMCD v Minister for Immigration* at [124] (Tracey and Foster JJ), citing *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* [1994] FCA 1253; (1994) 52 FCR 437 at 443 (Black CJ, Whitlam J agreeing). Another conclusion is that in assessing the appellant's objections to relocation to Kabul on the basis of the general security situation in Kabul, the Authority confined its consideration to only one limb of s 36(2B)(a) of the *Migration Act*, and thereby proceeded upon a legally erroneous

			appreciation of the dual criteria in s 36(2B)(a).” (Para 51) “Had the Authority considered the question of reasonableness of the appellant relocating to Kabul having regard to the general security situation there, there was a realistic possibility of a different outcome on review, and therefore the error was material and was jurisdictional: *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 363 ALR 599 at [45].” (Para 52)
CCR18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 9 (Jackson J)(Successful)	13 January 2020	26-49	The court allowed the appeal of an Afghan appellant noting that “… I do not consider that the scheme of s 473DC and s 473DD dictates that the Authority must follow any such elaborate course. What the scheme does require is that in the appropriate circumstances, the Authority must decide whether to get new information. That will be confined by the requirements of s 473DC(1)(a) and s 473DC(1)(b). But it must not be confined by any view that, because the absence of 'exceptional circumstances' within the meaning of s 473DD(a) rules out any consideration of the new information, there is no need to determine whether to get the information.” (Para 48)
AIJ19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2019] FCA 2205 (Perry J) (Successful)	24 December 2019	54-75	The court allowed the application of Sudanese applicant finding that the Assistant Minister did not give meaningful consideration to the applicant’s claims to fear harm where he had previously been tortured and caused extreme suffering. In doing so the court discussed *Omar (FCAFC)* and the duty to consider the

			merits of a case and to give meaningful consideration to a clearly articulated and substantial or significant representation on risk of harm independently of a claim concerning Australia's *non-refoulement* obligations. "As earlier explained, ground 1(c) relies upon the decision in *Omar (FCAFC)*. That decision turned upon the question of whether the Assistant Minister had made a jurisdictional error by failing to consider the matters (including factual matters) raised by the respondent in his representations made under s 501CA(3) as reasons for revoking the visa cancellation decision, irrespective of whether these matters engaged any of Australia's *non-refoulement* obligations. In *Omar (FCAFC)*, the representations by the respondent, Mr Omar, included a representation that even if the Minister considered that it was unnecessary to consider *non-refoulement* obligations, the cogent evidence of Mr Omar's fragile mental state remained apposite (*Omar (FCAFC)* at [9])." (Para 54) "However, while the Assistant Minister accepted that the applicant "*would face **hardship** arising from the conflict in his home country*", that finding falls well short of a finding as to whether or not he may suffer torture or extreme suffering or be exposed to highly dangerous conditions (Assistant Minister's reasons at [33]; emphasis added). Yet the Assistant Minister accepted that Sudan was (still) a "*conflict-affected third world country*" (at [23]; see also at [33]) and that the applicant "*has **previously** experienced torture and extreme suffering*" in his home country (at [33];

			emphasis added) because of the conflict – a finding which it can reasonably be inferred was based at least in part upon the fact of the earlier grant of the humanitarian visa to the applicant. Despite those findings, there is no consideration by the Assistant Minister of whether the situation in Sudan had changed such that, notwithstanding the ongoing conflict, the applicant was no longer at risk of suffering to the same extreme level as the Assistant Minister accepted he had been subjected to in the past." (Para 67) "It also follows that while the applicant's submissions about the harm which he says that he would face if returned are brief as the Minister submits, that brevity must be understood in a context where the Department has already accepted that the applicant would be subjected to discrimination amounting to a gross violation of human rights in Sudan." (Para 68)
BAL19 v Minister for Home Affairs [2019] FCA 2189 (Rares J) (Successful)	24 December 2019	30-55	A Sri Lankan citizen of Tamil ethnicity who was found to be a refugee and to whom Australia owed non-refoulement obligations established jurisdictional error in the personal decision of the Minister to refuse to grant a protection visa. 'The Minister committed a material jurisdictional error. What the Minister said in [94]-[97] of his reasons demonstrated that he did not approach the exercise of the discretion under s 501(1) on the basis that a refusal would have the legal or practical consequence of refoulement (as the direct and immediate result) that ss 197C and 198 mandated, in spite of this country's non-

			refoulement obligations owed to the applicant. He acted unreasonably (*Minister for Immigration and Citizenship v Li* [2014] FCAFC 1; (2013) 249 CLR 332 at 362-363 [63]) and did not address the correct question, namely what would happen to the applicant (*i.e.* the legal or practical consequence) if the visa were not granted because of the "unacceptable" risk that the Minister found **and**, as must then happen, he were returned to Sri Lanka where, the Minister also found, there is a real chance that the applicant would be persecuted as a person who had been involved with the LTTE for 10 years.' (Para 54)
XMBQ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2019] FCA 2134 (Davies J) (Successful)	19 December 2019	3-12	A Somali applicant' established error in the Tribunal's decision not to revoke the mandatory cancellation of his refugee visa for failure to engage meaningfully with claims relating to the risks of harm if returned to Somalia, including about the nature and probability of the risk of harm.
EZC18 v Minister for Home Affairs [2019] FCA 2143 (Besanko J) (Successful)	19 December 2019	30-47	In dismissing a British applicant's appeal of a decision to refuse a protection visa, the court considered whether suicide falls within the terms of ss 36(2A)(a) and 36(2)(aa) and whether it amounts to an arbitrary deprivation of life. The court discussed the issue by reference to the receiving country's response to the risk of suicide and deprivation of life by the applicant's own hand.
CTB19 v Minister for Immigration, Citizenship, Migrant Services and	18 December 2019	29-49	An Iraqi, Assyrian Christian established jurisdictional error in the failure of the Tribunal to adequately consider the applicant's fear or harm if returned to Iraq (an how this relates to *non-refoulement* obligations) in a

Multicultural Affairs [2019] FCA 2128 (Stewart J) (Successful)			decision not to revoke the mandatory cancellation of a humanitarian visa.
DKT16 v Minister for Immigration and Border Protection [2019] FCAFC 208 (Davies, Moshinsky and Snaden JJ) (Unsuccessful)	2 December 2019	11-49	In dismissing a Nepalese, HIV-positive widow's appeal of a refusal to grant a protection visa, the Court discussed significant harm, degrading treatment or publishment and cumulative risks. 'We do not accept that the Tribunal should be understood to have overlooked the subjective impacts upon the appellant of the relevant discriminatory or adverse treatment. As the analysis above demonstrates, it is plain that the Tribunal was conscious of the different species of treatment to which the appellant claimed that she would be subjected upon her return to Nepal, and of her contention that they would visit extreme humiliation specifically upon her. The Tribunal concluded that the appellant had embellished some of those claims, and that the adverse or discriminatory treatment to which *she* had been subjected in Nepal was of a moderate level only. There is no warrant to infer, in those circumstances, that the Tribunal did not consider the subjective impact that the treatment would have on the appellant. There is nothing about the Tribunal's approach in this case to the question of whether or not the appellant might be subjected to "extreme humiliation" that bespeaks jurisdictional error.' (Para 45) 'Likewise, that the Tribunal's analysis focused upon physical and discriminatory mistreatment was neither misplaced nor surprising. It reflected the bases upon

			which the appellant claimed that she satisfied the complementary protection criterion upon which the determination of her Visa Application partly rested. The appellant claimed that she had been and/or would be subjected to torture and discriminatory treatment in Nepal on account of her status as an HIV-positive widow. Those were the circumstances that the Tribunal was required to consider and it did so. It did not thereby import requirements of physical or discriminatory mistreatment into the statutory concepts with which it had to grapple (namely, "significant harm", "degrading treatment or punishment" and "extreme [and unreasonable] humiliation"); it simply considered whether the instances that the appellant advanced were sufficient to engage those concepts in a manner favourable to her Visa Application. Its conclusion that they were not was not one affected by jurisdictional error.' (Para 46) 'In our view, that is not a hurdle that the appellant in this case can clear. The adverse and discriminatory treatment to which the appellant is at risk of being subjected upon returning to Nepal was found to be of a "moderate level". Given the Tribunal's conclusions about the appellant's credibility, there is no prospect that it might have decided the Review Application in the appellant's favour but for any statutory misconstruction on this front (if there was one).' (Para 48)
AWU15 v Minister for Immigration and Border	2 December 2019	47-69	A Pakistani applicant, a member of the Yousafzai Pashtun tribe, and a Sunni Muslim established

Protection [2019] FCA 2008 (Kerr J) (Successful) (See also AWU15 v Minister for Immigration and Border Protection (No 2) [2019] FCA 2132 relating to suppression or redaction of reasons)			jurisdictional error in the failure to consider claims advanced relating to pre-trial detention in circumstances that would be different to those facing ordinary citizens.
CPE16 v Minister for Immigration and Border Protection [2019] FCA 2007 (Jagot J) (Succecssful)	29 November 2019	7-18	An Afghan, Hazara, Shia Muslim established jurisdictional error in the refusal to grant a protection visa due to the manner in which the reasonableness of relocation was considered on the facts in a context where the applicant would be required to travel between Kabul and Herat for his petrol selling business.
DYY18 v Minister for Home Affairs [2019] FCA 1901 (Steward J) (Successful)	18 November 2019	28-51	The South Sudanese appellant established jurisdictional error in the manner in which *non-refoulement* obligations were considered in a decision to not revoke the mandatory cancellation of a visa.
FBW18 v Minister for Home Affairs [2019] FCA 1878 (Yates J) (Unsuccessful)	15 November 2019	26-90	In dismissing a Sudanese applicant's application for judicial review of a decision not to revoke the cancellation of a visa, the Court discusses jurisprudence on the manner in which *non-refoulement* obligations should be considered.
DGI19 v Minister for Home Affairs [2019] FCA 1867 (Moshinsky J) (Successful)	14 November 2009	45-98	A Sierra Leone appellant established jurisdictional error, including in relation to the manner in which *non-refoulement* obligations were considered in the context of a decision not to revoke the cancellation of his visa. The court discusses jurisprudence and the role *non-refoulement* obligations play in the exercise of a

			discretionary power and in the context of an application for a protection visa. 'In my view, on the basis of the reasons of the majority in *BCR16* at [48]-[49], as applied in *Omar (first instance),* the applicant's ground is made out. For the reasons given by the majority in *BCR16*, there is a qualitative difference in the role that non-refoulement obligations may play in the context of the exercise of the discretionary power in s 501CA and in the context of an application for a protection visa under s 65. It follows that, if and to the extent that the Minister proceeded on the basis that non-refoulement obligations would be considered in the same way, he proceeded on the basis of a misunderstanding as to the operation of the *Migration Act*. In my view, in the present case, the Minister did proceed on the basis of such a misunderstanding. It is implicit in his reasons for not considering non-refoulement obligations (see [30] above) that he understood that such obligations would be considered in the same way in the context of an application for a protection visa. In this respect the Minister's statement of reasons is materially the same as the statement of reasons in *Omar (first instance)*.' (Para 66)
ZMBZ v Minister for Home Affairs [2019] FCAFC 195 (Perram, Stewart and Abraham JJ) (Successful)	11 November 2019	15-49	The Court allowed the appeal of a Rohingya, Sunni Muslim with HIV from Myanmar, who had been refused a protection visa. The court discussed whether the appellant's ethnicity and religion had been considered in the context of *non-refoulement* obligations owed to the appellant.

EKC19 v Minister for Home Affairs [2019] FCA 1823 (Davies J) (Successful)	8 November 2019	19-30	The Court set aside a decision of the Minister to cancel a Nuer, Christian, South Sudanese applicant's visa finding that the Minister did not give genuine consideration to the applicant's representations as to prospects of harm on return to South Sudan and the Minister erred in reasoning that non-refoulement obligations would be considered in processing a protection visa application. 'The obligation on the Minister or his delegate to give meaningful consideration to a representation on harm independently of a claim concerning Australia's non-refoulement obligations was very recently affirmed by the Full Court in *Minister for Home Affairs v Omar* [2019] FCAFC 188 at [34(i)], [39] and [40]. That obligation requires "an active intellectual engagement with the matters raised ... relating to the risk of harm" and the failure to consider may constitute a failure to carry out the statutory task and give rise to jurisdictional error: *Omar* at [41].' (Para 22) 'Although the Minister stated that he took into account the situation in South Sudan in forming the conclusion that the applicant will face hardship if returned there, merely taking account of the fact of civil war did not engage with the representations made on behalf of the applicant, which were before the Minister, namely that country information indicated that there was targeted violence against the Nuer ethnic community of which the applicant is a member, including killings, abductions, unlawful detentions, deprivation of liberty, rape and sexual violence. The Minister did not engage,

			in any meaningful way, with the nature and gravity of the possibility that the applicant would be killed because of his ethnic group and the reasons simply do not disclose a genuine consideration of all the claimed consequences of the decision (including death). The "obligation of real consideration" required the Minister to give proper and adequate consideration to all the claims made by the applicant and the failure to do so constituted jurisdictional error as there is plainly a realistic possibility that the Minister's decision could have been different if he had given proper and meaningful consideration to all the applicant's claims: *Minister for Immigration and Border Protection v SZMTA* (2019) 93 ALJR 252; [2019] HCA 3 ("***SZMTA***") at [45] (Bell, Gageler and Keane JJ).' (Para 24) 'The Full Court in *Ibrahim* held at [112] that the like reasoning in that case involved a misapprehension that Australia's non-refoulement obligations under international law would be considered in an application for a protection visa, whereas non-refoulement obligations under international law were not co-extensive with the protection visa criteria. Relevantly, the internal relocation principle in relation to the existence or otherwise of non-refoulement obligations no longer forms part of the consideration of an application for a protection visa under s 36(2)(a) of the Act. The Minister accepted that as this Court is bound by *Ibrahim* in this proceeding, there was legal error in the Minister's reasons by the conflation of the criteria for the grant of a protection visa under s 36 of the Act

			with Australia's non-refoulement obligations under international law.' (Para 28) 'It was argued for the applicant that the legal error constituted jurisdictional error because the error was material in the sense that there is clearly a "realistic possibility" that, if the Minister had not made the same misunderstanding of the Act in the present case as the Assistant Minister did in *Ibrahim*, he might have made a different decision: cf *SZMTA* at [45] (Bell, Gageler and Keane JJ). It was argued that had the Minister correctly understood that non-refoulement obligations would not be considered, and that the protection visa criteria do not reflect Australia's non-refoulement obligations, he may well have decided to consider whether Australia owes non-refoulement obligations to the applicant. Thus, it was said, it is clearly possible that the Minister would have been persuaded that non-refoulement obligations were owed and that this was a reason not to cancel the applicant's visa.' (Para 29) 'The Minister argued to the contrary that the error was not shown to be material, and the reasons demonstrate that the Minister accepted the underlying claim that the Applicant would face hardship "arising from famine and civil war" were he to return to South Sudan. Thus, it was said, the possibility of internal relocation was not raised by the Minister as a reason to reject the claim to fear harm on the applicant's return, so that the difference between international law and statutory criteria could not affect the findings actually made: cf *Hossain* at [35] (Kiefel CJ, Gageler and Keane JJ).

			However, it was also conceded for the Minister that if the Court found for the applicant on ground 3, it could not be said that there was no realistic possibility that the Minister might have made a different decision had the Minister not made the same misunderstanding of the Act as the Assistant Minister did in *Ibrahim*. In view of my conclusion on ground 3, the applicant also succeeds on ground 2(c)(iii).' (Para 30)
CWGF v Minister for Home Affairs [2019] FCA 1802 (Gleeson J) (Successful)	7 November 2019	20, 33-43	The Court found jurisdictional error in a Tribunal decision affirming the mandatory cancellation of an Iranian applicant's protection visa, due to the Tribunal's failure to give proper, genuine and realistic consideration to the real possibility that, as a consequence of the Tribunal's refusal to exercise its discretion in the applicant's favour, the applicant faced refoulement to Iran. 'In considering whether to revoke the cancellation of the applicant's visa, the Tribunal had an obligation to take into account the legal consequences of its decision by reason of its knowledge that Australia had currently existing non-refoulement obligations in respect of the applicant: cf. *FRH18 v Minister for Home Affairs* [2018] FCA 1769 at [44].' (Para 33) 'However, the Tribunal did not squarely identify the legal consequence of its decision that the applicant would be required to be removed "as soon as reasonably practicable". Instead, the Tribunal found that the applicant would *only* be removed "if it is reasonably practical to do so". The Tribunal's reasons do not

			address the implications of this finding in relation to Australia's non-refoulement obligations; they do not address the meaning of the phrase "as soon as reasonably practicable" or what practical considerations might affect whether or not it would become "reasonably practicable" to remove the applicant. In particular, the Tribunal's reasons do not address the applicant's submission, recorded at [95] of its decision record, that the Minister's plans for compliance with the duty to remove were unclear.' (Para 37) 'Although the Tribunal refers (at [97]) to the aim of effecting removals "in a timely manner", the decision record does not reveal how this aim affected its consideration of the legal consequence of its decision.' (Para 38) 'Although the Tribunal implicitly contemplates at [100] and [102] that the applicant might be returned to Iran in breach of Australia's non-refoulement obligations as a consequence of its decision, its decision record does not directly refer to that potential breach or consider its significance (generally or in relation to the applicant specifically), referring only to the "existence of the non-refoulement obligation" and to the fact that the applicant is a person "to whom Australia has non-refoulement obligations".' (Para 39) 'Further, the decision record does not record any consideration of the likely significant harms that were conceded to follow from the applicant's removal to Iran, as opposed to the fact of the Minister's

			concession. The Tribunal's finding at [102], balancing only the applicant's expressed concerns against the risk posed by the applicant to the Australian community, strongly suggests that the Tribunal did not give active consideration to the likely significant harms. That suggestion is reinforced by the absence of reference to those harms in considering the extent of impediments that the applicant may face if removed to Iran.' (Para 40)
AJI16 v Minister for Immigration and Border Protection [2019] FCA 1769 (Perram J) (Unsuccessful)	31 October 2019	24-34	The Court dismissed a Bangladeshi applicants appeal from a decision refusing to grant a protection visa, but in doing so discussed difficulties the applicant would face in terms of access to medicine if retuned to Bangladesh, complementary protection, the ICCPR and Human Rights Committee decisions.
Minister for Home Affairs v Omar [2019] FCAFC 188 (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ) (Unsuccessful)	29 October 2019	3-5, 26-46	The Court dismissed the Minister's appeal from orders made that gave effect to the primary judge's reasons for judgment (published as *Omar v Minister for Home Affairs* [2019] FCA 279.) which set aside a decision by the Assistant Minister under s 501CA(4) in which he declined to revoke the mandatory cancellation of a Somali respondent's partner visa. The Court examined the duties to consider non-refoulement obligations and to consider matters (including factual matters) raised by the respondent in his representations made under s 501CA(3) as being a reason for revoking the visa cancellation decision, irrespective of whether these matters engaged any of Australia's non-refoulement obligations.

			‘The key issues which potentially arise may be summarised as follows: (a) Did the primary judge err in finding that the Assistant Minister fell into jurisdictional error in making his decision under s 501CA(4) by deferring consideration of any *non-refoulement* obligations to a future protection visa application by the respondent? (b) Are *non-refoulement* obligations mandatory relevant considerations under s 501CA? (c) Is the decision of the Full Court in ***Ibrahim*** *v Minister for Home Affairs* [2019] FCAFC 89 at [106]-[116] plainly wrong, as contended by the Minister? In light of this contention, the Chief Justice directed that the appeal be heard by five Judges. (d) Does Direction No 75 reverse the effect of ***BCR16*** *v Minister for Immigration and Border Protection* [2017] FCAFC 96; 248 FCR 456? (e) Did the primary judge err, as contended by the respondent, in not holding that the Assistant Minister had made a jurisdictional error by failing to consider the matters (including factual matters) raised by the respondent in his representations made under s 501CA(3) as being a reason for revoking the visa cancellation decision, irrespective of whether these matters engaged any of Australia’s *non-refoulement* obligations.’ (Para 3)

			‘In oral address, the Assistant Minister accepted that if issue (e) was determined in the respondent’s favour, the other issues did not arise for determination.’ (Para 4) ‘As will shortly emerge, we consider that issue (e) should be determined in the respondent’s favour, consequently the other issues need not be determined, including the challenge to the correctness of *Ibrahim*. Also, although issue (a) need not be determined separately from issue (e), there is some overlap between the two issues inasmuch as there are some factual matters which underpin both issues.’ (Para 5) ‘The failure to consider, in the relevant legal sense, a substantial or significant and clearly articulated claim raised by the representations actually made and the acceptance of which could, in the present statutory context, constitute “another reason” for revoking the visa cancellation, may constitute a failure to carry out the statutory task and give rise to jurisdictional error (see *Viane* at [28]-[30] per Rangiah J and at [67] per Colvin J and *Ezegbe* at [37] per Perram J).’ (Para 41) ‘Applying those principles to the particular circumstances here, we shall now explain why we respectfully consider that the primary judge was wrong to find at [64] and [65] that the Assistant Minister: (a) “did examine risks of harm to the applicant if he had to return to Somalia”; and

			(b) that he "accepted there would be harm, but found that in the exercise of the revocation discretion, other factors outweighed whatever harm the applicant might suffer in Somalia"; and (c) that he "appeared to accept at a factual level, and certainly did not reject, all the substantial factual contentions put on behalf of the applicant in submissions about the significant difficulties and the likely harm he would experience in trying to exist in Somalia".' (Para 42) 'We are left with the abiding impression that part, possibly a large part, of the reason why the Assistant Minister failed to engage fully and meaningfully with the respondent's representations on this topic was because of the Assistant Minister's belief that they could be deferred and dealt with at a later stage of the decision-making process, whether in the context of a protection visa application or the Minister's consideration of the exercise of his various non-compellable powers under the *Act*. But to proceed in that fashion is to fail to recognise and give effect to the distinction identified by Robertson J in *DOB18* at [185] (with whom Logan J agreed) (see [34(f)] above.' (Para 44) 'Consistently with Colvin J's judgment in *Viane* at [75], we consider that the Assistant Minister's failure to consider in the relevant legal sense significant matters raised clearly by the respondent in the representations is a failure to conform with the *Act* or, to put it another

			way, to carry out the relevant statutory function according to law. As Colvin J stated at [75]: ... The statutory requirement for the Minister to invite representations must lead to the conclusion that if representations are made as to significant matters then the Minister must consider whether to revoke the original cancellation and do so by considering the representations as to those matters. Jurisdictional error, in the sense relevant in the present case, consists of such a material breach of an express or implied condition of the valid exercise of a decision making power conferred by the *Migration Act*: *Wei v Minister for Immigration and Border Protection* [2015] HCA 51; 257 CLR 22 at [23]- [26].' (Para 45) 'The Assistant Minister's error is material and gives rise to jurisdictional error because there is a possibility that if the Assistant Minister had truly engaged in an active intellectual process with the significant matters put forward by the respondent on the likelihood of harm, he may have come to a different conclusion on the issue of revocation.' (Para 46)
RZSN v Minister for Home Affairs [2019] FCA 1731 (Anderson J) (Unsuccessful)	24 October 2019	72-103	The court dismissed an Iraqi applicant's appeal of a Tribunal decision not to revoke the mandatory cancellation of the applicant's Class BA Subclass 202 (Global Special Humanitarian) visa. In doing so, the Court discussed the assessment of Australia's non-refoulement obligations as the applicant contended that the Tribunal erred in various ways in the manner in

			which it addressed (or failed to adequately address) any international non-refoulement obligations.
CLM18 v Minister for Home Affairs [2019] FCAFC 170 (Perram, Robertson and Abraham JJ) (and CLM18 v Minister for Home Affairs (No 2) [2019] FCAFC 194) RZSN v Minister for Home Affairs [2019] FCA 1731	8 October 2019 (and 7 November 2019)	10-64	This case is relevant to procedure for considering non-refoulement obligations. It concerned a Sri Lankan Tamil applicant who had arrived in Australia by boat in October 2012, but was not permitted to make an application for protection until mid-2016. People who fell into this so-called 'legacy caseload' were given a deadline to apply for protection by 1 October 2017. The applicant made a late application, which was rejected by the Department. The question was whether the Minister's exercise of his power under s 46A(2C) to revoke his determination to allow certain persons (including the applicant) to lodge an application for a protection visa was subject to a requirement of procedural fairness, and if so, whether the appellant was afforded procedural fairness. 'In my opinion, a sufficient interest is established. The consequence of the Minister having made a personal procedural decision and of the Appellant having a sufficient interest to attract the rules of procedural fairness is that, because he was not shown the adverse country information, he was denied procedural fairness. As noted above at [28], the Minister did not dispute that if an obligation of procedural fairness was owed, it was breached in the Appellant's case. I would therefore uphold grounds 3 and 4. The appeal should be allowed and the parties given an opportunity to frame the

			appropriate form of the relief.' (Para 64)
BDQ19 v Minister for Home Affairs [2019] FCA 1630 (Kerr J) (Successful)	4 October 2019	97-105	The Court found jurisdictional error in the Tribunal's decision to affirm the mandatory cancellation of an Afghan applicant's Permanent Resolution of Status Visa as the Tribunal failed to consider risk of harm to the applicant if returned by virtue of risk to civilians. An ITOA assessment had found that the applicant was owed non-refoulement obligations both under the 1951 Refugee Convention and the complementary protection provisions. 'The nub of this issue is whether, as Mr Brown submits, the first limb of Ground 2, which relates to collateral consequences of returning to Afghanistan as a civilian, was picked up in, and subsumed by, the Tribunal's finding that there had indeed been a decision made by the ITOA assessor that the applicant was owed *non-refoulement* obligations.'(Para 96) 'However, when the reasoning and conclusions of the ITOA are closely examined the first of Mr Brown's propositions appears to be unsound. The ITOA does refer to a significant body of country information which might be relevant to the collateral risk that BDQ19 might face if he were to return to Afghanistan as a civilian. However, that material is drawn on only in respect of the ITOA's ultimate conclusion that BDQ19 had a reasonable fear that he would be killed by the Taliban. That conclusion was the exclusive basis for the ITOA's assessment that BDQ19 was owed *non-refoulement* obligations both under the *Refugee*

			Convention and the complementary protection provisions of the *Convention Against Torture* and the *International Covenant on Civil and Political Rights* as have been codified by ss 36(2)(aa) and 36(2A) of the Migration Act.'(Para 98) 'For that reason, I do not accept Mr Brown's submission that the further risks which BDQ19 might face as a civilian must be understood as having been subsumed within the Tribunal's acceptance of the conclusions of the ITOA.' (Para 99) 'Mr Brown does not submit that BDQ19 did not advance a substantial contention before the Tribunal that this was another reason why the earlier revocation of his visa should be revoked.' (Para 100) 'Nor, in my view, is it plausible to suggest that BDQ19's submission in this regard was in respect of a matter capable of being validly dismissed without the Tribunal referring to it.' (Para 101) 'The collateral risk of harm that BDQ19 might face simply by being present in a place riven by violent extremism was a factor that the Tribunal was required to consider. It potentially added to the risks BDQ19 would face as a person specifically targeted by the Taliban if he were to return to Afghanistan. It was a matter the Tribunal was bound to take into account (if it accepted the truth of the proposition) pursuant to cl 14(1)(e) of Ministerial Direction No 65.' (Para 102)

			'I decline to accept that the Tribunal's failure to consider that claim was immaterial. The weighing of all relevant considerations, guided by Ministerial Direction No 65, is for the Tribunal, not the Court. It is not open to this Court to reason that had that additional factor been placed in the balance in BDQ19's favour, the Tribunal necessarily would have made the same decision.' (Para 103)
CAR15 v Minister for Immigration and Border Protection [2019] FCAFC 155 (Allsop CJ, Kenny and Snaden JJ) (Successful)	9 September 2019	17-18, 20	The court allowed the appeal of a Nigerian applicant, born in Australia in 2013, who was found to be at risk of significant harm in the form of female genital mutilation, if retuned to Nigeria. The court found jurisdictional error as the Tribunal misunderstood the state of satisfaction that it was to form under s 36(2B)(a) and, consequently, directed itself to the wrong question: namely, whether it was reasonable for the appellant's parents to relocate to Lagos with her and her sister. It proceeded to determine whether the appellant was at risk of "significant harm" for the purposes of s 36(2)(aa), without properly understanding in what circumstances s 36(2B)(a) of the Act recognised that she might not be.
Minister for Immigration and Border Protection v CTW17 [2019] FCAFC 156 (Robertson, Farrell and Wigney JJ) (Successful)	5 September 2019	20-41	The court allowed the Minister's appeal and found that the FCCA had erred in holding that three separate protection visa applications sent to the department in 2017 on behalf of three respondents were valid. An application for a protection visa had been made on behalf of the respondents in 2010 and had been refused and the question was whether s.48A(1AA) prevented a further application for a protection visa which relied on

			complementary protection criteria in s.36(2)(aa).
CHJK v Minister for Home Affairs [2019] FCA 1330 (Flick J) Successful)	23 August 2019	12-27, 29	A South Sudanese applicant's appeal of a decision not to revoke the mandatory cancellation of his protection visa was allowed. The Tribunal was found to have fallen into jurisdictional error for not having considered an international treaties obligations assessment relating to *non-refoulement* obligations.
AXT19 v Minister for Home Affairs [2019] FCA 1423 (Logan J) Unsuccessful)	23 August 2019	14-27	This case concerned an application for an extension of time and for judicial review of a decision of the AAT not to revoke the mandatory cancellation of a visa pursuant to s 501CA(4) in which the applicant possessed a refugee visa. The FCA discussed practice and judicial authority concerning the requirement, if any, to consider *non-refoulement* obligations and the possibility to make a future application for a protection visa where the claims could be assessed.
FQM18 v Minister for Home Affairs [2019] FCA 1263 (Davies J) Successful)	14 August 2019	3-15	A material error was found where an applicant for a mandatory cancellation of visa under s 501(3A) argued that the Minister erred by conflating protection obligations under s 36 with international *non-refoulement* obligations.
GBV18 v Minister for Home Affairs [2019] FCA 1132 (Anderson J) Unsuccessful)	29 July 2019	Extensive	The FCA dismissed a South Sudanese applicant's appeal from an AAT decision not to revoke cancellation of a Global Special Humanitarian visa, on the basis that the decision did not disclose jurisdictional error. Nonetheless, this case is flagged here as it contains an extensive discussion of whether and how, decision

			makers should consider *non-refoulement* obligations in the context of visa cancellation. 'The grounds of review advanced in this Court by the applicant primarily centered on the extent to which, and the manner in which, a decision-maker under s 501CA(4) is to consider whether or not Australia's owes non-refoulement obligations to the person whose visa was cancelled. Debate persists as to the correct approach. This is largely due to the feature of the legislative framework that it customarily remains open for that person to separately make an application for a protection visa, which would ordinarily invite consideration of those obligations as effected under the Act. These reasons consider this debate and how it applied to the Tribunal's decision.' (Para 2) 'In this case, the Tribunal was not required to consider Australia's non-refoulement obligations as expressed under the Act, but nonetheless proceeded to do so. In doing so, the Tribunal was required to give active intellectual consideration to the applicant's non-refoulement claims while maintaining due appreciation that these matters were but one consideration influencing the Tribunal's balancing exercise under s 501CA(4)(b)(ii).' (Para 3)
FER17 v Minister for Immigration, Citizenship and Multicultural Affairs [2019] FCAFC 106 (Kerr,	24 June 2019	5, 11-13, 15-16, 39-41, 56, 61-66, 71-73, 75, 77-79	The relevant issue in this case – to both refugee and complementary protection under s 36 of the Act – arose out of a cross-appeal by the Minister and concerned the

White and Charlesworth JJ) (Successful)			meaning of the term “a national” within the definition of “receiving country” in s 5 of the Act. ‘The Appellant arrived in Australia by boat in 2013. His SHEV application was advanced on the basis that his mother and father had fled Sri Lanka during the civil war to live in India. He had been born in India in 1998, had never resided in Sri Lanka, and did not have Sri Lankan citizenship. His account referred to his upbringing in India where, as a Tamil, he had suffered racial discrimination and had feared to leave his home other than to attend school.’ (Para 5). ‘Section 5 of the Act defines “receiving country” to mean: (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or (b) if the non-citizen has no country of nationality – a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.’ (Para 11). ‘The IAA concluded that “Sri Lanka is the receiving country for the purpose of this assessment”.’ (Para 12). ‘The IAA assessed the Appellant’s claims for protection exclusively on the premise that he was a national of Sri Lanka. It dismissed FER17’s claims for refugee status

			and complementary protection and affirmed the delegate's decision.' (Para 13). 'The primary judge accepted that contention. His Honour held that: (1) the IAA had misconstrued the relevant law when it had concluded that FER17 was a national of Sri Lanka and that Sri Lanka was his receiving country for the purpose of its review; and (2) the IAA's error was material to the conclusions reached with respect to the Appellant's protection claims. Consequently, the IAA had fallen into jurisdictional error; but (3) relief nonetheless was to be refused on discretionary grounds.' (Para 15). 'The first two of those findings are the subject of the cross-appeal in this proceeding. The third finding is the subject of the appeal.' (Para 16). 'Mr O'Leary submitted that the term "a national" as appears in that definition, properly construed, is to be understood as a reference not only to a person possessing an existing status consistent with that description (whatever bundle of rights may be attached to that status) but also to a person possessing a present capacity to acquire that status.' (Para 39).

