COMPLEMENTARY PROTECTION IN AUSTRALIA

DECISIONS OF THE FEDERAL COURT & FEDERAL CIRCUIT COURT

2015–16

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

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

The list may also include cases in which the complementary protection provisions have not been directly considered, 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
DEY16 v Minister for Immigration and Border Protection [2016] FCA 1261 (Kenny J) (Successful)	25 October 2016	1-2, 35, 79, 83-91 and 94-98	This case relates to: • Whether the decision-maker failed to consider that a legal consequence of the decision was the indefinite detention of the applicant 'On 12 November 2014, the Assistant Minister for Immigration and Border Protection (the Assistant Minister) exercised her discretion under s 501(1)' of the Act 'to refuse an application by DEY16 (the applicant) for a Bridging E (Class WE) visa (Bridging Visa E)' (para 1). 'The applicant applied for an extension of time in which to seek judicial review of the Assistant Minister's decision (the decision) on 21 August 2015' (para 2). The 'applicant advanced five grounds in support of his contention that the decision involved jurisdictional error' (para 35). *Ground 1:* 'The decision was legally unreasonable' (para 35). *Particulars of Ground 1:* 'In light of compelling discretionary considerations militating against refusal (including but not limited to the applicant's family circumstances, in particular those of his son who is owed protection obligations and cannot accompany his father upon removal), the

			decision was legally unreasonable' (para 35). *Ground 2:* 'The decision involved a failure to give proper, genuine and realistic consideration to the factors militating against refusal and/or a failure to discharge the Respondent's statutory task' (para 35). *Particulars of Ground 2:* 'Even if it was open to the respondent to refuse the applicant's visa by reference to the factors identified in the decision record, the Respondent did not give proper, genuine and realistic consideration to the factors militating against refusal (including those referred to in the particulars to Ground 1 above)' (para 35). *Ground 3:* 'The decision involved a failure to discharge the respondent's statutory task and/or to have regard to the risk of harm to the Australian community in the manner required by Australian law; alternatively, the decision was legally unreasonable' (para 35). *Particulars of Ground 3:* 'The respondent made no assessment of the likelihood of the applicant reoffending or otherwise harming the Australian community. In the circumstances, such an assessment was required to properly discharge the respondent's statutory task. Alternatively, in assessing the likelihood of the applicant reoffending, the respondent overlooked centrally relevant material and thereby failed to discharge her statutory task' (para 35).

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

			have regard to the fact that he had no entitlement under Australian law to have these claims assessed, with the result that he faced indefinite detention pending any favourable exercise of a non-compellable discretion (see NBMZ [v Minister for Immigration and Border Protection [2014] FCAFC 38; 220 FCR 1])' (para 35). 'The applicant's claim that, if returned to Albania, he will face a real risk of significant harm because of the blood feud that led to the acceptance of his eldest son's status a person in respect of whom Australia has protection obligations, has never been assessed' (para 79). 'A legal consequence of the refusal of the applicant's protection visa application in 2005 was that, by virtue of s 48A of the Migration Act, the applicant was barred from making any further application for a protection visa, unless the Minister exercised the discretion conferred by s 48B to determine that the bar in s 48A did not apply to him. The applicant was (and remains) unable to make a second application for a protection visa on the basis that he satisfies the criterion in s 36(2)(aa) of the Migration Act, on the very same basis as his son' (para 83). 'The applicant and the Department have requested Ministerial intervention under s 48B or s 417 of the Migration Act on numerous occasions in 2008 and thereafter'. 'All these requests have been declined' (para 84).

			'The immediate legal consequence of a decision to refuse an application for a visa is that an applicant in Australia, such as this applicant, is not given permission to remain. The present applicant does not have any other visa: cf s 501F. By operation of the Migration Act, he is an unlawful non-citizen because he is present in the migration zone without a visa. Section 189 of the Migration Act requires that in this circumstance he be detained in immigration detention. Section 198 further requires that he be removed from Australia as soon as reasonably practicable. The operation of s 198 is, however, subject to the operation of the general law' (para 85). 'At the time of the decision, an unlawful non-citizen could only be removed from Australia under s 198 of the Migration Act if that person's claim to protection under Australia's obligations under the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees (Refugees Convention), the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) or the 1966 International Covenant on Civil and Political Rights (ICCPR) had been "assessed and, if necessary, reviewed in a process which accords that person procedural fairness and addresses the correct question by reference to Australian law": SZQRB [2013] FCAFC 33; 210 FCR 505 at [200] per Lander and Gordon JJ, citing Plaintiff M70/2011 v Minister for Immigration and Citizenship [2011] HCA 32;244 CLR 144 at [95]- [98], [239]. Furthermore, for reasons of the

			kind set forth in NBMZ [2014] FCAFC 38; 220 FCR 1, notwithstanding the terms of s 198 of the Migration Act, it would not be a lawful exercise of power to return a person to a place where his life or freedom was endangered contrary to Art 33 of the Refugees Convention or relevant provisions of the CAT and the ICCPR: NBMZ [2014] FCAFC 38; 220 FCR 1 at [13]-[14], [80]-[96]' (para 86). 'At a general level, as the Court said in SZTAL v Minister for Immigration and Border Protection [2016] FCAFC 69 at [61], the complementary protection provisions of the Migration Act were enacted to give effect to international obligations, including those arising under the CAT and the ICCPR. The applicant has an apparently well-based claim to meet the complementary protection criterion in s 36(2)(aa) of the Migration Act, bearing in mind that the independent merits review tribunal has previously accepted that the applicant's eldest son is a person in respect of whom Australia has protection obligations under the complementary protection criterion in s 36(2)(aa) on the basis of a blood feud involving the applicant and his family. It would not have been a lawful exercise of power to return him to Albania without first assessing this claim and, if need be, allowing for a review of a decision on the claim, according to law' (para 87). 'Hence the decision had the legal consequence that the applicant was required to be detained indefinitely, bearing in mind that s 48A precluded a further protection visa application and it was unlawful to

			remove him to Albania without first assessing his complementary protection claim. There is no reference in the covering submission, the Reasons, or the Issues Paper, to this legal consequence' (para 88). 'It is possible that the Assistant Minister misunderstood the operation of the Migration Act and the nature of the decision she was required to make, and therefore the considerations that the Migration Act required her to take into account were not addressed. Paragraph [16] of the Reasons may indicate that the Assistant Minister proceeded on the mistaken assumption that the applicant could lawfully be returned to Albania without an assessment of his claim to meet the complementary protection criterion in s 36(2)(aa). Curiously, in light of the repeated refusals of requests for Ministerial intervention under s 48B and s 417, in referring to the possibility that the applicant's protection claim could be "considered separately" the paragraph did not mention the bar created by s 48A. This strengthens the inference that, at this critical point and in this context, the statutory bar was overlooked' (para 89). 'The Assistant Minister was required to take into account the legal consequences of her decision, which, as explained, included indefinite detention' (para 90). 'The Court in NBMZ [2014] FCAFC 38; 220 FCR 1 held that the Minister's failure to have regard to the legal consequence of a decision under s 501(1) to refuse a visa – namely, the prospect of the applicant's indefinite detention – resulted in jurisdictional error'

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

			applicant had not established that the Minister failed to have regard to the consequence of his decision. There is no mention of NBMZ in the joint judgment of Flick and Perram JJ in Jaffarie' (para 95). 'In the present case, however, the applicant was facing indefinite detention since the applicant claimed to satisfy the complementary protection criterion in s 36(2)(aa) of the Migration Act, a proposition enhanced by the fact that the applicant's son was assessed as being a person to whom Australia owes protection obligations on the basis of his father's claim; but the Minister repeatedly declined to act under s 48B to allow the applicant to make an application for a protection visa on that basis' (para 95). 'The decision of the Full Court in Ayoub [2015] FCAFC 83; 231 FCR 513 does not support the proposition that NBMZ should be distinguished from the present case. The Court in Ayoub held that the Minister had in fact considered the prospect of indefinite detention as a consequence of cancelling the applicant's visa and Australia's non-refoulement obligation: Ayoub at [17]. In addition, although the applicant claimed to fear for his and his family's safety if returned to Lebanon, he did not claim to be a refugee and had not applied for a protection visa: Ayoub at [16]. The Full Court held that indefinite detention was not a consequence of the decision under challenge in that case, since, by reason of s 501E, it remained open to the applicant "to make a future application for a protection visa": Ayoub at [19]-[20]. In the present case, as noted

			above, the applicant was barred from making a future application for a protection visa' (para 96). 'The Assistant Minister was required to take into account the legal consequences of her decision. In the circumstances of the applicant this included indefinite detention, as a result of ss 189, 196 and 198 of the Migration Act and Australia's obligations under the Refugees Convention, CAT and ICCPR. The Assistant Minister could not lawfully ignore this consideration: NBMZ at [17], [137]' (para 97). 'Jurisdictional error is therefore clearly shown' (para 98).
Minister for Immigration and Border Protection v SZVCH [2016] FCAFC 127 (Dowsett, Kenny, Siopis, Besanko and Mortimer JJ) (Successful)	14 September 2016	3, 4, 7-12, 27, 30-39, 44 and 144	This case relates to: • whether 'having regard to *SZGIZ* [2013] FCAFC 71; 212 FCR 235 and the relevant provisions of the Migration Act, it was permissible (or necessary) for the delegate to consider the first respondent's claims not only by reference to the criterion in s 36(2)(aa), which was the basis for his second valid application, but also by reference to the criterion in s 36(2)(a), which could not have supported a valid application' (para 27) **REASONS FOR JUDGMENT - KENNY, SIOPIS AND BESANKO JJ:** 'The first respondent (identified as SZVCH in the Federal Circuit Court of Australia and on appeal to this Court) arrived in Australia on 10 March 2006 and made

			an application for a protection visa on 1 March 2010. A delegate of the appellant Minister refused this application on 11 June 2010. The Refugee Review Tribunal (now the Administrative Appeals Tribunal) affirmed the delegate's decision not to grant SZVCH a protection visa on 27 June 2011' (para 7). 'On 18 March 2014, SZVCH made a second application for a protection visa. In an accompanying letter of the same date, his migration agent stated that this application was "expressly made in reliance only on s 36(2)(aa)"' (para 8). 'A delegate of the Minister refused this second application on 10 June 2014. The decision record showed that the delegate did not limit consideration of the visa applicant's claims to s 36(2)(aa) (the complementary protection criterion) but also considered these claims under s 36(2)(a) (the Refugees Convention criterion). The delegate was not satisfied that Australia had protection obligations' pursuant to s 36(2)(a) or s 36(2)(aa)' (para 9). 'The Tribunal affirmed this decision on 28 August 2014. In so doing the Tribunal expressly confined its consideration to s 36(2)(aa) and (c) (member of the same family unit as a non-citizen with a protection visa by virtue of s 36(2)(aa)), notwithstanding that late in the Tribunal hearing the first respondent's representative sought to persuade the Tribunal to consider the s 36(2)(a) criterion as well. The first respondent's representatives reiterated this submission in a post-

			hearing letter to the Tribunal dated 12 August 2014' (para 10). 'SZVCH successfully applied to the Federal Circuit Court for judicial review of this decision. The learned Federal Circuit Court judge held that: (1) the effect of the decision of the Full Court of this Court in *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71, 212 FCR 235 was that s 48A of the Migration Act prevented a visa applicant making a valid application "in respect of a particular criterion in circumstances where an application in respect of that criterion had already been determined" but that s 48A did not prevent a valid application "in respect of a particular criterion which was not the subject of a previous application": *SZVCH v Minster for Immigration & Anor* [2015] FCCA 2950 (PJ) at [24]. His Honour held that, in the circumstances of this case, SZVCH could therefore only make a valid application in respect of a claim under s 36(2)(aa) but that it was open to the Minister's delegate to consider this valid visa application by reference to both the criteria in s 36(2)(a) and (aa): PJ, [25]-26]. His Honour concluded that, since the Tribunal was bound to review a contested decision "in its entirety", then the Tribunal was obliged to consider the applicability of both criteria where the delegate had elected to do so; and in the present case the Tribunal fell into jurisdictional error by failing to do so: PJ, [26]' (para 11). 'The Minister appealed against the judgment of the Federal Circuit Court, upon the grounds that the

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

			strongly indicated that "the intention was to refer to a further application for a protection visa based on the same criterion relied upon in the earlier unsuccessful application for a protection visa". Thirdly, the Court held (at [37]) that the reference in s 48A(1)(a) to "where the grant of *the visa* has been refused" (emphasis original) was a reference to the refusal of an application for a protection visa made on the basis of one of the criteria mentioned in one of the four specified paragraphs in s 36(2)' (para 30). 'Whilst these were the principal considerations addressed by their Honours in *SZGIZ* [2013] FCAFC 71; 212 FCR 235, they were not the only matters relied on by the Court, which also had regard to some relevant legislative history' (para 31). 'We accept that, as the Minister submitted, the Court discerned "different streams of protection visa" represented by the different criteria set out in s 36(2) and held, in effect, that s 48A prevented a repeat protection visa application in the same stream. It is clear that their Honours may well not have reached this conclusion but for the terms of s 48A(2): see *SZGIZ* [2013] FCAFC 71; 212 FCR 235 at [28] (para 32). 'We also accept that, as the first respondent submitted, *SZGIZ* does not in terms address the primary question raised by the Minister on this appeal – whether it was permissible for the delegate to consider the first respondent's claims not only by reference to the

			criterion in s 36(2)(aa), which was the basis for his second valid application, but also by reference to the criterion in s 36(2)(a), which could not have supported a valid application. When one considers the reasoning of their Honours in that case and other relevant provisions of the Migration Act, the answer must be 'no'' (para 33). 'In the first place, it must be borne in mind that, whilst s 47 requires the Minister to consider a valid application for a visa, this provision also stipulates that the Minister must not consider an invalid application' (para 34). 'Section 65(1) complements s 47. It applies when the Minister has considered a valid application (para 35). 'These two provisions strongly support the proposition that a delegate of the Minister cannot properly consider anything other than that which is the subject of a valid application. This is implicit in ss 47(1) and (3) and in the opening words of s 65 ("[a]fter considering a valid application"). Moreover, the effect of s 48A, in light of *SZGIZ* [2013] FCAFC 71; 212 FCR 235, is that the reference to "other criteria" in s 65(1)(ii) is a reference to the criteria on which was based the further (valid) application for a protection visa' (para 36). 'Having regard to *SZGIZ* [2013] FCAFC 71; 212 FCR 235, the first respondent's second protection visa application was valid only because it was based on the criterion in s 36(2)(aa), which was a different criterion from the criterion in s 36(2)(a) on which his first

			protection visa application was based. A second protection visa application based on s 36(2)(a) would clearly have been invalid and the Minister would have been unable to consider it: see s 47(3). It would defeat the evident purpose of s 47(3) to allow that the Minister could consider a criterion in the substantive decision-making processes, which if it was the basis of the visa applicant's application would make that application invalid and could not be considered by the Minister. In this instance, therefore, the delegate ought not to have addressed s 36(2)(a) at all. Nothing turns on this, however, since the Tribunal in this case did "over again" that which the Migration Act required the delegate to do: see *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* [1963] HCA 41; (1963) 113 CLR 475 at 502 (Kitto J); cf. *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd* [1979] FCA 21;(1979) 24 ALR 307 at 313-317 (Bowen CJ) and 331-340 (Smithers J)' (para 37). 'The role of the Tribunal is relevantly set out in ss 414 and 415 of the Migration Act' (para 38). 'For the purpose of review, the Tribunal can exercise "all the powers and discretions that are conferred by [the Migration] Act on the person who made the decision". Equally, unless the Migration Act provided otherwise, the Tribunal cannot have any powers and discretions that were not conferred on the delegate. The powers conferred on the Tribunal by s 415(2) indicate, moreover, that, in undertaking a review of the delegate's decision, the Tribunal must give "a fresh

			consideration" to the application that led to the delegate's decision: see *Minister for Immigration v Li* [2013] HCA 18,249 CLR 332 at [10]. In so doing, it is incumbent on the Tribunal to identify in its own mind the issues that arise on that application, as indeed the Tribunal did in this case' (para 39). 'It is not the case that the Tribunal is required to review on the merits that part of a primary decision that the primary decision-maker had no power to decide and did not bear on the decision that the primary decision-maker was required to make by reference to the criterion on which the application was validly based. Rather, the Tribunal is obliged to decide the correct statutory question, which by reason of s 48A, was in this case whether it was satisfied that the visa applicant met the complementary protection criterion in s 36(2)(a) (or (c)) (para 39).' 'It follows that, in our view, Markovic J's reasoning and conclusion in *AMA15* [2015] FCA 1424 at [42]–[48], which was consistent with that of Perram J in *AOM15* [2015] FCA 1285 at [9] and followed by Katzmann J in *SZRAG* [2016] FCA 189 at [23], was correct. In this case, therefore the Tribunal did not fall into error as the primary judge found' (para 41). **REASONS FOR JUDGMENT - MORTIMER J:** 'When the matter came before the Tribunal, the effect of the terms of ss 414 and 415 of the Act was that the Tribunal was required to review the decision of the

			delegate, in the manner described by French CJ in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; 249 CLR 332 at [10]. However, like the delegate, its duty under s 65 was circumscribed by the limited validity of the further protection visa application. For it too, to consider the first respondent's further application for a protection visa against the criterion in s 36(2)(a) would have been to exceed the jurisdiction conferred on it in the circumstances by s 65 of the Act. To put it another way, the statutory task of the Tribunal under s 65 did not include any review of the delegate's assessment of the first respondent's further application for a protection visa against the criterion in s 36(2)(a) of the Act. The Tribunal was correct in the way it approached the limits of its jurisdiction, and the Federal Circuit Court was incorrect to set aside its decision' (para 144). **REASONS FOR JUDGMENT - DOWSETT J:** 'The respondent's submission is based upon a misunderstanding of the decision in *SZGIZ*. In that case, the Court had to decide whether s 48A of the Migration Act prevented a person who had previously applied, unsuccessfully, for a protection visa, relying upon the refugee criteria, from later applying for such a visa, relying upon the complementary protection criteria. The Court held that the section prevented only a further application based on the same criteria as any earlier, unsuccessful application. See the reasons for judgment at [38]. If, as the respondent submits, it follows that any such subsequent application effectively constitutes an

			application for a protection visa, relying upon any relevant criteria upon which the applicant has not previously relied unsuccessfully, then s 48A would be deprived of much of its apparent effect. It would apply only if a potential applicant had already unsuccessfully relied upon all other criteria. It is clear that in *SZGIZ*, the Full Court did not so decide. Further, it is not easy to see how s 50 would operate, were the respondent's approach to be adopted' (para 3). 'Finally, I note that in *SZGIZ* the Full Court identified the need to construe the legislation, having regard to Australia's international obligations. Having regard to those obligations and common humanity, it seems unlikely that Parliament, in adopting the complementary protection criteria, intended that a person in Australia, who would face serious harm if deported from Australia, should be denied Australia's protection, merely because he or she had previously unsuccessfully claimed to be a refugee. However it seems likely that Parliament intended that s 48B would provide a sufficient mechanism for dealing with that problem' (para 4).
AQP15 v Minister for Immigration and Border Protection [2016] FCA 943 (Logan J) (Successful)	9 August 2016	5-10 and 12-13	This case relates to: • whether Tribunal failed to afford the applicant the opportunity to make focused submissions on the issue of a family member providing surety for bail, and • whether Tribunal had sufficient regard to policy guidelines and international jurisprudence in accordance with s 499 Migration Act 1958 (Cth) and Ministerial Direction No. 56