			‘The Minister’s submissions were that, in applying the concept of “a national”, properly construed, it had not been open to the primary judge to have concluded that the IAA had erred in law in finding that FER17 was “a national” of Sri Lanka.’ (Para 40). ‘That is so, counsel submitted, because if FER17 has a present capacity to acquire Sri Lankan citizenship, he is, for the purposes of the definition of a “receiving country”, a “national” of Sri Lanka.’ (Para 41). ‘Mr McDonald [for the applicant] submitted that, whatever minimum bundle of rights would be sufficient for a person actually possessed of such rights to fall within the description of “a national”, there was nothing in the Act to suggest that the terms “a national” or “nationality” were open to be understood as applying to anything other than an existing status as recognised by the law of another country.’ (Para 56). 61. ‘The Macquarie Dictionary defines the word “national”, used as a noun, as “a citizen or subject of a particular nation, entitled to its protection”. It defines nationality as “the quality of membership in a particular nation (original or acquired)”: see *Macquarie Dictionary* (5th ed, Macquarie Dictionary Publishers Pty Ltd, 2009).’ (Para 61). 62. Those definitions refer to a status actually and presently held by a person.’ (Para 62).

			‘All of the statutory provisions set out above, relating to the assessment of a protection claim, refer in the present tense to the possession of such a status: Section 5 refers to a country of which the non-citizen “is a national”; Section 5H refers to the case where a person “has a nationality”; Section 36(3) refers to “countries of which the non-citizen is a national”; Section 91M uses the phrase “because of nationality”; and Section 91N refers to a circumstance where at a particular time, “the non-citizen is a national of 2 or more countries”.’ (Para 63) ‘As a matter of textual analysis, applying the ordinary and natural grammatical meaning of their words, we are satisfied that there is no basis on which to construe those provisions as extending to any status that a person does not presently possess. Instead, on their ordinary and natural meaning, the words “national” and “nationality” refer to a status presently possessed. They do not encompass a status capable of being sought and acquired, but which is not presently held.’ (Para 64). ‘As *SZTAL* posits, considerations of context and purpose recognise that in an enactment’s statutory,

			historical or other context, some other meaning of a word may be suggested, and that meaning may prevail over its ordinary meaning.' (Para 65). 'However, the Court discerns nothing in the history of the usage of the words "national" and "nationality" (whether at common law or in international law) as would provide a plausible basis for the contention that the Parliament should be understood to have intended those words to apply other than in their ordinary and natural sense. There is nothing to suggest those words might have a different technical legal meaning, which the Parliament might be thought to have adopted, as would apply to a status capable of being, but not as yet, acquired.' (Para 66). 'The Court is satisfied that the meaning submitted for by the Minister finds no footing in the text of the statute. As Mr McDonald submits, if nationality is not established then the definition of "receiving country" in s 5 of the Act provides a fall-back alternative: "habitual residence". We accept that submission. Given that Parliament has expressly provided for that specific eventuality, there is no reason inherent in the text to find that pragmatic considerations require this Court to construe the words "a national" and "nationality" in the relevant provisions other than in their ordinary and natural sense.' (Para 71). 'Moreover, other textual considerations point to contrary. The provisions of s 36(3)-(7) and s 91N(2) provide specific exceptions to Australia's protection

			obligations if, in the circumstances they refer to, a person has a lesser right than nationality as would enable them to safely enter and reside in a third country.' (Para 72). 'Section 91N(2) does not operate to deem a person falling within its terms (a person having the right to re-enter and reside in another country) to be a national of that country. It provides only that s 91N "also applies" to such a person. Moreover, s 91N(2)(a)(ii) expressly dis-applies the provision in so far as it might have application to a country of which a non-citizen is a national. To the extent that a different conclusion might be faintly arguable in the face of those obstacles (which we would reject), the operation of s 91N is confined by s 91N(7).' (Para 73). 'Without a foundation in the text or in any explanatory materials, there is no reason to construe the text other than consistently with its ordinary and natural meaning. It is not necessary to add any gloss to the language of the relevant provisions of the Act. The words used are plain and simple English.' (Para 75). 'Having regard to the narrow point that was argued before this Court it is both unnecessary and undesirable for us to venture any concluded view as to the correctness or otherwise of the Minister's submission that for the relevant purposes of the Act, "nationality" must have a wider meaning than citizenship. It is sufficient to note that the correctness of that proposition is not self-evident, having regard to the observations of

			Finkelstein J in *Lay Kon Tji* and of Weinberg J in *VSAB* in the passages cited above. The resolution of that point should await decision in a case that requires it to be addressed.' (Para 77). 'Once it is accepted that the meaning of "a national" and "nationality" for the relevant purposes of the Act, properly construed, does not extend to a person who is not presently a national of another country (understood in its ordinary sense) but who might have, or has, the capacity to acquire that other country's citizenship, it is clear that the Minister's cross-appeal cannot succeed.' (Para 78). 'The primary judge was correct to have held that the IAA had fallen into legal error by applying a wrong test in concluding that FER17 was a national of Sri Lanka.' (Para 79).
AEG16 v Minister for Immigration and Border Protection [2019] FCA 585 (Bromberg J) (Unsuccessful)	29 April 2019	4, 9, 12, 17-20, 29-30	The applicant argued that he had made an unarticulated claim to complementary protection that the Tribunal should have considered because of the type of harm he feared (being forced to kneel by authorities for extended periods of time). His argument was unsuccessful, but the Court accepted in principle that such a claim could be made, for example, if an applicant feared torture, or some other form of harm that clearly fell within the definition of 'significant harm'. 'Those grounds are as follows:

			1.The Federal Circuit Court erred in failing to find that the Tribunal failed to consider whether the treatment of the appellant constituted significant harm in the form of degrading treatment or punishment in accordance with s 36(2A)(e) of the *Migration Act*. Particulars a. The Tribunal accepted at [32] that the appellant had on multiple occasions been punished for forgetting his fishing pass by being made to kneel for around an hour. b. The Tribunal concluded that the punishment did not constitute serious harm for the purposes of the assessment of whether the applicant was a refugee. c. The Tribunal failed to consider whether the punishment constituted significant harm for the purposes of complementary protection, specifically degrading treatment or punishment in accordance with s 36(2A)(e)of the *Migration Act*, and if so, whether there was a real risk that the appellant would suffer such harm upon return to Sri Lanka.' (Para 4). 'The appellant contended that, prima facie, for a person to be forced by military personnel at a check point to kneel for an hour at a time, on multiple occasions, as punishment for forgetting a fishing pass, met the definition of either or both "cruel or inhuman treatment

			or punishment", or "degrading treatment or punishment".' (Para 9). '12. The appellant contended that the Tribunal's task required it to assess his claims against both the Refugee Criteria and the Complementary Protection Criteria and that, because the Tribunal failed to consider whether the punishment inflicted upon the appellant constituted "significant harm" for the purposes of the Complementary Protection Criteria, the Tribunal had constructively failed to exercise its jurisdiction. Specifically, the appellant contended that the Tribunal failed to consider whether being made to kneel in the circumstances experienced by the appellant was a form of "significant harm" for the purposes of the Complementary Protection Criteria in that it constituted "cruel or inhuman treatment or punishment", or "degrading treatment or punishment".' (Para 12). 'I accept the appellant's contention that an applicant for a visa need not expressly refer to the terms of the Complementary Protection Criteria to make an articulated claim which engages that criteria. Much depends on what is said, and the extent of any necessary implication to be made from that which is expressly articulated. For instance, a claim by an applicant that she was tortured and fears exposure to further torture should she be returned to her home country would, without more, sufficiently engage the Complementary Protection Criteria for that claim to be regarded as an articulated claim for complementary protection of the kind provided by s 36(2)(aa). That would be so

			particularly because the use of the term "torture" engages directly with the definition of "significant harm".' (Para 17). 'The position may be different where a category of harm referred to in the definition of "significant harm" is not mentioned, but instead, the claim that is articulated merely refers to the treatment claimed to have been inflicted upon the applicant, in circumstances where the treatment is capable of falling within the definition of "significant harm".' (Para 18). 'That is the position contended for by the appellant here. He contends that the punishment was capable of meeting the definition of "significant harm" and, accordingly, the claim he made should be regarded as an articulated or express claim for complementary protection.' (Para 19). 'In my view, the punishment inflicted on the appellant does not so obviously fall within the definition of "significant harm" as to effectively make express that which may merely be implicit. The extent of implication or inference required from what was expressly articulated by the appellant, deprives what was said by the appellant the character of being a "claim expressly made": ***SZSHK*** *v Minister for Immigration and Border Protection* [2013] FCAFC 125 at [36]. Of course, where the making of a claim is reliant on some implication or inference being drawn, the claim may nevertheless be characterised as a claim which clearly arises on the material before the Tribunal.

			I turn then to consider whether that was here the case.' (Para 20). 'Taking into account the subject matter being addressed when the evidence was given; the framing of the appellant's case made by the RAILS submission and, in particular, that whilst that submission made claims engaging the Complementary Protection Criteria, no claim was made based on the punishment; the fact that no supplementary submission was made after the Tribunal's hearing adverting to such a claim; the fact that the appellant was not unrepresented; and that the nature of the punishment was not a reasonably clear or obvious instance of "significant harm"; I do not consider that a claim relying on the Complementary Protection Criteria and based on the punishment, clearly emerges from or was raised by the material before the Tribunal.' (Para 29). 'For those reasons, ground 1 must be rejected.' (Para 30).
BCX16 v Minister for Immigration and Border Protection [2019] FCA 465 (Charlesworth J) (Successful)	5 April 2019	1, 13-14, 30-41	In this case the Court considered the interpretation of section 36(2B)(c), the exclusionary provision which states that a real risk is taken not to be a real risk when it is 'faced by the population of the country generally and is not faced by the non-citizen personally. The Court found that the Tribunal had erred by finding that a person would not be exposed to a risk personally if the risk was one which other persons in Kabul faced. Charlesworth J held at [37] that '[a] risk to which a person is exposed because of the circumstance that he

			or she resides in a specific area of the country is, in my view, a risk that is faced by the person personally, notwithstanding that other persons residing in the same area are exposed to the same risk.' 'The appellant is a citizen of Afghanistan and a former resident of Kabul. On 13 November 2012 he applied for a Protection (Class XA) visa under the *Migration **Act** 1958* (Cth). A delegate of the Minister for Immigration and Border Protection refused to grant the appellant the visa. The delegate's decision was affirmed on review by the Administrative Appeals Tribunal. The Federal Circuit Court of Australia (FCC) dismissed an application for judicial review of the Tribunal's decision: *BCX16 v Minister for Immigration & Anor* [2018] FCCA 364. This is an appeal from that judgment.' (Para 1). 'In respect of the Complementary Protection Criterion, the appellant relied on the same factual circumstances supporting his claim to be a refugee. In addition, the appellant claimed that there was a real risk that he would suffer significant harm if returned to Kabul, being the city in which he resided, because of the deteriorating security situation there. It is the latter additional claim that forms the subject of the first ground of appeal.' (Para 13). 1. 'The first ground of appeal is that: The Federal Circuit Court erred by finding that s 36(2B)(c) of the *Migration Act 1958* (Cth) (**the Act**)

			applied to preclude a finding of a real risk of significant harm. Particulars In circumstances where the Tribunal did not make any finding about the risk in Kabul compared to Afghanistan generally, there was no basis to conclude that the risk in Kabul was 'one faced by the population of the country generally and is not faced by the non-citizen personally'.' (Para 14). 'In the proceedings before the primary judge, as on this appeal, the appellant argued that the test in s 36(2B)(c) had been misconstrued or misapplied by the Tribunal. The appellant submitted that the Tribunal had failed to make any assessment of the degree of harm faced by him in light of all of his personal circumstances and particularly having regard to his status as a resident of Kabul. Relatedly, it was submitted, the Tribunal had failed to make an assessment of whether the risks faced by residents of Kabul were the same risks faced by members of the population of the whole of Afghanistan more generally. Accordingly, it was submitted, the Tribunal had not performed the comparative task prescribed by s 36(2B)(c) of the Act because it had not asked whether the risk faced by the appellant personally (that is, having regard to his personal circumstance as a resident of Kabul) was the same as that faced by the broader population of the whole of the country. Instead, it was submitted, the Tribunal had erroneously compared the

			risk faced by the appellant with the risk faced by the population of the city of Kabul. That was not the test established by s 36(2B)(c), it was submitted.' (Para 19). 'At [110] of its reasons, the Tribunal expressed the view that the risk of the appellant being harmed in a terrorist attack in Kabul was a risk "faced by the population generally, not by the applicant personally *in this generalised violence context in that city*" (my emphasis). The emphasised words are to be given some meaning. In my view, the words indicate that the Tribunal's reference to the population generally in this passage is a reference to the population of Kabul and not the general population of the whole of Afghanistan. Accordingly, the Tribunal should be understood as finding that the risk faced by the appellant was no greater than the risk faced by any other citizen of Kabul and, for that reason, was not a risk faced by him personally within the meaning of s 36(2B)(c).' (Para 30). 'In the following paragraph, the Tribunal states that it does not accept that the level of generalised violence *in Afghanistan* is so elevated that the appellant would face a real risk of significant harm. The Tribunal in that passage implicitly assesses the risk of harm faced by the appellant by reference to his status as a citizen of the country, without reference to the circumstance that he resided in the city of Kabul.' (Para 31). 'The parties described s 36(2B) as a "carve out" or "exclusionary" provision. That is an appropriate

			description. It is clear from the opening words of s 36(2B)(c) that the provision is to have application where the non-citizen faces what would be a real risk but for the deeming effect of the provision. The same may be said of s 36(2B)(a). If the degree of risk to which a non-citizen is exposed does not constitute a real risk, within the meaning of s 36(2)(aa), then there is no occasion to consider the exclusionary effect of s 36(2B) at all.' (Para 32). 'Section 36(2B)(a) presupposes that persons residing in one part of a country may be exposed to a real risk of harm to which persons in another part of the country are not exposed. I will return to this provision in due course.' (Para 33). 'The Tribunal did make an assessment of the likelihood that the appellant would be personally targeted in the generalised violence in Kabul, and concluded that he would not be. But that finding was not determinative of the whole of the appellant's claim. It was necessary to consider whether the appellant's residency in Kabul was, of itself, a circumstance that exposed him to a real risk of significant harm as a *non-targeted* citizen who may be caught up in the attacks. If the answer to that question was "no" then there would, as I have said, be no reason to consider the application of s 36(2B)(c) at all. If the answer was "yes", then it was the risk *so identified* that fell to be considered under s 36(2B)(c).' (Para 34).

			'I respectfully conclude that the primary judge erred in finding that the Tribunal made a finding that there was no real risk that the appellant would face significant harm quite apart from the operation of s 36(2B)(c)of the Act. The application of s 36(2B)(c) is front and centre in the Tribunal's reasoning in respect of the Complementary Protection Criterion. There is nothing to suggest that the Tribunal was applying the exclusionary provision as an alternative path in reasoning to its conclusion.' (Para 35). 'For reasons given below, the Tribunal misapplied the exclusionary provision.' (Para 36). 'As has been observed, s 36(2B)(a) contemplates a circumstance in which a person may be exposed to a real risk of harm by reason of the location of a person in an area of a country and yet is able to relocate so as not to be exposed to that risk. Section 36(2B)(c) should be construed harmoniously with s 36(2B)(c). Read in the context of s 36(2B)(a), the concept in s 36(2B)(c) of a risk being faced by a non-citizen *personally* in my view may include a risk faced by a person because of the circumstance that he or she resides in an area of a country. A risk to which a person is exposed because of the circumstance that he or she resides in a specific area of the country is, in my view, a risk that is faced by the person personally, notwithstanding that other persons residing in the same area are exposed to the same risk. In such cases, s 36(2B)(a) operates so that in cases where it would be reasonable for such a person to relocate to an area of the country where there would not

			be a real risk that he or she would suffer significant harm, then the risk in fact faced by the person must be taken not to be a real risk.' (Para 37). 'Returning to the present case, the Tribunal concluded that the risk to which the appellant was exposed was the same as that faced by other residents *of Kabul* and so was not, the Tribunal said, a risk faced by the appellant personally. In this aspect of its reasons, the Tribunal asked the wrong question. The Tribunal construed s 36(2B)(c) on the erroneous basis that a person would not be exposed to a risk personally if the risk was one to which other persons in the same area of a country were exposed to the same degree. In my view, on the proper construction of the Act, if there was a real risk of harm faced by all citizens of Kabul *by virtue of their residency there*, then it was a risk faced by each of them personally.' (Para 38). 'Where, however, the risk faced by a person is the same risk that is faced by the general population of the whole of the country, then it cannot be said that the person is exposed to the risk *because of* his or her personal circumstance of residency in any one particular area of it. No question of relocation could arise because the real risk would be one to which the person would be exposed throughout the country. Understood in this way, it can be seen that the text in s 36(2B)(c) is a composite phrase. Underlying the phrase is an assumption that a risk faced by the population of the

			country generally is, by its nature, a risk that is not faced personally by any one of its citizens.' (Para 39). 'I accept the submission that the Tribunal did not make an assessment of whether the appellant faced a real risk of significant harm in light of his status as a resident of Kabul so as to enable that risk to be the subject matter of its consideration under s 36(2B)(c). As a consequence of that error, the Tribunal could not and did not perform the comparative task required by s 36(2B)(c). Instead, the Tribunal compared the risk faced by the appellant with the risk faced with other citizens of Kabul and erroneously concluded that any risk of serious harm was not faced by the appellant personally because it was one faced by other people residing there. That was not the comparison which s 36(2B)(c) called for.' (Para 40). 'I have not overlooked the Tribunal's finding that the general population of Afghanistan did not face a real risk of harm by virtue of sectarian violence. That finding may be critical in an assessment of whether the appellant might reasonably be asked to relocate to another part of the country and so affect any assessment that may be made under s 36(2B)(a) but that does not affect my conclusion that the Tribunal committed jurisdictional error in its application of s 36(2B)(c).' (Para 41).
SZDCD v Minister for Immigration and Border	13 March 2019	3, 15, 20-23, 34-36, 38, 40-41, 48	In this case the court considered whether a lack of adequate access to medical treatment constituted 'significant harm' and was 'arbitrary' and whether a

Protection [2019] FCA 326 (Gleeson J) (Unsuccessful)			subjective intent to arbitrarily deprive someone of life is required by s 36(2A)(a) of the Act. 'The Tribunal accepted that the appellant has glaucoma and heart problems on the basis of evidence provided to the Tribunal. The evidence included a letter from a general practitioner which stated relevantly that the appellant had a "significant life-threatening condition". The general practitioner stated that the appellant was under the care of cardiologists and that certain treatment had been recommended "because of the known risk of sudden death associated with [the appellant's] cardiac condition". The general practitioner added: The cardiologists have stated that it is unlikely medical care in Bangladesh is suitable to meet [the appellant's] critical needs.' (Para 3) 'The appellant's notice of appeal contains the following four grounds of appeal: (1) The FCCA judge erred (at [60] of her Honour's reasons) by construing s 36(2)(aa) as requiring the appellant to establish that he would be arbitrarily deprived of medical treatment if he returned to Bangladesh rather than considering whether he would be arbitrarily deprived of his life as a necessary and foreseeable consequence of being removed from Australia to Bangladesh. (2) The FCCA judge erred (at [62] of her Honour's reasons) by finding that the requirement to identify an

			actual subjective intention to cause harm extended to the question of "arbitrary deprivation of life" for the purposes of ss 36(2)(aa) and (2A)(a) of the Act…' (Para 15). 'The appellant argued, based on [59] and [60] of her Honour's reasons, that the FCCA judge considered that the appellant was required to demonstrate that he would be offered only limited medical treatment by the Bangladeshi government or denied medical treatment in Bangladesh on an arbitrary basis.' (Para 20). 'The appellant contended that this approach had the effect of "superimposing an additional requirement beyond the terms of s 36(2)(aa)" and also requiring an analysis of the intentions behind the health policies of Bangladesh as the receiving country rather than an analysis of whether the act of removal from Australia would have the necessary and foreseeable consequence (not intention) of arbitrarily depriving the appellant of his life.' (Para 21). 'The appellant noted that, in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 91 ALJR 936 ("*SZTAL*") at [26], the requirement of actual subjective intent in ss 36(2A)(c) to (e) arose from the definitions of "torture", "cruel or inhuman treatment or punishment" and "degrading treatment or punishment" in s 5 of the Act, each of which contained a reference to intention. He argued that, in contrast, there is no definition by which a requirement of intention is imported into s 36(2A)(a),

			which is concerned with a consequence rather than intention.' (Para 22). 'The appellant argued that the ordinary meaning of the word "arbitrarily" clearly embraces situations that are random.' (Para 23). 'The language of arbitrary deprivation of life reflects the terms of Art 6(1) of the ICCPR, which provides: "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".' (Para 34). 'In relation to Art 6(1), Joseph and Castan writing in *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed, Oxford University Press, 2013) state at [8.04], relevantly: "[A]rbitrary" is a broader concept than "unlawful". That is, a killing may breach article 6 even though it is authorised by domestic law. The prohibition on the "arbitrary" deprivation of life signifies that life must not be taken in unreasonable or disproportionate circumstances. Some indicators of the arbitrariness of a homicidal act are the intention behind and the necessity for that action.' (Para 35). 'At [8.75], Joseph and Castan address the environmental and socio-economic aspects of Art 6 and state that the Human Rights Committee has confirmed

			that Art 6 has a socio-economic aspect by reference to the following comment: Moreover, the Committee has noted that the right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics. The reference to 'desirability' may indicate that States have a moral 'soft law' obligation, rather than a legal 'hard law' duty, to tackle problems such as high infant mortality and low life expectancy.' (Para 36). 'The language of s 36(2)(aa) required the Minister to consider the necessary and foreseeable consequences of the appellant being removed from Australia to Bangladesh. The phrase "being removed" is certainly wide enough to comprehend the consequences of the events that comprise the removal of a non-citizen from Australia to a receiving country and, to that extent, may cover events that occur prior to the arrival of a non-citizen in a receiving country such as the loss of access to medical treatment.' (Para 38).

			‘The *Macquarie Dictionary* (Online) defines “arbitrary” as follows: *adjective* 1. subject to individual will or judgement; discretionary. **2.** not attributable to any rule or law; accidental: **the only significance her smile could have had was that of an arbitrary, not to say perverse, decoration*. – PATRICK WHITE, 1976. **3.** capricious; uncertain; unreasonable: **The next thing to provoke him was the arbitrary way in which she disposed of his personal liberty*. –HENRY HANDEL RICHARDSON, 1925. **4.** uncontrolled by law; using or abusing unlimited power; despotic; tyrannical: **In fact Aboriginal society has been kept in continual tension by what appeared to Aborigines arbitrary and pointless interference with their lives* –CD ROWLEY, 1970. **5.** selected at random or by convention: an arbitrary constant.’ (Para 40). ‘The same Dictionary defines the verb “deprive” to mean: **1.** to divest of something possessed or enjoyed; dispossess; strip; bereave. **2.** to keep (a person, etc.) from possessing or enjoying

			something withheld. **3.** to remove (an ecclesiastic) from a benefice; to remove from office.' (Para 41). 'Dealing with the appellant's other submissions set out above: (1) The observation, at [59] of her Honour's reasons, that the prospect of dying of a health condition was not, without more, a subject matter that enlivened the application of the criterion for complementary protection under the Act, must be correct. The words "arbitrarily deprived" imply conduct which is responsible for the deprivation of a person's life. Further, they do not cover such a deprivation of life unless it may be characterised as "arbitrary". Dying of a health condition may be expected or unexpected but the requirement of arbitrariness operates to characterise the conduct by which a person is deprived of his or her life. (2) Accordingly, I do not accept that the decisions in *MZAAJ* place any gloss on the language of s 36(2)(aa). (3) In considering the circumstances in which the appellant would not receive adequate medical treatment in Bangladesh, the FCCA judge was not imposing an additional requirement. Rather, her Honour was effectively addressing the problem that the appellant had not identified a risk of "arbitrary" deprivation of

			life. (4) The word "arbitrarily" in s 36(2A)(a) may address situations that are "random" but it is necessary to consider whether the random nature of a situation is one that involves a risk of being "arbitrarily deprived" of life. (5) While the appellant may suffer the loss of his life as a result of losing access to medical treatment currently available to him in Australia, those facts are insufficient to support a conclusion that there is a risk to him that he will be "arbitrarily deprived of his life" as a consequence of his removal to Bangladesh because they do not involve an arbitrary conduct. (6) On the facts, the Australian government's removal of the appellant will not arbitrarily deprive him of his life. That act would be deliberate; it can be presumed that it will be effected lawfully, and it has no quality of randomness. Further, it will not deprive the appellant of his life, although it may not be protective of his life. Rather, it will deprive the appellant of his present access to medical treatment.' (Para 48).
AJL16 v Minister for Immigration and Border Protection [2019] FCA 255 (Mortimer J) (Unsuccessful)	5 March 2019	3, 28, 39-41, 60-61,	The issue in this case was whether the applicant had made a claim that he feared sexual violence on return in circumstances where sexual violence was only mentioned in submissions in the form of COI. The court indicated that the matter was to be considered in relation to the complementary protection criteria because unlike in refugee claims, there is no

			requirement to show a subjective fear. However, the court said that 'it is still necessary for a visa applicant to identify what it is about her or his particular circumstances which is said to give rise to "substantial grounds" for the belief' that he will experience significant harm. 'The appellant is a national of Sri Lanka, of Tamil ethnicity and a Roman Catholic. He arrived on Cocos Island by boat on 10 August 2012 and was first interviewed by an officer of the Department of Immigration and Border Protection on 13 August 2012. He was released into the community on a bridging visa on 8 November 2012.' (Para 3). 'The appellant contends a range of country information was put to the Tribunal on his behalf which indicated that sexual violence is widespread in Sri Lanka's detention facilities, and that Tamil men are at particular risk of such violence. In a context where the Tribunal found that there was a real risk that the appellant would be detained in Sri Lanka for up to several days, the appellant contends the Tribunal did not consider whether there was a real risk that the appellant would experience "degrading treatment or punishment" or "cruel or inhuman treatment or punishment" in the form of sexual violence while in detention, or whether the risk of suffering sexual violence in detention is a real risk faced by the population of Sri Lanka generally for the purposes of s 36(2B)(c) of the Act. On this basis, the appellant contends the Tribunal failed to perform its

			statutory review function, and failed to consider a claim he had made.' (Para 28). 'The appellant does not contend he directly raised the claim that there was a real chance he might be exposed to sexual violence during any period of incarceration on return to Sri Lanka. That is, it is not contended he gave any evidence either in his statutory declaration, or in the interview before the delegate, or the Tribunal, about this fear or risk specifically. In his statutory declaration, he did, however, express his fears of harm in a way which might be said to not exclude sexual violence: I fear harm including arrest, detention, physical assault and death at the hands of the Sri Lankan Army and other government authorities on account of my Tamil ethnicity and having made a complaint against the Government's attempt to confiscate our land. I face an increased risk of this harm as I am a young male Tamil and because I left Sri Lanka illegally. I have already experienced beatings, harassment and persecution by people I believe are associated with the army. I cannot reasonably relocate anywhere else in Sri Lanka to avoid the threat of harm. I believe that I will be killed if I return.' (Para 39). 'In this context, counsel for the appellant accepted the chance of being subjected to sexual violence in prison could not be described as a subjective fear expressed to be held by the appellant, and it may be more difficult to fit this claim within the confines of Art 1A of the

			Convention (*Convention Relating to the Status of Refugees*, done at Geneva on 28 July 1951 as amended by the *Protocol Relating to the Status of Refugees*, done at New York on 31 January 1967). He accepted the error identified was one which went principally to the Tribunal's assessment of whether the appellant satisfied the complementary protection criteria. Counsel correctly emphasised the different formulation of the criteria for a protection visa in ss 36(2)(a) and in 36(2)(aa) of the Act…' (Para 40). 'Thus, the agreed factual situation is that the appellant himself did not identify any such risk of harm, for either his claims under s 36(2)(a) or under s 36(2)(aa), but his representatives did put forward a reasonable amount of country information on the topic of risks of harm by way of sexual violence. They put forward some information to the delegate, but put more before the Tribunal. The country information contained references to the existence of such risks, and reports of Tamil returnees being harmed by the infliction of sexual violence.' (Para 41). 'Although in hindsight it may be easier to describe the Tribunal as having "missed" the aspect of the country information dealing with sexual violence, I do not consider that is what occurred. The appellant simply did not indicate he feared any such harm, inside or outside prison. He made no mention of sexual violence whatsoever. The RILC submissions drew attention to this specific risk as one of the many kinds of harm which it submitted could befall a person in the

			appellant's position. For the Tribunal to have dealt expressly with it would have required an exercise akin to attempting to "discover" any potential claims lying somewhere in the country information.' (Para 60). 'I do not accept that it is appropriate to describe this aspect of what was presented by RILC as a "claim" made by or on behalf of the appellant. While I accept the point made by the appellant about the difference between the assessment under s 36(2)(aa) and the assessment under s 36(2)(a), it is still necessary for a visa applicant to identify what it is about her or his particular circumstances which is said to give rise to "substantial grounds" for the belief that she or he may suffer significant harm on return to her or his country of nationality. That is not to insist such identification occur through evidence directly from a visa applicant, although of course that is one obvious and regular way in which a claim may be made. It may be inferred from the existing evidence, or it may be part of the instructions provided to a representative and communicated in such a way. In some circumstances, a representative may formulate a "claim" on behalf of a visa applicant, but whether or not that is the correct characterisation for what has occurred will be a matter of fact in each particular case.' (Para 61). 'I do not accept that the appellant, whether by himself or through his representatives, had sought to invoke Australia's protection obligations on the basis that if he were incarcerated, there was a real chance or a real risk that he might be subjected to sexual violence by State or

			non-State actors during that incarceration. He had sought protection on the basis he might be harmed – and the kinds of harm were developed in some detail by his representatives through the use of country information. One kind of harm identified was sexual violence. This did not mean that in considering and assessing this aspect of his "claim", the Tribunal needed expressly in its reasons to deal with every kind of harm the country material suggested a person in the appellant's position could conceivably face. The Tribunal was entitled to focus on what the appellant himself identified and what could reasonably be drawn from the RILC submissions. Although sexual violence was clearly mentioned as a possible form of harm, I do not consider it figured so prominently that it could properly be described as a separate "claim" made by the appellant, or a "claim" linked to another claim made by the appellant.' (Para 65).
DED16 v Minister for Home Affairs [2019] FCAFC 18 (Bromberg, Kerr and Charlesworth JJ)(Unsuccessful)	7 February 2019	4-16	In dismissing the appeal of a Nepalese applicant relating to a refusal to grant a protection visa, the Court considers whether the applicant had taken all possible steps to avail himself of a right to enter and reside in India within the meaning of s 36(3) of the *Migration Act 1958* (Cth).

FEDERAL CIRCUIT COURT OF AUSTRALIA

Case	Decision date	Relevant paragraphs	Comments
AYY21 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1961 (Successful)	25 August 2021	36 (ground 5), 37–63 (disposition of ground 5)	Judge Manousaridis allowed an application seeking remedies under section 476 of the *Migration Act* in relation to a decision made by a delegate of the Minister to cancel without notice the applicant's temporary protection visa. The delegate purported to cancel the visa under section 128 of the Act. The applicant also applied for an order restraining the Minister from determining an application the applicant made on 29 October 2018 for the grant of a Safe Haven Enterprise visa. Relevantly, ground 5 of the application alleged that the cancellation decision was affected by jurisdictional error in that the Minister's delegate failed to take into account mandatory relevant considerations or because the cancellation decision was otherwise irrational or legally unreasonable. By way of a particular to this ground, the applicant alleged that the delegate was required to take into account, but failed to take into account, the risk of harm to the applicant—a refugee—in the event that the visa was cancelled, a consideration distinct from consideration of Australia's non-refoulement obligations and a mandatory consideration in any decision to cancel a protection visa. Judge Manousaridis upheld ground 5 and allowed the application on this basis.
XDJD and Minister for Immigration and Border Protection (Migration) [2021] AATA 2882 (Unsuccessful)	17 August 2021	22–26, 77–119	The AAT affirmed a decision not to revoke the cancellation of the applicant's Global Special Humanitarian visa. Relevantly, however, the Tribunal discussed recent amendments to the *Migration Act* introduced by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth).

			The Tribunal found that the applicant would face harm if returned to South Sudan and that the Tribunal needed to consider Australia's international non-refoulement obligations. The Tribunal considered that the applicant's life would be threatened as a result of his mixed Nuer and Dinka ethnicity, his past involvement with the Sudan People's Liberation Army (SPLA), his status as a returnee from a Western country, and his disabilities in the context of the deteriorating security situation and ongoing civil war. The Tribunal found that this risk of harm gave rise to non-refoulement obligations such that Australia would be in breach of those obligations if the applicant were to be returned to South Sudan. This was a factor that weighed in favour of revoking the cancellation decision. The Tribunal further accepted that, regardless of whether the applicant's claims were such as to engage non-refoulement obligations, the applicant would face significant hardship including risk of violence based on his ethnicity and history as a child soldier, a deterioration in his mental and physical health, and a lack of support if he were to return to South Sudan. It is unclear precisely on what basis the Tribunal considered non-refoulement obligations to be owed (although the Tribunal later noted at [106] that 'there is a very real risk that the applicant will suffer significant harm if he is removed to South Sudan' and, in the same paragraph, that '[t]he possibility of removal to South Sudan is a factor that weighs in favour of revoking the cancellation decision', the language of which suggests that non-refoulement obligations may have been owed under the ICCPR and/or CAT), but, for completeness, the decision is nonetheless included here in this list of case summaries.

DOJ20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1882 (Unsuccessful)	13 August 2021	48 (ground 2), 49–54 (disposition of ground 2), 69 (ground 6), 70 (disposition of ground 6)	Judge Jarrett dismissed an application for an extension of time to make an application for judicial review of two decisions of the Minister, one to cancel the applicant's Resident Return visa and the other refusing to revoke the cancellation of this visa. Relevantly, proposed ground 2 alleged that the Minister erred in placing 'little weight' in respect of Australia's protection obligations towards the applicant, and 'no weight' in respect of Australia's international obligations towards the applicant. Ground 6 agitated, with respect to the cancellation decision, the same ground of review as proposed ground 2. Judge Jarrett rejected these grounds and dismissed the application.
BSB16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1830 (Unsuccessful)	11 August 2021	19 (grounds of review), 30–31 (disposition of ground 1), 36 (disposition of ground 4)	Judge Humphreys dismissed an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the applicant a temporary protection visa. Relevantly, ground 1 alleged that the IAA misconstrued or misapplied the words 'intentionally inflicted' and 'intended to cause' in the definitions of 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' in section 5(1) of the *Migration Act* in assessing the applicant's detention in Sri Lanka. Relatedly, ground 4 alleged that the IAA fell into jurisdictional error in assessing the applicant's detention and denied the applicant procedural fairness. Judge Humphreys rejected these grounds of review and dismissed the appeal.
FHE20 v Minister for Home Affairs [2021] FCCA 1492 (Unsuccessful)	10 August 2021	5–11 (disposition)	Judge Driver dismissed an application seeking orders in the form of declarations that the applicant's detention was not authorised by the *Migration Act* or any other power and was therefore unlawful, as well as orders that the applicant be released from detention forthwith. His

			Honour observed that the legal issues impacting upon the applicant, both in terms of the applicable provisions of the *Migration Act* and the interpretation of them, had been discussed in other proceedings in the High Court, the Federal Court, and the Federal Circuit Court, and that his Honour had traversed the legal issues at some length in *FDT20 v Minister for Home Affairs* [2021] FCCA 711 (also included in these case summaries).
ADM21 v Minister for Home Affairs [2021] FCCA 1488 (Unsuccessful)	9 August 2021	8–18 (disposition)	Judge Driver dismissed an application seeking orders in the form of declarations that the applicant's detention was not authorised by the *Migration Act* or any other power and was therefore unlawful, as well as orders that the applicant be released from detention forthwith. His Honour observed that the legal issues impacting upon the applicant, both in terms of the applicable provisions of the *Migration Act* and the interpretation of them, had been discussed in other proceedings in the High Court, the Federal Court, and the Federal Circuit Court, and that his Honour had traversed the legal issues at some length in *FDT20 v Minister for Home Affairs* [2021] FCCA 711 (also included in these case summaries).
DVT16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1813 (Unsuccessful)	6 August 2021	13 (grounds of review), 29–32 (disposition of ground 1)	Judge Humphreys dismissed an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to grant the applicant a protection visa. Relevantly, the first ground of review alleged that the AAT misconstrued the risk and fear of significant harm as set out in section 36(2A) of the *Migration Act*. Judge Humphreys, however, rejected this ground and dismissed the application.
BBY21 v Minister for Immigration, Citizenship, Migrant Services and	4 August 2021	26 (ground 1), 53–54 (disposition of ground 1)	Judge Humphreys dismissed an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to grant the applicant a

Multicultural Affairs [2021] FCCA 1768 (Unsuccessful)			protection visa. Relevantly, the first ground of review alleged as follows: > The applicant claimed that if required to return to Singapore, he will be charged with an offence and sentenced to a lengthy term, of imprisonment and strokes of the cane for an offence arising from an incident in late 2005 or early 2006 in which he assaulted or stabbed a man. The Administrative Appeals Tribunal ("the Tribunal") found in paragraph 93 of its decision, that it was "not satisfied that there is an outstanding warrant". The Tribunal fell into jurisdictional error in the manner in which it dealt with evidence given by the applicant in 2011 (in the course of sentencing for a criminal offence in the District Court of NSW) concerning the outstanding charge. In the course of rejecting this ground, Judge Humphreys explained: > The Tribunal accepted… that caning could be seen as being cruel or inhuman treatment or punishment. However, as the Tribunal found as there was no warrant outstanding for the applicant [sic], he was not at significant risk of being caned should he be returned to Singapore. Again, this was a finding that was open to the Tribunal based on the evidence before it and for the reasons it gave. Ground one has no merit. There is no error in the manner in which the Tribunal dealt with the evidence before it.

BDT20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1747 (Unsuccessful)	2 August 2021	52 (ground of review), 56–93 (disposition)	Judge Kelly dismissed an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to grant the applicant a Safe Haven Enterprise visa. The sole ground of review alleged that the AAT's decision was affected by jurisdictional error in that the AAT failed to consider corroborating evidence in the form of letters about the applicant's conversion to Christianity and thereby failed to exercise its jurisdiction to review the decision. Judge Kelly rejected this ground and dismissed the appeal.
FDT20 v Minister for Home Affairs [2021] FCCA 711 (Unsuccessful)	2 August 2021	170–188 (disposition)	Judge Driver dismissed an application for declaratory relief to the effect that the applicant's detention in immigration detention was not authorised by the *Migration Act*, relief in the nature of a writ of habeas corpus requiring the applicant's immediate release from immigration detention, and a writ of mandamus compelling the respondents to remove him to a regional processing country. In the course of considering the application, Judge Driver discussed the High Court's decision in *Commonwealth of Australia v AJL20* [2021] HCA 21, as well as the relevance of section 197C of the Act and its relationship with other provisions of the Act authorising the detention and removal from Australia of unlawful non-citizens.
ANB17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1656 (Successful)	23 July 2021	15 (ground 1), 16–30 (disposition of ground 1), 31 (ground 2), 32–45 (disposition of ground 2), 46 (ground 3), 47–57 (disposition of ground 3)	Judge Blake quashed a decision of the IAA affirming a decision of a delegate of the Minister refusing to grant the applicant a Safe Haven Enterprise visa. Ground 1 of the application for judicial review alleged that the IAA erred by failing to correctly perform the statutory task in accordance with section 473DD of the *Migration Act*. By way of particulars to this ground, the applicant explained

			that (a) he submitted new information to the IAA, consisting of two pieces of country information related to interrogation and torture of returnees to Sri Lanka due to their activities or contacts overseas, including situations where returnees were shown photographs of the events that they had attended abroad, and (b) in determining whether or not to consider this new information, the IAA failed to consider the explanation provided by the applicant as to why the information was not and could not have been provided to the Minister. Ground 2 alleged that the IAA erred by failing to consider and deal with a substantial, clearly articulated claim made by the applicant in relation to why the Karuna group would renew their interest in him and his father upon return to Sri Lanka. Ground 3 alleged that the IAA erred by failing to consider a claim made by the applicant that he would be targeted by the prison authorities for severe mistreatment, punishment, and torture on account of his adverse profile. Judge Blake rejected grounds 2 and 3 but upheld ground 1.
ANA17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1651 (Unsuccessful)	23 July 2021	38 (ground 1), 39–56 (disposition of ground 1), 13 (ground 2), 14–26 (disposition of ground 2), 27 (ground 3), 28–37 (disposition of ground 3)	Judge Blake dismissed an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the applicant a Safe Haven Enterprise visa. Ground 1 alleged that the IAA erred by failing to consider the applicant's claim to fear harm when questioned on return to Sri Lanka due to his reporting of his kidnapping to police, and evidence given by the applicant to the International Truth and Justice Project (ITJP) identifying a police officer from the Criminal Investigation Department (CID) involved in the kidnapping. Ground 2 alleged that the IAA erred by failing to consider and deal with a substantial, clearly

			articulated claim made by the applicant in relation to why the Karuna group would renew their interest in him and his father upon return to Sri Lanka. Ground 3 alleged that the IAA erred by failing to consider a claim made by the applicant that he would be targeted by the prison authorities for severe mistreatment, punishment and torture on account of his adverse profile. Judge Blake rejected all three grounds of review and dismissed the application.
BDN18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1962 (Unsuccessful)	21 July 2021	26 (ground 1), 27 (disposition of ground 1), 28 (ground 2), 29 (disposition of ground 2), 30 (ground 3), 31–37 (disposition of ground 3)	Judge Vasta dismissed an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to grant the applicants protection visas. Relevantly, the first ground of review alleged that the AAT misconstrued the risk and fear of significant harm as set out in section 36(2A) of the *Migration Act*. By way of particulars to this ground, the applicants alleged that the AAT construed erroneously (and narrowly) the existence of risk to life and fear of significant harm to the applicants upon their return to India, especially in view of the latest circumstances after the conviction of "Dera Sect". The second ground alleged that the AAT failed to comply with the mandatory requirement under section 424A (read with section 424AA) of the *Migration Act* to give the applicant clear particulars of information it considered would be part of the reason for affirming the decision under review, to ensure that the applicant understood why that information was relevant to the review and the consequence of its being relied upon, and to invite the applicant to comment upon or respond to that information. (The third ground was unparticularised and alleged that the AAT had no jurisdiction to make the

			decision because its reasonable satisfaction was not arrived at in accordance with the provisions of the Act.)
DCF18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1531 (Unsuccessful)	8 July 2021	4 (summary of conclusions), 36–52 (relevant statutory provisions and related legal principles), 54–55 (first and second grounds of review), 62–81 (disposition of first and second grounds of review), 82 (third ground of review), 90–108 (disposition of third ground of review), 109 (fourth ground of review), 114–119 (disposition of fourth ground of review), 120 (fifth ground of review), 126–140 (disposition of fifth ground of review), 141 (sixth and seventh grounds of review), 149–163 (disposition of sixth and seventh grounds of review), 164–207 (materiality)	Judge Kelly dismissed an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the applicant a Safe Haven Enterprise visa. In summary, his Honour concluded as follows: (1) it had not been established that the Secretary of the Minister's Department failed to consider the applicant's statutory declaration dated 31 October 2017 for the purposes of section 473CB(1)(c) of the *Migration Act*; (2) for the purposes of section 473DD(a), the IAA did not fail to consider what were described as the highly unusual circumstances in which the October declaration had been posted to, but not received until after, the delegate made a decision. The circumstance that the Secretary may have considered the October declaration to be relevant was not a factor that could have realistically affected the IAA's consideration of the matter; (3) for the purposes of section 473DD(b)(i), nor did the IAA fail to consider whether, before the delegate's decision was made, the applicant could have, but had not, provided the October declaration; (4) for the purposes of section 473DD(b)(ii), the IAA did not assess the new information on the basis of whether it was capable of being believed but instead decided that it was not capable of being believed or evidently not credible; (5) an impugned finding that the applicant had concocted one claim was not in fact made. Rather,

			the IAA, which found the claim to be inherently implausible, was a finding for which there was an intelligible basis; (6) it was not legally unreasonable for the IAA to decline the applicant's request for an interview; if there was error in the approach taken by the IAA in relation to the matters the subject of the grounds of review, objectively, the new information could not realistically have made a difference to the process of review.
ARB18 v Minister for Home Affairs [2021] FCCA 1427 (Successful)	24 June 2021	5 (issue), 24–38 (disposition)	Judge Young allowed an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the applicant a Safe Haven Enterprise visa. The applicant was not legally represented and did not identify any recognisable ground of jurisdictional error. However, Judge Young raised a concern as to whether the IAA conducted the required 'fact intensive assessment' about whether it would be reasonable and practicable for the applicant to internally relocate within Afghanistan to Kabul in order to prevent the real risk of the applicant suffering significant harm in Khost. Judge Young was satisfied that the IAA failed to perform the necessary statutory task and that this gave rise to jurisdictional error.
BGT18 v Minister for Home Affairs [2021] FCCA 1425 (Successful)	24 June 2021	5 (grounds of review), 6–12 (disposition of ground 1), 13–15 (disposition of ground 2), 16–26 (additional concern and jurisdictional error)	Judge Young allowed an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the applicant a Safe Haven Enterprise visa. The applicant had advanced two grounds of review. The first alleged that the IAA erred in its construction of section 473DD of the *Migration Act*, in that it failed to have regard to the criteria in section 473DD(b) before finding that there were no exceptional

			circumstances within the meaning of section 473DD(a) to justify considering the new information. The second ground alleged that the IAA failed to conduct the task required by statute in its consideration of the question of whether it was reasonable for the applicant to relocate to Mazar-e-Sharif, in that the IAA applied a test of relative safety and relative reasonableness, rather than safety and reasonableness per se. Judge Young rejected both grounds of review. His Honour, however, raised with the Minister his concern that the assessment of whether the applicant and his family could reasonably relocate was carried out at a level of generality inconsistent with the guidance provided by Mortimer J in *MZANX v Minister for Immigration and Border Protection* [2017] FCA 307, where her Honour said that such an assessment was "fact intensive". In Judge Young's view, the IAA's reasons merely stated a conclusion. They did not mention the particular circumstances of the applicant and his family, apart from the fact that the applicant was a single man, had a skill as a renderer, and had relocated previously within Afghanistan. The applicant's 'objections' were acknowledged to be persuasive but, in Judge Young's view, the IAA's consideration of them did not go beyond generalities and fell well short of the process required. His Honour was satisfied that the IAA's decision involved jurisdictional error.
CUH20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1309 (Successful)	10 June 2021	101–111 (jurisdictional error established)	Judge Kendall quashed a decision of the AAT affirming a decision of a delegate of the Minister refusing to grant the applicant a protection visa. The applicant was unrepresented and all grounds of appeal contained in his application for judicial review were rejected. Noting the Court's duty to assist self-represented litigants, however,

			Judge Kendall remained alert to the possibility of error on the part of the AAT, and ultimately concluded that the AAT had failed to consider material directly relevant to the applicant's claims for protection and had, accordingly, fallen into jurisdictional error, a conclusion with which counsel for the Minister agreed when addressing the Court.
DJJ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1258 (Unsuccessful)	8 June 2021	12 (relevant grounds of review), 13–29 (disposition)	Judge Egan dismissed an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the first applicant a temporary protection visa. (The success of the second applicant's visa application was dependent upon the success of the first applicant's visa application.) Relevantly, on appeal to the FCCA, the applicants alleged that the IAA was legally unreasonable by failing to interview the first applicant in the exercise of its powers under section 473DC of the *Migration Act*. The new information that the first applicant wished the IAA to consider was a submission (and an annexed medical report) to the effect that, on 21 August 2012, while being questioned in Sri Lanka by the CID concerning the first applicant's possible membership of the LTTE, certain events took place. Further, and in the alternative, the applicants alleged that the IAA was unreasonable in rejecting the new claim as a fabrication without giving the applicants the opportunity to give information about it at an interview. Judge Egan rejected both grounds and dismissed the application.
EIO20 v Minister for Immigration, Citizenship, Migrant Services and	31 May 2021	14 (ground of review), 15–26 (disposition)	Judge Riethmuller dismissed an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to grant the applicant a protection visa. The applicant advanced a single ground

Multicultural Affairs [2021] FCCA 1165 (Unsuccessful)			of review. It alleged that the AAT committed jurisdictional error by failing to consider and determine an integer of the applicant's claim that was expressly advanced and squarely raised on the materials, namely if he was returned to Pakistan as a Shia Muslim actively promoting human rights, he faced a significant risk of harm and therefore met the complementary protection criterion in section 36(2)(aa) of the *Migration Act*. Judge Riethmuller rejected this ground of review and dismissed the application.
CNY17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1141 (Unsuccessful)	19 May 2021	40 (ground 1), 41–57 (disposition of ground 1)	Judge Vasta dismissed an application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister refusing to grant the applicant a protection visa. Relevantly, the first ground of review alleged that the IAA failed to properly consider whether the applicant would face a real chance of persecution or real risk of significant harm in Iraq for reasons of him being in a de facto relationship with an Australia non-Muslim woman, or made conclusions that were not open on the evidence. Judge Vasta rejected this ground and, ultimately, dismissed the application.
BYZ17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1483 (Successful)	5 May 2021	11 (first substantive ground of review), 12–27 (disposition of first substantive ground of review), 28 (second substantive ground of review), 29–35 (disposition of second substantive ground of review), 36 (third and fourth substantive	Judge Riethmuller allowed an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to grant the applicant a protection visa. The applicant advanced five substantive grounds of review. The first ground alleged that the AAT failed to make an obvious inquiry about a critical fact, or alternatively, acted unreasonably, in failing to request a letter that was stated to be attached to a statutory declaration dated 18 January 2016 but was omitted from the copy provided to the AAT. The second ground alleged that the AAT's finding that it did not accept that

		grounds of review), 37–45 (disposition of third and fourth substantive grounds of review), 46 (fifth substantive ground of review), 47–48 (disposition of fifth substantive ground of review)	the applicant's brother was killed or buried in the manner claimed was based on a misinterpretation of the evidence before it, namely the assertion that 'the advice from the DFAT staff in Port Moresby [was] that there are absolutely no records of a death in the name of the applicant's brother at either the hospital or the morgue'. The third ground alleged that the AAT failed to afford the applicant procedural fairness in its treatment of information covered by a purported non-disclosure certificate under section 438 of the *Migration Act*. Relatedly, the fourth ground alleged that the AAT's decision was affected by a reasonable apprehension of bias in that the AAT had before it, under cover of a purported non-disclosure certificate under section 438, prejudicial material that was not relevant to the determination of the visa application. The fifth ground alleged that the AAT failed to consider a claim clearly arising from the material before it, namely whether the tribal violence that the AAT accepted persisted and had caused the applicant's family and others to flee the applicant's home village constituted a real risk of significant harm, regardless of whether or not the applicant was the catalyst for the tribal violence. Judge Riethmuller upheld the first and second substantive grounds of review and allowed the appeal on those bases.
BTV18 v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs [2021] FCCA 851 (Successful)	29 April 2021	43–55	The Court quashed a decision of the IAA affirming a decision of a delegate of the Minister refusing to grant the Iranian applicant a temporary protection visa. The Court also issued a writ of mandamus requiring the IAA to redetermine the review according to law. The Court declared that the Minister's delegate formed the opinion that the applicant was an "excluded fast track review

			applicant" and that the same delegate had no power to refer the decision dated 24 February 2017 to the IAA pursuant to s 473CA of the Migration Act. On the evidence before the Court, it was clear that the delegate was of the view that the applicant had applied for asylum in the Republic of Cyprus, that that application had been denied and, on that basis, that the applicant was very much an "excluded fast track review applicant". The Court did not accept that the delegate's "findings" in relation to what occurred in Cyprus did not relate to a finding about the applicant's refugee application in Cyprus. The delegate's reference to the decision made by the Cypriot authorities was clearly a basis upon which the delegate rejected the applicant's claims. In so doing, the delegate clearly "formed the opinion" that a previous application by the applicant in another country had been rejected. The fact that the delegate specifically compared the phrase "subsidiary protection" with "complementary protection" made it clear that the delegate was of the opinion that the applicant had made claims for protection that had been refused. The fact that claims in Cyprus had been rejected was a basis upon which the delegate reasoned that the applicant did not meet the protection visa criterion (as it undermined his credibility and because another authority had determined his claims did not warrant international protection).

			In the Court's view, it was evident that the delegate formed the opinion that the applicant had made a claim for protection in a country other than Australia that had been refused by that country. In so doing, the delegate implicitly determined that the applicant was an excluded fast track review applicant. The fact that the delegate may not have appreciated the consequences of this assessment did not alter the fact that the "opinion" *was* formed for the purposes of the definition in s 5(1). On this basis alone, the Minister had no power to refer the delegate's decision to the IAA and the IAA had no power to review the delegate's decision. In conducting the review, the IAA exceeded its jurisdiction.
DQV20 v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs [2021] FCCA 823 (Unsuccessful)	28 April 2021	52–64 (ground 1)	The Court dismissed an appeal against a decision refusing to grant the Indian applicant a protection visa. Relevantly, however, in the context of disposing of the first ground of appeal, the Court considered whether the AAT below had afforded the applicant procedural fairness and complied with the duty set out in s 425 of the Migration Act. This ground of appeal appeared to assert that, because the AAT hearing only lasted for 30 minutes (noting that it "was scheduled for 3 hours"), the Tribunal did not take the time to clearly understand the applicant's situation. Before the present Court, the applicant repeated his claim that he did not have enough time to explain his case. The Court noted that there is no statutory time limit or required duration for a hearing before the Tribunal. Rather, s 425(1) of the Act provides: 'The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the

			issues arising in relation to the decision under review'. The Court observed that it is well accepted that the hearing referenced in s 425 of the Act must present "a real and meaningful opportunity for the applicant to make arguments and present evidence". It must not be a "hollow shell" or an "empty gesture": *Mazhar v Minister for Immigration & Multicultural Affairs* [2000] FCA 1759 at [31]. Here, the applicant was invited to two hearings. The first occurred on 12 May 2020. The second occurred on 16 July 2020. The first hearing was 33 minutes long. The second hearing was 40 minutes long (not including the oral decision). The applicant was thus incorrect when he argued that the Tribunal only heard him for 30 minutes. The Tribunal heard from the applicant for over one hour. The Court concluded that the Tribunal did not deny the applicant procedural fairness. The two hearings attended by the applicant gave him ample opportunity to present evidence and make arguments. The Tribunal made every effort to assist the applicant and gave him every opportunity to explain his claims in a way that allowed the Tribunal to understand what was being claimed. No error arose in this regard. Ground 1 was, accordingly, dismissed.
BIP18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs	28 April 2021	58–59 (disposition of third ground of appeal)	The Court dismissed an appeal against a decision refusing to grant the Iraqi applicant a Safe Haven Enterprise Visa. Relevantly, however, the Court considered the applicant's third ground of appeal, which asserted that there were exceptional circumstances in

[2021] FCCA 827 (Unsuccessful)			the matter in relation to some of the evidentiary matters which required the IAA below to invite the applicant to an oral interview pursuant to s 473DC of the Migration Act. The Court noted that s 473DB of the Act specifically authorises the Authority to undertake its review (a) without accepting or requesting new information and (b) without interviewing the referred applicant. Further, the Court observed that no obligation exists upon the Authority to get, request or accept any new information (citing s 473DC(2) of the Act). Section 473DE of the Act sets out the limited circumstances whereby new information must be given to a referred applicant. In this case, the Authority considered the matter based solely on the information that was before the delegate. The Court noted that no obligation exists upon the Authority to advise an applicant that it might take a different view of the material to the delegate. The Court agreed with the submission of counsel for the Minister that, in the circumstances of this case, there was nothing that required the Authority to invite the applicant for an oral interview. There was no material that required further information which the applicant could have easily resolved by further oral evidence. The applicant had made his claims in his statement of claim and in his SHEV interview. Nothing further was required as necessary on the part of the Authority. Ground three revealed no jurisdictional error.
AFR19 v Minister for Immigration, Citizenship, Migrant Services and	28 April 2021	65–75, 76	The Court dismissed an appeal against a decision refusing to grant the Afghani applicant a protection visa. Relevantly, however, the Court considered

Multicultural Affairs [2021] FCCA 491 (Unsuccessful)			whether the IAA below did not consider whether the applicant had a well-founded fear of persecution in the reasonably foreseeable future. The Court noted that the relevant question is not so much whether the words "reasonably foreseeable future" were employed by the Authority but, rather, whether the Authority had made a forward-looking assessment as is required of any decision maker in this jurisdiction. The Court further observed that there may be cases in which the likely course of future events is unknown or unknowable. In such cases, the forward-looking assessment need not descend into mere speculation. The obligation on decision makers is to assess the risk facing a visa applicant in the future as best he or she can, notwithstanding that the foreseeable future may be within a short compass. In this case, while the Authority was sparing of the use of the expression "reasonably foreseeable future", it did not follow that the Authority failed to make a forward-looking assessment. The Authority's assessment was necessarily forward looking because it dealt with the hypothetical return of the applicant to Afghanistan at some point in the near future. The Authority was plainly alive to the fact that the general situation in Afghanistan was, at the time of the decision, unstable and the ability of the Authority to peer into the future was limited. The Court noted that, in such a case, it is reasonable for a decision maker to consider the trajectory of risk from the past to the present. If that trajectory of risk is reducing then a decision maker may be able to make a forward-looking assessment that the applicant does not confront

			a real or significant risk of harm. If the trajectory of risk is increasing, a decision maker may be driven to the opposite conclusion. That, in the Court's view, was essentially what the Authority was doing at [47] of its reasons in relation to the general security situation. As best as the Authority could determine, the trajectory of risk in Location A was static, off a low base. That analysis enabled the Authority to conclude that the risk of harm by generalised violence was remote. Likewise, the Authority was able to assess as best it could the risk of harm confronting the applicant by reference to his various Convention attributes. Like Mortimer J in *CPE15* at [60], the Court concluded that the Authority in the present case was making, as best it could, an assessment on the basis of probative material about future risk, without extending into guesswork. The predictions of the future that the Authority could make in relation to Afghanistan generally and Location A in particular were necessarily limited by the degree of uncertainty apparent from the material. Without necessarily saying so expressly, the Authority was engaging in an assessment of the risk confronting the applicant in the reasonably foreseeable future which is, as Mortimer J noted, an ambulatory period of time.
AXD21 v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs [2021] FCCA 736 (Unsuccessful)	15 April 2021	84–94	The Court dismissed an appeal against a decision refusing to grant the Pakistani applicant a Safe Haven Enterprise Visa. Relevantly, however, the Court considered whether the IAA below did not correctly apply the legal principles relevant to the refugee criterion and the complementary protection criterion.

			The Court was satisfied that the IAA's application of the "real chance" test was entirely sound. The IAA used positive language in its assessment. It expressly noted that it was not satisfied that the chance of harm was a "real one" (at [46] of its reasons) or that there was a "real chance" of harm for particular reasons. The IAA referred to the applicant's lack of any claim to have been subjected to harm previously for certain reasons (at [46]) and his family's lack of harm since his departure (at [49]). The Court affirmed that previous harm is a valid consideration in determining "the chance of harm" for an applicant on return: *Minister for Immigration & Ethnic Affairs v Guo* [1997] HCA 22. Further, the IAA (at [46]) expressly stated that the fact that one group does not face a higher risk or chance of harm than others does not preclude there being a real chance of harm to that group. This statement was a direct reference to the decision in *Ponnundurai v Minister for Immigration & Multicultural Affairs* [2000] FCA 91 which used the analogy that: … in World War II, the crew of a bomber were not all "equally at risk". The rear gunner was notoriously "at particular risk". But it did not follow that other members of the crew were not at risk, and did not have a real chance of being killed. The Court observed that any analysis in this regard should focus on the chance or risk of harm to the particular group. It is that chance or risk. That chance or risk may still be a "real" one notwithstanding that

			another group has a higher chance or risk. The IAA appreciated this distinction. It further analysed the level of risk and chance of harm and, on the basis of country information regarding the prevalence of harm to Sunni Pashtuns, was not satisfied that the chance of harm was a real one. As such, the IAA's consideration and application of the real chance test was sound. Further, as the real chance test imposes the same standard as the real risk test, it followed that in circumstances where there had been no error in the real chance test, then the real risk test was similarly without error. The Court was satisfied that the IAA properly applied the relevant legal principles when assessing each of the applicant's claims.
ERM18 v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs [2021] FCCA 740 (Unsuccessful)	15 April 2021	74–78 (grounds of appeal), 79–94 (disposition of ground 1A), 95–150 (disposition of ground 1B)	The Court dismissed an appeal against a decision refusing to grant the Sri Lankan applicant a Safe Haven Enterprise Visa. The Court, however, considered (though ultimately rejected) two grounds of appeal relevant for present purposes. The first relevant ground was that the IAA below erred in failing to have regard to relevant information, as some information was not referred to the IAA by the delegate of the Minister. Relevant to the possible concerns raised here was s 473CB(1) of the Migration Act. The second relevant ground of appeal was that the IAA erred in finding that it could not have regard to the "new information" that the applicant had provided in submissions from February 2018. The Court considered the IAA's assessment of each new piece of information against s 473DD of the Act, though concluded that no jurisdictional error had been established.
BDR19 v Minister for Immigration, Citizenship,	13 April 2021	62–79 (disposition of ground 1: whether the	The Court quashed a decision of the IAA affirming a decision of a delegate of the Minister refusing to grant

Migrant Services and Multicultural Affairs [2021] FCCA 501 (Successful)		admitted error by the IAA in the application of s 473FB(5) of the Migration Act was material), 111–140 (disposition of ground 2: whether the IAA unreasonably failed to invite, or consider inviting, the applicant to provide additional information before making adverse credibility findings not made by the delegate)	the Bangladeshi applicant a protection visa. The Court also issued a writ of mandamus requiring the IAA to redetermine the review according to law. Relevantly, the Court concluded that the IAA below fell into jurisdictional error in its application of s 473FB(5) of the Migration Act (ground 1). The Court also considered the meaning of s 473DC of the Act but concluded that no jurisdictional error had been established in this respect (ground 2).
ACN20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 685 (Unsuccessful)	9 April 2021	47, 51–60, 61	The Court dismissed an appeal against a decision refusing to grant the Bangladeshi applicant a Safe Haven Enterprise Visa. The Court noted that each of the applicant's claims for judicial review were not particularised and, for that reason alone, the grounds were liable to be dismissed ([47]). However, as the applicant was unrepresented, the Court perused the decision record of the IAA to determine whether any unarticulated jurisdictional error was apparent. Relevantly, the Court considered whether the IAA's consideration of new material at [5] of its decision complied with the decision of the High Court in *AUS17 v Minister for Immigration and Border Protection* [2020] HCA 37. The Court noted that *AUS17* is authority for the proposition that the Authority does not perform the statutory duty imposed by s 473DD of the Migration Act if it does not consider the new material

			against the criterion specified in both s 473DD(b)(i) and (ii) of the Act prior to considering if there are exceptional circumstances as set out in s 473DD(a) of the *Act*: (see *AUS17* at [12]). Here, the Court could not be reasonably satisfied that the Authority had distinctly turned its mind to each of the provisions of s 473DD(b) of the Act. That conclusion left the Court to consider whether or not the error was material. In the Court's view, however, the identified errors were not material.
DQI17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 678 (Unsuccessful)	9 April 2021	35–42 (resolution of question (a)), 43–45 (resolution of question (b)), 46–47 (resolution of question (c))	The Court dismissed an appeal against a decision refusing to grant the Sri Lankan applicant a Safe Haven Enterprise Visa. Relevantly, however, the Court considered the scope and application of s 473EA of the Migration Act, which is the source of the IAA's obligation to give reasons for its decisions. In the present case, in light of the applicant's three grounds of appeal and the parties' competing submissions, the Court answered the following questions that arose for consideration: (a) Did the Authority below misunderstand and therefore fail to adequately consider the applicant's claims? (In the Court's view, no.) (b) However (a) is answered, accepting the Authority was required to give reasons, did it give the reasons it was required to give? (In the Court's view, yes.) Assuming (b) is answered in the negative, what would be the legal consequences? (In the Court's view, even if the Authority had not provided reasons as required by s 473EA of the Act, that by itself would not have resulted in the Authority making a jurisdictional error.)