			The applicant submitted six grounds of appeal (para 5). *Ground 1:* 'The Federal Circuit Court should have found that the RRT failed to comply with s 425 of the Migration Act' (para 5). *Particulars of Ground 1:* 'The Federal Circuit Court should have found that the Tribunal failed to give the appellant the opportunity to present information and arguments at a hearing concerning the critical issues of whether a family member would provide surety to enable him to be bailed in the event that he was charged for illegally departing Sri Lanka' (para 5). *Ground 2:* 'The Federal Circuit Court erred in not finding that the RRT failed to comply with Ministerial Direction Number 56 in contravention of s 499(2A) of the Migration Act 1958' (para 5). *Particulars of Ground 2:* 'The Federal Circuit Court should have found that the RRT failed to take into account the PAM 3 Protection Visas complimentary protection guidelines when it made a finding on whether the treatment that applicant would face on being detained in Sri Lanka was degrading treatment or punishment or was cruel or inhuman treatment or punishment. The Federal Circuit court should have found that the RRT failed to take into

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

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

			Particulars of Ground 6: 'cruel or inhuman treatment or punishment is defined as severe pain or suffering, whether physical or mental, intentionally inflicted on a person; or (b) pain or suffering, whether physical or mental, 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. The Tribunal found that the conditions which the applicant faced were a result of neglect and under-resourcing. That neglect and under resourcing was a result of the action or omission of the Sri Lankan Government, as was the impending action of placing the applicant in those conditions. The Federal Circuit Court should have found that the RRT erred by not considering whether the Sri Lankan Government's neglect and under resourcing of its prisons was deliberate so as to cause all those incarcerated, including the applicant, pain or suffering' (para 5). 'As far as the first of the grounds is concerned, the question really is whether, in the events which transpired before the Tribunal, the case is one which at least arguably is analogous to, *Minister for Immigration and Border Protection v SZTQS* [2015] FCA 1069, or rather whether the case is so clear as to be nothing more than that type of case to which the Full Court referred as not raising any procedural fairness issue in *SZTAP v Minister for Immigration and Border Protection* [2015] FCAFC 175?' (para 6). 'It is a feature of the Tribunal's reasons in relation to

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

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

			the facts' (para 10). 'The real point about adverting to this jurisprudence is to underscore that there is an arguable case in relation to the first of the grounds, namely, if one finds that the detention is short because an applicant is likely to be granted bail on the basis of an applicant's family member standing as guarantor, it is by no means unreasonable then to conclude that there is no degrading treatment or cruel or unusual punishment of such a nature as to fall within the terms of the convention or, for that matter, to engage complementary protection. If, on the other hand, one has made that finding where there has been a failure to observe a particular procedural fairness obligation, then the vice lies in that failure, not in the failure to advert to the guidelines and related subjects that flow from that' (para 12). 'Insofar as the applicant seeks an extension of time to appeal, the extension is granted but, limited to the prosecution of an appeal on the first of the grounds identified in the draft notice of appeal' (para 13).
ABAR15 v Minister for Immigration and Border Protection (No 2) [2016] FCA 721 (Charlesworth J) (Successful) See below - ABAR15 v Minister for Immigration and Border Protection	17 June 2016	1, 37, 42, 45, 66, 86-100 and 102	This case relates to: • whether the Tribunal committed jurisdictional error with respect to the application of country information to the applicant's case The applicant was a citizen of Viet Nam (para 1). The applicant submitted two grounds of appeal *Ground 1:*

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

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

			domestic violence laws in Vietnam so that the Tribunals' decision could properly be viewed as one involving the preference of one body of evidence over another. The statements and opinions expressed in the reports concerning the effectiveness of the law were consistent, not countervailing. They were not contradicted by any other material to which the Tribunal referred' (para 88). 'The Tribunal's finding that neither the appellant nor her husband had political profiles in Vietnam such that the appellant would be discriminated against by Vietnamese authorities was one reasonably open to be made. Accordingly, it was open to the Tribunal to find that there was no political reason why the appellant could not seek the assistance of the Vietnamese authorities' (para 89). 'The Tribunal's conclusion that the appellant could in fact obtain protection from the Vietnamese authorities is expressed at [64] of its reasons as follows: [64] In my view, the country information demonstrates that the Vietnamese authorities do not fail to provide reasonable protection to the victims of domestic violence, and I consider the Vietnamese authorities would afford the applicant reasonable protection against any threat of domestic violence posed by her husband on her return to Vietnam. I consider that the protection offered by the Vietnamese state, in light of the information I have referred to above, reduces the risk of the applicant being significantly harmed to something less than a 'real risk'' (para 90).

			‘In reaching that conclusion, the Tribunal made no assessment of the scope of the law in Vietnam so as to determine precisely what kinds of conduct the authorities could and would protect the appellant against should she return there. The Tribunal does not give any consideration to the question of whether (and how) the appellant could obtain protection from the Vietnamese authorities without first suffering injuries of such a severity that the Vietnamese authorities would be willing to act’ (para 91). ‘Relatedly, the Tribunal makes no finding to the effect that the existence of laws prohibiting domestic violence in Vietnam would deter the appellant’s husband from carrying out the threats he had made against her. Relevant to that enquiry was the appellant’s claim that the laws prohibiting domestic violence were already in place before the appellant left Vietnam and remained in place at the time that her husband persisted in his threats, including his threats to retaliate against her for “running away”. These issues peculiar to the appellant were simply not addressed’ (para 92). ‘The definition of “cruel and inhuman treatment” in s 5(1) of the Act encompasses intentionally inflicted physical pain whether or not resulting in injury to the body. It is significant harm, as defined in the Act, from which the appellant seeks protection, not “domestic violence” as that phrase may be defined under the law of Vietnam or subjectively understood by the Vietnamese authorities’ (para 93).

			‘The Tribunal stated to the appellant, in the course of its hearing, that there was “no evidence” that the Vietnamese police do not act on reports of domestic violence. The conclusion ultimately reached by the Tribunal indicates that it reasoned from that premise to a conclusion that the Vietnamese authorities could and would act on reports of domestic violence (including threats of domestic violence) that might be made by the appellant. It may well have been open to the Tribunal to refer to the contradictory material and give a reasoned explanation for rejecting it, but that is not what it has done. It instead proceeded upon the false premise that there was no evidence contradicting its conclusion at all’ (para 94). ‘It should be acknowledged that the Tribunal’s statement is contained in that part of its reasons in which it gives an account of its hearing, rather than in that part of its reasons in which it considers the substantive issues before it and reasons to its ultimate conclusion. However, there is nothing in the reasons to indicate that the Tribunal had, since its hearing, reconsidered its statement concerning the absence of evidence and corrected itself on that issue. The result arrived at, in all of the circumstances, suggests that it did not’ (para 95). ‘The Tribunal correctly directed itself (at [53]) that the words “real risk” as they are used in ss 36(2)(aa) and 36(2B)(b), import the same standard as the test of a “real chance” applicable to the assessment of whether

			an applicant for a protection visa has a well-founded fear of persecution for the purposes of the Convention as required by s 36(2)(a) of the Act' (para 96). 'The phrase "real risk" necessarily involves an evaluation of the likelihood of the appellant suffering significant harm should she be returned to Vietnam. In performing that evaluation, the Tribunal must discount possibilities that are remote, insubstantial or far-fetched: *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (*Chan*) Toohey J (at 407), McHugh J (at 429). The test does not involve an assessment of whether it is more likely than not that the harm will be suffered: *SZQRB* (at [246] - [247]). It is enough that the infliction of significant harm on the appellant is a reasonable possibility, as opposed to a remote chance: *Chan* Mason CJ (at 389)' (para 97). 'Adopting the several expressions used in the authorities to describe the test of a real risk, the practical effect of the Tribunal's decision is that there was no reasonable possibility that the appellant would suffer significant harm if she was returned to Vietnam or, alternatively, that the chance of her suffering significant harm was remote, insubstantial or far-fetched' (para 98). 'The Tribunal's conclusion was one reached by impermissible reasoning from findings that were not capable of being supported by the country information upon which the Tribunal relied, particularly findings as to the content and practical implementation of the

			Vietnamese law in the appellant's particular circumstances' (para 99). In conclusion, the Court held that 'the Federal Circuit Court Judge erred in rejecting the appellant's submissions as being nothing more than an attack on the merits of the Tribunal's decision. There is appealable error in the Federal Circuit Court's failure to identify that the country information referred to in the Tribunal's reasons was not reasonably capable of supporting its findings on factual matters critical to the proper application of s 36(2)(aa) and s 36(2B)(b) of the Act' (para 100). The Court allowed the appeal (para 102).
MZZQA v Minister for Immigration and Border Protection [2016] FCA 584 (Mortimer J) (Successful)	24 May 2016	1, 4, 17-23, 25, 32, 34-37 and 39	This case relates to: • 'whether there was adequate discharge by the Tribunal of its statutory task to determine whether the applicant was entitled to complementary protection' (para 36). 'The applicant applies for an extension of time to appeal a decision of the Federal Circuit Court published as *MZZQA v Minister for Immigration and Border Protection* [2014] FCCA 3181 and dated 24 October 2014. The Federal Circuit Court dismissed with costs an application for judicial review of a decision of the Administrative Appeals Tribunal (then known as the Refugee Review Tribunal), in which the Tribunal affirmed a decision not to grant the applicant a Protection (Class XA) visa' (para 1).

			'The applicant is a citizen of Sri Lanka and is of Tamil ethnicity. He is from Udappu, a small Tamil village in a predominantly Sinhalese district in the North Western Province of Sri Lanka. He worked as a fisherman with his father before his departure for Australia' (para 4). The Tribunal found that the applicant did not meet the criteria of s.36(2)(a) of the Act (paras 17-23). The Tribunal also found that 'the applicant was not entitled to complementary protection. All it said about this criterion for the grant of a Protection visa (in relation to the applicant's claims concerning harm at the hands of the Navy) was (at [30]): Based on the same reasoning and the same "real chance' test, I find further that the past events do not give rise to substantial grounds for believing that there is a real risk that he will experience significant harm as a necessary and foreseeable consequence of his removal to Sri Lanka' (para 25). 'The applicant filed a proposed notice of appeal on 17 May 2016 outlining two proposed grounds of appeal. Both were generally expressed to allege error, first in the Federal Circuit Court's orders, and second in the Tribunal's decision, without any particulars' (para 32). The Court held that the 'applicant should be granted leave to appeal' based on the following reasoning (para 34). 'First, there is a whole paragraph in the reasons of the

			Federal Circuit Court which appears to completely misunderstand and misstate the findings of the Tribunal on the credibility of the applicant: see [29] of the Federal Circuit Court reasons. The Tribunal found the applicant to be credible and accepted in all substantive matters the account he gave to the Tribunal of what had happened to him at the hands of the Sri Lankan Navy officers. Paragraph [29] assumes the opposite to be the fact. What is then said by the Federal Circuit Court at [30] of its reasons seems to proceed from the misstatement in [29]. At the hearing, the Minister's counsel, understandably, could offer no explanation for these paragraphs in the Federal Circuit Court reasons' (para 35). 'If that is, mistakenly, how the Federal Circuit Court considered the Tribunal approached the applicant's claims, then its misapprehension may have affected its consideration of his entire judicial review claim. While, as the Minister's counsel submitted in oral argument, this might technically mean the correct order is to remit the judicial review to the Federal Circuit Court to determine again, the most cost and resource effective approach is to grant leave to appeal so that the matter can be finally determined expeditiously by this Court' (para 35). Second, the Court was 'not satisfied that there was adequate discharge by the Tribunal of its statutory task to determine whether the applicant was entitled to complementary protection. Its reasons are somewhat cursory, and repetitive of its assessment of the

			applicant's Art 1A claim. I accept, as the Minister's counsel developed in oral submissions, that there are authorities of this Court which suggest that in a particular circumstance, the overlap between a person's claim under Art 1A of the Refugees Convention, and her or his claim to complementary protection may be so complete that disposal of the former means the latter can be disposed of with only brief reasons, but whether this is such a case is a matter to be determined in the appeal' (para 36). Third, 'it is arguable that the Tribunal's approach to the applicant's request that it look at the press articles he produced in Tamil involved a denial of procedural fairness, in the sense of a failure to give the applicant a meaningful opportunity under s 425(1) of the Migration Act to appear and present evidence and arguments. It is also possible (as the Minister's counsel properly noted) that the Tribunal's refusal to consider the articles was legally unreasonable. I emphasise that at the moment all I have determined is that these arguments are not fanciful or remote, and the applicant is entitled to have them considered and developed' (para 37). 'The issue about the Tribunal's refusal to consider the Tamil articles was an argument the applicant made to the Federal Circuit Court. Although the Federal Circuit Court stated that the Tribunal had the "power" to require documents to be in English, there was a Tamil interpreter present at the Tribunal hearing who could have translated the relevant parts then and there for the Tribunal. If there were additional press reports to those

			the Tribunal already had (and referred to), then the additional press articles were capable of affecting the strength of the applicant's claims about the targeting of Tamil fishermen by the Sri Lankan Navy, and thus were capable of being material to the Tribunal's consideration of the risks faced by the applicant, given that it accepted he would return to his traditional fishing occupation' (para 37). 'There will be a referral for pro bono legal assistance under r 4.12 of the Federal Court Rules 2011 (Cth) in favour of the applicant so that he can be properly advised and represented on the appeal, and so that the Court can have the benefit of full legal argument by both parties' (para 39).
SZTAL v Minister for Immigration and Border Protection [2016] FCAFC 69 (Kenny, Buchanan and Nicholas JJ) (Unsuccessful)	20 May 2016	1, 18, 39, 42-46, 59-60, 63-81, 88, 97-99, 101 and 103-107	This case relates to: • Whether the expression "intentionally inflicted" required an actual subjective intention to inflict or cause the relevant harm (with reference to the definition of cruel or inhuman treatment or punishment in s.5(1) of the Act) • Role of international treaties in interpreting the complementary protection provisions Kenny and Nicholas JJ: 'These three appeals are from three judgments of the Federal Circuit Court of Australia (FCCA). Each judgment dismissed an application for prerogative writs in respect of a decision of the Refugee Review Tribunal (now the Administrative Appeals Tribunal). In each case, the Tribunal affirmed a decision of the respondent