DEQ17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 458 (Successful)	9 April 2021	45–48 (disposition of ground 1: procedural fairness)	The Court upheld an appeal against a decision of the AAT affirming a decision of a delegate of the Minister to cancel the applicant's protection visa. Relevantly, the Court upheld ground 1 of the appeal, which asserted that the AAT below denied the applicant procedural fairness by not putting its fabrication concerns to the applicant about two important documents (titled "Ruling extract - Warrant of commitment" and "Arrest and investigation warrant").
CXT16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 649 (Unsuccessful)	1 April 2021	15–19 (principles relating to relocation), 23–40 (disposition of ground 1), 44–52 (disposition of ground 2)	The Court dismissed an appeal against a decision refusing to grant the Afghani applicant a temporary protection visa. Relevantly, however, the Court considered two grounds of appeal that related to the issue of whether it was reasonable for the applicant to relocate to other areas of Afghanistan apart from the places where the applicant claimed he would suffer harm. *Principles relating to relocation* At the outset, the Court summarised the principles relating to relocation as follows ([15]–[19]): [15] As it related to the criterion for the grant of a protection visa in the former section 32(2)(a) of the *Migration Act 1958* ('**Act**'), the relocation principle calls for an assessment of whether it was '*reasonable, in the sense of practicable, for [a person] to relocate to a region where, objectively, there is no appreciable risk of the occurrence of the feared persecution*': *SZATV v Minister for*

			Immigration and Citizenship [2007] HCA 40; (2007) 233 CLR 18 ('**SZATV**'). [16] There are two components to this process. It was restated by a Full Court of the Federal Court of Australia in *AHK16 v Minister for Immigration and Border Protection* (2018) 161 ALD 457 ('**AHK16**') at [3] as follows: > The first concerns an assessment of the risk of harm, and the level of harm, which a person might face in those parts of her or his country to which she or he might be expected to return; and the second concerns whether it is reasonable, in the sense of practicable, to expect a person to return to a particular place if it has been assessed as one where she or he does not have a well-founded fear of persecution. [17] Insofar as the complementary protection scheme set out in section 36(2)(aa) of the Act is concerned, there will not be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that '*it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm*': section 36(2B)(a) of the Act. In this way, it is accepted, and I understood the parties before me to agree, that the relocation principle articulated in cases such as *SZATV* and *AHK16* is

			introduced into the complementary protection scheme operating under the Act. [18] An assessment of the reasonableness of relocation requires an assessment of what is practicable for an applicant: *SZATV* at [24]. The assessment is fact intensive. An applicant's objections to relocation form the framework for the analysis: *SZMCD v Minister for Immigration and Citizenship* [2009] FCAFC 46; (2009) 174 FCR 415 at 439, [124]. [19] There was debate before me as to the extent to which a decision maker is required to look beyond an applicant's objections to relocation. Ultimately, I regard it as unnecessary to resolve those issues in light of the fact that the Applicant abandoned Ground 3 of the grounds of review, and in light of the manner in which I have ultimately dealt with Grounds 1 and 2 below. *Ground 1* Ground 1 of the appeal asserted that the IAA's decision below was affected by jurisdictional error because the IAA failed to consider the applicant's objection to relocation — or a matter arising from the material — that it was not reasonable for the applicant to relocate to Kabul having regard to the discrimination the applicant would face being a returnee from a western country. The Court dismissed this ground. In the Court's view, the Authority did not fail to consider in its analysis of

			relocation the impact of discrimination that the applicant would face as a returnee from the West on the applicant's capacity to relocate, or on the likelihood of him obtaining employment or accommodation in Kabul. In the event that the Court were found to be wrong in relation to the conclusion expressed above, the Court noted that it would nevertheless make a finding that any failure by the Authority to refer to discrimination that the applicant might face as a result of being a returnee from a Western country was not a jurisdictional error. *Ground 2* Ground 2 of the appeal asserted that the IAA's decision was affected by jurisdictional error because the Authority asked itself the wrong question in not considering the risk of harm falling below the "real risk" threshold in assessing the reasonableness of the applicant relocating to Kabul. The Court also dismissed this ground. The Court concluded that when the Authority concluded in its reasons that it had taken into account the applicant's 'personal circumstances' in concluding that it was reasonable for the applicant to relocate to Kabul, the Authority was referring to, among other things, the risks to the applicant arising because he faced a risk of harm that was less than the real risk threshold in respect of relocation. As such, the Court dismissed the second ground of the appeal.
ECC19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs	31 March 2021	18–32, 33–46 (grounds 1 and 2)	The Court upheld an appeal against a decision of the IAA affirming a decision of a delegate of the Minister refusing to grant the Iraqi applicant a protection visa. On behalf of the applicant, it was submitted that the

[2021] FCCA 589 (Successful)			IAA failed to comply with s 473DD of the Migration Act as articulated by the High Court in *AUS17 v Minister for Immigration and Border Protection* [2020] HCA 37 as regards to the psychological report. Further, in relation to the passport information, after considering it in general terms, the IAA stated that it did not consider that the present whereabouts of the applicant's mother and brothers would directly impact upon his claims for protection before finding exceptional circumstances did not exist. The Court noted that this consideration did not comply with *AUS17.* Counsel for the Minister conceded that the IAA did not set out its consideration of the psychological report in the way explained or required by *AUS17.* It was submitted that the error did not go to jurisdiction as it was not material. It was submitted that the information was not material in the sense of that articulated in *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 at [29]–[31], the test being, absent the error, could it realistically have resulted in a different decision. The Court was also referred to *BXT17 v Minister for Home Affairs* [2021] FCAFC 9 at [146] ("*BXT17*"), where it was held that the principles of materiality apply to s 473DD of the Act and the question is whether any non-compliance with s 473DD of the Act operated "to deny the appellant the possibility of a successful outcome".

			The Court was satisfied that the updated psychological report was not considered as it should have been, pursuant to the requirements of *AUS17*. That said, the Court was not satisfied that had the report been considered it would have made a difference: see *BXT17*. There was nothing in the report which was not within the previous psychological reports by the same psychologist that were before the IAA. No jurisdictional error arose as regarded the exclusion of the updated psychological report. The Court was also of the view that a fair reading of the IAA's decision did not indicate that the IAA performed its consideration of the new information provided, as regards the passports, as required by *AUS17*. It was difficult to accept, from a reading of the relevant paragraphs of the IAA's reasons, that the Authority clearly considered both limbs of s 473DD(b)(i) and (ii) of the Act prior to finding that there were no exceptional circumstances. While the IAA had doubts as to why the information could not have been provided earlier, given its provision shortly after the delegate's decision, it made no findings in relation to either s 473DD(b)(i) or (ii) of the Act. At best, there was a general discussion of the nature of the information before the IAA found that there were no exceptional circumstances. There was no explicit rejection of the information under either s 473DD(b)(i) or (ii) of the Act to inform the IAA as to the existence of exceptional circumstances.

			The Court was further satisfied that the passports could have made a difference to the decision that was ultimately made. There were clear adverse credibility findings by, initially the delegate, and then the Authority which centred on the claims that the applicant remained in Iraq until 2013 and that his family were also there. The passports were evidence that this was not the case. This was central to the applicant's case. Accordingly, the Court was satisfied there was jurisdictional error as regards the consideration of the new passport material in terms of *AUSI7*. This finding was enough for the Court to grant the relief sought. While it was not necessary for the Court to consider the other grounds of judicial review agitated by the applicant, the Court noted that if the Court was wrong as to its conclusions above as to *ASU17*, given grounds 1 and 2 went to the operation of s 473DD of the Act as well, it was appropriate to also consider them. Ground 1 broadly alleged that the Authority failed to properly consider whether 'exceptional circumstances' existed under s 473DD of the Act to admit the new information. Ground 2 alleged the decision not to find 'exceptional circumstances' was legally unreasonable. After detailed consideration of these grounds of appeal, the Court concluded that both grounds 1 and 2 were also made out.
CVV16 v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs	25 March 2021	71–81	The Court dismissed an appeal against a decision refusing to grant the Sri Lankan applicant a protection visa. Relevantly, however, in considering the first ground of the applicant's appeal, the Court noted that the "real chance" test under the refugee criterion is

[2021] FCCA 590 (Unsuccessful)			forward-looking. Here, the IAA correctly applied that test. It considered the applicant's claims of past harm. It considered some of those claims to be implausible. Nevertheless, it found that even if it had accepted the claims, it was not satisfied that the applicant would face a chance of harm in the *future* (emphasis added by the Court). The core of that reasoning was found at [56] of the IAA's reasons, where the IAA (after referring to profiles of interest to the authorities) found that the low level of activity by the applicant (which he claimed was the reason for his kidnapping) and the span of time since the end of the civil war (and the kidnapping) meant that, should the applicant return to Sri Lanka, he would not be of interest to the authorities or others. The Court noted that the applicant was, in effect, disagreeing with the IAA's finding that, despite his previous experiences, he would not face a real chance of harm on return. The IAA's reasons for finding as it did in this regard were based on the changed security situation in Sri Lanka and the applicant's profile. On the evidence, there was a rational and reasonable basis upon which the IAA could conclude that past instances of harm did not inevitably lead to a finding that that the applicant faced the same chance or prospect of similar harm in the future. (Interestingly, while this ground of appeal was concerned with "real chance" test under the refugee criterion, it may have some indirect relevance to the "real risk" test under the complementary protection criterion,

			given that, as the IAA below explained at [58] of its reasons, the same standard applies to both tests.)
ATF17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 591 (Unsuccessful)	25 March 2021	25–34	The Court dismissed an application for judicial review of a decision of the AAT affirming an earlier decision of a delegate of the Minister refusing to grant the Pakistani applicants protection visas. Relevantly, however, the Court considered a submission about whether or not the AAT below had complied with its procedural fairness obligations under s 424A of the Migration Act. The first applicant had submitted that there had to be strict compliance with s 424A, even though there was no evidence, on the face of the record, that there had been any procedural unfairness in the conduct of the Tribunal hearings. Reliance was placed upon *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24 (at [77] per McHugh J). The present Court also referred to *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26 (at [17]–[22] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) and *Minister for Immigration and Citizenship v SZLFX* [2009] HCA 31 (at [22]–[25] per French CJ, Heydon, Crennan, Kiefel and Bell JJ). The present Court also noted that the facts of the present matter were distinguishable from those before the Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24. Here, the Tribunal's disbelief of the first applicant's claims did not relevantly constitute information within the meaning of s 424A(1)(a). The present Court accordingly was not required to apply *SAAP* to the facts of the matter before the Court.

			Like *SZBYR,* the Tribunal in the present matter found that there was no relevant Convention nexus. The obligation on the part of the Tribunal was to first determine whether there was any relevant protection obligation owed to the applicants. It carried out its statutory function in a logical and considered way. It did not err in doing so. The Court noted that it could not be said that no other rational or logical decision maker could not have made the same decision as the Tribunal, referring to *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 (at [130] and [135] per Crennan and Bell JJ). Neither could the decision of the Tribunal be considered as legally unreasonable, or one lacking an evident and intelligible justification, as such respective concepts were considered by Hayne, Kiefel and Bell JJ in *Minister for Immigration and Citizenship v Li* [2014] FCAFC 1; (2013) 249 CLR 332 at [66] and [76]. The applicants in the present case failed to establish jurisdictional error on the part of the Tribunal in respect of either the first applicant's claim or the claims of the second, third and fifth applicants. The submission that the first applicant's claim should be allowed on the basis that he was a family member of each of the second, third and fifth applicants was without merit. Such a claim was dependent upon the success of the claims of the second, third and fifth applicants. Such claims failed.
ESA19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs	25 March 2021	41	The Court dismissed an appeal against a decision of the IAA affirming a decision not to grant the Iranian applicant a protection visa. Relevantly, the Court did not accept that the IAA fell into error in making its adverse complementary protection finding. The IAA's

[2021] FCCA 428 (Unsuccessful)			conclusion on complementary protection was squarely based on earlier factual findings and the rejection of the applicant's claims of a fear of harm. The Court also pointed to [75] of the IAA's reasons, where the Authority similarly found there to be no real risk of significant harm, including on account of restrictions on pet ownership. In the circumstances of this case, the IAA was entitled to rely upon its earlier reasoning in relation to the refugee claims in order to deal with the issue of complementary protection. In that regard, this case was distinguishable from the Court's earlier decision in *SZSFK v Minister for Immigration & Anor* [2013] FCCA 7 at [91] where a claim for complementary protection had been overlooked.
DXP19 v Minister for Immigration & Anor [2021] FCCA 595 (Successful)	25 March 2021	135–136	The Court upheld an appeal against a decision of the AAT affirming an earlier decision not to grant the Iraqi applicant a protection visa. The appeal was upheld on the basis that the AAT's decision was tainted by jurisdictional error because the Tribunal failed in the requisite sense to have regard to the evidence of two witnesses, being evidence which was corroborative of the applicant's claim to be homosexual ([2]). Further, the AAT's reasoning, which was otherwise comprehensive in its attention to detail was affected by illogicality in its treatment of certain evidence on this topic ([2]). Insofar as Australia's international non-refoulement obligations were directly concerned, however, the Court noted that, during the applicant's evidence at the earlier hearing before the AAT, the AAT raised with the applicant, and he conceded, that he had not raised his

			claim to be gay either in answer to the cancellation of his Offshore Humanitarian visa or in his appeal of the delegate decision on cancellation as made to the Tribunal in 2017. The Court noted that the AAT correctly recognised that one consideration upon cancellation under s 501 of the Migration Act was that Australia's non-refoulement obligations may be engaged if a person was forcibly returned to a place where they would be at risk of harm. It was in those circumstances that the Tribunal found that "the applicant's decision not to raise his sexual identity as a claim at that hearing seems inconsistent with his claim that he feared harm in Iraq because he is gay." The Court emphasised the importance of distinguishing those authorities which caution against the danger of applying a label of "inconsistency" in relation to evidence that has been given, from those cases where it has not. The inconsistency to which the AAT below drew attention here had nothing to do with the applicant having given evidence on two or more separate occasions, the content of which was contradictory or inconsistent. The AAT's more fundamental concern was the failure of the applicant to have raised the fact of his sexuality as a ground on which to persuade the delegate of the Minister, and in turn, the AAT, that his Offshore Humanitarian visa should not be cancelled. In the Court's view, a decision-maker could very reasonably have come to the conclusion that it was inconsistent with the applicant's desire to avoid being forcibly returned to Iraq for him not to have raised his asserted sexuality at that time and only to have done so now.

DEA18 v Minster for Immigration, Citizenship, Migrant Services & Multicultural Affairs [2021] FCCA 553 (Unsuccessful)	23 March 2021	110	The Court dismissed an appeal against a decision refusing to grant the Afghani applicant a Safe Haven Enterprise (subclass 790) visa. The Court concluded that no jurisdictional error had been established ([117]). Relevantly, however, the Court observed that the fact that the IAA below addressed the applicant's complementary protection claim under the broader heading of the "Refugee Assessment", or that it used the terms "real chance" and "serious harm" in doing so, did not suggest that the IAA was not able to import the findings at [126]–[127] of its reasons with respect to the refugee criterion into its complementary protection assessment. The standard is the same: *Minister for Immigration & Citizenship v SZQRB* [2013] FCAFC 33 at [246].
CLZ19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 482 (Unsuccessful)	15 March 2021	41	The Court dismissed an appeal against a decision refusing to grant the Bangladeshi applicant a protection visa. The Court concluded that no jurisdictional error had been established ([45]). Relevantly, however, the Court noted that the Tribunal's rejection of the appellant's complementary protection claims was open to it. The "real risk" test in s 36(2)(aa) is the same as the "real chance" test provided for under the refugee criterion (s 36(2)(a)). The Tribunal was entitled to adopt its factual findings in relation to the refugee criterion for its assessment of the complementary protection criterion, given the essential claims about the applicant's fear of harm from the Awami League Party were identical.
DIE20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs	12 March 2021	21	The Court dismissed an appeal against a decision refusing to grant the South Korean applicant a protection visa. The Court concluded that no jurisdictional error had been established ([36]). Relevantly, however, the Court

[2021] FCCA 475 (Unsuccessful)			noted that the AAT acknowledged that, although the applicant might be liable for punishment if it was held that he had intentionally evaded conscription, the AAT was of the view that any punishment that the applicant might receive as a consequence would be due entirely to the general application of legitimate lawful sanctions which prevailed in South Korea, and which applied to all of its citizens. The Court observed that it was open to the AAT to find, as it did at [88] of its reasons, that any requirement for the completion of 36 months duty at a correctional facility as an alternative to the performance of military service was also of general application. At [89] of its reasons, the AAT relied upon US State Department country information which recorded that there were no significant reports regarding prison and detention centre conditions which raised any human rights concerns. It was noted that laws prohibited arbitrary arrest and detention. The Court noted that it was open to the AAT to find, as it did at [89] of its reasons, that there was no real chance that the applicant would face serious harm associated with any period of detention due to his refusal to undertake military service. It was also open to the AAT to find, as it did, that the mere fact of having a criminal record relating to the commission of an offence which gave rise to the imposition of a legitimate state sanction would not amount to serious harm or significant harm under either s 5J(5), 5J(1) or s 36(2A) of the Migration Act.
DZU19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs	11 March 2021	43, 49	The Court dismissed an appeal against a decision refusing to grant the Bangladeshi applicant a Safe Haven Enterprise visa. The Court concluded that no jurisdictional error had been established ([54]).

[2021] FCCA 452 (Unsuccessful)			Relevantly, however, the Court noted that it was legitimate, in the context of considering the complementary protection criterion, for the IAA to rely upon its previous factual findings that the applicant did not face a real chance of serious harm under the refugee criterion. The Court reiterated that a 'real risk' involves the same standard as a 'real chance'. The IAA was entitled to give such weight as was appropriate, subject to the principle of legal unreasonableness, to the evidence that was before it. There was nothing remarkable in the conclusion, at paragraph 36 of its decision, that there were not substantial grounds for believing as a necessary and foreseeable consequence of being removed from Australia that there was a real risk the applicant would suffer significant harm. The Court also observed that there is no requirement in the Migration Act that the IAA is required, as was asserted by the applicant, to as far as reasonably practical, ensure the applicant understands why information and questions were relevant to the review. Section 473DA of the Act makes it clear that the provisions of Division 3, together with s 473GA and s 473GB of the Act, are an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the IAA. There was no material before the Court to indicate that any of the relevant provisions of the Act were in any way breached by the IAA in the conduct of the review.
FKZ17 v Minister for Immigration, Citizenship, Migrant Services and	10 March 2021	75–85	The Court quashed a decision of the IAA affirming a decision of a delegate of the Minister refusing to grant the Afghani applicant a protection visa. The Court also

Multicultural Affairs [2021] FCCA 420 (Successful)			issued a writ of mandamus requiring the IAA to redetermine the review according to law. Relevantly, the Court upheld the applicant's sixth ground of appeal, which asserted jurisdictional error on the basis that the IAA fell into error by failing to follow the requirements of s 473DD of the Migration Act in accordance with the decision of the High Court in *AUS17 v Minister for Immigration and Border Protection* [2020] HCA 37. The present Court noted that that decision requires the IAA to look at the new information through the lens of s 473DD(b)(i) and (ii) of the Act prior to its consideration as to whether or not there are exceptional circumstances under s 473DD(a) of the Act.
DZB19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 442 (Unsuccessful)	10 March 2021	47–52	The Court dismissed an appeal against a decision refusing to grant the Sri Lankan applicant a protection visa. The Court concluded that no jurisdictional error had been established ([53]). However, as a matter of fairness, given that the applicant was unrepresented, the Court considered whether or not the manner in which the IAA below dealt with the new information sought to be provided by the applicant, contained error as identified by the High Court in *AUS17 v Minister for Immigration and Border Protection* [2020] HCA 37. The Court noted that this decision requires the IAA when considering new information pursuant to s 473DD of the Migration Act to consider that information first by reference to the criteria specified in both s 473DD(b)(i) and s 473DD(b)(ii) of the Act prior to considering whether not there are exceptional circumstances under s 473DD(a) of the Act. The consideration need not be formulaic in the wording used in the decision, if the language used by the IAA is

			sufficiently clear to indicate it has adopted the relevant process. Further, if it is clear that the relevant information does not and cannot fit within the relevant criteria of either s 473DD(b)(i) or (ii) of the Act, it may not be necessary to specifically refer to the subsection. In the present case, the Court was satisfied that, notwithstanding that the IAA initially stated there were no exceptional circumstances to warrant considering the information, the IAA then went through a process of considering impliedly the criteria under s 473DD(b)(i) and (ii) of the Act before making a final conclusion. No error arose. The Court took into account that the IAA's reasons should not be read with too keen an eye for error.
DTI19 v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs [2021] FCCA 387 (Unsuccessful)	5 March 2021	20–33	The Court dismissed an appeal against a decision refusing to grant the Burmese applicant a Safe Haven Enterprise visa. The Court concluded that no jurisdictional error had been established ([34]). However, the Court did provide a reasonably detailed analysis of s 473DD of the Migration Act (which, in the context of the IAA's making of decisions in relation to fast-track reviewable decisions, deals with the consideration of new information in exceptional circumstances). The Court noted that it is well understood that the default position or 'primary rule' is that the IAA must consider the review material provided under s 473CB of the Migration Act without accepting or requesting new information (*Plaintiff M174/2016 v Minister of Immigration and Boarder Protection* [2018] HCA 16 ("*Plaintiff M174*")). However, s 473DD of the Act

			governs the circumstances in which the IAA may consider 'new information'. Whether information is 'new information' is a matter to be determined by having regard to the legislative provisions. The Court observed that the phrase 'exceptional circumstances' in s 473DD is not defined in the Act. However, the term is not one of art and is to be given its ordinary meaning (*Plaintiff M174* at [30]; see also *BVZ16 v Minister of Immigration and Boarder Protection* [2017] FCA 958 ("*BVZ16*")). Circumstances need not be unique, unprecedented or rare to be exceptional (*AYK17 v Minister for Immigration and Border Protection* [2019] FCA 1053 ("*AYK17*") at [61]), and they may be exceptional if they can reasonably be seen to produce a situation that is out of the ordinary course, unusual or uncommon (*AYK17* at [61]; see also *CMY17 v Minister for Immigration and Border Protection* [2018] FCA 1333 at [26]). The applicant must meet s 473DD(a) and one of the sub-criteria in s 473DD(b) before the IAA can consider any 'new information'. If the applicant does not meet either sub-section (a) or (b), the IAA cannot consider the information (*Plaintiff M174)*. The Court noted that whilst the requirements of subparagraphs (a) and (b) of s 473DD are cumulative, they nevertheless overlap, with the effect that the IAA's consideration of either or both of the limbs in subparagraph (b) may inform the IAA's satisfaction under subparagraph (a) as to whether there are 'exceptional circumstances' to justify considering the

			new information (*Minster for Immigration and Border Protection v BBS16* [2017] FCAFC 176 at [102]). In *AUS17*, the High Court was concerned with the construction of s 473DD and what the IAA must do when assessing new information. The majority of the High Court explained: 10. Section 473DD would be at war with itself, and the purpose of s 473DD(b)(ii) would be thwarted, if the circumstance that there was new information from a referred applicant meeting the description in either s 473DD(b)(i) or s 473DD(b)(ii) were able to be ignored by the Authority in assessing the existence of exceptional circumstances justifying consideration of that new information in order to meet the criterion specified in s 473DD(a). 11. Logic and policy therefore demand that the Authority assess such new information as it might obtain from the referred applicant first against the criteria specified in both s 473DD(b)(i) and s 473DD(b)(ii) and only then against the criterion specified in s 473DD(a). If neither of the criteria specified in s 473DD(b)(i) and s 473DD(b)(ii) is met, the Authority is prohibited from taking the new information into account in making its decision on the review. Further assessment of the new information against the criterion specified in s 473DD(a) is redundant. If either the criterion specified in s 473DD(b)(i) or the criterion

			specified in s 473DD(b)(ii) is met, that is a circumstance which must be factored into the subsequent assessment of whether the new information meets the criterion specified in s 473DD(a). If both the criterion specified in s 473DD(b)(i) and the criterion specified in s 473DD(b)(ii) are met, that too is a circumstance which must be factored into the subsequent assessment of whether the new information meets the criterion specified in s 473DD(a) and which must heighten the prospect of that criterion being met. 12. The result, as has been recognised by the Federal Court in numerous other cases, is that the Authority does not perform the procedural duty imposed on it by s 473DD in its conduct of a review if it determines in the purported application of the criterion in s 473DD(a) that exceptional circumstances justifying consideration of new information obtained from the referred applicant do not exist without first assessing that information against the criteria specified in both s 473DD(b)(i) and s 473DD(b)(ii) and then taking the outcome of that assessment into account in its assessment against the criterion specified in s 473DD(a). The nature of the non-performance of the procedural duty in such a case is not inaccurately characterised as a failure to take account of a mandatory relevant consideration in the purported application of the criterion in s 473DD(a).

			The Court noted that satisfaction that new information is 'credible personal information' which was previously not known for the purposes of s 473DD(b)(ii) is capable of contributing to or resulting in satisfaction that there are exceptional circumstances justifying consideration of the information (*BVZ16* at [9]; *DKF17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1963 at [12] per Thawley J; *CVV16 v Minister for Home Affairs* [2019] FCA 1890 ("*CVV16*") at [41]). It is not necessary for the IAA to expressly state in its reasons that a particular criterion is not satisfied. Such a finding may be inferred from a proper reading of the reasons or it may be implicit that the IAA considered and found that the criterion is not met.
CSU16 v Minister for Immigration & Anor [2021] FCCA 73 (Unsuccessful)	19 February 2021	57–59	The Court dismissed an appeal against a decision refusing to grant the Sri Lankan applicant a protection visa. The Court concluded that no jurisdictional error had been established ([149]). Relevantly, the applicant had submitted that the interpreter failed to interpret the AAT Member's comments about the availability of complementary protection. The applicant relied upon the translation of the Member's introductory comments about complementary protection. However, whilst the interpretation of the Member's opening words was not a verbatim interpretation, the applicant conceded that the interpreter then did accurately interpret the Member's comments about the specific matters which might have given rise to complementary protection. When viewed in context, the Court found that the interpreter conveyed the specific grounds upon which complementary protection

			might be granted. They also translated the Member's comments about the criteria required to make out a claim for refugee status. Moreover, the applicant did not submit that there was a claim they could have made had they understood the concept of 'complementary protection' in a different way. It was difficult to see, therefore, how any translation error in this regard — even if the Court were to have accepted there was a substantive error, which it did not — could be said to have denied the applicant a fair and real hearing for the purpose of section 425 of the Migration Act.
CRK18 v Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs [2021] FCCA 267 (Successful)	16 February 2021	24–40	The Court quashed a decision of the IAA affirming a decision of a delegate of the Minister refusing to grant the Sri Lankan applicant a Safe Haven Enterprise (Class XE) (Subclass 790) visa. The Court also issued a writ of mandamus requiring the IAA to redetermine the review according to law. The Court accepted the applicant's submission as to the IAA's failure to consider exercising its discretion under s 473DC of the Migration Act. The IAA specifically considered the discretion in the context of receiving or not receiving the new information which it identified. The Court summarised this aspect of the IAA's analysis at [11] of its judgment (footnotes omitted): > The IAA had regard to those parts of the applicant's written submissions which were responsive to the delegate's decision. It did not consider certain new claims and information which the applicant sought to provide about fishing permits and the plan to build a resort on

			his island and relocate the residents. The IAA was not satisfied that exceptional circumstances existed which would justify considering that material. Similarly, it did not have regard to certain pre-existing country information which was not before the delegate, on the basis that there were no exceptional circumstances justifying it in doing so. The IAA was prepared to consider new information from the UN Special Rapporteur and the International Truth and Justice Project, finding that exceptional circumstances existed to do so. The Court noted that the IAA gave reasons for the decisions that it made in that regard. The IAA also specifically considered the exercise of the discretion in the context of the applicant's request for a further interview to explain why he disagreed with the delegate's decision. It gave as its reason the ample opportunities it regarded him as having had to put his case. The Court noted that that request made by the applicant drew specific attention to the fact that his claims with respect to delivering fuel had been accepted by the delegate. The Court was not satisfied that either of those decisions with respect to the exercise of the discretion could be regarded as having encompassed a consideration of whether or not to exercise the discretion to interview the applicant in the context of the significant reservations it had about the fuel delivery claim and its ultimate decision to decide that question differently to the delegate. In the Court's view, the IAA did not have good reason not to invite the applicant for an interview to gauge his demeanour for

			itself before it decided to reject an account given by the applicant in an audio recorded interview which the delegate accepted. In the Court's view, it could readily be inferred that the IAA did not consider inviting the applicant for an interview for that purpose. Whilst the IAA was not required to give reasons for procedural decisions, it clearly chose to do so in this matter. It made no reference to having considered the discretion in that context and in the circumstances it could be inferred that had it done so, reference would have been made to it. The IAA was operating with an informational gap of the kind identified by the High Court in *ABT17 v Minister for Immigration and Border Protection* [2019] FCAFC 43. An assessment of the demeanour of the applicant at an interview would have afforded the IAA the opportunity to make its own assessment and would have filled the gap. The demeanour of the applicant could have been particularly important when considering whether or not to reject his explanation of being frightened as the reason for not having made the fuel delivery claim at an earlier time. That was particularly so given the IAA rejected the explanation of his subjective fears by reasoning objectively about how persons in his situation would ordinarily behave. The failure to consider exercising the discretion in s 473DC was, in the circumstances of this matter, legally unreasonable. The Court was satisfied that the applicant had demonstrated jurisdictional error by reason of a constructive failure on the part of the IAA to review the decision as required by Part 7AA.
FLS18 v Immigration Assessment Authority &	16 February 2021	98–100, 101–110 (amended ground 2),	The Court quashed a decision of the IAA affirming a decision of a delegate of the Minister refusing to grant the Iranian applicant a protection visa. The Court also

Anor [2021] FCCA 252 (Successful)		111–121 (amended ground 3)	issued a writ of mandamus requiring the IAA to redetermine the review according to law. The Court was satisfied that the applicant had established jurisdictional error with respect to amended grounds 2 and 3 of the appeal. The Court noted that, stated succinctly, it was required to answer the following two questions: (a) Did the IAA comply with its statutory and procedural obligations under the Migration Act (i) in its treatment of two relevant interviews and (ii) as recorded in its reasons? (b) Was there compliance with the principle in *Blatch v Archer* by the Minister, and if not, what follows from it? In the Court's view, the IAA's decision was flawed. The IAA failed to perform its statutory task by virtue of not duly following the proper "decision-making pathways reasonably open to it", as confirmed by the High Court in *ABT17* at [21]. Also, in the Court's view, the *Blatch v Archer* point raised by the applicant (referring to the principle that 'all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted': *Blatch v Archer* [1774] EngR 2; (1774) 1 Cowp 63 at 65) was made out as a consequence of the Minister not providing the information in his possession, most notably by not calling the delegate as a witness. The evidence of Mr Wickham, a Senior Legal Officer within the Minister's Department, was insufficient compliance

			with the Minister's duty in this regard. His evidence was important, but the lack of any other evidence from the Minister, in the light of the High Court's comments in *ABT17*, was crucial, and ultimately fatal to the respondent's case. As the applicant argued in submissions, it was patently a forensic decision by the Minister not to call the delegate. In the Court's view, the Minister was required to bear the consequences for such a decision. Not calling the delegate ultimately left a significant number of unanswered questions, which the delegate could reasonably have been expected to answer.
DCT19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 155 (Unsuccessful)	16 February 2021	21–22	The Court dismissed an appeal against a decision refusing to grant the Iraqi applicant a protection visa. The Court concluded that no jurisdictional error had been established ([33]). However, the Court did express some concerns about the notification given by the IAA to the applicant through his representative on 1 July 2019. In particular, the notification stated that it was important that the applicant "act quickly in your dealings with us, as a decision may be made at any time". No time period was specified within which the applicant could provide anything further. This was in contrast to first notifications following referral to the IAA, which invite a submission within 21 days. The Court was aware that some IAA members use that time period when matters are remitted by the Court for reconsideration. The speed with which the IAA can deal with a matter upon remittal will depend, among other things, upon the complexity of the task imposed on the IAA by the Court on remittal. This case was straightforward in that the error identified was simply the failure to consider a single piece of information, which was rectified by the IAA. The Court

			noted that, in another case, a rushed reconsideration, coupled with the opaque and unhelpful notification as deployed in this case, may give rise to a jurisdictional error. In the Court's view, it would be desirable if the IAA adopted a standard practice of notification following remittal and, if the IAA were to depart from the usual 21 day time period for submissions, that the different time period be specified.
CZR20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 199 (Successful)	11 February 2021	15–31	The Court quashed a decision of the AAT affirming a decision of a delegate of the Minister refusing to revoke the mandatory cancellation of the Vietnamese applicant's resident return visa. The Court also issued a writ of mandamus requiring the AAT to redetermine the review according to law. The Court was satisfied that the applicant had established jurisdictional error with respect to ground 1 of the appeal. The Court noted that the applicant needed legal representation to enable him to have his claims for protection properly presented. The AAT ought to have appreciated that that was the case. The Court accepted the submission made on behalf of the applicant that the applicant's past criminal convictions and past drug use constituted, in part, reasons why the applicant ought not to be returned to Vietnam. It was asserted that if he was returned to Vietnam he would be jailed indefinitely due to such matters. The Court found that the AAT's failure to grant an adjournment to the applicant, in all of the circumstances, was arbitrary, capricious, without common sense and plainly unjust. This was the first

			occasion on which the matter had been listed for hearing before the AAT. It was not a case of an application for adjournment being refused on the basis of "enough is enough". The Court adopted what was said in *Minister for Immigration and Border Protection v Pandey* [2014] FCA 640 per Wigney J at [41] and [42] on the question of adjournments. The Court further adopted what was said in *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30, per Kiefel CJ at [10] and [11]. The Court in the present case found that the refusal of the adjournment application was both legally unreasonable and one lacking an evident and intelligible justification as such respective concepts were considered by Hayne, Kiefel and Bell JJ in *Minister for Immigration and Citizenship v Li* [2014] FCAFC 1; (2013) 249 CLR 332 at [66] and [76]. In the Court's view, the applicant had established that the AAT erred in failing to grant the adjournment application made on his behalf. The error was material, in that the granting of the application for the adjournment could have realistically resulted in a different decision being made after the AAT had received considered submissions.
ALO19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 228 (Unsuccessful)	10 February 2021	26–31	The Court dismissed an appeal against a decision refusing to grant the Pakistani applicant a protection visa. The Court concluded that no jurisdictional error had been established ([46]). Relevantly, ground 2 dealt with the applicant's claim to complementary protection. At [57] of its reasons for decision, the AAT said (emphasis added by the Court):

			I refer to my findings above in considering the real chance test. I am not satisfied that the applicant has established that there is a real risk that he will arbitrarily deprived of his life as a necessary and foreseeable consequence of him being returned to Pakistan. I have found that the applicant has established that he has experienced and would continue to face some entrenched discrimination, harassment and societal vilification if he was to return to Pakistan. However, as noted above, in the particular circumstances of this applicant's long term and accepted experience in Golarchi, I consider that the level of discrimination, harassment and vilification he has faced and would be likely to face if he returns to his home is moderate, in the form of some social discrimination, harassment and vilification and sporadic incidents of hate speech and abusive writing on external walls of the home. **I have considered the applicant's evidence and my findings, and I do not consider that the level of discrimination, harassment and vilification which he will encounter in the future is properly considered as causing and intending to cause the applicant 'severe' pain or suffering, whether physical or mental, that will be intentionally inflicted on the applicant, or that they are at a level such that they cause extreme humiliation.** I acknowledge that the applicant's experiences of discrimination, vilification and harassment have caused and will cause the applicant some mental

			and physical distress and humiliation. I consider that the moderate discrimination, harassment and vilification faces by the applicant if he is returned to Pakistan would be at a level which he has faced throughout his life, and despite which he has prospered. **Bearing in mind his own evidence, and taking into account his physical location in Pakistan, his established standing within his community and his lifetime experience, I am not satisfied that the level of pain or suffering the applicant will face (as he has in the past) is at a level which could be regarded as cruel or inhuman in nature, or as cruel or inhuman or degrading treatment or punishment causing or intending to cause severe pain or suffering or extreme humiliation, even when considered cumulatively**. The applicant submitted that the AAT misunderstood the definition of 'cruel or inhuman treatment or punishment'. He submitted that, in the passage extracted above, the AAT clearly limited its consideration to instances of 'severe pain and suffering'. He submitted that the definition of 'cruel or inhuman treatment or punishment' at s 5(1) of the Migration Act includes pain or suffering, whether physical or mental, intentionally inflicted on a person. According to the applicant, pain or suffering is included in the definition, so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature. The applicant argued that the AAT limited its

			consideration of the material before it to whether the applicant would experience 'severe pain or suffering' (within subparagraph (a) of the relevant definition) rather than 'pain or suffering' which is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature (within subparagraph (b) of the relevant definition). He argued that the AAT failed to consider whether he may face pain or suffering in circumstances where the act or omission could reasonably be regarded as cruel or inhuman in nature and thereby failed to consider or apply the relevant definition of 'cruel or inhuman treatment'. In the Court's view, however, this ground could not be accepted. The AAT set out the correct statutory definitions at [55] of its reasons for decision. It was plainly aware of the law that was to be applied. The first aspect of [57] of its reasons for decision, which the Court highlighted in the extract above, dealt with whether the first limb of the definition of 'cruel or inhuman treatment or punishment' was met. The AAT concluded that it was not. The second passage the Court emphasised above, in the Court's view, was the AAT's attempt to deal with the second limb of the definition. It might also be considered to attempt to deal with the question of whether the relevant conduct met the definition of 'degrading treatment or punishment'. It was expressed in infelicitous language but, in the Court's view, read fairly and with an eye not too finely attuned to error,

			the AAT did understand the contents of the two limbs of the test. The Court accepted the Minister's argument that the applicant's approach to this ground of review read the first sentence in the second emphasised passage above too narrowly. The reference in that sentence to the level of pain and suffering that the applicant would face was, in the Court's view, a reference to the discrimination, harassment and vilification faced by the applicant if he was returned to Pakistan and the finding made by the AAT that those acts would be at a level which he had faced throughout his life and despite which he had prospered. Thus, the reference in the first sentence of the second emphasised passage above to the 'level of pain or suffering' was, in the Court's view, a reference to the actions leading to the feelings of pain or suffering engendered in the applicant by reason of those actions. The Court accepted the Minister's submissions that, although not perfectly expressed, the AAT's reasons demonstrated that it understood the relevant test and correctly applied it.
DIT19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2) [2021] FCCA 171 (Unsuccessful)	3 February 2021	24	The Court dismissed an appeal against a decision refusing to grant the Bangladeshi applicant a protection visa. The Court concluded that no jurisdictional error had been established ([27]). Relevantly, there was no error, let alone jurisdictional error, in the manner in which the IAA below had approached the assessment of the complementary protection criterion in s 36(2)(aa) of the

			Migration Act. It correctly summarised the complementary criterion at [57]–[58] of its reasons. The IAA observed at [60] that the "real chance" test (applicable in relation to s 36(2)(a)) and the "real risk" test involve the same standard. The Court noted that this is correct. The IAA also relied on its earlier factual findings, namely that there was no "real chance" of harm for any reason claimed, and found that there was also no real risk of harm being suffered. The Court noted that that logically follows, given the equivalence between the two standards, and is an orthodox and permissible approach. There was no basis in the IAA's reasons to suggest any misunderstanding of the complementary protection criterion, or that it "failed to apply the correct test". Even if the IAA had "failed to apply the correct test", any error could not be material to its decision, given the fact that the IAA rejected all the applicant's claims at a factual level. There was nothing of the applicant's claims left upon which he could satisfy the criteria in s 36(2)(aa).
EOJ17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 2 (Successful)	3 February 2021	77–87	The Court quashed a decision of the IAA affirming a decision of a delegate of the Minister refusing to grant the Sri Lankan applicant a protection visa. The Court also issued a writ of mandamus requiring the IAA to redetermine the review according to law. The Court was satisfied that the applicant had established jurisdictional error with respect to ground 1 of the appeal. In analysing ground 1, the Court noted at the outset that the applicant's credit was satisfactorily established. His fears were genuine, although not well-founded. The question to be answered was whether the IAA erred in

			not considering the reasons why the applicant's sister was granted protection and, if so, whether such error was material. The applicant claimed that he was at risk of serious harm as a failed asylum seeker. His status was accepted by the IAA at [54]–[70] of its reasons. The IAA accepted at [60] that there was a possibility that a person with "actual or perceived links to the LTTE" would be at risk when processed at the airport. The Authority relied on the applicable Guidelines. It noted at [38] that the Guidelines indicated that persons with real or perceived links with the LTTE may give rise to a need for international refugee protection. The nature of the links could vary, but included (a) former LTTE combatants or cadres, and (b) persons with family links or who were dependent on or otherwise closely related to persons with the above profiles. The IAA considered at [38] whether the applicant would have these "real, actual or perceived links". Relevantly to the applicant, this included his sister. The IAA accepted in relation to the applicant's sister: (a) she had been abducted by the LTTE, given a uniform, photographed and given an alias, that she was able to escape; (b) she had been "detained, assaulted and otherwise harmed on numerous occasions by the Sri Lankan authorities" on suspicion of involvement with the LTTE. She had been held in a camp for a month by the Sri Lankan authorities and tortured;

			(c) the applicant had resided with his sister from 2002–2004 and 2007–2011; (d) the applicant had departed Sri Lanka illegally with his sister in 2012. According to the evidence, the applicant's sister organised both of their travel; (e) the applicant and his sister had each applied for asylum in Australia. There was initially a joint application; (f) the IAA accepted at [54] and [60] that the Sri Lankan authorities would assume that the applicant have travelled to Australia to claim asylum. The same assumption must apply to the applicant's sister. (g) the "data breach" related to the applicant. The Court noted that an issue not raised by the parties on appeal was whether the Secretary of the Minister's Department breached s 473CB of the Migration Act by not providing to the IAA the departmental file concerning the claim to protection by the applicant's sister, or at least the decision of the delegate on that application. The Court observed that, generally, a decision on another person's claim for protection is not relevant to a claim for protection by another person, as individual circumstances differ. However, where a joint application is made, the circumstances of all the applicants must be considered, and where claims are common, though made separately as may be the case with a family group, the circumstances of one applicant may well impact upon the consideration of the circumstances of related applicants. If the issue had

			been raised on appeal, the Court noted that it would have taken the same view that it took in *DIN19 v Minister for Immigration & Anor* at [103]–[104]. In the present case, the applicant and his sister had initially made a joint application. Although they subsequently pursued separate applications, they were interviewed on the same day by the delegate, who made separate decisions. The applicant's sister was successful while the applicant was not. The reasons why the delegate distinguished between the applicant and his sister were not known, because her decision concerning the sister was not provided to the IAA. Neither did the IAA ask for it. That disinterest was, in the Court's view, remarkable. The travel to Australia by the applicant and his sister and their pursuit of protection was a joint enterprise. They had lived together for many years in Sri Lanka and their claims overlapped in at least two critical respects: the first was the threat posed by the applicant's former brother-in-law; the second was the risk of being imputed with a political opinion supportive of the LTTE and the consequences of that. The applicant invited the Court to speculate on what might happen to him on return to Sri Lanka without his sister. He asserted that the Sri Lankan authorities would assume that his sister has been granted protection and that the reason was her past association with the LTTE. This in turn was said to raise the profile of the applicant to one facing a real chance or risk of serious harm. As

			the Minister pointed out, and as the Court accepted, such speculation was not the function of the Court. An assessment of future risk was, however, central to the review function of the IAA. On what basis could the Secretary of the Minister's Department, or the IAA, have concluded that the reasons why the applicant's sister had been granted protection were not relevant to the applicant's review? Those reasons bore directly on his claims to fear harm at the hands of his former brother-in-law and because of his sister's LTTE connection. In the Court's view, the delegate's decision concerning the applicant's sister was relevant to the applicant's review, and the IAA fell into error by not considering it. It followed that Ground 1 had been established because the IAA failed to consider an issue that squarely arose on the available material, let alone the material that the IAA was not given and elected not to obtain.
DIN19 v Minister for Immigration & Anor [2021] FCCA 1 (Successful)	2 February 2021	95–104	The Court quashed a decision of the IAA affirming a decision of a delegate of the Minister refusing to grant the Sri Lankan applicant a protection visa. The Court also issued a writ of mandamus requiring the IAA to redetermine the review according to law. The Court was satisfied that the applicant had established jurisdictional error. *Grounds 1 and 2* The applicant contended in Ground 1 that the IAA fell into jurisdictional error in failing to obtain and rely on the most recent information. In particular, the applicant

			submitted that information about a change in government in Sri Lanka in 2018 and the cessation of the suspension of the PTA were matters that were easily ascertainable from a web search or other basic enquiry. The Minister contended that this argument could not be accepted. In the second ground, the applicant contended that the IAA failed to consider his submission that the PTA was "yet operative". It was unclear from this submission precisely what the applicant meant by saying that the PTA was "yet operative", however the applicant also submitted that "this gives wide powers to the Sri Lankan armed forces to arrest and detain young Sri Lankan Tamils like me". The first ground took issue with the IAA's decision at [26] of its reasons where it stated: > In addition to the above, I am not satisfied that the applicant's activity assisting the LTTE to build bunkers places him within the category of either high or low profile former LTTE member such that he would face any harm or monitoring on return. I have found I am not satisfied that his brother was a high ranking member of the LTTE and am not satisfied R or S are of ongoing interest to the authorities, such that the applicant faces harm or monitoring on return for that reason. Nor having regard to the independent information and the profile of he and his family, including his brother, K, am I satisfied that he will be of any

			future interest for any suspected LTTE membership or support, or that he otherwise has, or will have on return to Sri Lanka in the foreseeable future, a profile of those currently of interest to the Sri Lankan authorities as set out in the independent information above. The evidence above indicates that the PTA has been suspended. Noting this, and having regard to his profile, I am not satisfied that he faces a real chance of being arbitrarily arrested and detained under the provisions of that Act for any reason on return to Sri Lanka in the reasonably foreseeable future. Further, on the independent information, noting he has family who continue to reside in Sri Lanka and his employment history in Sri Lanka, I am also not satisfied that he will be unable to find accommodation and employment on return to Sri Lanka, or that he otherwise faces a real chance of discrimination or harm for any reason associated with his Tamil ethnicity, his residence in the north, or his own past activities in Sri Lanka or that of his brothers. The Court noted that the statement by the IAA that the PTA had been suspended was incompatible with the finding by Mortimer J in *DIJ16* at [61]. The Federal Court was, of course, dealing with the decision of the previous IAA, not this one. The Court observed, however, that where the IAA on remittal falls into the same error as that identified on judicial review of the prior decision, it is impossible

			to avoid the conclusion that the error, though one of fact, goes to jurisdiction. The Court noted that the 2019 DFAT Report made clear that the PTA had never been formally suspended, that it had been used sporadically during the period of its "effective suspension" and that effective suspension had been lifted. That report was not available to the IAA, as its decision was made prior to its publication, but the Court accepted the applicant's contention that the suspension was lifted before the IAA's decision. The IAA only needed to consider the observations of the Federal Court to understand that it needed to consider more closely the issue of the application of the PTA. However, the IAA elected not to consider any new information from the applicant about the updated DFAT reports that it did obtain. The applicant asserted, correctly, that the PTA was "yet operative" but the IAA failed to use its power under s 473DC of the Migration Act to obtain further information from him. That failure was, in the Court's view, unreasonable, having regard to the clear and specific guidance provided by Mortimer J in *DIJ16.* The Court found that the first ground of appeal had been established. For the same reasons, the Court found that the second ground had also been established. *Ground 3*

			In light of the foregoing, the Court did not consider it strictly necessary to deal with the remaining grounds of appeal. However, the Court noted that it was persuaded that Ground 3 had also been established. In the third ground, the applicant asserted error in the IAA's failure to provide or obtain documents relating to the applicant's brother's protection visa application. The applicant put the argument two ways: either as a breach by the Secretary under s 473CB to provide the IAA with material in his possession or control that was considered by the Secretary to be relevant to the review; alternatively, as a failure by the IAA under s 473CB itself to get information about the brother's protection claims. The Court noted that the IAA accepted at [16] of its reasons that one of the applicant's brothers, K, had been granted protection in Australia. Neither the Departmental file nor the reasons for granting protection were before the IAA. Nevertheless, the IAA found at [26] that the profile of the applicant in Sri Lanka and that of his family, including K, was not such as to put the applicant at risk. It followed that the reasons why K was granted protection were relevant to the review. For the purposes of s 473CB of the Migration Act the Secretary, if he had turned his mind to the issue, would have been bound to consider that information relating to the grant of protection to K was so relevant. Accordingly, even if that information was not before the delegate, it should have been provided to the IAA. This breach was material because the

			information could have made a difference to the outcome. For its part, the IAA, having been made aware of the grant of protection to K, should have obtained for itself the information relating to that grant under s 473DC of the Migration Act. The Court accepted the applicant's submissions in that regard. The failure by the IAA to get the missing information was unreasonable. The Minister disputed that any error went to jurisdiction because the Court had no evidence about K's claims for protection. That, however, was to seek to make a virtue out of the vice identified. It was at least possible that K's profile led to the grant of protection, and the IAA needed to explore that possibility.
DSH17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 16 (Successful)	29 January 2021	58–65 (grounds 1 and 2), 70–72 (ground 3), 78 (ground 4)	The Court quashed a decision of the AAT affirming a decision of a delegate of the Minister to cancel the applicant's protection visa. The Court also issued a writ of mandamus requiring the AAT to redetermine the review according to law. The Court was satisfied that the applicant had established jurisdictional error. *Grounds 1 and 2* Grounds 1 and 2 concerned the AAT's reasoning at [31]–[34] of its reasons where the Tribunal stated: > In consideration of the evidence as a whole, and despite the credibility concerns, the Tribunal accepts as plausible that the applicant and various members of his family had lived in Kuwait. However, in consideration of the evidence as a

			whole, the Tribunal does not accept that the applicant and/or his family did not acquire Iraqi nationalities. In consideration of the evidence as a whole including, but not limited to, the Iraqi passports and identity cards, the Tribunal finds that the applicant and members of his family are registered Bidoon and that they are Iraqi nationals, contrary to the applicant's protection claims that they are stateless Bidoon -with no nationality. Essentially the applicant was found to have provided incorrect answers to question 11 of form 866B, questions 20, 22, 23, 42, and 47, of form 866C. In relation to questions 23 and 42 and given the finding that the applicant is an Iraqi national, the Tribunal has concerns as to whether the responses to those questions amount to incorrect answers. Question 23 asks "Do you have a right to enter or reside in, whether temporarily or permanently, any country(s) other than your country(s) of nationality or your former country(s) of habitual residence?", the applicant ticked "No" which appears to be correct. Question 42 asks "I am seeking protection in Australia so that I do not have to go back to (give name of country or countries)["], the applicant responded "Kuwait and Iraq". Although his returns to Iraq undermine his claims for protection, the response itself is arguably correct.

			Given the findings about the applicant's nationality and that of his family and in consideration of the evidence as a whole, the Tribunal finds that the applicant has provided incorrect information when seeking Australia's protection and that he provided incorrect answers to question 11 of form 866B, questions 20, 22, 47, of form 866C. For these reasons, the Tribunal finds that there was non-compliance with s.101 (b) by the applicant in the way described in the s.107 notice. Grounds 1 and 2 asserted error by the AAT in finding that the applicant had given incorrect answers in the way described in the s 107 Notice and impermissibly taking certain information into account when exercising its discretion. The Court noted that the applicant here was in the unenviable position of having to base his case on the question of which of his untruths enlivened the power to cancel his visa and which of his untruths were material to the exercise of discretion to cancel. Nevertheless, the Court considered that the cancellation of a visa is a serious matter and the Migration Act sets out a formal procedure for dealing with it. The Court accepted the applicant's core contention that, unless the AAT found that particular answers to particular questions given by the applicant were incorrect, amounting to non-compliance for the

			purposes of s 101 of the Migration Act, as described in the s 107 Notice, the AAT's power to cancel the visa was not enlivened. Further, the Court observed that if the AAT found that a particular answer to a particular question was incorrect but was silent about an answer given to another question notified under s 107, then the AAT could not proceed as if the answer was incorrect for the purposes of considering its discretion to cancel. This was the nub of the problem in the present case. Here, the AAT identified the incorrect information at [31]–[34] of its reasons. The incorrect information there identified was limited to the issue of the applicant's Iraqi nationality. The AAT did not mention there the question of the applicant's return trips to Iraq and the genuineness of his claim to fear harm. The Tribunal referred to that at [55] (see below under ground 3) but in the context of the AAT's exercise of discretion. The Court noted that it is not enough that the AAT referred to the "consideration of the evidence as a whole" at [33]. The finding of non-compliance at [34] was specific and limited to the issue of nationality. It was that which enlivened the discretion to cancel and it was not open to the AAT to rely on answers to other questions which the AAT had not found were incorrect for the purposes of exercising its discretion adversely to the applicant. It followed, in the Court's view, that the AAT fell into jurisdictional error in the manner asserted by the applicant.

			Ground 3 This ground contended that, in finding the applicant had provided incorrect information about his nationality and his claims of fearing harm in Iraq, the AAT erred by not considering the documents and information he provided in support of his visa application. The Court noted that the AAT had stated (at [55]): > As outlined earlier, subsequent to the grant of the protection visa on 2 July 2012, the applicant returned to Iraq for the first time on 15 January 2013. On the evidence before it and for the reasons explained above, the Tribunal is satisfied that his returns to Iraq indicate that he did not fear harm as claimed. His returns also support the findings that the applicant has provided incorrect information about his nationality and his claims of harm. The Court agreed with the applicant's submissions that the AAT fell into error as alleged in Ground 3. This was related to the error identified in respect of Grounds 1 and 2. The AAT proceeded at [55] on the basis that the applicant had provided incorrect information about his nationality and his claims of harm when the AAT had only found that he had provided incorrect information about his nationality. That incorrect assumption by the AAT led it into error by failing to consider properly whether the applicant continued to face a well-founded fear of harm in Iraq for the reasons he claimed.

			Ground 4 The Court noted that the AAT had found that the applicant and his family had acquired Iraqi nationality. It did not find that the applicant knew that he and his family had acquired Iraqi nationality at the time he made his protection visa claims. The applicant had expressly raised in his Clarification Statement the proposition that he genuinely believed he was stateless. This was a matter bearing on the exercise of discretion by the AAT (noting that whether the applicant knew it or not, his answer to the question on nationality was incorrect) and it was not considered. It should have been. By failing to consider whether the applicant had a genuine belief in his claimed statelessness at the relevant time, the Tribunal fell into jurisdictional error.
FFM20 v Minister for Immigration [2021] FCCA 64 (Unsuccessful)	22 January 2021	59	The Court dismissed an appeal against a decision refusing to grant the apparently stateless applicant a protection visa. The Court concluded that no jurisdictional error had been established ([69]). Relevantly, however, the Court considered the concept of an applicant's 'receiving country' in the context of assessing protection claims. The delegate in this case found that Norway was the relevant receiving country, being the applicant's habitual place of residence prior to arriving in Australia. The Court noted that the suggestion that Australia had become the applicant's place of habitual residence for the purposes of a protection claim was novel but misconceived. It cannot be the case that a claim can be made that, due to the length of time within Australia as a non-citizen, Australia has now become that person's place of habitual residence for the purpose of a

			protection claim. The definition of 'receiving country' in s 5(1) of the Migration Act makes it clear that if a non-citizen has no country of nationality, the receiving country is the country of habitual residence regardless of whether it would be possible to return the non-citizen to that country. The Court found that there was no jurisdictional error in the decision of the delegate to find that Norway was the receiving country based on the material that was before the delegate. The Court agreed with the Minister that Australia could not become a receiving country for the purposes of an assessment under s 36(2)(aa) of the Act.
EXL19 v Minister for Immigration & Anor (No.2) [2021] FCCA 50 (Unsuccessful)	22 January 2021	27	The Court dismissed an appeal against a decision refusing to grant the Iranian applicant a Safe Haven Enterprise visa. The Court concluded that no jurisdictional error had been established ([60]). Relevantly, however, the Court affirmed the proposition that it is acceptable for the IAA to have regard to prior findings in considering whether an applicant meets the complementary protection criterion (citing *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33; (2013) 210 FCR 505 at [245]- [246]).
DQD16 & Anor v Minister for Immigration & Anor [2021] FCCA 57 (Unsuccessful)	20 January 2021	77–81	The Court dismissed an appeal against a decision refusing to grant the Indian applicants protection visas. The Court concluded that no jurisdictional error had been established ([89]). Relevantly, however, the Court clarified, by reference to the authorities, that self-inflicted harm is not harm of a kind that falls within the type of harm covered by s 36(2A) of the Migration Act. Here, the applicants were effectively asking the Court to ignore binding decisions in favour of obiter comments made by Snaden J in *GLD18* at [103].

			However, in the Court's view, his Honour there was not expressing a concluded view and the view that he did express appeared to be at odds with a body of authority. The Court noted that it seemed that if the Court were to adopt the approach put by the applicants in their submissions, it would find itself not following binding authority. As was stated by the majority in *GLD18* at [61]: "61. Whether or not an individual judge of the Federal Circuit Court considers any "doubt" attaches to a decision of this Court, a Federal Circuit Court judge is bound to follow a decision of this Court unless it can be lawfully distinguished. As a member of a court whose orders are subject to the exercise of appellate jurisdiction by this Court, a Federal Circuit Court judge is obliged and required to follow a decision of this Court, whether the decision is made in this Court's original or appellate jurisdiction." The Court concluded that this ground of review must fail.
AJN19 v Minister for Immigration & Anor [2020] FCCA 3432 (Unsuccessful)	16 December 2020	15–21	The Court dismissed an appeal against a decision refusing to grant the Sri Lankan applicant a Safe Haven Enterprise visa. The Court concluded that no jurisdictional error had been established ([21]). Relevantly, however, the Court noted that, in circumstances where there was a breach under s 473CB of the Migration Act by the Secretary, but where the IAA had turned its mind to exercising its powers under s 473DC of the Act in respect of that information, the Court did not accept that there was, nonetheless, a

			jurisdictional error because of the alleged materiality of the information. The Court accepted that the information would meet that materiality test in terms of giving rise to the possibility of a different outcome in the conduct of the review, had it been before the IAA. However, where the IAA had turned its mind to the exercise of its powers, under s 473DC, to get the information the subject of the alleged breach under s 473CB, the Court did not accept that there was a jurisdictional error in circumstances where the decision by the IAA under s 473DC was not, itself, the subject of error. The fact that the information may have been material had the IAA exercised its powers under s 473DC did not give rise to the power being invalidly exercised or to the determination of the IAA under Part 7AA of the Act exceeding its statutory powers, meaning that there was no jurisdictional error in the circumstances of this case. The Court found that the breach of s 473CB did not give rise to a jurisdictional error because the IAA expressly considered getting the information and made a valid decision not to do so. There was no excess of statutory authority in the conduct of the review nor was the IAA in this case disabled from carrying the review required by Part 7AA. Because the IAA independently expressly considered the exercise of its powers in respect of the material the subject of the s 473CB breach, there was no disabling of the IAA in the conduct of the review required under Part 7AA. The breach of s 473CB in this case did not give rise to a jurisdictional error. The Court conceded that it would have found in the applicant's favour, but for the consideration of the exercise of the powers under s 473DC in respect of the very information the subject of

			the alleged breach under section 473CB. Accordingly, no jurisdictional error was made out.
BAA20 v Minister for Immigration & Anor (No.2) [2020] FCCA 3403 (Unsuccessful)	14 December 2020	32	The Court dismissed an appeal against a decision refusing to grant the Iranian applicant a Safe Haven Enterprise visa. The Court concluded that no jurisdictional error had been established ([29], [31], [33]). Relevantly, however, the Court affirmed the proposition that it was open to the IAA to take into account its adverse findings under the Refugee Convention when considering the complementary criteria ([32]).
EJC18 & Anor v Minister for Immigration & Anor [2020] FCCA 3171 (Unsuccessful)	27 November 2020	51-76 (first ground of review), 77-100 (second ground of review)	The two applicants, a Pakistani citizen and his spouse, sought judicial review of an AAT decision affirming a decision of a delegate of the Minister refusing the applicants' application for protection visas. Relevantly, on appeal, the applicants advanced two grounds of review. First, they argued that the AAT engaged in jurisdictional error by applying the incorrect legal test for determining what amounts to a 'real risk of significant harm' in the context of the complementary protection criterion contained in s 36(2)(aa). Second, they argued that the AAT engaged in jurisdictional error on the basis that its reasoning with respect to a 2011 shooting of the first applicant's brother's car was affected by illogicality or unreasonableness. Judge Mercuri dismissed the application for judicial review. In the context of the first ground of review, his Honour provided a discussion of the concept of a 'necessary and foreseeable consequence' within s 36(2)(aa). His Honour also noted that s 36(2B) is not an exhaustive statement of all possible circumstances that may negate a finding of a 'real risk of significant harm'. In the context of the

			second ground of review, Judge Mercuri rejected the role of conjecture in determining whether there existed a real chance of serious harm and concluded that no illogicality or unreasonableness had been established.
DRX20 v Minister for Immigration & Anor [2020] FCCA 3167 (Unsuccessful)	20 November 2020	45-49 (merit of proposed grounds of review), 55-65 (merit generally and the issue of procedural fairness and legal reasonableness)	The Malaysian applicant sought an order for an extension of time to pursue his application for judicial review of an AAT decision affirming a decision of a delegate of the Minister refusing to grant the applicant a Protection (subclass 866) visa. The delegate determined that the applicant could obtain an adequate level of state protection such that he did not meet the complementary protection criterion. In dismissing the application for an extension of time, Judge Kendall firmly rejected the merits of the applicant's proposed grounds of judicial review. At the same time, his Honour also discussed his duty to assist self-represented litigants and analysed the issue of whether the AAT had complied with procedural fairness obligations and acted reasonably. His Honour concluded that no arguable case of jurisdictional error arose.
CQI18 v Minister For Home Affairs & Anor [2020] FCCA 3104 (Unsuccessful)	19 November 2020	141-164 (Amended Ground 5, dealing with complementary protection and the concept of the 'receiving country')	The applicant applied for judicial review of a decision by an Independent Merits Reviewer affirming a decision of a delegate of the Minister refusing to grant the applicant a protection visa. Judge Kelly held that the application should be dismissed. His Honour concluded that: (1) the Reviewer's reasoning provided a rational basis for her conclusion that she was not satisfied the applicant had been born in Iraq or was a stateless undocumented Faili Kurd as he had claimed; (2) jurisdictional error was not established on the basis of a failure to consider whether her decision might be wrong; (3) the Reviewer did not misapply the law in relation to the claim for

			complementary protection; (4) the 'no evidence' challenge to the finding that the applicant was an Iranian national was not made out; (5) there was no error by the Reviewer in failing to consider an unarticulated claim that the applicant might be harmed by reason of a mental illness. In the course of considering Amended Ground 5 of the appeal (and in reaching conclusion #3 above), Judge Kelly provided a discussion of the concept of the 'receiving country' for the purposes of analysing the complementary protection criterion in s 36(2)(aa).
BIM16 & Ors v Minister for Immigration & Anor [2020] FCCA 3066 (Unsuccessful)	13 November 2020	19-74 (grounds 1 and 2), 75-130 (grounds 3 and 4)	The first and second applicants, both married Indian citizens, and the third and fourth applicants, their Australian-born children, sought judicial review of an AAT decision affirming a decision of a delegate of the Minister refusing to grant the applicants protection visas. The applicants advanced four grounds of appeal. None were upheld. The first two grounds dealt with the AAT's failure to adjourn the hearing after the video hearing system malfunctioned: (1) that the AAT's failure to adjourn the hearing to enable the hearing to proceed in person or by video-link was unreasonable, and (2) that the AAT fell into jurisdictional error by failing to invite the applicants to appear to give evidence and present arguments relating to the issues arising in relation to the decision under review within the meaning of s 425, or alternatively, by failing to provide the opportunity to the applicants to appear to give evidence and present arguments relating to the issues arising in relation to the decision under

			review consistent with the invitation that was given under s 425. The second two grounds related to alleged errors in the AAT's analysis regarding the issue of relocation: (3) that the AAT failed to give proper and adequate consideration to whether it was reasonable in the circumstances of the applicants to relocate to another place within India, and (4) that the AAT failed to give proper and adequate consideration to whether it was reasonable in the circumstances of the applicants to relocate in the sense that the AAT failed to consider reasons that were given by the applicants and/or reasons arising from the material before the AAT that affected the reasonableness of relocation. Judge Mercuri rejected all four grounds of appeal and dismissed the application.
ELQ18 v Minister for Home Affairs & Anor [2020] FCCA 3080 (Unsuccessful)	13 November 2020	12-26 (first relevant argument), 32-40 (second relevant argument), 61-72 (third relevant argument)	The Sri Lankan applicant sought judicial review of an IAA decision affirming a decision of a delegate of the Minister refusing to grant the applicant a Safe Haven Enterprise visa. In substance, the applicant advanced three relevant arguments. First, the applicant argued that the IAA failed to consider whether to obtain new information under section 473DC and that the IAA failed to consider the effect that the applicant's mental and psychological difficulties had on his ability to recall events, in circumstances where the IAA had reports from the applicant's professional counsellors. Second, the applicant argued that the IAA's failure to give the applicant an interview, or to take other steps to get

			information about his past repeated detentions interrogations and beatings or about other aspects of his claim which it ultimately rejected, was an unreasonable failure to exercise its power under s 473DC. Third, the IAA unreasonably rejected the evidence of a Member of Parliament's letter without seeking to get new information from the applicant at interview or from the Member of Parliament pursuant to s 473DC. Judge Blake dismissed the application. In evaluating the applicant's first argument, his Honour set out the statutory scheme established by Part 7AA of the Act. His Honour noted that, insofar as this argument asserted a failure to consider relevant considerations in the sense described in *Yusuf* or *Abebe*, they must be dismissed. Given the operation of the statutory scheme, it could not be said that it was mandatory for the IAA to consider obtaining new information, or interviewing an applicant, in every case. Additionally, the applicant's claim that the IAA failed to consider the effect that the applicant's mental and psychological difficulties had on his ability to recall events suffered from at least two difficulties. First, it was not a claim that was advanced by the applicant before the IAA. Nor was it a claim that emerged clearly from the available material. Second, and more significantly, the IAA expressly considered the reports from the applicant's professional counsellors. The IAA's reasons revealed that the IAA was aware of the counsellors' reports and had regard to them, that the IAA gave these reports little weight, and that the IAA explained its reasons for giving the reports little weight.