			Minister's delegate not to grant a protection visa. In the Tribunal, all three decisions were made by the same Tribunal member; and in the FCCA, all three applications were determined by the same judge' (para 1). 'Each of the current appellants appealed from the relevant judgment of the FCCA' and 'the two grounds of appeal were the same in each appeal' (para 18) *Ground 1:* 'The primary judge erred in law in holding that the expression "intentionally inflicted" in the definitions of "torture" and "cruel or inhuman treatment or *punishment*" in s 5(1) of the Migration Act 1958 (Cth) (Act), and the expression "intended to cause" in the definition of "degrading treatment or punishment" in s 5(1) of the Act, require an actor to have "an actual, subjective, intention" to inflict pain or suffering by his or her acts or omissions, being an intention that cannot be proved by the actor's knowledge of the probable or possible consequences of his or her acts or omissions' (para 18). *Particulars of Ground 1* (a) 'The primary judge should have held that pain or suffering is "intentionally inflicted" by the act or omission of a person within the meaning of s 5(1) where the person does an act or omission knowing that it is probable or possible that pain or suffering will

			result'. (b) 'The primary judge should have held that the second respondent (Tribunal) erred in law in adopting the unqualified proposition that "[p]oor prison conditions involving inadequate resources and overcrowding do not appear to give rise to significant harm under Australian law"'. (c) 'The primary judge should have held that, where the Tribunal finds that an applicant may be imprisoned or detained in conditions involving pain or suffering by the act or omission of another person, the Tribunal must ask itself whether the other person will do the act or omission knowing that it is probable or possible that pain or suffering will result'. (d) 'The primary judge erred in holding (at [48]-[49], [57]) [of *SZTAL* [2015] FCCA 64)] that the decision of Yates J in *SZSPE* [2014] FCA 267 foreclosed his Honour's acceptance of the applicant's submissions about the proper construction of the expression "intentionally inflicted" in s 5(1); alternatively, *SZSPE* should not be followed in this case'. (e) 'The primary judge erred in holding (at [51]) [of *SZTAL*] that the Full Federal Court's statements in *MZYYL* [2012] FCAFC 147; (2012) 207 FCR 211 at [18] ("the criteria and obligations are not defined by reference to a relevant international law") and [20] ("[i]t is therefore neither necessary nor useful to ask how the CAT or any of the International Law Treaties would

			apply") had not been overtaken by the Full Federal Court's decision in *SZQRB* [2013] FCAFC 33; (2013) 210 FCR 505 at [70], [99], [313]; alternatively, the statements in *MZYYL* are inconsistent with the express references to "*Article 7 of the Covenant*" in the definitions in s 5(1) of the Act' (para 18). *Ground 2:* 'The primary judge erred in law in holding that, although the Tribunal was prepared to accept that the applicant was a member of a particular social group of "returnees or persons who left Sri Lanka illegally" against whom s 45 of the Immigrants and Emigrants Act 1945 would be enforced, there was no occasion for the Tribunal to consider whether that law is "appropriate and adapted to achieving some legitimate object of the country": cf. *SZNWC* [2010] FCAFC 157; (2010) 190 FCR 23 at [45]- [49]' (para 18). *Consideration of Ground 1:* 'Under Ground 1, the appellants contended that the learned primary judge erred in holding that the expression "intentionally inflicted" in the relevant definitions required an actual subjective intention to inflict or cause the relevant harm' (para 39). 'Purpose, reasons and intention' – 'Nothing to our mind turns on the distinction between "purpose" (or "reason") and "intention" in the definition of "torture" in s 5(1) of the Migration Act and the omission of a

			reference to “purpose” or “reason” in the definition of “cruel or inhuman treatment or punishment”. Reference to the two definitions shows that they each depend on an identical concept — an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted; but that to constitute “torture” there is an additional element — the act or omission must either occur for a purpose mentioned in paragraphs (a) to (d) or a reason described in paragraph (e) of the definition of “torture”’ (para 42). ‘The Explanatory Memorandum (at [16]) confirms that “torture” and “cruel or unusual treatment or punishment” involve the same concept, with an additional element in the case of “torture”: This new defined term provides that cruel or inhuman treatment or punishment means an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person. This is an act or omission that would normally constitute an act of torture but which is not inflicted for one of the purposes or reasons stipulated under the definition of torture’ (para 42). ‘The stated relationship between the definitions of “torture” and “cruel or inhuman treatment or punishment” indicates that the addition of a purpose or reason requirement in the definition of “torture” does not affect the operation of the requirement that pain or suffering must be “intentionally inflicted” before it can qualify as either “torture” or “cruel or inhuman treatment or punishment”. The additional purposive

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

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

			construction' (para 63). 'Our conclusion in this regard is consistent with *Minister for Immigration and Citizenship v MZYYL* [2012] FCAFC 147; (2012) 207 FCR 211, in which a Full Court of this Court considered the standard of protection required by s 36(2B)(b) of the Migration Act. In considering this standard, the Court emphasised (at [36]) that s 36 of the Migration Act must be read as a whole, noting (at [18]) that the complementary protection provisions define the criteria and obligations by reference to the definitions set down in that Act. Hence, as the Court said (at [20]) it was unnecessary "to ask how the CAT or any of the international law [sic] treaties would apply to the circumstances of [the] case", since they were governed by the applicable provisions of the Migration Act alone: see also *Minister for Immigration and Border Protection v SZSWB* [2014] FCAFC 106 at [30]. We reject the appellants' submission that *MZYYL* [2012] FCAFC 147; 207 FCR 211 is inconsistent with, or overtaken by, *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33; (2013) 210 FCR 505, where, at [70] and [99], the Court proffered only a very brief summary of the complementary protection regime, the operation of which was not in issue in that case. We would therefore reject the appellants' submissions that *MZYYL* [2012] FCAFC 147; 207 FCR 211 is plainly wrong' (para 64). 'The proposition that it is unnecessary to explore the operation of the relevant treaties when considering the operation of the complementary protection regime is

			subject to the qualification that where any applicable provisions of the complementary protection regime adopt the standards of one of those treaties, then it will be necessary to consider the relevant treaty provisions and any relevant jurisprudence: see, for example, paragraph (e) of the definition of "torture", paragraphs (c) and (d) of the definition of "cruel or inhuman treatment or punishment", and paragraphs (a) and (b) of the definition of "degrading treatment or punishment" in s 5(1) of the Migration Act' (para 65). 'There is a lack of clarity in the authorities concerning the interaction of Art 7 and Art 10 of the ICCPR in the context of poor prison conditions. For present purposes, we accept that the relevant authorities fall broadly into the three categories identified by the Minister' (para 66). 'These authorities and the scholarly commentary to which the Minister referred indicate that the circumstances in which exposure to poor prison conditions will infringe Art 7 (either alone or with Art 10) are not settled. The Minister expressly did not submit that the risk that the appellants will be exposed to poor prison conditions in the circumstances found by the Tribunal was necessarily incapable of constituting a breach of Art 7 of the ICCPR. The basis for the Minister's position is clear and it is unnecessary to explore the issue further in these appeals' (para 66). Other considerations – 'We reject the appellants' submission that the relevant definitions in s 5(1),

			focusing particularly of the definition of "torture", should be construed harmoniously with the offence of torture in s 274.2 of the Commonwealth *Criminal Code* (Schedule to the *Criminal Code Act 1995* (Cth)). The legislature has clearly taken a different approach to the criminal offence of torture to the concept of "torture" in the complementary protection regime. The considerations affecting the creation of a criminal offence aimed at the alleged perpetrators are likely to differ to an extent from the considerations that govern the definition of "torture" in a complementary protection regime' (para 67). 'These are reflected in the obvious material textual differences. The offence in s 274.2 of the *Code* does not specify a fault element for the physical element of the offence – conduct that inflicts severe pain or suffering. Since that physical element is described by result, then s 5.6 of the *Code* provides that the fault element is that of recklessness. Clearly, though, the *Code* recognises that the concepts "recklessness" and "intention" are different: see s 5.6. It is not permissible under the *Code* to treat the two mental states as the same. Having regard to this and to the entirely different contexts in which the concept of "torture" is relevant under the *Code* and the Migration Act, there is simply no basis to equate the expression "intentionally inflict" in the relevant definitions in s 5(1) of the Migration Act with the concept of recklessness applicable in the case of an offence under s 274.2 of the Commonwealth *Criminal Code*' (para 67).

			'We are not persuaded that if the expressions "intentionally inflicted" or "intended to cause" are construed to require actual subjective intention, as opposed to the lesser standard for which the appellants advocate, then the outcomes will include irrational outcomes of a kind not intended by the Parliament. Nor are we persuaded by any other consideration urged on the Court by the appellants that the primary judge relevantly erred in construing these expressions' (para 68). 'Accordingly Ground 1 of the appeal is not made out' (para 69). *Consideration of Ground 2* 'The appellants' argument in support of the second ground depended on the proposition that the group of "persons who left Sri Lanka illegally" was capable of constituting a particular social group. The Tribunal had, so they submitted, determined this in their favour. Although the Minister noted that the appellants had taken a different point before the primary judge, the Minister accepted that the Court should deal with the point as it was argued before it on the appeals' (para 70). 'A social group cannot be defined by reference to a fear of persecution based on the non-discriminatory enforcement of a State's generally applicable domestic legislation: see *Applicant A v Minister for Immigration*

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

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

			enforcement of the law' (para 75). 'In these circumstances, *Minister for Immigration and Citizenship v SZNWC* [2010] FCAFC 157; (2010) 190 FCR 23 is clearly distinguishable since the Tribunal's finding in that case that there was a particular social group comprised of "Bangladeshi ship deserters" was defined by more than the fact that each member had committed the offence of ship desertion' (para 76). 'There is no basis shown for the appellants' contention that the Tribunal relevantly erred because it did not consider whether the Sri Lankan *Immigrants and Emigrants Act* was "appropriate and adapted to achieving some legitimate object" of Sri Lanka (assuming, without deciding, that such a duty might arise as indicated in *SZNWC*)' (para 77). 'Accordingly, Ground 2 is not made out' (para 78). 'For the reasons set out above, no jurisdictional error has been demonstrated in the Tribunal's decision and no relevant error was demonstrated in the judgment of the primary judge' (para 79). 'The appeals should be dismissed, with costs' (para 81). BUCHANAN J: 'The matters relied upon by each of the appellants to argue that they met the requirements of s 36(2)(aa) of the Act are that, upon their return to Sri Lanka, as

			persons who have been refused protection visas, they will (under Sri Lankan law and by Sri Lankan authorities) be arrested and then either "tortured", or otherwise subjected to significant harm in the form of cruel or inhuman treatment or punishment, or in the form of degrading treatment or punishment, because they will be put in a Sri Lankan prison. Those consequences will follow, it was argued, from the application and operation of the Immigrants and Emigrants Act of Sri Lanka, which makes illegal departure from Sri Lanka an offence' (para 88). 'The arguments on the present appeals are in substance those rejected by the FCCA. Those arguments assert that the RRT misunderstood the requirements of s 36(2)(aa) of the Act. In particular, the appellants argued that those elements of significant harm referred to in s 36(2A)(c), (d) and (e), (which are imported through the definitions of "torture", "cruel or inhuman treatment or punishment" and "degrading treatment or punishment" in s 5 of the Act) which require intentional conduct (e.g. intentionally inflicted/intended to cause) may be satisfied by knowledge of probable consequences. In my view, the general premise on which this contention depends is unsound (see *Zaburoni v The Queen* [2016] HCA 12; (2016) 90 ALJR 492 ("*Zaburoni*") at [10], [14], [43], [55])' (para 97). 'In any event, in my respectful view, any argument of this kind should only be addressed in a case where the factual circumstances allow it to be decided by reference to concrete matters rather than abstract

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

			command attention and respect. That was a criminal case, but it concerned the proper construction of s 320A of the Queensland Criminal Code, contained in the *Criminal Code Act 1899* (Qld)' (para 103). 'Chesterman J, (with whom Williams JA and Jerrard JA agreed) said: [27] ... Torture is, as I mentioned, the intentional infliction of suffering by an act or a series of acts. The words of s. 320A are plain and unambiguous; they offer no scope for misunderstanding. To make out a case of torture the prosecution must prove, beyond reasonable doubt of course, that an accused intended his acts to inflict severe pain and suffering on his victim. It is not enough that such suffering is the consequence of the acts, and that the acts were deliberate. The prosecution must prove an actual, subjective, intention on the part of the accused to bring about the suffering by his conduct. The acts in question must have as their object the infliction of severe suffering; that must be their intended consequence. ... [29] "Intention" has no specific legal definition. It is to be given its ordinary, everyday, meaning. "Intention" is the act of "determining mentally upon some result". It is a "purpose or design". (See the Macquarie Dictionary.) To prove that the appellant tortured Mr Loncar the Crown had to prove that his assaults and cruelty were designed to inflict severe psychological harm upon him. It had to prove that the purpose of those assaults was to inflict that harm on the complainant. ... (Emphasis added)' (para 104) 'That approach to the construction of s 320A of the

			Queensland Criminal Code involves rejection of the foundation of the appellants' construction arguments in the present case. Whether the same approach should be adopted to the construction of s 36(2)(aa) of the Act is an important question. It need not be answered at present, but it is noteworthy that *R v Ping* was referred to in *Zaburoni*, which I read as consistent with the approach taken by Chesterman J to that question' (para 105). 'The FCCA was correct to dismiss each of the applications to that court' (para 106). 'I would dismiss the present appeals with costs' (para 107).
SZRFP v Minister for Immigration and Border Protection [2016] FCA 522 (Perry J) (Unsuccessful)	13 May 2016	1-2, 21-25, 30, 32, 34-36, 38 and 42	This case relates to: • did the 'assessor asked herself the wrong question or applied the wrong test in her treatment of country information as to those categories of persons with links to the LTTE which might place them at risk of persecution or significant harm so as to attract Australia's treaty protection obligations' (para 2). 'This is an appeal from a decision of the Federal Circuit Court dismissing an application for judicial review of an assessment undertaken as part of an International Treaties Obligations Assessment (ITOA). The assessor who had undertaken the ITOA (the second respondent) found that Australia does not have *non-refoulement* obligations to the appellant, that is, obligations not to return the appellant against his will to his country of

			origin' (para 1). 'Relevantly, the appellant claimed to fear persecution or significant harm by reason of his or his family's association with the Liberation Tigers of Tamil Eelam (LTTE) if he was returned to Sri Lanka. The principal issue on the appeal is whether, in rejecting these claims, the assessor asked herself the wrong question or applied the wrong test in her treatment of country information as to those categories of persons with links to the LTTE which might place them at risk of persecution or significant harm so as to attract Australia's treaty protection obligations' (para 2). *Ground 1: did the primary judge err in his application of s 197C?* Section 197C of the Act provides that: (1) 'For the purposes of section 198, it is irrelevant whether Australia has nonrefoulement obligations in respect of an unlawful noncitizen'. (2) 'An officer's duty to remove as soon as reasonably practicable an unlawful noncitizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's nonrefoulement obligations in respect of the noncitizen' (para 21). 'Section 198, as is apparent from s 197C, imposes an obligation upon an officer to remove as soon as possible an unlawful non-citizen where the person has applied for, and been refused, a protection visa and the

			application has been finally determined' (para 22). 'The proceedings below were adjourned at the appellant's request pending delivery by the Full Court of its decision in *SZSSJ*. In that case, the Full Court ultimately upheld the appeal, holding that s 197C (which came into force on 16 December 2014) did not operate retrospectively with the result that, once the appellant had made his claim for *non-refoulement*, he had an accrued right within the meaning of s 7(2) of the Acts Interpretation Act 1901 (Cth). As a consequence, that right could not be removed until any *non-refoulement* obligations were assessed and was preserved in any legal proceedings or departmental investigation into whether he was owed *non-refoulement* obligations: *SZSSJ* at [56]-[58] (the Court)' (para 23). 'Applying that reasoning to this case, the process of assessing whether the appellant was owed any *non-refoulement* obligations was initiated on 22 September 2014 and therefore before the commencement of s 197C, and was completed and notified to him in March 2015 after the section commenced. As such, the first respondent conceded for the purposes of this appeal that s 197C did not apply to the appellant in line with the Full Court's reasons in *SZSSJ* and that the primary judge erred in concluding otherwise. I agree with the first respondent and it follows that to this extent, the appeal must succeed' (para 24). *Ground 2: whether the assessor asked herself the wrong*

			question in applying country information 'Notwithstanding the concession with respect to ground one, the first respondent rightly submitted that that did not necessarily dispose of the appeal. First, s 197C played no part in the assessor's reasons. Secondly, the first respondent did not rely upon s 197C before the Court below but rather submitted that there was no error made in the reasons given by the assessor which would vitiate the assessment and provide a basis for the grant of relief. The primary judge addressed those submissions in the alternative. Finally, I agree with the first respondent that nothing in s 197C could have affected the Court's power to issue declaratory, as opposed to injunctive, relief in the proceedings in the Court below in any event' (para 25). 'No specific error in the way in which the assessor used or applied the country information is identified. Nor is any error evident. As the first respondent submitted, it is well established that the choice of country information, the use made of it and the weight to be given to it, are matters for the administrative decision-maker to decide' (para 30). 'The appellant fails to identify any claim or integer of a claim which he submits has not been considered by the assessor. Nor while the appellant correctly submits that jurisdictional error would be established if the assessor failed to have regard to the actual nature of the legal inquiry which it is required to undertake, is any such error identified' (para 32).

			'I accept the submission of the first respondent that this submission seeks impermissibly to take issue with the assessor's factual findings. It is apparent from the assessor's reasons that she correctly treated the UNHCR guidelines and the DFAT report as evidence which identified those people or classes of people which the author or authors considered to be at risk of persecution or harm in Sri Lanka. It is also apparent that the assessor treated that evidence as reliable. That does not amount, however, to treating that evidence as binding or having any statutory force which plainly it did not have; nor to supplanting the test for assessing risk in the context of Australia's *non-refoulement* obligations with a new test. The assessor then considered whether the grounds on which the appellant claimed to fear harm, being his brother's association with the LTTE and his own involvement, placed him within any of those categories of persons with links to the LTTE which might place him at risk of persecution. In this regard, the appellant did not claim that he or his brother had leadership or high profile roles within the LTTE and in fact claimed the contrary' (para 34). 'With respect to his brother, the appellant contended that his role was to guard the border every now and then. The appellant's case, as earlier explained was that he was not a supporter and provided only carpentry services and sometimes undertook training or made donations/bribes. As such, the critical finding by the assessor that "the claimant was not a leader or a high profile member of the LTTE or closely related to family

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

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

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

			capable of supporting a finding by the Tribunal to the effect that there existed only four NGO-operated domestic violence shelters in the whole of Vietnam, a country with a population of more than eighty million people' (para 27). 'A question arises as to whether that material ought to have been before the Tribunal and taken into account. Depending on the circumstances, that material might conceivably support an argument that the Tribunal acted unreasonably (in a legal sense) in making its own findings of fact, or that it erred in construing the meaning of the phrase "real risk" in s 36(2)(aa)' of the Act (para 27). 'It might then be argued that the Federal Circuit Court erred in failing to identify such an error on the part of the Tribunal. In advancing such arguments, the applicant may well come up against decisions of the Full Court of this Court relating to the use by the Tribunal of so-called country information, and she may indeed be required to demonstrate that such cases are wrongly decided' (para 27). 'The requirement that an applicant for an interlocutory injunction show a serious question to be tried is one requiring the applicant to demonstrate "a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial": *O'Neill* at 82 [65] (Gummow and Hayne JJ)' (para 28). 'The two criteria for the grant of an injunction are

			interrelated: where the balance of convenience strongly favours the applicant for an injunction, less weight may be placed on the strength of the applicant's prima facie case: *Samsung Electronics Co Limited v Apple Inc* (2011) 217 FCR 238; [2011] FCAFC 156 [67]; *Tait v P.T. Ltd as Trustee of the Scentre Tuggerah Trust* [2015] FCA 1015' (para 28). 'Against those principles, and in circumstances where the orders I proposed were to the effect that the removal of the applicant from Australia be delayed by 16 days, the serious question threshold was a very low one. The applicant fulfilled that criteria by reference to her foreshadowed amended grounds of appeal, at least one of which appeared arguable, even if, on the materials before me, it was only barely so' (para 29). With regard to the applicant's appeal 'the Court will have before it additional materials that may well demonstrate that the applicant's cause is either unarguable or so weak that any further delay in her deportation cannot be justified' (para 30). 'The grant of interim relief is justified on an alternative basis' (para 31). The Court held 'that the respondent could have, but did not, afford the applicant more notice than he did of her impending removal. I have granted the applicant interim relief on the alternative basis that it is in the interests of the administration of justice to make such an order, irrespective of whether the substantive criteria for an

			interlocutory injunction pending the outcome of the appeal can presently be demonstrated: rule 1.32 of the Federal Court Rules 2011' (para 34). 'Such an order ensures that the Court's processes are not frustrated by the short notice given to the applicant of her impending removal and the consequential short notice afforded to her in arranging legal representation and preparing for the hearing of her application for interlocutory relief' (para 34). 'This is not to ignore the express words of s 198(6) of the Act which impose an obligation to remove from Australia persons falling within its purview. Rather, it is to recognise that the appeal (or any subsequent proceedings) may well determine that the applicant is no such person. If the decision of the Tribunal is found to involve jurisdictional error, then it is to be regarded as no decision at all: *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; (2002) 209 CLR 597 at 614, [51]. It would follow in that event that the applicant's application for a Protection Visa is not an application that has been finally determined within the meaning of subs 198(6) and she is not "liable" to be removed as stated in the Removal Notice' (para 35). 'The respondent opposes the interlocutory application on the ground that this Court does not have the jurisdiction to restrain the removal of a person pursuant to s 198(6) of the Act' (para 36).

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

			Refugee Convention (even though fear of persecution based on political affiliation would have such a nexus)' (para 32). The Court rejected 'the submission that taking into account whether there are political or economic dimensions in assessing the risk of persecution to a person because they are Hindu was to "bind up" the assessment under the complementary protection criterion with Convention-related thinking' (para 32). The Court did not accept that 'the Tribunal asked itself the wrong question' (para 32). 'On a plain reading of the Decision Record at [53], the appellant responded to the country information identified by the Tribunal with the anecdote and by doing so he sought to assert that Hindus were at risk of persecution in Bangladesh for that reason alone. Both the Tribunal and the primary judge were entitled to find that, without more evidence, the anecdote did not establish the appellant's contention' (para 33). 'The Tribunal addressed the issue of risk of persecution when it put to the appellant that "it had concerns about whether the country information supported his claim that all Hindus in Bangladesh are being persecuted" at [54] of the Decision Record. The Tribunal did not misdirect itself when it relied on the country information in assessing risk under the refugee criterion or the complementary protection criterion' (para 33).

			'The Tribunal dealt with the appellant's claim based on his adherence to the Hindu religion under both the refugee criterion (Decision Record at [52]-[55]) and the complementary protection criterion (Decision Record at [58]-[61]). That is inconsistent with a contention that the Tribunal considered the appellant to have abandoned any of his claims to protection on that basis' (para 34). 'Further, as noted by the primary judge in SZUYK at [46], to the extent that the appellant's religious claim was "interwoven" with his political claim and was therefore relevant to the assessment of the degree of risk facing the appellant (taking into account the country information), the Tribunal rejected both of those claims for reasons which were open to it on the materials before it (para 34). 'In contrast to the facts of SZSFK, the appellant did not identify (to the Tribunal or the Court) any part of his claim which would not satisfy the refugee criterion but which may satisfy the complementary protection criterion. Nor, on the basis of the Decision Record, is there anything which "emerges clearly" from the materials considered by the Tribunal that would establish such a claim: see NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2) (2004) 144 FCR 1; [2004] FCAFC 263 at [68]. I am satisfied that this is what the primary judge referred to at [45] when he said "the applicant's assertion in relation to [53] and [59] of the Tribunal decision would have had some substance if the applicant had advanced

			any claims that could not be disposed of by reference to the refugee criterion alone" and "neither did he advance any claim that required consideration pursuant to the complementary protection criterion' (para 35). 'In light of the detail of the appellant's claims, the country information and the findings of the Full Court in SZQRB at [245]-[246], no error is revealed by the Tribunal's reliance at [59] of the Decision Record on its factual findings set out earlier in the Decision Record. Based on those factual findings, it was open to the Tribunal to find that it was not satisfied that there was a "real risk" that the appellant would be harmed if he returned to Bangladesh on the basis of his relationship with his partner, his religion or his political opinion or activities. Although [59] of the Decision Record is a somewhat compressed consideration of the complementary protection claims, it is adequate in the circumstances' (para 36). 'For completeness, the fact that the appellant had been able to obtain an education in Bangladesh and afford to travel extensively are indicators that he had not suffered harm in the past having regard to the nature of his claims. Further, those factors can relevantly form part of the Tribunal's assessment of the appellant's claims, including the risk of future harm. I do not accept that the Tribunal's reasons at [55] disclose jurisdictional error' (para 37). In concluding, the Court dismissed the application (para 39).

SZSLG v Minister for Immigration and Border Protection [2016] FCA 207 (Logan J) (Unsuccessful)	26 February 2016	1, 11, 19, 21-22, 27-28 and 30	This case relates to: • the application of the test of 'unreasonableness', and • the issues a decision maker must consider with respect to a 'relocation' determination. The appellant was a citizen of India (para 1). The appellant submitted two grounds of appeal. *Ground 1:* 'The Federal Circuit Court Judge failed to consider that the Tribunal decision was affected by judicial error in that the Tribunal failed to correctly apply the test in s.36(2B)(a) of the Act' (para 11). *Ground 2:* 'The Federal Circuit Court Judge failed to consider that the Tribunal had no jurisdiction to make the said decision because its "reasonable satisfaction" was not arrived in accordance with the requirements of the Act' (para 11). The Court considered Ground 2 before Ground 1. *Consideration of Ground 2* The Tribunal found that 'the risk faced by the applicant is taken not to be a real risk as it would be reasonable for the applicant to re-locate to an area of Indian where there would not be a real risk he will suffer significant harm' (para 19).

			The appellant 'emphatically disagrees with the conclusions reached by the Tribunal on the subject of relocation' (para 21). 'He reiterated the harm that he had put to the Tribunal he would suffer in the event he were returned to India' (para 21). 'A number of members of the High Court over time have observed that describing reasoning as "illogical or unreasonable or irrational" may merely be an emphatic way of expressing disagreement with that reasoning: see *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at 646, *Minister for Immigration and Multicultural Affairs; Ex Parte Applicant S20/2002; Appellant S106/2002 v Minister for Immigration & Multicultural Affairs* (2003) 77 ALJR 1105 at 1107; [2003] HCA 30 at [5] and *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 626' (para 21). 'In so doing, each of those judges has stated that unreasonableness is not to be found just in such emphatic disagreement. For present purposes, what that means is that the second ground of appeal, insofar as it might be regarded as evidencing disagreement with the particular satisfaction or want thereof expressed by the Tribunal, is not sufficient to amount to a jurisdictional error' (para 22). 'One thing which the Federal Circuit Court on judicial review and this Court on appeal must not do is to delve

			into what are just matters of relative factual merit or, related to that, credibility. If there is some basis rationally and logically expressed for a particular factual conclusion, it is for this Court to observe the limits of judicial power in this case and not interfere with evaluative factual conclusions reached by the Tribunal for all of the reasons expressed by Sir Gerard Brennan in *Attorney-General (NSW) v Quin* [1990] HCA 21; (1990) 170 CLR 1 at 35-36' (para 22). *Consideration of Ground 1:* 'The particular risk of significant harm which the Tribunal found did exist had about it, on the material the Tribunal accepted, a particular geographic focus arising from the activities in which the appellant had engaged in selling particular insurance products. The Tribunal also found, as it was entitled, that the appellant was a supporter but not a member of the Lok Dal party' (para 27). 'The Tribunal's conclusions as to relocation reflect particular individual features of the appellant. It was not necessary for the Tribunal to identify some other region within India, much less a specific locale, to which he might relocate in order to address the issue posed by s 36(2B) when one has regard to the appellant's individual circumstances' (para 28). 'The position may well be different in respect of a different individual who had, for example, a very high public profile which the Tribunal accepted. But that is not this case. What follows, in my view, is that the

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

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

			any event. Each of the circumstances listed in s 36(2A) which would satisfy the definition of significant harm requires more' (para 78). 'For an act or omission to constitute torture, for example, there must be "an act or omission by which *severe* pain or suffering, whether physical or mental, is intentionally inflicted" for one or other of a number of specific purposes. "Cruel or inhuman treatment or punishment" also denotes "an act or omission by which ... severe pain or suffering ... is intentionally inflicted ..." unless "the act or omission could reasonably be regarded as cruel or inhuman in nature", in which case the pain or suffering need not be severe. "Degrading treatment or punishment" requires "extreme humiliation"' (para 78). 'It is evident from the Tribunal's reasons that it was not satisfied that there was a real prospect that any of these consequences would ensue from the appellant's detention on remand' (para 78). 'Guideline 18, which appears in the section of the Guidelines on torture reads: 18 Intentionally inflicted pain or suffering. To meet the definition of torture, an act or omission must be intended to inflict severe pain or suffering. An act or omission which is not intended to cause pain or suffering but inadvertently did so, would not fall within the definition. In certain circumstances, it may be appropriate to infer an intention to inflict severe pain or suffering if it is evident that such pain or suffering was or may be

			knowingly inflicted' (para 82). 'Having regard to the Tribunal's conclusions in [44]', the Court did not accept that 'there is any sound basis to argue that the Tribunal failed to give consideration to these matters' (para 83). The Tribunal did not accept 'the underlying premise of the submission that there was an obligation on the Tribunal in the circumstances of this case to consider whether an intention to inflict severe pain or suffering should be inferred' (para 83). Leave to argue ground 4 was refused and grounds 1, 2 and 3 were dismissed (paras 53, 58, 70, 84) In concluding, the Court dismissed the appeal with costs (para 85).
AMA15 v Minister for Immigration and Border Protection [2015] FCA 1424 (Markovic J) (Unsuccessful)	15 December 2015	2, 19, 24, 30 and 48-52	This case relates to: • the application of *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71 and *SZVCH v Minister for Immigration & Anor* [2015] FCCA 2950 to ss.36(2)(a) and 36(2)(aa) of the Act. The appellant was a citizen of China (para 2). The appellant's Notice of Appeal raised the following four grounds: 1. 'The Tribunal failed to consider the complementary protection in my case'.

			2. 'RRT has denied me procedural fairness by failing to provide adequate reasons for the finding of a fact'. 3. 'Tribunal unfairly refused to offer me protection saying my case was not covered by the Convention'. 4. 'The Tribunal under evaluated the risk of serious harm that I will face if going back to China' (para 19). With respect to ground 1, the Court held that 'on a fair reading of the Tribunal decision, there is no error in the approach of the Tribunal in its application of the complementary protection criteria to its findings on the evidence and the material before it' (para 24). The Court held that ground 2 was without merit and leave to raise it on appeal was denied (para 30). With respect to grounds 3 and 4, the Court held 'contrary to the findings in SZVCH, in my view, the delegate considered criteria that she was not required to consider and which were not relevant to the Second PV Application. Insofar as the delegate did that she acted beyond her jurisdiction. The Tribunal's role on a review is to undertake a fresh review of the application which has led to the decision under review' (para 48). 'The Tribunal correctly identified that it could only proceed to consider the Second PV Application based on the complementary protection criterion. That approach was consistent with its obligations having regard to ss 414, 415 and 65(1) of the Act. It cannot be said, in those circumstances, that the Tribunal was required to undertake a review of the delegate's

			decision to the extent it included findings on matters that were not relevant to the criteria upon which the visa the subject of the valid application could be granted. The Tribunal exercised the powers and discretions conferred on it by the Act, as it was entitled to do. It considered the delegate's decision in that context (para 48). The Court noted 'that the Tribunal recorded in its decision at [8] and [9] that it told the appellant that it was proceeding on the basis that it would only consider his claims pursuant to s 36(2)(aa). To the extent it differed from the approach of the delegate, the appellant was on notice of that. In those circumstances it cannot be said that there was in that regard any breach of s 425 of the Act' (para 49). The Court accepted 'the submission of the Minister that Driver J erred in his finding in SZVCH in relation to this issue' (para 50). The Court held that the 'appellant should be granted leave to raise grounds 3 and 4. The issues that arise for consideration in relation to these grounds in light of the recent decision of Driver J including whether, as the Minister submits, Driver J erred in his findings in SZVCH makes those grounds arguable. They do not lack merit. There is no prejudice to the Minister in permitting the grounds to be agitated. However, having granted that leave, in light of my consideration above, grounds 3 and 4 should be dismissed' (para 51).