			As to the second argument, Judge Blake noted that the central thrust of the argument was that the applicant was dissatisfied that the IAA had not accepted his claims, or parts of them, in circumstances where the delegate initially accepted them. His Honour noted that it was understandable that the applicant was aggrieved by that outcome in circumstances where he was not given an interview. The difficulty for the applicant, however, was the nature of a review under Part 7AA. Judge Blake observed that there is no requirement on the IAA to interview an applicant or to obtain new information. There is no requirement on the IAA to notify an applicant whose case is being reviewed that it is intending to depart from a favourable finding made by the delegate: see *BKY17 v Minister for Immigration and Border Protection* [2019] FCA 487 at [17]. The IAA is not required to assist an applicant by identifying inadequacies in his or her case and asking for more information: see *FBR18 v Minister for Immigration and Border Protection* [2019] FCA 1620 at [45]. This was not a case in which the findings as to the credibility of the applicant involved assessing the applicant's demeanour at an interview. As to the third argument, Judge Blake noted that the IAA did not make any finding that the MP's letter was not genuine. The letter contained contact details which would have enabled an enquiry to be made by the IAA. However, at no stage in this matter did the applicant request that the IAA contact the relevant MP. Further, the applicant here did not place before the Court any evidence to demonstrate how any further information

			that should have been sought could have satisfied the preconditions in s 473DD. Finally, the IAA's reasons revealed the IAA expressly considered the terms of the letter and gave reasons as to why it failed to place any weight on the letter. Those reasons included that the letter made no mention of the applicant's own involvement in the LTTE, and the fact that the IAA was not satisfied that the writer of the letter was speaking from first-hand knowledge of events. In all of the circumstances, the IAA's decision to give the letter no weight was one that was open to it. There was nothing unreasonable about the reasoning adopted by the IAA.
ENT19 v Minister for Home Affairs [2020] FCCA 2653 (Unsuccessful)	6 November 2020	24-30 (applicable legislative scheme), 65-93 (resolution of first ground of appeal), 111-118 (resolution of second ground of appeal), 148-158 (resolution of third ground of appeal)	The Iranian applicant sought judicial review of a decision of the Minister for Home Affairs made personally to refuse to grant the applicant a Safe Haven Enterprise visa. The Minister was required to refuse the visa under s 65 because he was not satisfied that the grant of the visa was in the national interest and the applicant therefore failed to meet the criterion specified in cl 790.227 of Schedule 2 to the *Migration Regulations 1994* (Cth). The applicant advanced three grounds of appeal alleging jurisdictional error. The first asserted that the Minister failed to have regard to the legal and practical consequences of the decision to refuse the applicant the relevant protection visa. The second asserted that the Minister did not comply with the requirements of procedural fairness. The third argued that the Minister's decision was legally unreasonable, illogical, and irrational.

			Judge Driver dismissed the application. In doing so, his Honour provided a discussion of the relationship between ss 4(1), 5H, 33(3), 35A(3A), 36, 65(1), 196, 197C, 198, 501, 501A, and 501CA of the Act, and of the relevant authorities explaining their scope and operation and the relevance of Australia's international non-refoulement obligations.
DEZ18 v Minister for Home Affairs & Anor [2020] FCCA 2880 (Unsuccessful)	23 October 2020	14-19 (first ground of appeal), 20-22 (second ground of appeal)	The Afghani applicant sought judicial review of an IAA decision affirming a decision of a delegate of the Minister refusing to grant the applicant a Safe Haven Enterprise visa. The applicant advanced two grounds of appeal. First, the applicant alleged that the IAA made irreconcilable findings in concluding that the applicant was at risk of being harmed. Specifically, the applicant argued: that a 'risk' inherently is a risk and not remote risk; that the IAA asserted at the same time that the applicant faced a risk and a remote risk; and that this betrayed some error, the precise nature of which did not need to be particularised. In other words, the argument was that the IAA would not have concluded that the risk existed if it had also considered it "material". The applicant referred in that regard to *Chan v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379. Second, the applicant alleged that the IAA misunderstood s 36(2B)(c) in that it could not rationally be said on the evidence before it, and could not rationally be said in any event, that the whole population of Afghanistan was exposed to the risk identified in the IAA's reasons given that the overwhelming majority of the population of Afghanistan would never travel on the roads in question.

			Judge Cameron rejected both grounds of appeal and dismissed the application. As to the first ground of appeal, his Honour noted that *Chan*'s case concerned and considered the criteria set by the 1951 Refugee Convention for determining whether a person is a refugee and in particular what 'well-founded' meant in the Convention's 'well-founded fear of persecution' criterion. The test now applied by ss 5H and 5J of the Act relevantly reflects his Honour's reasoning. Judge Cameron noted that, according to *Chan*'s case, the decision-maker must consider whether there is a real risk that relevant harm will befall an applicant if returned to their country of nationality or usual residence. The applicant's argument that a 'risk' inherently is a risk that is not a remote risk was correct only to the extent that a risk must be a 'real risk' in order that an applicant's fear of persecution can be well-founded. His Honour noted that it was apparent from McHugh J's statement in *Chan*'s case that a risk may exist but not be a 'real risk'. The IAA did not err by identifying the existence of a risk but then concluding that that risk was not serious enough to satisfy the relevant criterion of the refugee test. As to the second ground of appeal, Judge Cameron accepted as sound law the proposition that a risk faced by the residents of an area or district, because of the risks posed in that particular area or district, is a risk faced by each of those residents personally. His Honour, however, rejected its relevance to the present case. The relevant issue in this case was not concerned with hazards posed by residence in Takhar Province but with whether any citizen of Afghanistan travelling on the Afghan road

			network would face the same risks as the applicant would face if he travelled that network to return to Takhar. Having identified that question, the IAA answered it by finding that all persons travelling on those roads, which plainly included all Afghan citizens, would face those risks. Judge Cameron concluded that that conclusion was open on the evidence.
CYY18 v Minister for Immigration & Anor [2020] FCCA 2835 (Unsuccessful)	16 October 2020	23-38 (active intellectual engagement argument)	The Afghani applicant sought judicial review of an IAA decision affirming a decision of a delegate of the Minister refusing to grant the applicant a protection visa. In relation to the applicant's complementary protection claims the IAA had concluded that the applicant was exposed to a remote, and therefore not real, risk of significant harm from general violence in Afghanistan and his home province of Maidan Wardak. It accepted that there were risks of harm from IEDs and landmines but that these were risks faced by the population generally and therefore did not give rise to a complementary protection obligation by reason of section 36(2B)(c). Relevantly, on appeal, the applicant argued that the IAA in reaching its conclusions had failed to actively intellectually engage with new information provided to the IAA in the applicant's response received on 7 May 2018, including a covering letter, a report of Mr Swincer dated 2018 and a report of Professor Maley dated 2018. It was submitted that the IAA 'glossed over' this material or dealt with it in a cursory way evidenced by the bare reference to this material in the IAA's reasons.

			Judge Young rejected this ground of appeal and dismissed the application. His Honour noted that, while the Maley information in particular referred to specific attacks on Shias or Hazaras in particular areas of Afghanistan, especially Kabul, Mazar-i-Sharif and Herat, the overall thrust of the report was that there were groups in Afghanistan ideologically, politically or religiously motivated to harm Hazaras and Shias and to target them for attack. His Honour also noted that the thrust of the Swincer and Maley reports was that every Shia or Hazara was at risk in every part of Afghanistan. His Honour found, however, that the IAA's response to this information was to undertake a reasonably detailed analysis of conditions in Maidan Wardak province. The IAA concluded that most of the attacks against Shias or Hazaras in Afghanistan on religious or ethnic grounds were carried out by IS or its affiliates and there had been no evidence of IS attacks in Maidan Wardak, implying that the risks to Shias or Hazaras in Maidan Wardak were generally not from targeted attacks. The IAA acknowledged that Shias and Hazaras had been killed and injured in Maidan Wardak but found they were primarily casualties of ground attacks or generalised warfare. It did so on the basis of specific information, including a report published by the European Asylum Support Office (EASO) and DFAT information. Additionally, in relation to the IAA's conclusion about the general risks to the safety of Shias or Hazaras in Maidan Wardak, the IAA reasoned in the way it did on the basis of specific information before it, particularly the EASO report and, by implication at least, preferred

			that country information to the country information provided by Mr Swincer and Professor Maley. The IAA did not accept the general thrust of the Swincer and Maley reports but its reasoning did not, in Judge Young's opinion, constitute a failure to actively engage with that material or give it proper and genuine consideration in relation to the applicant's circumstances as a resident of Maidan Wardak. The IAA preferred country information that, while clearly demonstrating that the people of Maidan Wardak were subjected to generalised warfare, indicated that the risks to the applicant were primarily from such generalised warfare and instability and these factors did not constitute a risk because of race, religion, nationality, membership of a particular social group or political opinion. The IAA concluded that the applicant was not a refugee and that he was not owed complementary protection obligations because the risk he faced from generalised warfare was one faced by the population of Afghanistan generally and not faced by him personally. It concluded that s 36(2B)(c) applied. In these circumstances, Judge Young was not satisfied that the IAA had committed jurisdictional error.
ESV17 v Minister for Immigration & Anor [2020] FCCA 2804 (Unsuccessful)	15 October 2020	32-49 ('real risk' argument), 57-62 (no evidence argument)	The Malaysian applicant sought judicial review of an AAT decision affirming a decision of a delegate of the Minister refusing to grant the applicant a Protection (subclass 866) visa. Relevantly, the applicant argued that the AAT misunderstood the 'real risk' test involved in considering the complementary protection criterion in s 36(2)(aa). The applicant also argued that the AAT made a finding, with no evidence, that the involvement of the Royal Malaysian Police would reduce the applicant's

			risk of harm to below a "real risk" if he were removed to Malaysia. As to the first argument, Judge Kendall found that, when the AAT's reasons were considered as a whole, they disclosed no error. The source of the applicant's concern arose from his asking why he could be sent back to Malaysia if the AAT already had found that there was a real risk of significant harm. While Judge Kendall acknowledged the applicant's concern, his Honour noted that s 36(2B) deems any risk not to be "real" if the level of state protection available lessens the risk to a level below one that is "real". Here, the Tribunal analysed and assessed whether the availability of state protection measures lowered the risk to below a level that was "real". It found that the protective measures available in Malaysia had that effect. Accordingly, when read in context, no error arose from this aspect of the AAT's decision. Additionally, in the other impugned passages of the AAT's reasons, Judge Kendall observed that the AAT was not applying the real risk test, but simply summarising s 36(2B) and weighing the evidence before it to determine the seriousness of the threat the applicant faced. The seriousness of the threat informed the risk of harm the applicant faced and the adequacy of protective measures that may have been required. All the AAT was doing was making a factual finding as to the seriousness of the threat which would inform its assessment of whether the applicant faced a real risk of harm. As to the second argument, Judge Kendall found that, when the impugned finding was construed in its context,

			it was apparent that there was much evidence to support the finding. It was also the case, although not argued, that the AAT's finding was entirely logical. The basis for the finding was the applicant's own evidence about what actions had and had not been taken.
ATT16 v Minister for Immigration & Anor [2020] FCCA 2449 (Unsuccessful)	15 October 2020	30-38	This decision is included here insofar as it relates to whether the AAT complied with its procedural fairness obligations under Pt 7 Div 4 of the Act, in circumstances where the applicant did not appear at a hearing scheduled to take place on 3 March 2016 that the AAT had invited him to attend and where the applicant provided no explanation for his absence. In these proceedings, the applicant was seeking judicial review of the AAT's decision dated 16 March 2016 affirming its earlier decision to dismiss his application dated 3 March 2016. That original application sought review of a decision of a delegate of the Minister refusing to grant the applicant a Protection (Class XA) visa. The delegate had concluded the applicant was not a person in respect of whom Australia owed protection obligations either as a refugee under s 36(2)(a), or by way of complementary protection under s 36(2)(aa). Judge Kelly found that the AAT had complied with its procedural fairness obligations. His Honour found that the AAT's hearing invitation complied with the requirements of s 425A and gave the applicant notice of the day, time and place of the scheduled hearing. The notice was transmitted by email to the last email address provided to the AAT by the applicant in connection with the review. The period of notice given was in fact more

			than that prescribed by the Act and regulations, and the notice contained a statement of the effect of s 426. In all of those circumstances, as the applicant failed to attend the hearing and provided no explanation for his non-attendance, the AAT's power to proceed to dismiss the application under s 426A(1A)(b) was engaged. Judge Kelly also accepted that, in the circumstances, the AAT's decision to dismiss the application was not legally unreasonable. Although both SMS reminders failed to be delivered through the applicant's nominated mobile phone number, contextually, the notification of the hearing was transmitted to the applicant's legal representative. In his Honour's view, the AAT was not obliged to do anything more to ensure the applicant's attendance at the hearing. This was not a case where the AAT was required to take any additional steps to contact the applicant by other means in circumstances where he failed to appear. In the final analysis, the AAT's decision to confirm the dismissal could not be said to be legally unreasonable in circumstances where it was not satisfied that the applicant's claim that he mistakenly recorded the date of the hearing was a satisfactory reason to reinstate the application, and in circumstances where the applicant had properly confirmed he had been correctly notified of the hearing date.
EKW18 & Ors v Minister for Immigration & Anor [2020] FCCA 2819 (Unsuccessful)	15 October 2020	9-27	The Iranian applicants sought judicial review of an IAA decision affirming a decision of a delegate of the Minister refusing to grant the applicants Safe Haven Enterprise (Class XE) (Subclass 790) visas. The applicants argued that the IAA committed jurisdictional error by failing to consider the applicants'

			complementary protection claims or their component integers. Specifically, the applicants alleged that the IAA failed to make findings concerning whether the first applicant had been stabbed in Iran in 2012 as claimed and failed to consider whether there was thus a risk of harm of the kind relevant to complementary protection status. Judge Blake dismissed the application. His Honour accepted that the IAA had failed to consider whether there was a risk of significant harm to the first applicant in respect of his application for complementary protection. In its reasons, the IAA had left open the possibility that the attack occurred. As such, the IAA was required to conduct an assessment of risk that paid sufficient regard to the fact that an attack may have occurred. Importantly, however, while the IAA assessed risk in relation to the attack in dealing with whether the first applicant satisfied the refugee criteria, the IAA failed to assess that risk in the context of the application of the complementary protection criteria to the first applicant. Nonetheless, Judge Blake declined to find that the IAA's failure to consider the 2012 attack in its assessment of complementary protection for the first applicant was material such as to establish jurisdictional error. His Honour accepted that a single event can give rise to a finding of 'significant harm'. However, his Honour considered that when the IAA used the word 'random' to describe the attack, it was of the view that the attack occurred 'without definite aim, purpose or reason'. This had two implications. First, there was no reason or

			purpose to the attack. Second, it being the case that there was no reason or purpose to the attack, no assessment could properly be made as to whether there existed a real risk of significant harm in the future. As such, the IAA's failure to consider the attack was not a material failure.
BCW16 v Minister for Immigration & Anor [2020] FCCA 2769 (Unsuccessful)	12 October 2020	14-51	The Sri Lankan applicant sought a declaration that an International Treaties Obligations Assessment (ITOA) dated 29 April 2016 was not made according to law. The applicant raised one ground of review, namely that the ITOA failed to consider the applicant's claim that as a necessary and foreseeable consequence of returning to Sri Lanka, he was at real risk of significant harm within the meaning of s 36(2)(aa). In dismissing the application, Judge Mercuri discussed the difference between the criteria necessary to satisfy the refugee criterion under s 36(2)(a) and the criteria necessary to satisfy the complementary protection criterion under s 36(2)(aa).
FXO18 v Minister for Immigration & Anor [2020] FCCA 2223 (Successful)	8 October 2020	56-64 (successful ground of appeal)	The Iraqi applicant sought judicial review of an IAA decision affirming a decision of a delegate of the Minister refusing to grant the applicant a Temporary Protection Visa. Among other grounds of appeal, the applicant submitted that the IAA adopted an erroneous construction of s 473DD in that it rejected material that may have made a difference to the applicant's case. The applicant had provided new information including a 2018 IAA decision, 13 annexures, a media article, a map of Iraq highlighting all locations with safety and security issues, and DFAT's "Smart Traveller" advice on Iraq. The applicant argued that IAA decisions are merely information and must be treated in the same manner as any other new information. They are not legal precedents and should not be given the same status as a judicial

			decision. The applicant argued that IAA decisions in relation to other individuals constitute personal credible information about an identifiable individual within the meaning of s 473DD(b). Judge Humphreys upheld this ground of appeal insofar as it related to the 2018 IAA decision. His Honour reasoned that IAA decisions are capable of being publicly accessed but in such circumstances are anonymised. Each contains a particular identifier which is unique to that decision. No other IAA decision has the same identifier. While the individual name of the applicant in a particular matter is not known, they are identifiable by reference to the identifier in the decision heading. This is exactly the same as would be the case, in the name of a particular matter within the Federal Circuit Court. Additionally, while there may be more than one particular individual who goes by the same name, for example, John Smith or Tom Jones, IAA decisions and identifiers are unique to the particular individual. His Honour rejected the Minister's assertion that, in order to meet the definition of personal credible information, it would require a further step on the part of any person seeking to assert that, of actually knowing the individual name of the applicant. The Commonwealth Parliament, in its Explanatory Memorandum to the amendments allowing the publication of IAA decisions, wanted them to be available to assist in understanding the nature, processes and decisions of the IAA. To suggest that they then could not be used in argument before the

			IAA was, to his Honour's mind, nonsense. Although they are of the nature of information and are not legal precedent, his Honour was satisfied that the IAA erred in finding that they did not contain information about an identifiable individual and that the provisions of s 473DD(b) were not met. His Honour was satisfied that the identifier used, as it is unique to each matter, is sufficient to meet the requirements of personal credible information under s 473DD.
BBN18 v Minister for Immigration & Anor [2020] FCCA 1768 (Driver J) (Unsuccessful)	20 August 2020	37-47	The Court found that no jurisdictional error had been established with respect to a decision of the IAA affirming a decision not to grant the Iraqi applicant a protection visa. However, the Court provided an extensive analysis of s 473DD that helps to clarify the distinction between paragraphs 473DD(a) and (b).
DST18 v Minister for Immigration & Anor [2020] FCCA 1813 (Driver J) (Successful)	18 August 2020	108-111	The Court quashed a decision of the IAA affirming a decision not to grant the Afghani applicant a Safe Haven Enterprise Visa. The Court also issued a writ of mandamus compelling the IAA to redetermine the matter according to law. A jurisdictional error arose when the IAA incorrectly applied s 473DD by either misapprehending or overlooking important evidence bearing upon the applicant's "New Claim" relating to s 36(2)(aa) (i.e. complementary protection).
DPI18 v Minister for Immigration & Anor [2020] FCCA 1805 (Driver J) (Successful)	17 August 2020	46-53	The Court quashed a decision of the IAA affirming a decision not to grant the Afghani applicant a protection visa. The Court also issued a writ of mandamus compelling the IAA to redetermine the matter according to law. A jurisdictional error arose when the IAA constructively failed to exercise its jurisdiction on review by not considering the applicant's claim that he was at risk on the roads in Afghanistan in travelling to

			visit his immediate family in Quetta, Pakistan. This went to the IAA's finding that the risk of harm faced by the applicant in travelling on the roads did not amount to a real risk because the applicant would only need to travel outside his home district infrequently.
DYL16 & Anor v Minister for Immigration & Anor [2020] FCCA 2244 (Barnes J) (Unsuccessful)	14 August 2020	51-65 (sections 424A and 424AA analysis), 73-85 (legal unreasonableness)	The Court found that no jurisdictional error had been established with respect to a decision of the AAT affirming a decision refusing to grant the Chinese applicants protection visas. The Court provided an extensive discussion of the operation of sections 424A and 424AA. These are two of the procedural rules contained in Pt 7 Div 4 of the *Migration Act 1958* (Cth). They deal with procedures and powers relating to invitations for information given orally and in writing by the AAT. The Court found that, to the extent that there was information which enlivened the Tribunal's obligation under s 424A(1), the Tribunal was relieved of that obligation under s 424A(2A). The Court also found that the AAT's reasoning about the failure of the Mandarin-speaking Mr L and the applicants to seek out a Mandarin-speaking temple (cf a Cantonese-speaking temple) had not been shown to lack an evident or intelligible justification or to impose an arbitrary standard such as to give rise to jurisdictional error.
CZN19 v Minister for Immigration & Anor [2020] FCCA 1936 (Humphreys J) (Successful)	14 August 2020	33-43	The Court quashed a decision of the Minister not to grant the Sri Lankan applicant a Safe Haven Enterprise Visa. The Court also issued a writ of mandamus compelling the Minister to redetermine the matter according to law. A jurisdictional error arose because it was difficult to see the reasoning process behind the IAA's conclusions. The Court noted that an incapacity by a reviewing court to follow the reasoning process of

			a decision-maker below amounts to jurisdictional error. Here, the IAA's affected conclusions had a material impact on its decision, in that it was possible that, without them, the IAA may have come to a different outcome.
ALK17 v Minister for Immigration & Anor [2020] FCCA 2230 (Unsuccessful)	13 August 2020	10–18	The Court dismissed an appeal against a decision refusing to grant the Iraqi applicant a protection visa. The Court concluded that no jurisdictional error had been established ([18], [30]). Relevantly, with respect to the first ground of appeal, the Court confirmed that there is no jurisdictional error in a decision maker relying upon earlier findings of fact. The Court noted, with reference to the authorities, that while there are differences between Convention claims and complementary protection claims, the most significant being the need for a Convention reason in Convention claims, both rely upon a finding of a risk of harm. In this case, while accepting that the applicant's son's kidnapping had occurred, the IAA was satisfied that it was for profit, but rejected the proposition that the applicant would still be considered a successful businessman (the fact which underpinned the kidnapper's profit motive). In the Court's view, it was clear from the IAA's reasons that the applicant's past profile as a successful businessman was the basis for the kidnappers considering that they could obtain a ransom from him, but that the applicant would no longer be perceived as such, nor had there been any incidents since 2011. Thus, the IAA concluded that there was

			no longer a real risk of significant harm and that the applicant did not meet s 36(2)(aa). In substance, the applicant argued under this ground of appeal that the IAA had failed to consider the risk to the applicant as a result of generalized criminal activity 'including kidnap for ransom', even though all of the factors that the applicant pointed to as showing that these risks were real risks in his particular circumstances were rejected by the IAA. It was clear to the Court that the IAA did not consider that the applicant was at real risk of harm in circumstances where none of the matters raised by the applicant were accepted as reasons for him or his family to be targeted at the time of the decision. The Court therefore found that the applicant had not made out this ground of appeal.
DAF17 v Minister for Immigration & Anor [2020] FCCA 1763 (Driver J) (Successful)	12 August 2020	81-87	The Court quashed a decision of the IAA affirming a decision not to grant the Iraqi applicant a protection visa. The Court also issued a writ of mandamus compelling the IAA to redetermine the matter according to law. A jurisdictional error arose in respect of the complementary protection criterion to which s 5J does not apply. The IAA sought to replicate its reasoning in relation to complementary protection from its analysis of the refugee claim. However, having accepted that being beaten may constitute cruel or inhuman treatment, and having previously accepted that the applicant faced a risk of harm from Shia militia groups and possibly devout Muslim individuals, the IAA needed to grapple with the question of whether the applicant was confronted by a real risk of significant harm. The IAA

			could not complete that consideration by simple reliance on its findings that the applicant would not be harmed by the Iraqi state. The IAA was only able to deal with the prospect of the applicant being harmed by non-state actors if he once again consumed alcohol in public as a political act by reference to the modification of his behaviour consistently with s 5J. The absence and unavailability of that reasoning in relation to complementary protection left a gap. As such, the IAA's review in relation to complementary protection was incomplete.
FON17 v Minister for Immigration & Anor [2020] FCCA 2173 (Barnes J) (Successful)	7 August 2020	66-109 (failure to consider exercising s 473DC(1) power), 110-115 (failure to exercise s 473DC(1) power)	The Court quashed a decision of the IAA affirming a decision not to grant the Iraqi applicant a Safe Haven Enterprise Visa. The Court also issued a writ of mandamus compelling the IAA to redetermine the matter according to law. The Court found that the IAA had fell into jurisdictional error because the IAA's failure to consider exercising its power under s 473DC(1) was legally unreasonable ([107]). This failure was a material error because there was a realistic possibility that, had the error not occurred, a different decision might have been reached ([108]). The Court also found that the IAA had fell into jurisdictional error by failing actually to exercise its power under s 473DC(1) ([115]-[116]).
BLQ16 v Minister for Home Affairs & Anor [2020] FCCA 2148 (Kendall J) (Successful)	5 August 2020	32-51	The Court quashed a decision refusing to grant the Vietnamese applicant a protection visa. The Court also issued a writ of mandamus compelling the AAT to redetermine the matter according to law. The Court found that the AAT fell into jurisdictional error by failing to have regard to, and to properly consider, the applicant's level of involvement in the Australian

			Vietnamese community, which in turn went to the question of whether such involvement generated a sufficiently high profile of the applicant in Australia such that it could result in a risk or chance of harm in Vietnam. This was a material error.
EDI16 & Anor v Minister for Immigration & Anor [2020] FCCA 1990 (Riley J) (Successful)	22 July 2020	65-82	The Court quashed a decision of the AAT affirming a decision of a delegate of the Minister for Immigration not to grant the applicants protection visas. The Court also issued a writ of mandamus compelling the AAT to redetermine the matter according to law. The Court upheld the applicants' third ground of appeal and found that the AAT fell into jurisdictional error either by failing to consider an integer of the applicants' claim, or by misunderstanding the meaning of persecution, or both. Specifically, while the AAT clearly considered the applicants' claims to fear being killed on account of their Chinese ethnicity, there was also the subsidiary claim of the applicants facing a real risk of harm falling short of being killed for reasons of their ethnicity. That claim was clearly made, whether or not it was supported by evidence. As such, the AAT was obliged to consider it. The closest the AAT came to considering that claim was when it said that ethnic Chinese in Malaysia 'generally do not experience discrimination or violence on a day-to-day basis'. The Court noted, however, that to say that an event *generally* does not happen, and to say that an event does not happen on a day-to-day basis, does not say whether there is a real chance of that event happening. By failing to consider whether there was a real chance of the applicants suffering persecution falling short of death for reasons of their ethnicity, the AAT failed to consider the claim. The AAT was not

			cognisant that persecution can include harms falling short of death. Note that the Court appears principally to be discussing refugee protection rather than complementary protection; notably, the applicants' third ground of appeal was that: "The Second Respondent failed to consider and determine whether the applicant faces a real chance of persecution in Malaysia on the basis of ethnicity. It could give rise to a well-founded fear of persecution for a convention reason." (See [43].) For completeness, however, this case is included in this list of complementary protection decisions.
SZQTU & Ors v Minister for Immigration & Anor [2020] FCCA 1944 (Dowdy J) (Unsuccessful)	21 July 2020	29-40	The Court dismissed an application for judicial review of a decision of the AAT affirming the Minister for Immigration and Border Protection's decision not to grant the applicants protection visas. On appeal, the applicants argued that the AAT had failed to provide a meaningful invitation to the first applicant to appear at a hearing before it, and/or that the AAT ought to have appointed or arranged a litigation guardian or a lawyer for the first applicant to appear on his behalf at a hearing before the AAT. The Court rejected the applicants' argument and concluded that the AAT had conducted its review in accordance with its statutory obligations, and in particular its obligation under s 425 to invite the first applicant to appear before it to give evidence and present arguments. Further, there was no substance in the contention that the AAT ought to have appointed or arranged for a litigation guardian or a lawyer for the first applicant to

			appear on his behalf at a hearing before the AAT, for at least three reasons. First, s 427(6) provided that the first applicant was not entitled to be represented before the AAT by any other person, and there was no evidence that the AAT was ever asked to exercise its discretion to allow the first applicant to be represented by anyone at a Tribunal hearing. Second, the AAT did not have power, either under the *Migration Act 1958* (Cth) or at general law, to order that legal representation be provided to an applicant for review before it. Nor did procedural fairness require an applicant to be provided with legal representation. Third, there was no provision in the *Migration Act* which would have entitled or permitted the AAT to appoint some form of tutor or litigation guardian for the first applicant. (Sections 425 and 427 are two of the procedural rules contained in Pt 7 Div 4 of the *Migration Act 1958* (Cth).)
BNZ18 v Minister for Immigration & Anor [2020] FCCA 1614 (Driver J) (Successful)	17 July 2020	66-69	The Court quashed a decision of the IAA affirming a decision of a delegate of the Minister for Immigration not to grant the applicant a protection visa. The Court also issued a writ of mandamus compelling the IAA to redetermine the matter according to law. The Court found that the IAA fell into jurisdictional error in finding that it was more likely that the applicant was a national of Iran than Afghanistan, and that he had claimed to be a Hazara from Afghanistan to strengthen his claims for protection. First, the IAA's rejection of the applicant's claim to be of Hazara (or Tajik) ethnicity residing in Iran as an illegal immigrant from Afghanistan did not of itself resolve the question of the

			applicant's nationality. The IAA needed to explore whether the fact of the applicant's birth in Iran was sufficient to make a finding of Iranian nationality or whether something else was required. There was no such analysis. Second, the IAA's finding that it was more likely than not that the applicant was a national of Iran necessarily involved an element of doubt. The uncertainty in the IAA's finding meant that the IAA needed to consider what the position would be if it was wrong, given that it had not expressed itself in unequivocal terms. That uncertainty called for a discussion of the outcome in the event that the applicant was a stateless person whose habitual residence was Iran, or an Afghan national as he claimed.
ATS17 v Minister for Immigration & Anor [2020] FCCA 1926 (Barnes J) (Unsuccessful)	15 July 2020	72-109 (section 424A analysis), 119-132 (section 425 analysis)	The Court dismissed an application for judicial review of a decision of the AAT setting aside an earlier decision to grant the applicant a protection visa. On appeal, the applicant argued that the AAT failed to comply with ss 424A and 425 in relation to evidence from a pastor. Specifically, the applicant alleged that the AAT failed to invite the applicant to respond to the pastor's oral evidence and to "the material he produces", which the AAT relied on in finding that the applicant's evidence was unsatisfactory. The Court rejected the applicant's argument about s 424A after extensive analysis of the authorities about the provision on the basis that it had not been established that the pastor's evidence, and the material he produced, constituted information enlivening the obligation contained in s 424A(1). Similarly, after extensive analysis of the authorities concerning s 425, the Court concluded that no failure to comply with s 425, or any

			denial of procedural fairness in that respect, had been established. Sections 424A and 425 are two of the procedural rules contained in Pt 7 Div 4 of the *Migration Act 1958* (Cth).
CLQ17 v Minister for Immigration & Anor [2020] FCCA 1864 (Manousaridis J) (Successful)	10 July 2020	23-29	The Court quashed a decision of the IAA affirming a decision of a delegate of the Minister for Immigration not to grant the Sri Lankan applicant a Safe Haven Enterprise Visa. The Court also issued a writ of mandamus compelling the IAA to redetermine the matter according to law. The Court found that the IAA fell into jurisdictional error by not considering a "diagnosis ticket" for the purpose of assessing the applicant's claims that he had been detained and injured by the SLA in July 2011. The "diagnosis ticket" was sufficiently important that the IAA's failure to consider it for this purpose materially affected the IAA's determination of the applicant's claim that he had been detained and tortured by the SLA. Separately, and additionally, the IAA fell into jurisdictional error by acting irrationally in reaching its findings on this point. Given the facts the IAA accepted, and the evidence that was before it, it was not rationally open to the IAA, on the one hand, not to accept the applicant suffered injuries because of torture inflicted on him by the SLA which required him to have an operation that resulted in scarring; and, on the other hand, to accept the applicant did have an operation that resulted in scarring.
BYB18 v Minister for Immigration & Anor	6 July 2020	41-49	The Court quashed a decision of the IAA affirming a decision of a delegate of the Minister for Immigration not to grant the Afghani applicant a Safe Haven

[2020] FCCA 1832 (McNab J) (Successful)			Enterprise Visa. The Court also issued a writ of mandamus compelling the IAA to redetermine the matter according to law. The Court found that the IAA fell into jurisdictional error by having regard to the applicant's personal attributes, rather than to general information material, about Mazar-e-Sharif when considering whether it would be reasonable and practical for the applicant to relocate to Mazar-e-Sharif. As such, the IAA did not (correctly) perform its statutory task under s 36(2)(b) when it found that it would be reasonable for the applicant to relocate to Mazar-e-Sharif in Afghanistan.
BCJ18 v Minister for Immigration & Anor [2020] FCCA 1831 (McNab J) (Successful)	6 July 2020	39-46	The Court quashed a decision of the IAA affirming a decision of a delegate of the Minister for Immigration not to grant the Afghani applicant a Safe Haven Enterprise Visa. The Court also issued a writ of mandamus compelling the IAA to redetermine the matter according to law. The Court found that the IAA had fell into jurisdictional error by incorrectly finding that re-integration services had been provided to returnees to Afghanistan and in Mazar-e-Sharif, when such a finding was not open on the evidence. This went to the 'very important issue' of whether there existed sufficient supports available to the applicant if he were to be returned to Afghanistan ([45]).
FUR18 v Minister for Immigration & Anor [2020] FCCA 1796 (McNab J) (Successful)	3 July 2020	32-40	The Court quashed a decision of the IAA affirming a decision of a delegate of the Minister for Immigration not to grant the Afghani applicant a Safe Haven Enterprise Visa. The Court also issued a writ of mandamus compelling the IAA to redetermine the matter according to law. The Court found that the IAA had fell into jurisdictional error by giving an unduly

			narrow interpretation to the phrase 'exceptional circumstances' in s 473DD(a). This error was material as it could have affected the IAA's decision ([40]).
CCJ16 v Minister for Immigration & Anor [2020] FCCA 1717 (Barnes J) (Successful)	26 June 2020	55-90 (ground of appeal and parties' submissions), 91-140 (consideration of this ground of appeal)	The Court quashed a decision of the IAA affirming a decision of a delegate of the Minister for Immigration not to grant the Sri Lankan applicant a Safe Haven Enterprise Visa. The Court also issued a writ of mandamus compelling the IAA to redetermine the matter according to law. The Court found that the IAA had fell into jurisdictional error by misconstruing s 473DD(b)(ii) and by misconceiving what the exercise of its statutory power required. Section 473DD prevents the IAA, when making a decision with respect to a 'fast track reviewable decision', from considering any new information, unless two conditions are met. First, the IAA is satisfied that there are exceptional circumstances to justify considering the new information (s 473DD(a)). Second, the applicant satisfies the IAA that the new information either: • was not, and could not have been, provided to the Minister before the Minister made the decision under s 65 (s 473DD(b)(i)); or • is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims (s 473DD(b)(ii)). The IAA's error was material because, in light of the nature and cogency of the new information supplied and its place in the assessment of the applicant's claims, it

			operated to deprive the applicant of the possibility of a successful outcome ([138]-[139]).
CQO16 v Minister For Immigration & Anor [2020] FCCA 1711	26 June 2020	58-78	The court found jurisdictional error regarding the application of an Iranian national. The Court explained that the finding by the Tribunal that the applicant faced a remote risk of torture was central to the assessment of harm the applicant faced, but it was not an assessment that could be supported on the evidence and findings. The court found that the reasoning of the Tribunal was illogical, irrational or unreasonable.
FCW18 v Minister for Immigration & Anor [2020] FCCA 1515 (Judge Kendall) (Successful)	11 June 2020	66-123	The court found jurisdictional error regarding the application of an Afghanistan applicant of Hazara ethnicity, finding that the IAA went beyond the material and information available to it and that the findings, including in relation to relocation to Kabul, was made without evidence.
AHH20 v Minister for Immigration & Anor [2020] FCCA 1518 (Unsuccessful)	10 June 2020	51	The Court dismissed an appeal against a decision refusing to grant the Bangladeshi applicant a protection visa. The Court concluded that no jurisdictional error had been established ([46], [51]) and that, with respect to the second ground of review, the applicant in substance was seeking impermissible merits review ([50]). However, the Court did affirm the correctness of the 'entirely orthodox' ([51]) approach adopted by the IAA and noted that the IAA was entitled to make its complementary protection findings based on the previous refugee findings ([51], citing *SZSGA v Minister for Immigration and Multicultural Affairs and Citizenship* [2013] FCA 614, [31] (Marshall J)).