			In concluding the Court dismissed the appeal (para 52).
MZZZR v Minister for Immigration and Border Protection [2015] FCA 1390 (Mortimer J) (Unsuccessful)	9 December 2015	1, 18, 32-33, 36, 38 and 51	This case relates to: • the questions a decision maker must ask when considering a claim under s 36(2)(aa). The applicant was a citizen of Sri Lanka (para 1). The applicant pursued the following two grounds: 1. 'The Federal Circuit Court erred in failing to find that the decision of the Refugee Review Tribunal (the Tribunal) was affected by jurisdictional error, in that the Tribunal asked itself the wrong question when considering the appellant's claim under s 36(2)(aa) of the Migration Act 1958 (Cth) at [115] of its decision record'. 2. 'The Federal Circuit Court erred in failing to find that the decision of the Tribunal was affected by jurisdictional error, in that the Tribunal had no evidence for its finding that the appellant would not return to driving a "three wheeler" or return to the parking lot if returned to Sri Lanka' (para 18). Only ground 1 considered the application of s.36(2)(aa). 'It is correct that the first and last sentences of [115] suggest the Tribunal is still examining the appellant's claims through the prism of the criteria set out in Art 1A of the Refugees Convention and which are relevant to s 36(2)(a). The references to Tamil ethnicity, and to imputed political opinion are obviously references to the Convention attributes upon which the appellant had

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

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

			entitlement to do so is new'. - 'The concepts of "grounds" and "criteria" in s 48A are ambiguous, and possibly interchangeable'. - 'It would have been a relatively straightforward amendment to the Act if Parliament had intended to prevent any person who made an application prior to the commencement of the complementary protection provisions from making a later application after the 2014 Act. It did not do so' (para 22). 'It is clear to us that it is irrelevant whether the grounds or criteria on which a non-citizen relies in his or her subsequent protection visa application were available for reliance by that visa applicant at an earlier point in time (including the time when the non-citizen made an earlier protection visa application)' (para 26). 'We do not accept the submission of the appellant that the language of s 48A(1C)(b) is ambiguous. Section 36(2) unambiguously sets forth the "criterion for a protection visa". And s 48A(1C) is equally unambiguous when it relevantly provides in s 48A(1C)(b) that a person may not make a further application for a protection visa "regardless of … the grounds on which an application would be made or the criteria which the non-citizen would claim to satisfy existed earlier"' (para 26). 'Even though the "criterion" now sought to be relied upon, namely s 36(2)(aa) did not exist as at the date of the earlier application, s 48A(1C)(b) is unambiguous in its prohibition on a further application being made

			"regardless of … whether" the criterion now relied upon "existed earlier". We note that the plain language of the legislation is supported by the Explanatory Memorandum, which details the policy behind the introduction of s 48A(1C)' (para 26). 'In our view the decision of the Full Court in SZGIZ has been superseded by the 2014 Amendment Act, to the extent that that decision permitted a person whose application for a protection visa has been rejected to make another application based on a different criterion in s 36(2) of the Act' (para 26). 'In light of the statutory regime following the commencement of the 2014 Amendment Act (and in place at the time the appellant made his second visa application), it follows that it is irrelevant that the appellant could not, in 2009 at the time of his first protection visa application, have relied on the complementary protection provisions in s 36(2)(aa) of the Act. It is not in dispute that the appellant has previously sought, and been denied, a protection visa. Section 48A(1) of the Act prohibits him lodging another application for a protection visa' (para 27). In concluding, the Court dismissed the appeal (para 30).
AIY15 v Minister for Immigration and Border Protection [2015] FCA 1180 (Perry J) (Unsuccessful)	4 November 2015	12, 29, 32, 40 and 43-45	This case relates to: • the scope of the application of s.36(2)(aa) of the Act The applicant was a citizen of Sri Lanka (para 12).

			The applicant submitted two grounds of appeal. *Ground 1:* 'His Honour erred in failing to find that the Tribunal misapplied the definition of significant harm in s 36(2)(aa) of the Migration Act....' (para 29). *Ground 2:* 'His Honour erred in finding that Ground 3, which related to significant harm under s 36(2)(aa) of the Migration Act, was doomed to fail on the basis that Sri Lanka's *Immigrants and Emigrants Act* was a law of general application and was not enforced for any Convention-based reason (see decision at [12])' (para 29). *Consideration of Ground 1:* 'The appellant's submissions were based on the proposition that nothing in the text of s 36(2)(aa) or the definitional provisions excluded the possibility that a legislative act could be an "*act*" and therefore that a parliament may be an actor for the purposes of the complementary protection provision' (para 32). 'This proposition assumes that the criteria in s 36(2)(aa) can be met by the enactment of a law dissociated from the question of how that law might in fact be applied to an applicant. Yet that assumption is difficult to reconcile with the statutory requirement to consider

			whether there is a real risk that the non-citizen will suffer significant harm if the person concerned were returned to her or his country of nationality – a question which is of its nature directed towards what might happen in the future if certain circumstances eventuate. However, it is unnecessary for me to determine the correctness of this proposition as, even if it were correct, ground 1 could not in any event succeed' (para 32). 'No argument to the effect that the enactment of the I&E Act was itself degrading treatment or punishment was clearly articulated before the delegate or the Tribunal. Nor did it arise "squarely" on the material before the Tribunal, including the material before the delegate and the delegate's reasons. The appellant's claim before the Tribunal was not based upon the mere existence of the I&E Act, but upon how it would be applied to him if he were returned. To submit that the harm identified because of his illegal departure is "pursuant to the Immigrants and Emigrants Act" is therefore to seek to carve out an integer of the appellant's claim as put and duly considered by the Tribunal, and to treat that integer as if it were a separate claim. There was however nothing to suggest that the appellant put, as a separate and distinct claim, the proposition that the I&E Act itself was intended by the Parliament to cause extreme humiliation which was unreasonable' (para 40). *Consideration of Ground 2*:

			'The appellant also submits that the primary judge erred in finding in the context of ground 3 of the judicial review application alleging error in the Tribunal's findings on the complementary protection claim' that 'It is clear that the Tribunal made findings that that law and the detention and questioning that would follow would be as a result of a non-discriminatory enforcement of the law, and that it was a law of general application and was not enforced for any Convention-based reason. In those circumstances, ground 3 is doomed to fail' (para 43). 'The fact that the law is one of general application may well have been relevant to the question of whether there was any improper intention of the kind alleged by the appellant, as the Minister submits' (para 44). Nonetheless, the Court accepted 'the appellant's submission that the primary judge has at [12] plainly conflated the criteria under s 36(2)(a) for a protection visa based on a claim to be a refugee, on the one hand, with the criteria for a protection visa based on a claim for complementary protection under s 36(2)(aa), on the other hand' (para 44). However, the Court held 'that error relates only to an additional basis on which the primary judge found that there was no jurisdictional error in the Tribunal's decision and was not essential to his decision. No equivalent error is said to taint the validity of the Tribunal's decision. As such, the ground ultimately does not provide a basis on which to allow the appeal'

			(para 44). In concluding, the Court dismissed the appeal with costs (para 45).
Ayoub v Minister for Immigration and Border Protection [2015] FCAFC 83 Flick, Griffiths and Perry JJ (Unsuccessful)	12 June 2015	1-4, 6, 8, 11, 15-16, 20, 27-29 and 57	This case relates to: • whether the Minister must give consideration to 'the issue of *non-refoulement*' and 'the prospect of indefinite detention' when exercising the discretion conferred by s 501 of the Act (to cancel a visa) The applicant, Mr Ayoub, was a citizen of Lebanon (para 1). He 'first entered Australia in April 2001' and 'in September 2003 he was granted a visa which enabled him to remain in Australia indefinitely' (para 2). 'In June 2009 Mr Ayoub was convicted in the New South Wales District Court of a criminal offence and sentenced to seven years' imprisonment' (para 3). 'He was released from prison on 14 May 2014' (para 3). 'On 16 May 2014 the Minister made a decision to cancel Mr Ayoub's visa', pursuant to s.501 of the Act (para 4). 'On 30 January 2015 the Federal Court of Australia dismissed the following application for review: *Ayoub v*

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

			The substance of ground 1 was 'that when exercising the discretion conferred by s 501 of the Migration Act the Minister must give consideration to: "...the issue of *non-refoulement*"; and "...the prospect of indefinite detention..."' (para 11). The Court 'noted that the concept of *non-refoulement* has its origins, not in s 501 of the Migration Act, but in Article 33 of the 1951 Convention Relating to the Status of Refugees (the "Refugees Convention") as amended in 1967' (para 15). 'Mr Ayoub, it may further be noted, had not claimed to be a refugee and had not applied for a protection visa. He was not claiming to be a person whose "life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". He did, however, claim that there "is constant war in Lebanon" and that he did "fear for the safety of my wife and kids..."' (para 16) The Court held that 'on no view of the facts of the present case could it be said that the "consequence" of the cancellation of Mr Ayoub's visa pursuant to s 501 was "indefinite detention". The "consequence" of the cancellation decision may well be his detention pursuant to s 189 of the Migration Act – but that "consequence" falls well short of "indefinite detention". A comparable conclusion was reached by White J in *Jaffarie v Director-General of Security* [2014] FCAFC 102 at [126] to [133], (2014) 226 FCR 505 at 538 to 539' (para 20).

			The Court held that 'a consideration by the Minister in the present case of Australia's "*non-refoulement* obligations" may not have been a consideration of matters irrelevant to the decision to be made. But, having pursued that line of inquiry to some extent, his consideration was not thereafter to be elevated to the position that he was required to do more than properly consider the claims being made and the factual material being relied upon by Mr Ayoub. In the present proceeding, the Minister gave genuine consideration to the claims being made and was not required to undertake further inquiries or solicit further information such that he could make a decision as to whether the return of Mr Ayoub to Lebanon – assuming that decision were to be taken – would be in breach of Australia's obligations' (para 27). The Court held that 'an exercise of the statutory power conferred by s 501 of the Migration Act does not require the same analysis to be undertaken as would be required if an application for a protection visa is made and s 36 is invoked. Nor is that analysis to be undertaken even where the Minister does take into account Australia's "*non-refoulement* obligations" (para 28). The Court held that 'it is in this context that s 501E of the Migration Act may assume some relevance. By reason of that provision, the decision of the Minister to cancel Mr Ayoub's visa pursuant to s 501 could not operate to prevent a future application being made for a

			protection visa' (para 28). As to whether 'an identification of those tasks which remained to be discharged if a "complete" analysis of Australia's "*non-refoulement* obligations" was to be undertaken, the Appellant was unable to identify any information he had advanced for consideration which was not taken into account. And, short of requiring the Minister to make further inquiries and possibly to make further findings of fact by reference to materials not presently placed before him, the Minister had "completed" the tasks presently required of him' (para 29). 'For this Court to require the Minister to do more would have the very real potential of propelling the Court impermissibly into merits review and inviting potentially different factual conclusions to be reached upon the basis of different facts' (para 29). The appeal was dismissed with costs (para 57).
Francuziak v Honourable Michael Keenan MP, Minister for Justice [2015] FCA 464 Mckerracher J (Unsuccessful)	15 May 2015	1, 21, 23, 30, 32, 36, 43, 45-46, 49-53, 64, 66, 68, 70-71 and 73	This case relates to: • the definition of torture; and • the scope of the 'legal unreasonableness' test under the *Extradition Act*. The applicant, Mr Francuziak, sought to challenge the Minister's decision to surrender him for extradition to the Republic of Poland (para 1). The applicant submitted two grounds of appeal:

			(a) 'the Minister applied the wrong test in considering Australia's non-refoulement obligations under s 22(3)(b)' of the *Extradition Act 1988* (Cth) ("Extradition Act")'; and (b) 'the determination that Mr Francuziak should be surrendered was sufficiently irrational, capricious or so unreasonable that no reasonable person could have made it so as to be an unreasonable abuse of power in the relevant sense' (para 1). *Ground 1 - Application of the wrong test* The applicant argued that 'circumstances where the Minister was advised of "reports of overcrowding, limited access to healthcare and prison violence in some Polish prisons and instances of ill-treatment of inmates by some prison officials", the question was not whether this was the result of deliberate Polish government policy designed to punish and harm inmates or Mr Francuziak personally' (para 21). Rather, the applicant argued that 'the proper question, was whether such misconduct occurs or there was a real chance of it occurring irrespective of government policy' (para 21). 'It was an important part of Mr Francuziak's argument that Poland has declined to explain or clarify the correct position in Poland or give assurances as to his treatment in circumstances where it has had the opportunity to do

			so' (para 23). It was 'argued by Mr Francuziak that despite the weight of secondary material supporting his claims, the issue was dealt with by Poland by: (a) a bare assertion, unsupported by evidence, that there was no longer any overcrowding; and (b) reference to Polish law which mandates what the conditions should be and which further describes the exceptional circumstances in which that mandate might be avoided' (para 30). The applicant argued 'the acknowledgment, as reflected in [36] of the Departmental Advice, of the occurrence of instances of ill-treatment of inmates by police officers and prison guards is demonstrative of the existence of a real chance of such misconduct eventuating (in contrast to, say, the 10% chance referred to by McHugh J in *Chan* (at 429]))' (para 32). The applicant also argued, the 'fact that such conduct occurs and is apparently condoned by public officials is sufficient to constitute torture, even if not specifically carried out by them' (para 36). The Court held that 'imposing the test in this way is inconsistent' with *de Bruyn v Minister for Justice & Customs* [2004] FCAFC 334; (2004) 143 FCR 162 which provides that s 22(3)(b) of the Extradition Act 'is directed towards institutionalised torture by government authorities as distinct from occasional and unpredictable violence occurring in prisons, even with the connivance

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

			‘In relation to the delay issue, Mr Francuziak submitted to the Minister that the Polish parole system operated so slowly that applications to be considered for parole could be pending for years’ (para 50). ‘Mr Francuziak submitted that the time which he had spent in custody in Poland together with his time on remand in Australia constituted more than half of the length of the sentence to be served in Poland’ (para 51). ‘The Department Advice suggested that those matters did not constitute a sufficiently compelling basis to consider that his extradition would be totally incompatible with humanitarian considerations because of exceptional circumstances’ (para 51). ‘In reaching that conclusion, Mr Francuziak says that the Department relied upon “the absence of information in [human rights reports on Poland published by the US Dept of State, Amnesty and the CPT] with respect to parole consideration delays” and dismissed Mr Francuziak’s reliance on an instance where an applicant who had served 11 years of a 15 year imprisonment sentence had his parole application pending for more than three years’ (para 52). ‘Mr Francuziak’s primary submission is that rather than speculating on what might occur’, having regard to the obligation in Art 3(4) of the Treaty between Australia and the Republic of Poland on Extradition (the “Treaty”), ‘Poland’s assurances should have been sought and obtained, especially having regard to the

			fact that he has been in custody at Hakea Prison in Western Australia since 9 October 2010 on his arrest pursuant to the extradition warrant' (para 53). The applicant argued 'that despite the fact that he has been in custody in Australia for over four years, Poland has not indicated whether that time will be taken into account in determining whether to consider an application for early conditional release or in determining whether such an application should be granted' (para 53). The Court held that 'in the present case the question might adequately be posed by asking whether the Minister's decision to surrender Mr Francuziak, notwithstanding the content of his submissions and having regard to the Art 3(4) obligation, was a decision "lacking an evident and intelligible justification" (a test posed by the plurality in *Li*), having regard to the tasks to be performed in discharging the duty under s 22' and the purpose of the Extradition Act (para 64). The Court held that 'it is also necessary in considering the argument as to legal unreasonableness, to examine what the legislature has said about the matters that must be considered before arriving at the impugned decision' (para 66). The applicant's argument focused on Art 3(4) of the Treaty. 'Article 3(4) of the Treaty is only enlivened where Australia forms the view that extradition in light of an applicant's exceptional circumstances would be

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

			process conducted in Australia pursuant' to the Extradition Act 'is an administrative function in accordance with the legislative requirements as modified by the Treaty. It involves no consideration or determination of guilt or innocence and, therefore, no occasion to take into account considerations which might ordinarily apply, in this instance, in Poland in considering whether or not and, if so, to what extent, credit should be given for time already spent in custody under the administrative process in Australia' (para 70). 'Having regard to the content, purpose and policy' of the Extradition Act, 'including s 22 and the Treaty, it cannot be said that the apparent decision of the Minister that extradition would not be totally incompatible with humanitarian considerations was a decision "which lacked an evident and intelligible justification"' (para 71). In concluding, the Court dismissed the application by the applicant (para 73).
SZTFI v Minister for Immigration and Border Protection [2015] FCA 322 Perry J (Successful)	8 April 2015	2, 4, 39-41, 48-49, 54-58 and 82	This case relates to: • the application of the 'real chance test' • the extent to which claims for refugee and complementary protection must be considered separately • consideration of the grounds in which the appellant had a well-founded fear of persecution The applicant submitted three grounds of appeal:

			1. 'The primary judge erred in holding at [28]-[33] of the judgment below (J), that the respondent tribunal (Tribunal) properly applied the "real chance" test to the appellant's claims. The primary judge ought to have held that the test was wrongly applied' (para 2). 2. 'The primary judge erred in holding at J[39]-[42] that the Tribunal properly considered the appellant's claims under the complementary protection regime in s 36(2)(aa) of the Migration Act 1958 (Cth). The primary judge ought to have held that the claims were not properly considered' (para 2). 3. 'The primary judge erred in holding at J[56]-[57] that the appellant did not claim that the persecution that he had experienced in the past and apprehended in the future took the form of repression of behaviour about which he desired to be more open. In particular, the primary judge overlooked the fact that the applicant had made an express submission in writing to that effect to the Tribunal (at CB 137)' (para 2). The appeal was allowed on grounds 1 and 3, but the Court did not make a ruling with respect to ground 2 (para 4). *Consideration of Ground 1* The first ground of appeal focused 'on whether the primary judge correctly held at [31] that the "away without official leave hypothesis" was a claimed past

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

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

			(para 57). The Court held that 'Tribunal was correct to view the spy claim as being based only on the appellant's concerns that he would be imputed with a political opinion hostile to the regime of the country of nationality' (para 57). The Court held, 'the Tribunal did not erroneously assess the spy claim only by reference to the Convention criteria; rather all of the appellant's claims for protection, Convention based and for complementary protection, were ultimately based on the appellant's fear of being imputed with political opinions hostile to the regime of his country of nationality. In these circumstances, the Tribunal was entitled to proceed on the basis that the appellant's claims to fear persecution as a spy failed for the same reasons as his claim to fear being imputed with an anti-regime political opinion in the context of his Convention claim' (para 57). However, with respect to ground 2, the Court held that 'it follows from the correlation between the two claims that my findings allowing the appeal on ground 1 may have consequences for the consideration of this claim' (para 57). *Consideration of Ground 3* Ground 3 turned 'upon whether the Tribunal was required to consider whether, if the appellant were returned to his country of nationality, he would keep his

			political views to himself because of a fear of persecution' (para 58). The Court held that the Tribunal did not consider 'why the appellant has in the past, and might be expected in the future, to keep his political views to himself and whether his conduct in so doing was influenced by the threat of harm if those views were exposed' (para 82). Therefore the Court held that the Tribunal 'failed to consider properly the issue of "real chance" and fallen into jurisdictional error' (para 82). The Court held that the 'Tribunal erred in this way by its focus upon whether the authorities might impute to the appellant a political opinion (which he in fact holds) which the Tribunal described as his sole claim, as opposed to his claims insofar as they relate to his actual political opinions' (para 82). In concluding, the Court 'allowed the appeal with costs' (para 83).
SZUNZ v Minister for Immigration and Border Protection [2015] FCAFC 32 Buchanan, Flick and Wigney JJ (Unsuccessful)	13 March 2015	1, 7, 14, 20-22, 25-26, 35-36, 39, 67-71, 121 and 126-127	This case relates to: • The definition of 'receiving country' under section 36(2)(aa) of the Act The applicant was 'stateless' and his 'former country of residence (from 2004 to 2010) was Norway' (para 1). The Refugee Review Tribunal (Tribunal) 'accepted the appellant's claim that he had joined a criminal gang in

			Europe around 2002 and genuinely feared harm from the criminal gang if returned to Norway, where the gang also operates' (para 7). However, the Tribunal found that the 'fear of harm held by the appellant did not establish that the appellant had a well-founded fear of persecution within the meaning of the Refugees Convention (s 36(2)(a) of the Migration Act)' (para 7). The Tribunal 'found that the appellant was a stateless person and that Norway was his sole receiving country for the purpose of assessing whether he was eligible for complementary protection' (para 14). However, the Tribunal was satisfied 'that the applicant could obtain, from the Norwegian authorities, protection such that there would not be a real risk that the applicant will suffer significant harm: s.36(2B)(b) of the Act' (para 20). The Tribunal also rejected the claim that 'the appellant might face a real risk of significant harm from the Norwegian authorities themselves' (para 21). The appellant sought review of the Tribunal's decision before the Federal Circuit Court of Australia (FCCA) as to whether the Tribunal was 'correct to conclude that only Norway should be regarded as a receiving country for the purpose of s 36(2)(aa) so that claims to fear harm should be assessed only in relation to claims of feared harm in that country' (para 22).