DCE16 v Minister for Immigration & Anor [2020] FCCA 1344 (Judge Barnes) (Successful)	29 May 2020	83-139	The court found jurisdictional error regarding the application of a Sri Lankan, Tamil applicant finding that that the authority failed to consider material new information.
FJV18 v Minister For Home Affairs & Anor [2020] FCCA 1032 (Judge Young) (Successful)	1 May 2020	13-35	The court found jurisdictional error and upheld the appeal of an ethnic Hazara and Shia Muslim from Paskistan. It found that the "Authority approached the question of relocation at a level of generality which meant it did not discharge its statutory task of examining the material and make findings about whether the applicant, and his wife and child, could as a matter of practical reality live in Islamabad in way that would allow them to meet their basic needs as individuals and a family. The assessment was affected by jurisdictional error and must be set aside." (Para 35)
BZA17 v Minister for Immigration & Anor [2020] FCCA 375 (Judge Manousaridis) (Unsuccessful)	28 February 2020	36-58	In finding no jurisdictional error on the part of the IAA, the court discussed considered the manner in which the Authority purported to undertake a cumulative assessment of risk of harm relating to an applicant from Afghanistan.
GCLV v Minister for Immigration & Anor [2020] FCCA 270 (Judge Manousaridis) (Successful)	14 February 2020	22-35	The court granted an extension of time to an applicant from El Salvador and quashed the Tribunal's decision on the basis of jurisdictional error, noting that "the Tribunal proceeded on the basis that the notion of "*arbitrary deprivation of life*" referred to in s.36(2A)(a) of the Act required an intention to inflict harm and, in proceeding in this way, the Tribunal misunderstood the tasks it was required to undertake when reviewing the delegate's decision. The Tribunal, therefore, made a jurisdictional error, and its decision is liable to be quashed." (Para 35)

AEJ17 v Minister for Immigration & Anor [2020] FCCA 261 (Judge McNab) (Successful)	13 February 2020	22-44	The court allowed the application of a Sunni Muslim, Afghan applicant of Pashtun ethnicity and found "a failure on the part of the Authority to engage in a detailed consideration of the applicant's circumstances so as to consider in real terms whether a relocation to Kabul is reasonably practicable for the applicant." (Para 38)
ADL17 v Minister for Immigration & Anor [2020] FCCA 148 (Judge A Kelly) (Unsuccessful)	2 February 2020	2, 85-105	In dismissing the application of an Iranian applicant, the court also considered whether "*Appellant S395* principles" should have been applied. "In summary, I am not satisfied that the Authority erred in its consideration of whether the applicant satisfied the criteria for refugee status and in particular what may happen if the applicant returned to Iran or whether he could then take reasonable steps to modify his behaviour. Nor am I persuaded on the very limited submissions made before me that the principles in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*[1] should be applied to complementary protection under s 36(2)(aa) of the Act. Finally, I do not accept that there was error by the Authority in the asserted failure to consider properly what was described as the applicant's 'nuanced' claim to protection based upon the further pursuit of some level of interest in Christianity." (Para 2)
CMB18 v Minister for Home Affairs & Anor [2020] FCCA 110 (Judge Neville)	29 January 2020	35-47	In dismissing the application of an applicant from Afghanistan, whose grounds for review included the alleged misapplication of ss.36(2)(aa) and 36(2B)(a), the court discussed the relocation criteria.

(Unsuccessful)			
EBV17 v Minister for Immigration & Anor [2019] FCCA 1216 (Judge Driver) (Unsuccessful)	5 December 2019	24-59	In dismissing the application of a Shia Hazara from Quetta, Balochistan province in Pakistan, the court discussed the reasonableness of relocation in a context where the applicant's extended family lived in Quetta and the applicant's need to travel by road from Lahore to Quetta.
BXU17 v Minister for Immigration & Anor [2019] FCCA 3326 (Judge A Kelly) (Successful)	16 November 2019	35-73	A Sunni Muslim applicant of Baloch ethnicity established failure to accord procedural fairness and jurisdictional error in the failure of the Tribunal to deal with the generalized risk to persons of Baloch ethnicity. This was an issue which "clearly arose on the country information" before the Tribunal and "sufficiently established a risk of significant harm to persons of Baloch ethnicity as a fact or matter that warranted consideration." (para 71 and 72, respectively)
BLH15 v Minister for Immigration & Anor [2019] FCCA 3379 (Judge Barnes) (Unsuccessful)	22 November 2019	63-67	In dismissing a Tongan applicant's application, the court discussed the real chance test as it relates to family violence, including the degree of protection afforded by family relationships.
CAC19 v Minister for Home Affairs & Anor [2019] FCCA 3336 (Judge Burchardt) (Unsuccessful)	22 November 2019	20-29, 31	In dismissing a Nigerian applicant's application, the court discussed jurisprudence on whether the act of removal itself could constitute the significant harm.
WZAUK v Minister for Immigration & Anor [2019] FCCA 3246	13 November 2019	76-100	A Kenyan applicant established jurisdiction error due to a failure to engage in an active intellectual manner with the evidence of a critical witness on a matter central to

(Judge Kendall) (Successful)			the applicant's claim for protection (i.e., his homosexuality).
BXN16 v Minister for Immigration & Anor [2019] FCCA 2820 (Judge Kelly) (Successful)	24 October 2019	2, 39-76	A Pakistani applicant established jurisdictional error as the Tribunal failed to correctly apply the test for reasonableness of internal relocation. "For the reasons which follow I have concluded that the application should be allowed. In summary, I have concluded that the decision was affected by jurisdictional error by reason that, although the Tribunal correctly identified the test for internal relocation, it did not apply that test. The Tribunal did not adopt a forward looking approach in evaluating whether the applicant could reasonably expect to face harm in the future, nor did it take into account information that was before it in undertaking that assessment. The other grounds of review have been rejected and leave to further amend the application refused." (Para 2)
FSR18 v Minister For Home Affairs & Anor [2019] FCCA 2295 (Judge Driver) (Successful)	17 October 2019	78-88	The Court found jurisdictional error in the IAA's consideration of the reasonableness of relocation for a Pakistani applicant because the IAA failed to consider the impact on the applicant of his family relocating with him. "I accept the Minister's submissions set out above that the Authority gave adequate consideration to the reasonableness of relocation in considering the applicant's mental health problems, his lack of family support in Islamabad, his former occupation as a driver and the general security situation in Islamabad. Further,

			I do not accept the applicant's complaints in relation to the Authority's general consideration about the cost of living in Islamabad and the applicant's employment prospects." (Para 85) "I am, however, persuaded that the Authority did err in failing to consider the impact on the applicant of his family relocating to Islamabad with him. While the Authority at [50] stated that the applicant could draw on his extended family for assistance for his wife and child to "come to Islamabad" should they wish to do so, it appears to me that the Authority was envisaging a visit rather than a permanent relocation. The wording of this statement suggests that the applicant could call on family assistance to get his wife and children to Islamabad, which says nothing about the cost and difficulty of maintaining their residence there. In the rest of that paragraph, the Authority reasoned by reference to the fact that the applicant would be living independently from his wife and family. As the applicant's submissions demonstrate, the relocation of his wife and children to the place he would be living in Pakistan was an issue of fundamental importance to him and was raised specifically both before the delegate and the Authority. The Authority needed to give consideration to the impact on the applicant's need for employment, housing and the other essentials of life if he had his wife and children living with him. By failing to consider the impact of the permanent relocation of the applicant's wife and children with him in Islamabad, the Authority fell into error." (Para 86)

AMG18 & Ors v Minister for Immigration & Anor [2019] FCCA 2466 (Judge Driver) (Successful)	16 October 2019	26-30	Vietnamese applicants established jurisdictional error on the part of the IAA because it rejected a submission (or misconstrued arguments) as new information. "The first ground addresses the vexed issue of the Authority having to grapple with the distinction between argument and information and claims and argument. It is now tolerably clear that there is no material distinction between claims and information. There is, however, a difference between argument and information. In the very recent decision of the Full Federal Court in *DNA17 v Minister for Immigration*[30] the Full Federal Court considered a circumstance not dissimilar to the present at [38]-[45]." (Para 26) "In my view, as in *DPH17*, the present case is an example of the circumstances set out at (b) above. In other words, the applicant was seeking to engage with the delegate's decision by drawing on information that was before the delegate in the form of a responsive but new argument. The applicant was not seeking to introduce any new information in order to support the argument. It was already known that the family had travelled together and that the applicant father had arranged it." (Para 29) "I conclude that the Authority was wrong to regard the submission as new information. As in *DPH17*, the argument might not have been a strong one, but it could have made a difference to the outcome and the

			Authority should have considered it. By failing to do so, the Authority fell into error." (Para 30)
CMV18 v Minister for Immigration & Anor [2019] FCCA 2522 (Judge Driver) (Successful)	4 October 2019	48-61	An Afghan applicant established jurisdictional error on the part of the IAA for failing to engage with part of the applicant's submission on the reasonableness of relocation to Mazar-e-Sharif. "In my view, it was insufficient for the Authority to deal with the applicant's submission at such a high level of abstraction. The assumptions made by the Authority were both bold and broad. In my view, the Authority needed to consider what level of scarcity and meagreness was practicable and what level of scarcity and meagreness was reasonable for the applicant to accept in his struggle for existence. Some things should no doubt be assessed against basic standards, such as access to potable water, food, clothing and shelter. Other things might be assessed on a more relativistic basis, because if a person is returning to a third world country, they must expect third world conditions. These may be issues of some subtlety of analysis which was absent from the Authority's reasoning." (Para 59)
DPH17 v Minister for Immigration & Anor [2019] FCCA 2258 (Judge Driver) (Successful)	3 October 2019	39-52	The Court found that a Sri Lankan applicant established jurisdictional error by the IAA, which had characterized an argument as new information. "In my view, the applicant's argument was a new argument but was based on information that was before the delegate. It fell within the class described at [46(b)] above. It may not have been a strong argument, but the

			Authority was wrong to characterise the new argument as new information." (Para 51) "Having erred in its characterisation of the argument as new information for the purposes of s.473DC and s.473DD, the Authority fell into error which artificially constrained the review, thus going to jurisdiction. The applicant should receive the relief he seeks." (Para 52)
ALI18 v Minister for Immigration & Anor [2019] FCCA 2257 (Judge Driver) (Successful)	2 October 2019	36-40	The Court found jurisdictional error in the IAA decision not to grant a protection visa to an Afghan citizen. The Court explained that the "psychological impact of isolation on the applicant needed to be taken into account in considering the reasonableness of relocation. It was not and the omission goes to jurisdiction." (Para 39)
WZAUB v Minister for Immigration & Anor [2019] FCCA 2749 (Judge Lucev) (Successful)	27 September 2019	19-88	The court found jurisdictional error due to interpretation given which was affected by a number of errors and non-interpretation errors, many of which were significant and material such that the applicant was not afforded a fair hearing.
DPV18 v Minister For Home Affairs & Anor [2019] FCCA 2762 (Judge Riethmuller) Succesful)	26 September 2019	14-40	The court allowed the application of a Shia Hazara from Afghanistan who claimed that the IAA denied procedural fairness by failing to put before the applicant material, or its substance, that the IAA knew of and considered may bear upon whether to accept the Applicant's claims. "In these circumstances it is difficult to avoid the conclusion that it was legally unreasonable not to have

			also sought information from the applicant with respect to this new information, particularly given that the discretion under section 473DC is not even so constrained as to require 'exceptional circumstances'." (Para 39)
DZQ16 v Minister for Immigration & Anor [2019] FCCA 2609 (Judge Manousaridis) Successful)	20 September 2019	3, 4, 25-44	The court quashed the decision of the IAA affirming a decision of a delegate of the Minister who refused to grant the applicant, a Sri Lankan Tamil from Jaffna, a Safe Haven Enterprise visa. The applicant was of interest to the Sri Lankan authorities and had been questioned, interrogated and mistreated including in connection to his activities with an uncle who assisted the LTTE and his suspected links to the organization. The court found jurisdictional error due to the IAA's failure to consider evidence relevant to the claim. In light of the findings that the IAA had made, the Court stated that consideration of the relevant evidence could have resulted in the IAA making a different decision.
BTP18 v Minister For Home Affairs & Anor [2019] FCCA 2608 (Judge Neville) Unsuccessful)	20 September 2019	46-61	The court dismissed the appeal of a Hazara Shia from Surkh-e Parsa district in the Parwan Province of Afghanistan, who claimed he was a target of the Taliban because of his employment profile as a self-employed mechanic whose customers included local government workers. In doing so the court discussed the relocation and real chance tests under the refugee definition.
FKZ17 v Minister for Immigration & Anor [2019] FCCA 2521	20 September 2019	69-79	The court allowed the appeal of an Afghan national of Hazara ethnicity and Shia religion whose application for a Safe Haven Enterprise visa had been refused by a

(Judge Neville) (Successful)			delegate of the Minister, based on relocation, and affirmed by the IAA for different reasons. The applicant claimed he feared harm from the Taliban due to his religion and his ethnicity, as a returnee, and as a failed asylum seeker from a western country. He also claimed he feared harm because of his previous "adverse profile" as a long-haul truck driver who had regularly encountered, and been stopped and searched by, the Taliban when delivering goods. The Court held that the IAA failed in its statutory task as it failed to consider independent country information, which directly contradicted the country information that the IAA relied on to form an adverse finding. '…My particular concerns, which cumulatively lead to the conclusion that the statutory task of the IAA under s.473CC has relevantly failed, are as follows: (a) In my view, there is a fundamental procedural issue where, as here, the Delegate determined the Applicant's case in one way, but the IAA determined it on a totally different basis, albeit that the end result of a denial of a protection visa was the same. Before the Delegate, the case was conducted and determined on the bases of (i) "internal relocation", (ii) it was unsafe for the Applicant to return to his original Jaghori province, and (iii) the Applicant could and should relocate to Kabul. Before the IAA, while the reasons of the Delegate and the submissions related to "internal relocation", the decision of the IAA was contrary to that of the Delegate. The IAA held that there was no need for the Applicant to relocate to Kabul because he would be

			living in Jaghori, an area that was considered to be "relatively secure" (reasons par.24); (b) The general assessment by the IAA of the relative safety of Hazaras in Jaghori province relied upon a Thematic Assessment by DFAT dated 5th September 2016. This particular assessment (and others) was specifically criticised in the detailed reports (dated November and December 2016) provided by the Applicant from Professor Maley. But the IAA had rejected these Reports on the basis that the requirements of s.473DD(b) had not been met (par.5). So, on the one hand, the IAA had available to it expert information that critiqued (and strongly criticised) Thematic Assessments provided by DFAT, but on the other hand, it had formally rejected this later, expert evidence; (c) I accept that Bromwich J has recently held that there is no obligation upon the IAA to provide reasons in relation to the exercise of its discretion under s. 473DD. However, in the current instance, deciding not to consider the Reports of Professor Maley deprived the IAA of information that was relevant because it was directly at odds with country information provided by DFAT, and which also provided a detailed critique of that information. The country information from DFAT was ultimately relied upon by the IAA, adversely to the Applicant; (d) Moreover, in providing no reasons for rejecting the expert Maley Reports (accepting – again – that there was no legal requirement to do so), the IAA provided

			no assistance let alone insight to the parties (or ultimately to this Court) to comprehend why later, expert Reports, did not come within the broader, and therefore outside of the unduly narrow, interpretation of the term "exceptional circumstances" as discussed by White J in BVZ16 v Minister for Immigration and Border Protection. This expansive approach has since been approved in two recent Full Court decisions, BBS16 and CHF16; (e) Further, a detailed critique and adverse assessment by a recognised expert (Professor Maley) of material provided by DFAT, which material was ultimately relied upon by the IAA in making a decision that was adverse to the Applicant, in my view, must be viewed as constituting "exceptional circumstances". "Exceptional circumstances" for the purposes of s. 473DD has been interpreted and applied in an ever-growing number of cases as including "circumstances that are unusual and out of the ordinary course." One would hope (and expect) that a strong critique of Departmental advice by an independent expert would readily come within such a definition, particularly where, as here (at par.7) the IAA itself confirmed that there was "limited analysis" of the security situation for Shias before the Delegate; …' (Para 69(a)-(e))
DEA18 v Minister for Home Affairs & Anor [2019] FCCA 2550 (Judge Kendall) (Successful)	13 September 2019	45-55, 60-91	The court found jurisdictional error in the decision of the IAA, which affirmed a decision not to grant a Safe Haven Enterprise visa to a Shia Muslim Afghan citizen of Hazara ethnicity and a former resident of Kabul. The court held that the IAA erred in failing to assess and

			undertake a comparison between the real risk of harm faced by residents of Kabul with the risk of generalized violence faced by the Afghan population. The court discussed the exercise, in light of refugee and complementary protection provisions. The court also considered whether the claim arose clearly on the material. 'In assessing the Tribunal's decision, Justice Charlesworth found that the claims or facts that the applicant in BCX16 alleged did not "wholly coincide" – that is, they were not the same for both the refugee and complementary protection provisions: BCX16 at [24]. The applicant did not rely on his status as a resident of the city of Kabul in his claims to fear persecution. The applicant did, however, "rely on his place of residency as a personal circumstance that caused him to face a real risk of significant harm that was not the same as that faced by the population of Afghanistan generally": BCX16 at [24].' (Para 50) 'In explaining how s.36(2B)(c) of the Act should be construed and applied, the following is of note in relation to her Honour's findings in *BCX16*: a. read in the context of s.36(2B)(a), a risk being faced by a non-citizen personally as described in s.36(2B)(c) may include a risk faced by a person because of the circumstance that he or she resides in an area of a country. A risk a person is exposed to because of their residence in a specific area of the country is a risk that is faced

			by the person personally, notwithstanding that other persons residing in the same area are exposed to the same risk: *BCX16* at [37]; b. it is erroneous to construe s.36(2B)(c) on the basis that a person would not be exposed to a risk personally if the risk was one that other persons in the same area of a country were exposed to the same degree: *BCX16* at [38]; c. where the risk faced by a person is the same as is faced by the general population of the *whole* of the country, the personal circumstance of residency in any one particular area of the exposure to risk is not because of the particular residency: *BCX16* at [39]; d. section 36(2B)(c) is a composite phrase founded upon an assumption that a risk faced by the population of the country *generally* is a risk that is not faced *personally* by any one of its citizens: *BCX16* at [39]; and what is required is an assessment of whether an individual faced a real risk of significant harm in light of their status as a resident of a particular area or city. It is that risk (in the particular city) that must be the subject matter of consideration under s.36(2B)(c) against the population generally: *BCX16* at [40].' (Para 54)

DFL18 v Minister for Immigration & Anor [2019] FCCA 2356 (Judge Kendall) (Successful)	27 August 2019	41-58	The court allowed the appeal of a Shia Muslim from Iraq, whose appeal from a refusal to grant a Safe Haven Enterprise visa by a delegate of the Minister was affirmed by the IAA. The applicant had become involved in serious criminal activities and while incarcerated been the victim of a serious sexual assault. The court found jurisdictional error by the IAA for failing to properly assess the applicant's claim he would face harm as a victim of same-sex assault.
FUI18 v Minister For Home Affairs & Anor [2019] FCCA 1682 (Judge Driver) (Successful)	15 August 2019	15-38	The court allowed the appeal of a citizen of Mali, who had resided in Bamako before fleeing to Australia and whose application for a protection visa was refused by the delegate of the Minister and affirmed by the IAA. The court found jurisdictional error on the part of the IAA for failing to consider a key piece of country of origin information relating to Bamako.
CDG16 v Minister for Immigration & Anor [2019] FCCA 1749 (Judge Barnes)(Successful)	28 June 2019	63-76	The court upheld an appeal from a Shia Muslim Iraqi citizen of Bidoon ethnicity, born in Kuwait who was refused a Temporary Protection visa. The court found jurisdictional error on the part of the IAA for failing to consider an integer of the Applicant's claim that arose squarely on the material before it. 'The IAA did not reject the factual premise of the claim to fear harm consisting of future detention and mistreatment in making the finding that the Applicant's release by the criminal court indicated he was no longer suspected by the authorities of involvement with the 2009 or 2012 bombings. This finding did not dispose of the need to consider the real risk of significant harm to

			the Applicant following any future bombing or terrorist act, having regard to the fact he had twice been detained in such circumstances and only released after a court determined that the charges should be dismissed.' (Para 73).
BRE15 v Minister for Immigration & Anor [2019] FCCA 1680 (Judge Lucev) (Successful)	20 June 2019	64-94	The court quashed a Tribunal decision and required the Tribunal to re-hear the application for review made by a Vietnamese applicant as a number of paragraphs constituting the majority of its consideration on complementary protection was copied from another Tribunal decision. "The Court is conscious of the fact that the Tribunal has given detailed consideration to its factual findings in relation to the refugee criterion, but notwithstanding that, the Court is left with the overall impression that there was not a fresh and independent consideration of the complementary protection findings and reasons by the Tribunal in the BRE15 – Tribunal Decision." (Para 93) "It follows from the above that the Tribunal did not therefore discharge its statutory task or function in relation to making its findings and reasons on complementary protection, and that there is therefore a jurisdictional error in that regard by the Tribunal. It follows that ground 5 is made out." (Para 94)
ECE17 v Minister for Immigration & Anor [2019]	12 June 2019	4, 14, 29-35, 37-38	The case concerned whether there had been a sufficiently prospective assessment of the applicant's complementary protection claim.

FCCA 1223 (Judge Driver) (Unsuccessful)			'In support of his application for the SHEV, the applicant raised the following matters: a. he is a Hazara and Shia Muslim. He was born in Iran, as his father had fled Afghanistan due to persecution he suffered as a Hazara; b. in May 2012, the applicant was involved in a traffic incident with Pashtuns. They fired a shot at him, which grazed his skin and caused bleeding; c. a few days before the applicant fled to Australia, a friend of his was killed by the Taliban; and d. he fears harm from the Taliban or Pashtuns, because of his Hazara ethnicity, Shia religion, being a failed asylum seeker from the west, and for being an Afghan returnee from Iran.' (Para 4, footnotes omitted). 'These proceedings began with a show cause application filed on 13 September 2017. The applicant now relies upon an amended application filed on 5 October 2017. At the trial of this matter on 9 May 2019, I granted leave for the applicant to further amend the single ground in it to broaden its scope somewhat. In its final form, that ground is: *1. In holding that the applicant did not face a real chance of serious harm from* [insurgent groups] *on*

			account of his ethnicity or religion (imputed or actual), the Immigration Assessment Authority (IAA) erred in failing to consider the risk faced by the applicant in the reasonably foreseeable future. *Particulars* *a. The IAA accepted that the applicant was a Hazara Shia: IAA Decision [18].* *b. The IAA accepted that the Taliban were active and "have the capability to orchestrate serious attacks in Kabul", but found that the Taliban were not targeting Shia Hazaras for reasons of their ethnicity or religion within Kabul: IAA Decision [43].* *c. The IAA accepted that "the security situation in Afghanistan is serious and there has been a deterioration in the security situation through the country, including Kabul": IAA Decision [78].* *d. There was information before the IAA that indicated that, in the past, the Taliban had targeted Hazaras: see, eg, material referred to at p 4 of the decision of the Minister's delegate.* *e. In assessing whether the applicant faced a real chance of serious harm from the Taliban on account of his ethnicity or religion (imputed or actual), the IAA did not once refer to the issue of whether the applicant might face such a risk in the reasonably foreseeable future.*' (Para 14).

			‘The Authority in this matter clearly understood the test it was to apply. At [15]-[16][52] of its reasons, it correctly summarised the definition of refugee in s.5H(1) of the Migration Act, as well as observing that there must be a “well-founded fear of persecution”, which required, among other things, that there is a “real chance that the person would be persecuted”. While it is correct that the Authority did not use the phrase “reasonably foreseeable future”, it was plainly not required to do so[53] and the phrase is not, in any event, used in ss.5H or 5J of the Migration Act. The fact that the Authority does not use that phrase does not, of itself, show a misunderstanding or misapplication of the relevant test. The Authority’s reasons should not be read with an eye finely attuned for error.’ (Para 29). ‘The ground of review and the applicant’s submissions allege that the Authority failed to “have regard to the reasonably foreseeable future” in considering whether the applicant faced a real chance of harm from the Taliban, IS or other insurgent groups. The applicant focuses on [37]-[43] of the Authority’s reasons. However, the reasons must be read as a whole,[55] and the discussion at [37]-[43] forms part of the Authority’s assessment, at [35]-[56],[56] of the “risks to the applicant on the basis of his ethnicity, his religion...”, both in Kabul and Afghanistan more generally.’ (Para 30). ‘It is apparent that the Authority did, at [35]-[56] of its reasons, engage in a prospective assessment of the applicant’s risk of harm on account of his ethnicity

			(Hazara) or religion (Shia) if he were to return to Afghanistan, as it was required to do.' (Para 31). 'As noted above, the Authority correctly understood the test it was to apply, and it expressed its conclusion at [47],[57] in terms of the applicable statutory test, namely, that the applicant did not have "a well-founded fear of persecution" on account of his ethnicity or religion.' (Para 32). 'Further, in its consideration of the complementary protection criteria, the Authority expressly stated that it was assessing whether there were "substantial grounds for believing that, as a *necessary and foreseeable consequence* of the person being removed from Australia to [Afghanistan], there is a real risk that the person will suffer significant harm" (emphasis added).[58] This also plainly suggests that the Authority was engaging in a prospective assessment, as required. Also, at [85],[59] the Authority, in considering harm under the complementary protection criterion in relation to the applicant's religion and ethnicity was, in reliance on its earlier findings, "satisfied there is not a real risk that he would suffer significant harm for any of the reasons claimed if he returns to Afghanistan, and lives in Kabul...". This, too, suggests that the Authority had undertaken a prospective assessment, focussing on what would occur if the applicant returned to Afghanistan.' (Para 33). 'Contrary to the applicant's submissions, the language, expressions and findings used and made by the

			Authority make it plain that it did engage in a *prospective assessment* of what the applicant would do and the risk of harm he would face if he returned to Afghanistan.[60] For example: a. the Authority found that if the applicant went back to Afghanistan, he would return to Kabul and would seek to re-establish himself there, and had "assessed him on that basis";[61] b. the Authority considered at [36][62] the applicant's religious practices and made findings as to how the applicant "would live in the community", how the Authority "expected" he would practise his faith, and concluded that he "would not be" harmed if he returned; i. in relation to harm suffered by Shia Hazaras from the Taliban and other anti-government elements, the Authority considered the country information before it as to the risk of harm faced by Shia Hazaras in Kabul; ie. the applicant's circumstance if he returned. That indicated that "ordinary Shia Hazaras" were not being targeted. The country information also indicated that persons with certain profiles were at risk, but the Authority found that the applicant did not have such a profile

			and *would not* if he returned to Afghanistan.[63] The Authority also considered country information put forward by the applicant relating to recent attacks in 2016 and 2017 against Shia Hazaras. The Authority was not, on the basis of this country information, satisfied that the applicant would be at risk of harm if he returned;[64] a. in relation to IS, the Authority considered relevant country information about their actions, including recent attacks in 2016 and 2017.[65] The Authority noted that casualties caused by IS were decreasing,[66] and that IS was focusing on high profile government, military and coalition targets, ie. not the applicant;[67] b. relying on country information, the Authority did not accept that anti-government elements were targeting Shia Harazas in Kabul on the basis of their ethnicity and/or religion;[68] and c. other parts of the Authority's decision also plainly show that it undertook a prospective assessment of the risk of harm facing the applicant on return to Afghanistan.' (Para 34).

			‘The applicant’s submission to the Authority refers to country information indicating that the security situation in Afghanistan was deteriorating, which, it is submitted, meant that it was “important” for the Authority to consider the “reasonably foreseeable future”. No error is revealed by this submission. The Authority acknowledged that “there has been a deterioration in the security situation in the country overall...”.[70] That does not, however, mean that the applicant would face a real chance of harm on return to Afghanistan. Having acknowledged this country information, the Authority also considered country information as to the particular risk of harm relevant to the applicant in the areas to which he was returning, and was not satisfied that the applicant would face a real chance of harm there.[71] In doing so, the Authority considered country information (put forward by the applicant) as to recent circumstances and attacks in those areas.[72] No failure to engage in a prospective assessment of the applicant’s risk of harm on return to Kabul has been shown.’ (Para 35). ‘I am satisfied that the Authority did make a forward looking assessment concerning the risks faced by the applicant from insurgents. The applicant has not challenged the Authority’s assessment of the risk he faces from generalised violence in Kabul or Afghanistan more generally. That may have been a generous concession, having regard to the fact that the Authority accepted the applicant had been shot during his brief period in Kabul, which might indicate a real risk of significant harm from generalised violence for

			the purposes of the complementary protection assessment. In a country where firearms are ubiquitous and are openly carried on the street, and in circumstances where the applicant was shot in a random incident of violence because of a traffic incident, the conclusion that he does not face a real risk of significant harm as a result of generalised violence is, to my mind, a somewhat brave one.' (Para 37). 'This is a matter which the Minister might consider pursuant to s.417 of the Migration Act. Further, there are humanitarian considerations in this case. The applicant was born in Iran as a refugee and spent most of his life there. More recently, he has spent some years in Australia. He has only spent a short time in Afghanistan, in Kabul, where he was shot. Plainly, being compelled to return there is a very unhappy prospect for him.' (Para 38).
BGE17 v Minister for Immigration & Anor [2019] FCCA 1291 (Judge Nicholls) (Unsuccessful)	16 May 2019	5-6, 64, 67-69, 72-74, 77-78, 94-97	This case was concerned with the proper way to approach the statutory definition of 'significant harm'. The FCCA confirmed that a decision-maker does not have to consider all possible forms of statutorily defined harm in each case, but rather only those which are raised by the particular case. 'The applicant is a citizen of Afghanistan who arrived in Australia on 27 August 2012. He subsequently made an application for a SHEV which was received by the Department on 8 December 2015 (CB 97– CB 146).

			The applicant was assisted by a migration agent in making the application.' (Para 5). 'The applicant claimed to fear harm if he were to return to Afghanistan from the Taliban, other (Sunni Islam) extremist groups, and the Pashtun population generally due to his being of Hazara ethnicity, of Shia Islamic religion, that he would be imputed with an anti–Taliban political opinion, and would return as a failed asylum seeker.' (Para 6). 'Ground two takes issue with the IAA's consideration of the question of the reasonableness of relocation to Mazar–e–Sharif.' (Para 64). 'In any event, the assertion of legal error was said to be, simply, as follows. In the context of its consideration of relocation, the IAA did consider all of the forms of significant harm in relation to social discrimination, and nepotism ([40] at CB 322–CB 323). Further, that the IAA did make conclusions regarding the reasonableness of relocation at [43] and [50] of its decision record.' (Para 67). 'However, the applicant submitted, the IAA made "generic conclusions" which he "would have to go behind...to contend that there was no consideration in relation to the other forms of significant harm".' (Para 68).