			The FCCA held that the Tribunal had not committed a jurisdictional error, and dismissed the application for judicial review' (para 25). The applicant appealed the decision of FCCA to the Full Court on the following grounds: 1. 'The trial judge erred in finding that the Tribunal had applied the correct test to determine habitual residence under s36(2)(aa) of the Migration Act, where: a. the trial judge found the correct test for a 'receiving country' was 'principally one of fact' independent of a legal right to enter and reside in the country [at 57]; and b. the Tribunal relied on the Appellant's lack of legal status in particular countries when deciding whether those countries were 'receiving countries' (para 26). 2. 'The trial judge erred in finding that "the Tribunal should not be found to have fallen into error by relying on the case put to it" [at 61], in circumstances where: a. the relevant factual assertions made by the Appellant as to his former countries of residence were before the Tribunal; b. the Tribunal did not limit itself to considering Norway as a potential receiving

			country; c. the case put to the Tribunal by the Appellant included the submission that at least one other place was a receiving country, and the Appellant only- modified the submission during the course of or subsequent to the hearing; and d. the Appellant's 'contention' regarding Norway ([60],[61]) did not permit the Tribunal to avoid its duties under the statute' (para 26). *Reasons for Judgment – Buchanan J:* Buchanan J held that 'although the RRT accepted (for the purpose of its decision) that the appellant lived in a camp in Western Sahara until about six years old, the RRT also accepted that he had lived (for varying periods of years) in Spain, Belgium, the Netherlands and Norway' (para 35). His Honour further held that 'whatever connections by birth or origins might be asserted, it is hard to conceive of that place as a country of habitual residence of that person as an adult, after a life spent moving through other countries. In the present case it was quite artificial to suggest Western Sahara as a country of habitual residence' (para 36). In concluding, His Honour held that 'the grounds of appeal mis-characterise the way in which the RRT went about its task and do not identify either jurisdictional

			error on the part of the RRT or legal error on the part of the FCCA' (para 39). *Reasons for Judgment – Flick J:* His Honour held that 'it would be difficult for any factual conclusion to be reached that a person was an (sic) "habitual resident" of a country simply because he lived in that country with his mother as a child and for such a short period of time. After having left Western Sahara, the Appellant advanced no claim regarding any continuing connection. His links with Western Sahara – either by reason of his factual connection with that area or by reason of his legal rights – were properly characterised as "uncertain"' (para 67). Further, His Honour detailed that the 'Tribunal's reasons records a finding of fact that the Appellant "has nothing to demonstrate any actual links with" Algeria and Morocco' (para 68). 'Nor was Counsel for the Appellant able to take the Court to any factual account given by the Appellant not recorded in the Tribunal's reasons which demonstrated a greater factual connection to any of these countries' (para 69). In concluding, His Honour held that 'any error of either the Tribunal or the Federal Circuit Court could not impugn the Tribunal's fundamental factual findings that the Appellant had not demonstrated any real connection with Western Sahara, Algeria or Morocco.

			Any error in the Tribunal's focus upon the Appellant's "legal status" in any of these countries mattered not, so long as the Appellant remained unable to demonstrate any "connection" with any of these countries or "any actual links with these places ..."' (para 70). 'Any error in the Tribunal's consideration of whether Norway was a "receiving country" equally matters not. The Tribunal accepted that Norway was a "receiving country". That claim failed because the Appellant could not demonstrate any "significant harm" if he returned to Norway' (para 71). *Reasons for Judgment - Wigney J:* Wigney J held that a 'fair reading of the impugned passages from the Tribunal's reasons reveals that the Tribunal's decision in fact turned on broader findings of fact concerning the appellant's connection with the Western Sahara, and the absence of any "actual links" with any part of that territory controlled or administered by Morocco or Algeria. Whilst the Tribunal did refer to a lack of satisfaction concerning the appellant's legal status and entitlement, and even (at [45]) nationality, these findings followed, or were a consequence of, the independent factual findings that the appellant had no relevant connection or link with these countries such as to support any claim of habitual residence' (para 121). In concluding His Honour held that the Tribunal 'considered and made findings about whether any country other than Norway was a receiving country'

			and the 'primary judge did not limit his consideration of potential jurisdictional error by the Tribunal in the manner suggested by the appellant' (para 126). The appeal was dismissed with costs (127).
SZTMD v Minister for Immigration and Border Protection [2015] FCA 150 Perram J (Unsuccessful)	4 March 2015	1, 6, 10, 11-12, 15, 19, 21, 25-27, 33 and 35-36	This case relates to: • the requirement to take account of policy guidelines prepared by the Department of Immigration The applicant was a citizen Burundi and of Tutsi ethnicity (para 27). The applicant claimed that he was a 'member of the Hutu "CNDD-FDD" party in order to obtain employment' and claimed to fear harm based on 'being considered a traitor by his native ethnic group and a traitor by his adopted ethnic group' (para 27). *First argument* The 'applicant's first argument focused on the obligation imposed' on the Tribunal by the Act to 'comply with any Ministerial directions which had been issued under the Act' (para 6). That is, 'in accordance with Ministerial Direction No. 56, made under section 499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration and Citizenship – "PAM3: Refugee and humanitarian – Complementary

			Protection Guidelines" and "PAM3: Refugee and humanitarian – Refugee Law Guidelines" – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration' (para 10). The applicant submitted that the Tribunal 'did not explain whether it dealt with the guidelines and country information at some other part of its reasons (in fact, it did not); nor did it explain whether it regarded some parts or all of the guidelines to be irrelevant to the task it was required to perform' (para 11). The applicant questioned 'how could the Tribunal have complied with the requirement that it take into account the two guidelines and country information, even if only to dismiss them as irrelevant, if it had not apparently turned its mind to them at all?' (para 12). The Court considered the decision of *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 in which it was held that 'the effect of s 430(1) is that the Court is entitled to infer that a matter not mentioned in the Tribunal's reasons was not considered by it to be material' (para 15). Therefore, the Court held that it was permissible for the Court 'to conclude from the absence of any direct consideration of either the two guidelines or the country information that the Tribunal did not consider them to

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

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

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

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

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

			five years and three months. An appeal against the sentence was dismissed by the New South Wales Court of Criminal Appeal' (para 6). On 21 August 2013, Mr Ayoub was notified by the Department of Immigration and Border Protection that 'consideration would be given to cancelling his visa'. My Ayoub 'was invited to provide any further information that he felt the decision-maker should take into account' (para 7). The information provided by Mr Ayoub, in response to the notice of 21 August 2013, detailed his family situation, 'including the hardship that would be suffered by his wife and four young children' if he returned to Lebanon. 'He stated that the situation in Lebanon was dangerous and unstable, that the country was on the brink of civil war, and that he feared for his life if he were to return there'. He also stated that he came to Australia in 2001 'to flee the constant trouble in Lebanon and for the employment opportunities and way of life' (para 8). The Court held that 'none of the information provided by Mr Ayoub suggested that he was a person who might be owed protection obligations under the Convention'. 'In particular, the information provided by him did not suggest that there was any risk that he might suffer harm in Lebanon on account of his race, religion, nationality, membership of a particular social group or political opinion'. (para 9)

			On 16 May 2014 the Minister cancelled Mr Ayoub's visa (para 10). The Minister, in his statement of reasons, detailed that 'while I note Mr AYOUB's claim to fear return to Lebanon, I also consider that the existence of a *non-refoulement* obligation does not preclude the cancellation of a person's visa. This is because Australia will not necessarily remove a person, as a consequence of cancelling their visa, to a country in respect of which a *non-refoulement* obligation exists' (para 11). The application for review raised the following ground: 'The Minister failed to complete the exercise of his jurisdiction in that he failed to lawfully consider the case that the applicant raised against exercise of the Minister's discretion under s. 501(2) of the *Migration Act*' (para 12). This ground was particularized as a 'failure to give proper, realistic and genuine consideration to the applicant's claim that he would be in danger were he to be returned to Lebanon which required the Minister to decide: (i) Whether Australia has *non-refoulement* obligations to the applicant, or alternatively, whether the applicant was otherwise in danger if he were to be returned to Lebanon? (ii) If so, is there a country other than Lebanon which would accept him? (iii) If there is no other country, and if *non-refoulement* obligations or other danger prevented his return to

			Lebanon, what would be the legal consequences of the cancellation of his visa?' (para 12) The Court held that the Minister was not 'obliged to give the issue of *non-refoulement* any consideration'. This was based on the reasoning that Mr Ayoub had not made an application for a protection visa and there was 'nothing in the material provided to the Minister to indicate that Mr Ayoub was a person to whom Australia might owe protection obligations' (para 24) The application by Mr Ayoub was dismissed with costs (para 25).

FEDERAL CIRCUIT COURT OF AUSTRALIA

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

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

			'As noted by Judge Street in ARS15, Portorreal "was a decision in which there was close analysis of the conditions to which the person was exposed for no more than 50 hours, but nonetheless there was a finding of a violation of Article 7" of the ICCPR' (para 28). 'I assume that Portorreal is referred to in "PAM3: Refugee and humanitarian – Complementary Protection Guidelines" and "PAM3: Refugee and humanitarian – Refugee Law Guidelines". The Tribunal did not refer to Portorreal. That does not necessarily mean the Tribunal did not consider it. Assuming that Portorreal is referred to in PAM 3, and given I am not satisfied the Tribunal did not consider PAM3, I am not satisfied the Tribunal did not consider Portorreal' (para 29)'. The applicant failed on all three grounds (para 31).
ABD16 v Minister for Immigration & Anor [2016] FCCA 2872 (Judge Smith) (Unsuccessful)	23 November 2016	5, 9 and 46-49	This cases relates to: • whether the International Treaties Obligation Assessment (ITOA) process was affected by error The applicant sought 'judicial review of the report prepared at the conclusion' of the International Treaties Obligation Assessment (ITOA) or Post Review Protection Claims Assessment (para 5). 'The applicant does not take issue with the way in which the assessor dealt with the obligations under the Refugees Convention. His complaint is that the assessor did not properly deal with the other non-refoulement

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

			of sub-s.36(2)(aa) and s.36(2A) of the Act: SZSPT v Minister for Immigration & Border Protection [2014] FCA 1245 at [11]- [13] (Rares J); see also BBK15 v Minister for Immigration & Border Protection (2016) 241 FCR 150; [2016] FCA 680 at [30] (Buchanan J). Given that the assessor's finding under the Refugees Convention was that the applicant may be penalised under a law of general application, his conclusion there applied mutatis mutandis to the non-refoulement obligations under the ICCPR and CAT. I note in this respect that the applicant did not contend that s.36(2B) had no application to the determination of the matter by the assessor' (para 48). 'The applicant has not established that the assessor has fallen into any error and the application will be dismissed' (para 49).
AAC16 v Minister for Immigration & Anor [2016] FCCA 3001 (Judge Smith) (Successful)	23 November 2016	4, 19-22 and 25-27	This cases relates to: • whether the Tribunal's decision was affected by jurisdictional error by applying s.91R(3) into its reasoning in respect of complementary protection The applicant sought 'judicial review of the Tribunal's decision. He argues that the Tribunal's decision was affected by jurisdictional error because it incorporated its application of s.91R(3) of the Act into its reasoning in respect of the complementary protection criterion, whereas that provision only applies in respect of the refugee criterion' (para 4). 'There appears at first to be some tension between the

			Tribunal's statement, at [120], that it disregarded the applicant's church attendance, association with Christians and study of Christianity and its reference, at [123], to his "limited contact with Christian churches in Australia", his becoming a catechumen and conversion to Christianity. The tension is explained, however, by the fact, as explained above, that s.91R(3) only prevents conduct in Australia being used favourably to an applicant. The findings at [123] were not favourable to the applicant and so were made conformably with the Tribunal's statement at [120]. The same reasoning applies to the Tribunal's statement, at [105], that if the applicant had fled Iran because he wanted to exercise his Christian religion freely, he would have been going to church more regularly at least up to the time of his accident in mid-2014' (para 19). 'However, that does not mean that the Tribunal did not disregard the relevant conduct in making other findings. It specifically said that it had done so. That leaves the question of which findings were made disregarding the applicant's limited contact with Christian churches in Australia, his becoming a catechumen and conversion to Christianity' (para 20). 'One of the critical findings made by the Tribunal was that the applicant's conversion to Christianity was not genuine. Importantly, this finding led the Tribunal to conclude, at [123], that the applicant would not engage in any Christian related practices upon return to Iran' (para 21).