			'The complaint as expressed in the applicant's written submissions is as follows: (at [23]) *"...The IAA expressly considered whether the applicant had the "capacity to subsist" in Mazar-e-Sharif at [46] and [47] of its decision. However, the IAA erred by failing to consider the risk to the applicant of other possible forms of statutorily-defined forms of significant harm when assessing the reasonableness of him relocating to Mazer-e-Sharif."*' (Para 69). 'Implicit, if not explicit, in the applicant's argument is that in all cases where a decision maker gives consideration to the matter of "significant harm" under the Act, the decision maker is compelled to consider each and every one of the items set out at s.36(2A). In the current case the applicant argues the IAA did not do this.' (Para 72). 'There are two immediate answers to the general proposition postulated by the applicant.' (Para 73). 'One, s.36(2A) is not a "shopping list" that requires some formulaic "ticking – off" of each item set out there. Rather, the decision maker's task is to consider the circumstances presented, and attendant upon, claims expressly made or clearly arising from the material before it (*NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* [2004] FCAFC 263, and *"WAEE"*).' (Para 74).

			‘Two, in that light regard must also be had to the entirety of the IAA’s consideration. For example, as set out above findings of fact made by the IAA under different headings in its decision record are available and may be “imported” into the consideration under the heading of “Real risk of significant harm” (CB 322.3).’ (Para 77). ‘As the respondent’s counsel submitted in the current case there is no suggestion that the IAA was unaware of the “various means” by which a person may suffer significant harm (see the IAA’s references in [35], and see also [37]).’ (Para 78). ‘Two things may be said about the applicant’s submission before the Court concerning the matter of the capacity to subsist. One, it was not unreasonable for the IAA to focus on this given the applicant’s claims and arguments about relocation to Mazar–e–Sharif. Two, as the Minister submits this was not the only element in the IAA’s relevant consideration.’ (Para 94). ‘For example, the IAA considered the applicant’s circumstances in light of his claimed personal circumstances, his concerns about the economic well-being of his family, his capacity to re-establish himself in Mazar–e–Sharif, employment concerns and relevant familial and social networks. In addition the IAA addressed the matters raised as being “Accommodation and Family support”.’ (Para 95).

			‘Contrary to the applicant’s submissions now, this went beyond a simple consideration of the applicant’s capacity to subsist but, properly, considered the reasonableness, and practicability of relocation in the context of the applicant’s own circumstances, and his objections to relocation.’ (Para 96). ‘In all therefore, the IAA understood the question posed by s.36(2)(aa) and s.36(2A), and its application of s.36(2B) does not reveal jurisdictional error. Ground two is not made out.’ (Para 97).
EZC18 v Minister For Home Affairs & Anor [2019] FCCA 464 (Judge Brown) (Unsuccessful)	1 March 2019	1-4, 23, 31-35, 37-38, 41, 46-47, 49-51, 67, 69-71, 74-76, 79, 81, 83-84, 90-93	The court discussed the meaning of ‘arbitrary deprivation of life’ and whether there was a requirement of intention attached in relation to an applicant who was at risk of committing suicide on return to the UK. Not only does the court indicate that there must be a subjective intention, it appears to require that the state condone the actions of a non-state party which would deprive someone of life. ‘The applicant is a British citizen. He was born in Cumnock, Scotland on 24 January 1932. He migrated to Australia, with his now deceased spouse and three children, in June 1964. He has never applied nor been granted Australian citizenship. He remained living in Australia, pursuant to a permanent resident visa, issued under the provisions of the *Migration Act 1958*.’ (Para 1). ‘On 10 March 2016, the applicant was convicted of two counts of sexual exploitation of a minor, in the District

			Court of South Australia, and sentenced to four years imprisonment, with a non-parole period of one year. The victims of the crimes were two of his granddaughters, who were each under fourteen years of age at the time of offending.' (Para 2). 'The applicant is in poor health. He suffers from atrial fibrillation; type 2 diabetes; hypertension; hypercholesterolaemia; hypothyroidism; congestive cardiac failure; cardiovascular disease; and various lung diseases. In the past he has suffered from bowel cancer. He has hearing loss; blindness in one eye; suffers from arthritis; and has mobility issues. He has also been diagnosed with some form of dementia.' (Para 3). 'On 22 August 2016, a delegate of the Minister for Immigration & Border Protection cancelled the applicant's permanent resident visa pursuant to the provisions of section 501(3A) of the Act. This requires that any migration visa held by a person is to be cancelled if that person does not pass a *character test* because he/she has been convicted of a sexually based offence, involving a child, and has been sentenced to a term of full-time imprisonment.' (Para 4). 'In this particular case, the applicant does not contend that he is a refugee for the purposes of section 5H.The grounds for his application turn on the complimentary protection provisions. It is his position that as there is evidence, in the form of the assessment of Dr Begg, that he will commit suicide, if returned to the United

			Kingdom. As a consequence it is contended, on his behalf that there is a *real chance* that he will suffer significant harm through the *arbitrary deprivation* of his life within the terms envisaged by section 36(2A).' (Para 23). 'In these circumstances, his counsel, Mr Finlayson submits that AAT erroneously interpreted the expression and concept of a person who is *arbitrarily deprived* of life, as contained in section 36(2A) of the Act. In his contention, a person can be *arbitrarily deprived* of life, if the action is occasioned by his/her own hand, if a state based authority fails to take adequate precautions or put in place sufficient measure to prevent the suicide in question occurring. The emphasis, in his submission, being on the meaning of *arbitrarily* in the context of the complementary protection provisions.' (Para 31). 'In this context, the AAT had available to it a paper prepared by Aida Ziganshina entitled *Independent Research on Arbitrary Deprivation of Life.*[12] Essentially, in Ms Ziganshina's thesis, an action result in a person being deprived of life can be authorised by domestic law and still remain arbitrary. The expression is to be interpreted broadly, whilst bearing in mind it will have a variety of meanings depending on context.' (Para 32). 'By way of example, it is submitted that the suicide of a person in lawful custody may be characterised as arbitrary, if the state authority concerned has acted

			negligently through failing to provide adequate safeguards to prevent the self-harm in question. Such state authorities are accountable to a higher standard as a consequence of their deprivation of the liberty of the person who is subject to their control.' (Para 33). 'Ms Ziganshina cited a United Nations Special Rapporteur, Manfred Nowak, who defined arbitrariness as difficult to define in abstract, but in the context of deprivation of life it is a concept linked to ideals of justice and covered both intentional and unintentional acts and one which contained elements of unlawfulness, injustice, capriciousness and unreasonableness.' (Para 34). 'In this context, it is contended, on behalf of the applicant, given the fact that the AAT accepted he is at significant risk of suicide because of his idiosyncratic circumstances on return to the UK, it is axiomatic that Australia owes him complementary protection obligations and it is immaterial that his death may be self-initiated.' (Para 35). 'The AAT considered Ms Ziganshina's thesis to be a helpful insight into international jurisprudence but found it was not bound to consider any possible breaches, by Australia, of the *International Covenant On Civil and Political Rights* when considering the complementary protection criterion under the Act.' (Para 37).

			‘The AAT noted that the expression *arbitrarily deprived of life* was an expression not defined within the applicable legislation. In these circumstances, the adverb *arbitrarily* should be given it ordinary meaning, which it found to be concerned with *“capriciousness, unpredictability, injustice and unreasonableness”* in the sense of *“not being proportionate to the legitimate aim sought”*. Finally, the AAT found that the natural reading of section 36(2A) required the harm arbitrarily inflicted on the person concerned to emanate from a third party.’ (Para 38). ‘The difficulty arising in this case is that the expression *arbitrarily deprived of life* is not defined within the Act. Other aspects of *significant harm,* listed in section 36(2A) such as *torture; cruel or inhuman treatment or punishment;* and *degrading treatment or punishment* are defined. Necessarily, in my view, these definitions provide context to assist the court, in determining the issues arising in this case, as will the overall legislative intent underpinning the provision.’ (Para 41). ‘Mr Bowen indicated that the purpose of the bill was to honour Australia’s *non-refoulement* obligations arising under its ratification of the *International Covenant on Civil and Political Rights*[18] and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*[19]Particularly relevant were Articles 6 & 7 of the *ICCPR.*’ (Para 46).

			‘Accordingly, in my view, it is appropriate, for this court, in its interpretation of section 36, to look to both the *ICCPR* and the *CAT* to determine the meaning of *significant harm* in the context of the person concerned being *arbitrarily deprived of life.*’ (Para 47). ‘The predominant focus of Article 6 is on state sanctioned executions and genocides, which are by their nature intended to occur. In each case, either a state based authority (in the case of an execution) or a ruling clique has determined on the killing of a particular ethnic or religious group (in the case of genocide). Judicially authorised executions are recognised but only in closely prescribed circumstances.’ (Para 49). ‘In the case of the applicant in the present case, neither the UK nor Australian authorities actively *intend* his death, in the sense that either state actively seeks it or has put in place formative steps to ensure that it will definitely occur at some specific time, as with an execution. Accordingly, in the current case, the authorities do not *mean* the applicant’s death to occur, but they can foresee its possibility, given the applicant’s idiosyncratic circumstances, particularly his psychiatric prognosis.’ (Para 50). ‘Necessarily given the applicant’s accepted state of psychological infirmity, his death at his own hand, is a foreseeable consequence of his forced removal from Australia, which is known to the relevant authorities in this country. The question for the court, which arises, is whether this situation is equivalent to

			an *arbitrary* action, of the state, likely to lead to the deprivation of life. As will be seen, in *SZTAL,* Edelman J referred to this concept as *oblique intention.*' (Para 51). '*MZAAJ v Minister for Immigration & Border Protection* [23] Judge Riley was dealing with a judicial review matter, in respect of a complementary protection claim, concerning a Sri Lankan Tamil, who suffered significant diabetes and kidney disease requiring regular dialysis. Again, given it developmental status, Sri Lanka could only provide limited dialysis, which had the potential to have life threatening consequences for the applicant, if returned there.' (Para 67). 'On appeal, Pagone J again dealt with the issue in brief terms. He said as follows: *"The words "arbitrarily deprived" are to be given their ordinary meaning. In this case the Tribunal found that any lack of adequate medical treatment would not result from the first appellant's ethnicity or particular circumstances but from the general circumstances faced by all Sri Lankans. The Tribunal did not expressly mention s 36(2B)(c) in its reasons but did find, for the purposes of that provision, that the risk of harm from inadequate medical treatment was a risk faced by all Sri Lankans when concluding that the first appellant would be excluded from the*

			operation of the complementary protection regime.”’ (Para 69). ‘In this context, counsel for the Minister, Mr d’Assumpcao submits as follows: *“...the ordinary meaning of the words ‘arbitrarily deprived’ read in the context of the Act and the policy underlying their introduction, mean that the harm is concerned with matters such as extrajudicial killing and the like.”*’ (Para 70). ‘I agree with this submission. The risk of significant harm facing the applicant in this case is not one which emanates specifically from any state based authority or its agents or proxies. The applicant faces the risk of death, at his own hand, because of the travails of loneliness; social isolation; compounded by old age and poor health. These are risks likely to be faced by many individuals, in both this country and the UK.’ (Para 71). ‘The same dictionary defines verb *deprive* as *“strip, dispossess, debar from enjoying”*. It is a transitive verb which necessitates in its usage that it has a direct object. Accordingly, for the applicant to suffer significant harm, pursuant to this criterion, a decision maker must be satisfied that another actor is intent on dispossessing another person of his/her life in a despotic or tyrannical fashion or otherwise subject to whim or caprice.’ (Para 74).

			‘Despotism and tyranny are attributes of some form of malign authority, inimical with any consideration of internationally sanctioned standards of human rights. In my view there is a consistency between the various forms of significant harm delineated in section 36(2A) in that each requires an intended consequence. This follows from the specific use of the word intend and in the context of *deprivation of life* the use of a transitive verb.’ (Para 75). ‘It is also clear that section 36(2A) was created to give substance to Australia’s non-refoulement obligations at an International level. Section 36(2B) limits these obligations by the principle of internal relocation and in cases where the harm faced is generic in nature. In my view, the harm concerned, given the tenor of the second reading speech, must also have a causal connection to one of Australia’s obligations under either *ICCPR* or *CAT*.’ (Para 76). ‘As such, the applicant was not likely to be subject to any direct form of discrimination or harm emanating from the UK authorities or subject to the infliction of any sort of harm by others, whom the government was either unable or unwilling to restrain. The direct harm, in this case, would come from the applicant himself by dint of his circumstances.’ (Para 79). ‘In these circumstances, the situation facing the applicant may be regarded as one characterised by the relevant authorities having a callous disregard for his safety and well-being but not, in my view, one

			characterised by those authorities having a tyrannical or capricious intent to end his life. The distinction is a fine one but is significant given the context and intent of the relevant legislation.' (Para 81). 'The example given of the honour killing is apposite to the current matter. The victim of an honour killing will have been axiomatically arbitrarily deprived of life in an unrestrained and tyrannous manner. The death will involve the actions of others and be meant, by them, to occur. If it occurs with the passive disregard of the relevant authorities, it will be tantamount to the commission of significant harm, which the government condones. It will be antipathetic to the principles of human rights to which Australia adheres. As such, in my view, it will not be analogous to the situation confronting the applicant.' (Para 83). 'In the current matter, neither the Australian nor the UK governments condone the applicant engaging in self-harm. Any potential self-harm is unlikely to have the involvement of another individual actor and, if it does, it will arise with the acquiescence of the applicant. As such, there is no suggestion of any direct act or omission attributable to any government agency.' (Para 84). 'What is fundamentally different between this case and other cases involving honour killings; exposure to violence because of sexual preference; or the return of a person to an environment in which family violence is prevalent and condoned; is that each of these exemplars

			of harm involves the actions of others; whilst in the applicant's case, his harm is potentially self-actioned and self-directed.' (Para 90). 'Section 36 is directed towards ensuring Australia meets it international human rights obligations as entailed in its ratification of the Refugees Convention; the *ICCPR;* and the *CAT.* Each of these, in my view, is directed to provide protection, for individuals, from the despotic actions of states and any actors within states, whose tyrannical activities are not subject to the control of state based authorities, who have passively provided its imprimatur to such activities.' (Para 91). 'I appreciate that Article 2 of the *ICCPR* places emphasis on every human being's *inherent right to life.* This statement prefaces sub-articles dealing with the imposition of the death penalty; genocide; the right to seek commutation or pardon in respect of a penalty of death; and negates it imposition for youths and pregnant women.' (Para 92). 'It is in the context of such matters – all involving state actions – that the phrase *arbitrarily deprived of life* appear. In this context, I agree with the submissions of counsel for the Minister, Mr d'Assumpcao that the Article is concerned with the concept of extra-judicial killings, which are state initiated. In my view, the Article does not create any obligations upon contracting states, in respect of ensuring the sanctity of life, in a more generic sense.' (Para 93).

AOS18 v Minister for Immigration & Anor [2019] FCCA 327 (Judge Kendall) (Unsuccessful)	15 February 2019	4, 36-37, 42, 57-58, 61-62, 66-73	The issue in this case was whether the Tribunal had sufficiently examined the applicant's complementary protection obligations where the Tribunal had not made findings separate to its Refugee Convention findings. The court applied the Federal Court's decision in *CDY15 v Minister for Immigration and Border Protection* [2018] FCA 175 (28 February 2018) in finding that the Tribunal had not erred. 'The Applicant provided a statutory declaration with his SHEV application in which he claimed that that he feared harm by the Bangladeshi police. The Applicant claimed that his parents and siblings were supporters of the Bangladesh Nationalist Party ("BNP") and that his father was a member of the BNP. The Applicant also indicated that he had endured physical and emotional harm at the hands of members of a rival political party, the Awami League ("AL") and that he also fears harm as a Sunni Muslim.' (Para 4). 'As noted above, in his Application for judicial review, the Applicant relies on one ground of review, as follows: 1. *The Assessor failed to properly consider all of my claims. The Immigration Assessment Authority (IAA) erred by:* a. *failing to consider an integer of the Applicant's claims for protection by not considering whether the physical harm,*

			threats and extortion suffered by the applicant in Bangladesh for a non-Convention reasons gave rise to complementary protection obligations under s.36(2)(aa) of the Migration Act 1958 (Cth) (Act); and / or in the alternative b. *requiring the Applicant to show a Convention-nexus to the risk of significant harm he faced in order to fall within complementary protection criteria under s.36(2)(aa) of the Act.*' (Para 36). 'It is evident from the very useful oral submissions presented by Mr Saul-Jahnke for the Applicant that at the core of the Applicant's ground of review is the contention that, given the IAA's findings in relation to the evidence of physical harm inflicted on the Applicant in Bangladesh (on three occasions), the IAA failed to comply with its obligations under the Act because it did not specifically address these acts of violence in determining whether the Applicant risked future harm as per the requirements of s.36(2)(aa) of the Act.' (Para 37). 'In assessing whether or not an error has occurred here in relation to the IAA's obligations when assessing any Complementary claims, the Court is guided by the overview provided by Derrington J in *CDY15*.

			Relevantly, His Honour wrote that the question to be determined in assessing whether an Applicant is entitled to any Complementary protections is: *23. ...whether, as a necessary and foreseeable consequence of the applicant for a visa being removed to a receiving country, there is a "real risk" that he or she will suffer significant harm. That involves an evaluation of the harm which the applicant might suffer in the future and that assessment requires past facts and events to be evaluated for the purposes of ascertaining whether a propensity exists for the applicant to encounter harm in the future. Highly relevant to that inquiry is whether the applicant has suffered any previous infliction of harm and the circumstances in which it occurred. If it were the case that third parties inflicted harm on the applicant and had reasons and motivation for doing so and those reasons and motivations remained extant at the time when the decision is made, the decision maker might rightly assume that there exists a propensity for harm to be suffered by the applicant at the hands of those third parties in the future. Conversely, if the motivation or reasons behind the infliction of the initial harm have expired or lapsed, a decision maker might rightly consider that the prospect of the applicant suffering harm in the future from the identified third parties does not exist.*

			24. That is not to say that the identification of motivation for the infliction of past harm is a necessary requirement. It is possible to contemplate circumstances where the motivation for prior incidents is not known but the frequency of the infliction of harm or the circumstances are such that it is possible to reach the conclusion that there exists a real risk of the applicant suffering significant harm in the future. That said, such circumstances (outside of war zones and the like) will be unusual and it is likely that they will only occur where they generate an assumed or implicit motivation for the infliction of past harm which can be seen to continue at the time of the making of the decision. Nevertheless, in general, as a matter of logic it is the motivation behind past inflictions of harm on an applicant which make that factor relevant to a consideration of whether similar harm is likely to be inflicted in the future. In circumstances where the reason or motivation for the past infliction of harm is not known, the fact that the applicant has sustained that harm, of itself, must necessarily be of little significance in deciding whether, in the future the applicant might be at risk of similar harm. Put another way, it must be that, in all but the most exceptional cases, the existence of prior acts of harm for which no reason or motivation is known cannot lead to the conclusion that the

			victim of those acts of violence faces any risk of similar harm in the future.' (Para 42). 'Applying *CDY15* to the specific facts of this case, it is clear here that the Applicant made a Complementary claim to fear harm on the basis of the attacks he referenced. That much is clear from the Applicant's SHEV application, where he states that he had been assaulted in the past and was worried that he would be attacked again.' (Para 57). 'It is worth stressing here that this particular Complementary claim does not exist in a vacuum and cannot simply be segregated from the Applicant's Convention claims. Rather, the claim to fear harm arises within the context of a series of quite violent attacks that, on the Applicants own evidence, occurred at the hand of the AL in Bangladesh because of his *political affiliations* (as either a member of supporter of the BNP). The Applicant here, on the evidence, does not assert that he was attacked for any reason other than his political affiliations. This is crucial to any s.36(2)(aa) analysis.' (Para 58). 'Here, it is clear that the IAA accepted that the Applicant was attacked. However, the IAA rejected the Applicant's claims as to *the motivations* for the attacks and his evidence surrounding the attacks and *why they occurred* – evidence which, the IAA found, suggested no political motivation for the attacks.' (Para 61).

			‘The question that follows is whether the IAA was then required to specifically address these attacks under its assessment of s.36(2)(aa).’ (Para 62). ‘To paraphrase Derrington J, the difficulty the Applicant faces here is that the facts and evidence that underpin his claim about a risk of significant harm if he is returned to Bangladesh are clearly linked to his own evidence and concerns about the harm that might arise because of his political leanings. The allegations and concerns raised in relation to his Complementary claims are the same as those which ground his Convention claims.’ (Para 66). ‘Here, once the IAA had determined that any harms that arose in the past were not, in any way, politically motivated – but rather, random in nature – the foundation of the Applicant’s claims as a whole necessarily fell away.’ (Para 67). ‘In these circumstances, there is no jurisdictional error in the IAA applying its earlier Convention findings (being the rejection of the Applicant’s evidence as to why he was assaulted) for the purposes of determining whether or not he would face a real risk of harm if returned to Bangladesh for the purposes of s 36(2)(aa) of the Act.’ (Para 68). ‘Here, as in *CDY15*, the rejection of the Applicant’s evidence as to the motivations for the violence he experienced (which he says suggested a political motivation for the attacks), had the effect that the fact

			of the attacks having occurred carried with it no suggestion, on the evidence before the IAA, that similar harm would be suffered in the future.' (Para 69). 'Here, the IAA relied on its findings made pursuant to 36(2)(aa) of the Act when it wrote: > *I have otherwise found that the applicant does not face a real chance of any harm on return to Bangladesh due to his former political involvement, his previous or future support of the BNP, his father's BNP support, as a Sunni Muslim or due to his illegal departure.*' (Para 70). 'This is sufficient. The Applicant's claims about the acts of violence inflicted on him all relate to his specific claims and his own evidence about his political affiliations. Here, the IAA determined that the violence in question was not politically motivated. It references that conclusion in its 36(2)(aa) analysis. The fact that the IAA does not specifically reference the attacks in question does not, in the circumstances of this case, point to jurisdictional error.' (Para 71). 'Although the Complementary analysis provided by the Tribunal in *CDY15* is more substantive and detailed, the Court does not accept that the IAA is *required* to specifically reference each factual finding made in its analysis of an Applicant's Convention claims. To oblige the IAA to do so risks requiring the IAA to undertake separate determinations of fact in relation to each

			ground as advanced. To again reference Derrington J in *CDY15* (at [42]): > *The Tribunal is entitled to make factual findings on the basis of the evidence provided to it by the applicant and what other evidence is available. If such findings of fact are relevant to the application of two or more statutory tests, the Tribunal is entitled to rely upon the finding in relation to each. To require the Tribunal or other decision maker to undertake a wholly nugatory task of considering the material a second time would be irrational. ... [I]t is not surprising in cases of this nature that a finding of fact by the Tribunal may well diminish the factual foundation of two or more distinct claims.*' (Para 72). 'Here, the factual basis for the Applicant's Convention and Complementary claims is the same. All the evidence points to harm on the basis of a political affiliation. In circumstances where that occurs, the basis of the IAA's rejection of the Convention claims (i.e. that no *political* violence was evident) can be relied on for the rejection of the Applicant's claim for Complementary protection. The IAA makes specific reference here to its Convention findings, noting that it found no political motive for any harm infected in the past. That finding clearly captures any Complementary claims that rely, as they do here, on the same factual context for proof of harm in the future.' (Para 73).

ANL15 v Minister for Immigration & Anor [2019] FCCA 238 (Unsuccessful) For similar discussion on the Ministerial Direction, see also BNF15 v Minister for Immigration & Anor [2019] FCCA 236 (8 February 2019)	8 February 2019	3, 5, 10, 14, 16-18, 25-29	The FCCA considered whether there had been a failure to comply with Ministerial Direction No 56 in circumstances where the Tribunal had mentioned the Guidelines in the 'Relevant Law' section but not in the substantive section where it set out its findings on complementary protection obligations. 'The background to this matter is as follows: a. the applicant is a citizen of Sri Lanka and arrived at Cocos Island on 12 August 2012 as an illegal maritime arrival: CB 95-96; b. on 6 September 2012 an entry interview was conducted: CB 1-14, and on 20 November 2012 the Minister lifted the bar under s.46A of the *Migration Act* to allow the applicant to lodge a Protection Visa application: CB 96; c. the applicant lodged the Protection Visa application on 13 December 2012, in which he claimed to fear harm on the basis of his actual or imputed political opinion and his unlawful departure from Sri Lanka: CB 15-45; …' (Para 3). 'The applicant submitted as follows: a. the ground of review could also be described as a failure to take into account a relevant consideration, namely the PAM 3 Refugee and

			Humanitarian Complementary Protection Guidelines ("Guidelines"); b. the Tribunal was obliged under s.499(2A) of the *Migration Act* to comply with any Ministerial direction made pursuant to s.499(1) of the *Migration Act*. In this instance, the Ministerial Direction as set out at [4(d)(iii)] above had been made, which required the Tribunal to take into account the Guidelines to the extent they are relevant; c. the Tribunal dealt with the Ministerial Direction in the Tribunal Decision at CB 164 at [69]; d. the Tribunal Decision at CB 171-172 at [107]-[109] rendered the Guidelines relevant, and by reason of s.499(2A) of the *Migration Act*, the Guidelines were a mandatory consideration; e. the Guidelines provide examples of poor prison conditions which can amount to cruel or inhuman or degrading treatment or punishment: CB 171-172 at [107], including, amongst other things, overcrowding, unsanitary conditions, exposure to cold, inadequate ventilation or lighting, inadequate bedding, inadequate clothing, inadequate nutrition and clean drinking water, lack of opportunity for adequate exercise, and denial of medical treatment: Guidelines, pp.27-29;

			f. despite that finding at CB 171-172 at [107], the Tribunal does not then consider whether the overcrowding, poor sanitary facilities, limited access to food, absence of basic assistance mechanisms, lack of reform initiatives and instances of torture, maltreatment and violence would, when regard is had to the Guidelines and the international jurisprudence referred to therein, mean there is a risk of significant harm to the applicant; g. the Ministerial Direction requires the Tribunal to take into account the Guidelines to the extent they are relevant to the decision under review; …' (Para 5). 'What is required to be undertaken is a consideration of the reasoning in the Tribunal Decision as a whole, and an evaluation as to whether the omission of any further specific reference to the Guidelines can be understood, or rationalised, as being because the Tribunal did deal with the matters the subject of the Guidelines, albeit without specifically referring to the Guidelines, or because the matters or evidence which were required to be considered were not material to the Tribunal's reasons: *Minister for Immigration & Border Protection v SZSRS* [2014] FCAFC 16; (2014) 309 ALR 67 ("*SZSRS*") at [33]-[34] per Katzmann, Griffiths and Wigney JJ; *Minister for Immigration & Citizenship v MZYZA* [2013] FCA 572 at [48] per Tracey J.' (Para 10).

			‘The Tribunal specifically dealt with whether the applicant would experience significant harm for reasons of returning as a failed asylum seeker or an illegal departee: CB 169-171 at [94]-[101], and in particular observed that the applicant would be detained for a short period if charged with an offence under the *I & E Act*, would be fined, and bailed, and that if he could not afford to pay the fine could make arrangements to pay the fine by instalments: CB 169-170 at [94]-[97]. The Tribunal then dealt specifically with prison conditions…’ (Para 14). ‘The Tribunal further dealt with: o the question of prison conditions in assessing the complementary protection claims of the applicant at CB 171-172 at [107]-[109] set out at [4(v)] above; o the process by which the applicant was likely to be charged with an offence under the *I & E Act*, bailed and fined in its complementary protection assessment: CB 171 at [104]-[105]; and i. the question of the applicant’s employment upon his return to Sri Lanka in its complementary protection assessment: CB 172 at [110].’ (Para 16). ‘It is evident from the foregoing that the Tribunal engaged at an appropriate intellectual level with the

			claims made by the applicant, both in the context of the refugee and complementary protection assessments: *Lafu*at [47]-[54] per Lindgren, Rares and Foster JJ.' (Para 17). 'It is possible to infer that the Tribunal has failed to consider particular evidence or information where it does not mention it in its reasons: *Yusuf* at [69] per McHugh, Gummow and Hayne JJ. The fact that evidence or information is not expressly referred to in the Tribunal Decision does not, however, mean the Tribunal did not consider the evidence or information at all, or failed to actively engage in a consideration of the evidence or information: *Yusuf* at [69] per McHugh, Gummow and Hayne JJ; *SZSRS* at [34] per Katzmann, Griffiths and Wigney JJ. Where a Tribunal makes findings on a particular matter, the omission of other matters can be reasonably understood or inferred to be on the basis of irrelevance or immateriality to the Tribunal's reasoning, however, "[i]n some cases, having regard to the nature of the applicant's claims and the findings and reasons set out in the [Tribunal's] reasons, it may be readily inferred that if the matter or evidence had been considered at all, it would have been referred to in the [Tribunal's] reasons, even if it were then rejected or given little or no weight": *SZSRS* at [34] per Katzmann, Griffiths and Wigney JJ.' (Para 18). 'In *ADO15* this Court observed as follows at [52]-[54] per Judge Smith:

			52. The first point to note is that cl.2 of the Direction only requires the Tribunal to "take account of" the relevant guideline. It does not require the Tribunal to follow the guideline slavishly as though it were a statement of law. In this case, the Tribunal stated, at [6] that it was required to take the guideline into account. In light of that, it is clear that the Tribunal was at least cognisant of its obligation under s.499 of the Act. Thus, in my view, in order to succeed the applicant must show from the balance of the Tribunal's reasons that, in spite of this cognizance, the Tribunal failed to have any regard to the guidelines. *53. The second point to note is that the particular paragraph in the guidelines relied upon by the applicant (the second paragraph quoted at [51] above) is very general in nature and application. The Direction does not say when it would be appropriate to make certain inferences, or when certain inferences must be drawn. Indeed, if it did it would probably be beyond the power in s.499(1) of the Act…*' (Para 24). 'As in *ADO15* the reference to the Guidelines at CB 164 at [69] indicates that the Tribunal was well aware of the requirement to take the Guidelines into account. That is reinforced in this case by the placement of the reference to the requirement to take the Guidelines into account in the paragraph immediately preceding the Tribunal's consideration of the applicant's claims and the evidence: CB 164 at [69]. For the reasons which follow immediately hereunder it cannot be said in this

			case that in spite of its cognisance of the Guidelines the Tribunal failed to have regard to them.' (Para 25). 'In the Court's view it can plainly be inferred from the Tribunal Decision that the Tribunal read, understood and took into account the Guidelines, particularly insofar as it focussed upon the likely short period of detention: CB 172 at [108]. The Tribunal expressly set out and engaged with the definition of "significant harm" as it related to the applicant's circumstances in this case, and in particular the applicant's return to Sri Lanka as a failed asylum seeker or an illegal departee: CB 163-164 at [66]-[68], 171 at [102] and [104], and 171-172 at [107]-[109]. The focus on the short period of detention allows an inference that the Tribunal was applying duration-based reasoning as a centrally important factor in assessing prison conditions against Article 7 of the *ICCPR* as indicated in the Guidelines. The necessary implication to be drawn from this inference is that having found the applicant would be detained for only a short period, the Tribunal did not consider the other parts of the Guidelines relevant, as opposed to failing to consider them: *SZTMD* at [15] per Perram J. Moreover, the Tribunal otherwise specifically considered country information concerning prison conditions, in the context of a short period of confinement, as it was required to do by the Guidelines: *AJW15-FCCA* at [3] per Judge Street. *SZUQZ* and *ARS15* are therefore distinguishable in these circumstances, the Court being of the view that in this case the Tribunal's reasons indicate that it read,

			understood and took into account the Guidelines.' (Para 26). 'For all of the above reasons, the Court is bound to follow the Federal Court's judgment in *SZTMD*, *AAH15* and *AWJ15-Federal Court*, and applying those judgments, and the rationale in *ADO15*, the Court is of the view that the Tribunal was aware of the requirement to, and, as a matter of substance and not mere form, did take into account, the Guidelines.' (Para 27). 'Finally, it is pertinent to observe that even if there was an error with respect to the treatment of the Guidelines by the Tribunal in the Tribunal Decision, the finding by the Tribunal at CB 172 at [108] that the mere act of imprisonment in the applicant's circumstances does not have a requisite intention to cause significant harm means that any error with respect to the Guidelines would be irrelevant: see *SZTAL* (and now see *SZTAL v Minister for Immigration & Border Protection* [2017] HCA 34; (2017) 91 ALJR 936; (2017) 347 ALR 405 at [4] per Kiefel CJ, Nettle and Gordon JJ, and [74] per Edelman J).' (Para 28). 'With respect to the applicant's sole ground of review the Court does not find any jurisdictional error in the Tribunal's consideration of the Guidelines in the applicant's case and, in particular, finds that there was no failure to relevantly take account of the Guidelines.' (Para 29).