			'This paragraph suggests that the Tribunal considered that the fact that the applicant had become a catechumen might support the applicant's claim to have genuinely converted to Christianity. However, accepting what the Tribunal said about the operation of s.91R(3) and inferring that the reference to study of Christianity included a reference to the applicant being a catechumen, the Tribunal must have disregarded that fact for the purposes of determining whether the applicant had genuinely converted to Christianity. If that was the case, it may be concluded that the finding about genuineness was affected by the Tribunal's application of s.91R(3). The corollary of that is that, when the Tribunal simply adopted this finding for the purpose of its consideration of the complementary protection criterion, it wrongly applied s.91R(3)' (para 22). 'Even though the Tribunal may have been aware of the limited operation of s.91R(3), there is nothing to indicate that that awareness formed any part of its reasoning process' (para 25). The 'Tribunal's finding that the applicant's church attendance was only engaged in to strengthen his refugee claims, supported the Tribunal's finding that the applicant's conversion was not genuine. The problem with this is that the Tribunal did not expressly say that it relied on this finding to support any conclusion other than that s.91R(3) required it to disregard the applicant's conduct in Australia. The danger with this consideration is that inferring reasoning beyond what it

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

			violence" in the country that would continue to cause difficulty after the withdrawal of foreign forces in 2014 ([53])' (para 12). (c) 'The Tribunal's response to the applicant's claims to fear harm by reason of the planned withdrawal was that the withdrawal would not lead to any "targeting" ([37]-[40]) nor any "persecut[ion]" ([53])' (para 12). (d) 'Targeting and persecution form no part of the test for complementary protection. In circumstances where the Tribunal accepted that violence would occur after the withdrawal, but did not give any separate consideration to the distinct issues that arise in relation to the complementary protection claim, error is manifest' (para 12). (e) 'This inference is confirmed by the observation that under the heading "Complementary protection obligations", in [62], the Tribunal mentions that the applicant is a Hazara Shia and will not be exposed to a risk of harm "merely because of his background"; in [63], the Tribunal mentions that the applicant lacks an actual or imputed political opinion connected with his return from a foreign country. These matters are irrelevant to complementary protection and would not be expected if the Tribunal were applying the correct test; it might be asked, rhetorically, why mention these matters if the correct test was being applied?' (para 12). *Consideration*

			'The applicant argued that the Tribunal's statements at paragraph 53 of its reasons for decision indicated that there was a risk to the applicant of sporadic violence. The applicant said that when the Tribunal dealt with the issue of complementary protection, it did not deal with that risk in the correct way' (para 16). 'The Tribunal, clearly, in its reasons, focused on whether the applicant faced a real risk of significant harm arising from his Hazara Shia background' (para 18). 'The risk of sporadic violence identified by the Tribunal was said to apply "in the country", meaning Afghanistan. That clearly means that sporadic violence was a risk faced by the population of the country generally' (para 20). 'The applicant argued in court today that he would face a particular risk personally if he were to return to Afghanistan, because he would be an inhabitant of Kabul. At CB167 there was an extract of a submission from the applicant to the Tribunal which referred to a number of articles in The Age newspaper about attacks on Hazaras in towns surrounding Kabul' (para 21). 'There was nothing else put forward by the applicant that suggested that he faced a particular risk of sporadic violence in Kabul. In any event, the Tribunal made a finding that the risk of sporadic violence applied "in the country", not just in Kabul. Consequently, the risk of sporadic violence would fall within s.36(2B)(c) of the

			Act' (para 22). 'Additionally, the applicant, in a formal, apparently exhaustive, written submission prepared by his lawyers set out the various bases upon which he sought complementary protection: CB198-201. In that submission, the applicant specifically relied upon his race, being Hazara. That clearly is why the Tribunal focused on that issue'. 'In identifying that attribute, the Tribunal was dealing with the claim that was put to it' (para 23). 'Counsel for the applicant noted that the Tribunal did not refer specifically to s.36(2B)(c) of the Act and perhaps implied that the omission of any reference to that paragraph of the Act meant that the Tribunal did not rely on it. However, I do not accept that argument. It seems to me, in the circumstances of this case, that the Tribunal can be taken to know the relevant provisions and understand their application. The Tribunal's references to the applicant's Hazara background seem to be based on the fact that the applicant submitted to the Tribunal that he was in need of complementary protection because of his ethnicity' (para 24). 'The applicant apparently accepted that he had not specifically put to the Tribunal that he faced harm from sporadic violence particularly in Kabul. The applicant argued that whether or not he had put to the Tribunal that he faced significant harm personally because he would be in Kabul was irrelevant because the Tribunal

			made a finding that there was sporadic violence. This was an argument based on the allegation that the ground clearly arose from the materials. However, the fact is that the Tribunal's finding was that the violence was "in the country", rather than in Kabul' (para 25). The application was dismissed (para 26).
MZAJD v Minister for Immigration & Anor [2016] FCCA 2697 (Judge Wilson) (Successful)	20 October 2016	2, 15, 22, 37- 39, 42, 44, 48 and 65-66	This cases relates to: • whether the Tribunal adequately considered the applicant's complementary protection claim. The applicant sought two grounds of review: *Ground 1* 'The Second Respondent erred by failing to consider the statutory criteria in s 36(2)(aa) in respect of the claims of the Applicant, especially in respect of his claim to be at real risk of arbitrary deprivation of life' (para 2). *Ground 2* 'The Second Respondent erred by failing to conduct a hearing in compliance with s 425(1) of the Migration Act 1958 (Cth) in that the Applicant was not given an opportunity 'to give evidence and present arguments relating to the issues arising in relation to the decision under review', namely issue as to whether the Applicant lacked 'any role or standing in his district which would have caused him or enabled him to organise ... a protest [concerning the Army dumping bodies in his home village] within 24 hours'' (para 15).

			Consideration of Ground 1 Counsel for the applicant 'submitted that the Tribunal addressed issues relating to the convention-based protection up to paragraph 70 of its reasons, then disposed of the applicant's complementary protection claim in paragraph 70 stating "[f]*or the reasons set out above*", then it rejected the applicant's complementary protection application. Mr Albert submitted that nothing in the reasoning that the Tribunal applied in the passages that preceded paragraph 70 addressed factual and legal matters that were pertinent solely to complementary protection issues under s.36(2)(aa)' (para 22). 'The applicant completed his visa application answering questions 45 and 46 in a manner that identified an integer directed to arbitrary deprivation of life. So too did the information he set out in paragraph 57 of his statutory declaration dated 20 September 2012. The RILC submission at paragraph 3(b) squarely raised arbitrary deprivation of life as did part three of RILC's submission under the heading "Complementary protection". The debate between the Tribunal member and the applicant recorded on page 8 of the transcript of the Tribunal hearing similarly raised matters that called for separate consideration under s.36(2)(aa) of the Act' (para 37). The Court held that the 'complementary protection claim was not addressed. Instead, it was generically rolled into the Tribunal's consideration of Convention-

			related issues' (para 39). The Court 'did not agree that the complementary protection claims that ought to have attracted separate consideration were somehow subsumed in the findings of fact made in respect of the claims that called for consideration under a different section, that is to say under s.36(2)(a) of the Act' (para 39). 'The matters canvassed between paragraphs 61 to 69 of the Tribunal's reasons were findings linked to a Convention nexus of harm. Conversely, the arbitrary killing of a person was a claim under complementary protection. It was erroneous for the Tribunal to consider the killing of the applicant's cousin under the rubric of the Convention. The Tribunal should have dealt with that issue as a complementary protection claim. Having erroneously considered the issue under factors relevant to s.36(2)(a) and not to factors relevant to s.36(2)(aa) of the Act, the Tribunal fell into jurisdictional error by sweeping all claims up by reference in paragraph 70 to the much lamentable expression "[f]or the reasons set out above" (para 42).' 'A reader of paragraph 70 of the Tribunal's reasons was none the wiser in knowing what facts underpinned the Tribunal's finding that the applicant had failed in his complementary protection claim. That situation should not be permitted to stand. Even if some repetition in the Tribunal's reasons was involved, the Tribunal should have identified as separate matters those findings that supported the conclusions it reached in respect of the

			complementary protection claim' (para 44). *Consideration of Ground 2* 'In essence, the applicant complained that the Tribunal failed to give him an opportunity to adduce evidence and present argument as to whether the applicant lacked any role or standing in his district which would have caused him or enabled him to organise a protest concerning the Pakistan Army dumping bodies in his home village within 24 hours' (para 48). The Court held that the second ground was made out (para 65). The Court made orders quashing the decision of the Tribunal made 30 June 2014' and directed 'that this matter be remitted to the Tribunal for rehearing before a differently constituted Tribunal. The Minister must pay the applicant's cost' (para 66).
APK15 v Minister for Immigration & Anor [2016] FCCA 2190 (Judge Driver) (Unsuccessful)	16 September 2016	11, 39 and 42-43	This case relates to: • 'whether the Assessor considered the wrong issue or failed to consider an integer of the applicant's claims' (para 11) The applicant relied on the following two grounds: 1. 'the wrong issue was considered and the Assessor did not ask himself the right question'; and 2. 'the Assessor failed to consider all of the applicant's claims, which he had accepted during the refugee assessment, under the complementary protection provisions' (para 11).

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

			(and affirmed on appeal: *Minister for Immigration v SZQPA* [2012] FCA 1025) (para 42). 'Unlike in *SZQPA*, the concern here is not that the applicant might be harmed because he was suspected of being a security risk but, rather, that the period that the applicant might have to spend in detention pending his ultimate acquittal of any criminal charge might constitute serious or significant harm because of the conditions of detention and the Assessor's implicit acceptance that, because the applicant would not ultimately be subject to any criminal penalty, any detention would not be justified. In essence, the question that the Assessor failed to consider was whether the applicant, as an innocent man, would nevertheless be detained and, if so, whether the fact, duration and conditions of that detention would enliven Australia's protection obligations to him. The Assessor's failure goes to jurisdiction because it amounted to overlooking an integer of the applicant's claims' (para 43).
SZTVA v Minister for Immigration & Anor [2016] FCCA 2005 (Judge Manousaridis) (Unsuccessful)	10 August 2016	1-3, 14, 18-20, 25-27 and 29-31	This case relates to: • whether the applicant was denied procedural fairness The applicant was a citizen of India (para 3). 'This application for judicial review raises two questions. The first is whether, in conducting a review of a decision by a delegate of the first respondent (Minister) not to grant the applicant a Protection (Class XA) visa (Protection visa), the second respondent

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

			Federal Court in SZSSJ (Claimed Information)' (para 14). 'Ground 1 fails for a number of reasons. First, it is premised on the proposition that the applicant claimed he faced a risk of harm as a result of the data breach. That premise, however, is not correct. Although the applicant, through his agent, and at the hearing before the Tribunal, claimed he needed to have access to the Claimed Information, the applicant did not articulate the harm or possible harm he feared or claimed might occur to him as a result of the data breach if he were to return to India. The applicant decided not to comment in response to the Tribunal's question whether the applicant was claiming he would be subjected to harm as a result of the data breach. In those circumstances, it is difficult to see how there could have been any unfairness in the manner in which the Tribunal conducted its review (para 18). 'Second, the submission that the Department held information that "was credible, relevant and significant" is an unsupported assertion. The applicant does not identify the information which he claims was "credible, relevant and significant information", or how such information is said to be credible, relevant, and significant. That is not surprising, given the applicant was unwilling to inform the Tribunal of the harm he feared would or might occur to him as a result of the data breach. Further, as I have already noted, the Tribunal was prepared to assume that the data breach identified the applicant as having sought protection in

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

			the data breach in fact identified the applicant as having sought protection in Australia, and the applicant was not prepared to inform the Tribunal of the harm the applicant feared would or might occur to him as a result of the data breach, it is not possible to say how the availability to the applicant of the unabridged KPMG report and any other Claimed Information could have assisted the applicant' (para 25). 'In the course of oral address, counsel for the applicant submitted the Tribunal was required to accord the procedural fairness the Full Federal Court in *SZSSJ* held it was necessary for the Minister to accord to applicants in that case. Even if the Full Federal Court's reasoning had been approved by the High Court, I would not have accepted that submission. First, the issue in *SZSSJ* was whether the Minister was under a common law duty to accord procedural fairness and, if so, whether the Minister did accord procedural fairness. Because of s.422B of the Act, however, the Tribunal's duty to accord procedural fairness is limited to the duties provided by Division 4 of Part 7 of the Act. The applicant did not fail to comply with s.425 of the Act, or otherwise act unfairly. The applicant was invited to attend a hearing before the Tribunal to give evidence and present arguments. He had been given notice by the Department before the Tribunal hearing that if the applicant wished to claim Australia owed the applicant protection obligations, he should advance that claim before the Tribunal; and the Tribunal specifically invited the applicant to make submissions about whether he claimed Australia owed him protection

			obligations as a result of the data breach' (para 26). 'Second, and in any event, the High Court in *Minister for Immigration and Border Protection v SZSSJ* held the Minister did accord procedural fairness to the applicants in that case. In my opinion, even if the Tribunal had been under a common law duty to accord procedural fairness, for the reasons I have already given, the Tribunal did accord the applicant procedural fairness' (para 27). *Consideration of Ground 2:* 'The Tribunal did review the applicant's case according to law. It asked the applicant to expand on claims he had based on the data breach, and specifically asked the applicant whether he was claiming he would be subjected to harm as a result of the data breach. The Tribunal considered the material before it. It cannot be said the Tribunal did not review the applicant's case because it did not consider information that was not before it' (para 29). 'Ground 2, therefore, also fails' (para 30). 'The applicant has failed on both of his grounds. The application will therefore be dismissed. (para 31).
BIT15 v Minister for Immigration & Anor [2016] FCCA 1995 (Judge Antoni Lucev) (Successful)	5 August 2016	5, 7, 53-58	This case relates to: • whether the Tribunal considered whether the applicant was a member of particular social groups and whether the applicant would face a risk of significant harm as a result of such

			memberships, when considering the complementary protection criteria The applicant was a citizen of Afghanistan (para 7). The applicant submitted the following ground of review: 'The Tribunal fell into jurisdictional error when it failed to consider whether the applicant was: (a) a member of a particular social group consisting of "failed asylum seekers", "returnees from the West" or an Afghani who lived illegally in Pakistan for a prolonged period (13 years); (b) at risk of harm due to being a failed asylum seeker, returnee from the West and/or an Afghani who lived illegally in Pakistan for a prolonged period (13 years) when considering whether the applicant was a person who was subject to the Complimentary (sic) Protection provisions' (para 5). 'When the Tribunal came to assess whether the applicant would be at risk of harm for a reason other than facing harm from the Taliban because of political and religious views imputed to him because he worked on a truck taking supplies to Shias in Parachinar, the Tribunal observed that Paktia Province (the applicant's home province) was "insecure and dangerous", but that "the primary targets" of the Taliban and other insurgent groups "are individuals and institutions associated with the Afghan government and security forces, and the international forces": CB 191 at [45]. It is said that country information reports "consistently indicate that

			those targeted are people associated with government or security institutions": CB 191 at [45]. The Tribunal found that there was "no credible evidence" that the applicant "as a Pashtun Sunni or for any other reason he has suggested or which arises from the credible evidence ... would be targeted for a Convention reason for systematic and discriminatory harm that would constitute persecution should he return to his village in Paktia"': CB 191 at [45]' (para 53). 'The Tribunal went on to find that any risk he might face was one of generalised violence arising from general insecurity and not one faced by the applicant personally, and in those circumstances the risk was not a real risk for the purposes of the complementary protection criterion: CB 191 at [45]' (para 53). 'The Court has several difficulties with the Tribunal's analysis, in the context of the claims made with respect to membership of a particular social group. There is no analysis or comment or consideration of the secondary or other non-primary targets of the Taliban or the insurgents, or who the secondary or non-primary targets of the Taliban and other insurgent groups might be. There is also only a consideration of persons "targeted" by the Taliban or other insurgent groups. There is no consideration of whether or not persons who are not targeted, and who return to a local village after more than 20 years away (a finding made by the Tribunal at CB 190 at [41]), having spent some time in both Pakistan and the West (in Australia) and who are also failed asylum seekers, might be the subject of an act

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

			cause harm. It might be said that that general conclusion was one which covered all of the matters arising from the Applicant's May 2015 Submissions and the Applicant's June 2015 Submissions, and otherwise, and consistent with the longstanding principles arising from *Minister for Immigration & Ethnic Affairs v Wu Shan Liang & Ors* [1996] HCA 6; (1996) 185 CLR 259; (1996) 70 ALJR 568; (1996) 136 ALR 481; (1996) 41 ALD 1, that this Court should not engage in merits review. Such a suggestion ignores the fact however that the general conclusion reached by the Tribunal involves the applicant being "targeted", and fails to consider whether he might be harmed by local Taliban or other insurgent groups as a consequence of his membership of the identified social groups' (para 56). 'The applicant's membership of the particular social groups, and the particular circumstances in which he was returning to his village, including his absence of more than 20 years, required the Tribunal in determining whether the real risk was not one faced by the applicant personally, to consider the possible personal harm that the applicant might suffer by returning to his village, and in effect, being a stranger in a strange land. The Tribunal did not do this, and approached the matter at a greater level of generality, and in the Court's view, therefore failed to consider the actual claim made by the applicant' (para 56). 'The conclusion reached above means that the Tribunal Decision is affected by jurisdictional error: *Dranichnikov*; *Htun*; *M51*' (para 57).

			'The Court has concluded that the Tribunal Decision is affected by jurisdictional error. It follows from that conclusion that jurisdictional error has been established, and that prerogative relief ought to be granted on the Judicial Review Application' (para 58).
ANG15 v Minister for Immigration & Anor [2016] FCCA 1590 (Judge Smith) (Unsuccessful)	20 July 2016	1, 5, 13, 17 and 21-25	This case relates to: • whether the 'Tribunal failed to comply with a direction made by the Minister under s.499 of the Act, namely Ministerial Direction No.56' (para 5). The applicant was a citizen of Sri Lanka (para 1). The applicant 'seeks judicial review of the Tribunal's decision. The applicant relies on two grounds to argue that the decision was affected by jurisdictional error: first, that the Tribunal was wrong to proceed on the basis that "significant harm" relevantly required an element of subjective intention; and secondly, that the Tribunal failed to comply with a direction made by the Minister under s.499 of the Act, namely Ministerial Direction No.56' (para 5). *First issue: the element of intention in the meaning of "significant harm"* 'The balance of [156] of the Tribunal's reasons shows that its conclusion that there was no real risk of "significant harm" was based on its consideration of two separate matters. First, the fact, in and of itself of spending up to 2 weeks in jail; and secondly, what

			might occur to the applicant whilst in jail. Once that approach is understood, it can readily be seen that the Tribunal's conclusion about the first (2 weeks in jail) was not determinative of the entire issue and, in particular, was not determinative of the question of whether or not the applicant might suffer significant harm while being in prison as a consequence of the poor prison conditions' (para 13). *Second issue: compliance with Ministerial Direction 56* 'The applicant relied on two matters to support his contention that the Tribunal failed to "take account" of the Guidelines: first, the Tribunal did not say that it had done so; and secondly, even though the lack of the requisite intention was dispositive of the relevant claim made by the applicant, and it appears to have implicitly accepted that the government of Sri Lanka was aware of the prison conditions, the Tribunal failed to give any consideration to the question of whether the intent required to satisfy the intention requirement could be inferred from this knowledge. In support of this point, the applicant relied on the Tribunal's finding in [156] that the prison conditions were a product of the "general state of the system and negligence and indifference"' (para 17). 'The real difficulty for the applicant is the lack of prescription in the relevant part of the Guidelines. They contain nothing more than a suggestion that it may be appropriate in certain circumstances to draw certain inferences' (para 21).

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

			indifference of the authorities of the prison conditions in Sri Lanka could give rise to the inference of subjective intention does not satisfy me that the Tribunal failed to "take into account" those guidelines. Accordingly, this ground fails' (para 24). 'There is no jurisdictional error in the Tribunal's decision and the application must be dismissed' (para 25).
SZURV v Minister for Immigration & Anor [2016] FCCA 1371 (Judge Dowdy) (Unsuccessful)	24 June 2016	1-3, 26-28 and 33-39	This case relates to: • whether the applicant's earlier protection visa application was rendered invalid by the introduction of complementary protection criteria from 24 March 2012 The applicant was a citizen of Lebanon (para 1). The applicant sought 'constitutional writs to quash what he terms the purported decision (purported decision) of the Respondent, the Minister for Immigration & Border Protection (Minister) made on 24 June 2014 to the effect that the application made by him on 23 June 2014 for a Protection (Class XA) visa (second Protection visa application) was not a valid application under the *Migration Act 1958 (Cth)* (Migration Act). He further seeks a declaration that the second Protection visa was validly made and a writ of mandamus requiring the Minister to consider it according to law' (para 2). The 'second Protection visa application relied solely on the complementary protection criteria provided for under s.36(2)(aa)' of the Act (para 3).

			The Court rejected the 'argument and submissions that the earlier Protection visa application was rendered invalid by the introduction of complementary protection criteria from 24 March 2012' (para 26). 'The Applicant, at the time that he made his earlier Protection visa application, had a relevant "right" by virtue of s.65(1) of the Migration At to be granted the visa he applied for if the Minister was satisfied under s.65(1): see *Re Minister of Immigration; Ex Parte Cohen* [2001] HCA 10; (2001) 177 ALR 473 per McHugh J' (para 27). 'It was a substantive right of a quasi-judicial nature to have his earlier Protection visa application visa dealt with in accordance with the law applicable at the time under the Migration Act' (para 28). 'The there is nothing in any part of the complementary protection legislation effective as of 28 March 2012 which evinced or manifested either expressly or by necessary implication any intention to render invalid and ineffective the earlier Protection visa application' (para 33). 'The legislation introducing the complementary protection criteria and particularly Item 35' of the Explanatory Memorandum of the Migration Amendment (Complementary Protection) Act 2011 (Cth) 'assumed and took as a given the continued efficacy and validity of any protection visa application

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

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

			repealed. That being so, and in the absence of a contrary intention, the right was protected by s. 8 of the Acts Interpretation Act and was not affected by the repeal of the 1971 Act. [footnotes omitted and s.8 of the Acts Interpretation Act is now s.7]' (para 38). In concluding the Court held that there was 'no jurisdictional error and the application should be dismissed with costs' (para 39).
BFQ15 v Minister for Immigration & Anor [2016] FCCA 1541 (Judge Young) (Successful)	23 June 2016	1, 3, 5-11, 13 and 15-16	This case relates to: • whether the Tribunal failed to consider the possibility of the applicant being charged with a capital offence The applicant was a citizen of Viet Nam (para 1). The applicant's first application for a protection visa was refused. 'The applicant's subsequent application and its consideration were limited to the complementary protection grounds' (para 3). 'The grounds raised before the delegate stemmed from the fact that the Vietnamese authorities have charged the applicant with a serious criminal offence and seek his return to Vietnam (although there is no evidence of an extradition application). In broad terms the alleged offence might be described as fraud perpetrated by the applicant against a state owned bank in Vietnam' (para 5). 'The sum said to be involved is more than 100 billion Vietnamese dong', 'that is about Australian $6.1

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

			that, in view of the applicant's lack of credibility, there was no substantial evidence to support the applicant's claims' (para 7). 'In dealing with the third ground the Tribunal found that while the prison conditions in Vietnam were poor those conditions did not amount to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment. In reaching that conclusion the Tribunal had regard to a US Department of State report on human rights practices in Vietnam and UK Border Agency reports dealing with prison conditions in Vietnam. In my view these conclusions, based on the Tribunal's own assessment of the applicant's credibility and country information properly exposed and explained, were open to it' (para 7). 'In relation to the fourth ground the Tribunal concluded that the "red notice" indicated that the Vietnamese authorities believed the applicant was likely to be in Australia or Cambodia and that the "data breach", even if it brought the applicant's presence in Australia to the attention of the Vietnamese authorities, was not likely to add to any risk of harm. The Tribunal noted that the applicant had not indicated what, if any, harm he was at risk from as a result of the "data breach" and noted his concession that it may not be relevant to his case. The Tribunal was not satisfied that the applicant was at risk of any harm as a result of this' (para 8). 'Both the delegate's and the Tribunal's consideration of the first ground focused on the question of whether the

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

			Although the indictment provided by the applicant does not mention article 278(4)(a) all Australian criminal lawyers would be familiar with the addition of counts to an original indictment. In my view, an obvious question arising from the uncontested material is whether the applicant is at risk of being charged as an accessory under article 278(4)(a)' (para 13). 'It is centrally relevant to consider if this possibility, the applicant being charged with a capital offence, exists in the criminal practice and procedure of Vietnam. The possibility arises from the uncontested facts of this case and the legal concepts which would appear likely to be shared by any developed criminal code, including the Criminal Code of Vietnam' (para 15). The Court held that 'Tribunal's failure to properly consider this issue constitutes jurisdictional error and the Tribunal's decision should be quashed' (para 15). 'It might be that, even after appropriate consideration - perhaps including consulting an expert, it is not possible for the Tribunal to reach any definite conclusion about the operation of the Criminal Code of Vietnam in general or in the particular circumstances of this case. If so, it might be appropriate to attempt to resolve the uncertainty by seeking an assurance from the Vietnamese authorities that the applicant will not be subjected to the death penalty if he is returned' (para 16).
WZAWB v Minister for Immigration & Anor	20 June 2016	1, 16, 48, 104, 106-107, 109-112, 118, 122, 135,	This case relates to: • 'whether the Department of Immigration made a

[2016] FCCA 1345 (Judge Antoni Lucev) (Unsuccessful)		141, 148-149, 155-158, 176 and 189-194	jurisdictional error in making the pre-removal clearance decision on 9 February 2015 by denying the applicant procedural fairness', and • 'whether the Department of Immigration made a jurisdictional error in making the pre-removal clearance decision on 9 February 2015 by failing to have regard to a relevant consideration' (para 158). The applicant was a citizen of Afghanistan (para 16). The applicant sought a 'review of a decision of the former Refugee Review Tribunal, now the Administrative Appeals Tribunal ("Tribunal Decision" and "Tribunal" respectively) made on 27 February 2013' and 'an extension of time in which to lodge the application pursuant to s.477(2) of the Migration Act' (para 1). *Extension of time application* 'Pursuant to s.477(1) of the Migration Act the applicant was required to make his application for review of the Tribunal Decision within 35 days of the date of the Tribunal Decision, that is by 3 April 2013. The application before the Court was not filed until 20 February 2015. It is therefore 687 days outside of the 35 day period permitted by the Migration Act' (para 48). 'Having regard to: a. the extraordinary length of the delay in making the application;

			b. the very lengthy period between the time of the Law Access refusal and the making of the application; c. the fact that the applicant knew from about mid-March 2013, at which time he was still within the time limitation period, that he had some form of right of review against the Tribunal Decision, and knew that the Tribunal Decision was not to grant him a Protection Visa; d. the fact that having no legal representation and no legal advice, being non-English speaking and being ignorant of the time limits, is not a satisfactory explanation for the delay; e. the necessity for the finality of litigation in relation to administrative decision-making; and f. the time limitation period itself, the Court does not consider that the extraordinary delay in this case has been satisfactorily explained by the applicant. Indeed, having regard in particular to the High Court's judgment in *Marks* cited above, the delay in this case must almost be insuperable, or at the very least, require the most powerfully arguable merits case, together with some support from other factors, in order for an extension of time to be granted' (para 104). 'The prejudice facing the applicant, whose Tribunal Decision providing for his removal to a war-torn country has not been yet been tested under judicial review, in circumstances where his lawyers have certified in writing that there are reasonable grounds for believing that the application for judicial review has a reasonable prospect of success, is self-evident' (para 106).

			‘In relation to prejudice to the Minister, the Minister may have incurred significant costs thrown away in organising for the applicant’s removal following the issue of the Notice In Respect of Removal Costs provided to the applicant and dated 10 February 2015 where removal costs are estimated at $26,627 itemised: Applicant’s February 2015 Affidavit at [19] and Annexure B’ (para 107). ‘There must be some prejudice arising from the fact that this is a case in respect of which the Minister might rightfully have thought that the litigation was at an end by reason of the extraordinary length of the delay in making the application. In traditional terms, the Minister is prejudiced by reason of the fact that he was entitled to consider that the fruits of the litigation were his. In those circumstances, there is additional prejudice by reason of the costs incurred as a consequence of this application. And, in this case, because of the manner in which it has been conducted, those costs which are likely to be considerably over and above those normally incurred in a judicial review application in migration proceedings in this Court. Not only has there been an originating application, and a hearing on the interlocutory injunction application, but an amended application, and at hearing a minute of proposed further grounds, each of which the Minister has had to prepare to meet. Further, there have been ten affidavits filed in support of the applicant’s application, whereas usually there would be one simply attaching the Tribunal Decision and perhaps providing some brief evidence.

			Furthermore, some of those affidavits have been the subject of objections, which have been dealt with above: see [7]-[14] above. Finally, the hearing of this matter went for most of the day from 11.04am to 4.20pm. The hearing was therefore longer than is the case for a typical hearing of a judicial review application in migration proceedings, which might normally take anywhere between half an hour to two hours' (para 109). 'In the above circumstances the prejudice to the Minister in terms of costs in this case is considerably more than would usually be the case, and therefore weighs against the grant of an extension of time in which to file the application' (para 110). The impact on the applicant of a failure to extend time for making the application will be negligible, as, for reasons set out below, the application has no reasonable prospect of success because no jurisdictional error is established (para 111). 'As to the interests of the public at large, there is nothing in the matter able to excite the interests of the public at large, such as to warrant the exceptional exercise of the Court's discretion to extend time for the making of the application' (para 112). *Merits of Tribunal Decision* <u>Ground 1</u> –Tribunal failed to consider whether it was reasonable for the applicant to relocate from his home

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

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

			home area in Beshood, Maidan Wardak province where he would be at risk of harm on the roads and in the province itself 'Unlike *SZSCA* the applicant here had a choice, and if he chose to move to Maidan Wardak, and thereby to leave the security of Kabul, that was his choice: cf *SZTAV*. The making of that choice needs to be considered in the context that the applicant, in addition to saying that there was nothing for him in Kabul, also said that there was nothing for him in Beshood, but that he would "like" to see if he could obtain work in Maidan Wardak on a farm, in circumstances where he had not been in that province since 2009, and had never worked in that province, other than as a young teenager working on the family farm. In any event, it is apparent from the Tribunal's findings that it considered that the applicant was not at risk of harm or persecution within Afghanistan generally, which must include Maidan Wardak, and that general finding therefore applied to Maidan Wardak: *Applicant WAEE* at [47] per French, Sackville and Hely JJ' (para 148). 'In the circumstances, ground 4 is not made out' (para 149). <u>Ground 5</u> – whether Tribunal made jurisdictional error in not considering or failing to ask whether applicant had well-founded fear of persecution at the hands of the Taliban if returned to Beshood in Maidan Wardak Province by reason of Hazara ethnicity, Shia Muslim religion or belonging to particular social group being a

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

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

			The Department of Immigration made a jurisdictional error in making the pre-removal clearance decision on 9 February 2015 by failing to have regard to a relevant consideration' (para 158). <u>Particulars of Further Ground 2</u> 1. The Tribunal accepted DFAT advice that the main targets on the road to Ghazni, and nationally, were people employed by or with direct links to the Afghan Government or the international community ([112]). 2. The applicant is a person with a direct link to the international community as a result of his time in Australia and being issued with a Certificate of Identity by the Australian Government. 3. The pre-removal clearance decision does not consider whether the applicant is a non-citizen who is at further risk of harm if returned to Afghanistan as a result of the matters in particular 2 above' (para 158). 'The first question is whether the Court has jurisdiction to determine the matter. The issues which arise are whether the PRC Decision' ("pre-removal clearance" assessment in relation to the applicant's case) was: a. 'conduct preparatory to the making of a decision under the Migration Act; or b. a decision made under the Migration Act' (para 176). 'The PRC Decision is not like the ITOA process which was under consideration in *SZSSJ*. The ITOA process was to determine if a person was owed protection

			obligations, and if so the case would be referred to the Minister for consideration under the Minister's intervention powers under the Migration Act, but if found not to be such a person, subject to any other proceeding challenging that assessment or any other impediment to his removal, planning would commence in relation to the applicant: *SZSSJ* at [35] per Perram, Jagot and Griffiths JJ. The PRC Decision is nothing more than an administrative arrangement pursuant to which officers of the Department consider whether there is anything that they think should be drawn to the Minister's attention that the Minister might then choose to take into account in the exercise of personal non-compellable powers that the Minister could exercise to grant a visa (and thus prevent removal) if the Minister thinks that appropriate. The PRC Decision was not a decision made, or proposed to be made, or required to be made, under the Migration Act or any regulation or other instrument made under the Migration Act' (para 189). 'Section 197C of the Migration Act was enacted for the express purpose of reversing the implied limitation on s.198 of the Migration Act that had been identified in *Plaintiff M70/2011* at [54] and [94]-[98] per French CJ, and [239] per Kiefel J and in *SZQRB* at [229]-[231] per Lander and Gordon JJ and [313] per Besanko and Jagot JJ: Explanatory Memorandum at [1135] and [1139]' (para 190). 'Section 197C(2) of the Migration Act makes it clear that even if the applicant could demonstrate that the

			PRC Decision was not undertaken according to law, that would have no effect on the duty to remove the applicant from Australia under s.198 of the Migration Act' (para 191). 'In the Court's view: a. s.197C of the Migration Act plainly prohibits the Court from granting any form of relief which would have the effect of preventing the applicant's removal from Australia; and b. the challenge to the PRC Decision is incompetent, because the PRC Decision is not a "migration decision" within the meaning of s.476(1) of the Migration Act for the reasons set out above' (para 192). *Conclusion and orders* 'The length of the 687 day delay in making the application, and the failure to satisfactorily explain that delay, is such that the delay alone in this case is a sufficient basis for dismissal of the extension of time application. It follows that there should be an order that the applicant's application under s.477(2) of the Migration Act for an extension of time in which to lodge an application under s.476 of the Migration Act be dismissed. It further follows that the injunction issued on 23 February 2015 should be discharged' (para 193). 'Even if the length of, and failure to explain, the delay were alone not enough to warrant dismissal of the extension of time application, the effect of a

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

			a Protection visa that has been refused may not make a further application for a Protection visa while the non-citizen is in the migration zone' (para 2). 'There is no issue the applicants are non-citizens, and that the applicants, while in the migration zone, had previously lodged applications for Protection visas that had been refused. The first three applicants claim, however, that the previous application for Protection visas they had lodged was not a valid applications because the complementary protection criterion prescribed by s.36(2)(aa) of the Act was introduced into the Act after they had lodged their Protection visa application, but before that application was finally determined. Because the previous application the applicants lodged was not a valid application for a visa, s.48A of the Act did not apply because that section applies only where an applicant had previously made a valid application' (para 3). 'The applicants accept that the form by which the Original Protection visa application was made was an approved form of application at the time it was lodged. They submit, however, that, with the introduction into the Act of s.36(2)(aa), the form by which the Original Protection visa application was made ceased to be an approved form – it had become "defunct" – and, for that reason, the Original Protection visa application was not a valid application for a visa. Because it was not a valid application for a visa, s.48A(1) of the Act did not prevent the applicants from making the application for protection which they made on 21 October 2014' (para

			17). ‘As a general principle, where at one point in time the law attaches to an act or event a particular legal character, that legal character continues to attach to the act or event unless there is a law that denies the act or event of that character. The applicants accept that the Original Protection visa application was a valid application for a visa at the time it was made. Thus, to make good their claim that the Original Protection visa application, although originally a valid application for a visa, had ceased to be so, the applicants must identify some law that denied the Original Protection visa application the character it originally had of being a valid application for a visa’ (para 18). ‘The applicants rely on item 35 of Schedule 1 to the Amending Act’ (para 19). ‘The manner in which the applicants submit item 35 invalidated the Original Protection visa application is as follows: The effect of Schedule 1 Item 35(a) of the [Amending Act] and the retrospective application of the complementary protection criterion was to invalidate the first application, given that the Schedule 1 and 2 criteria as at date of lodgement could not be satisfied prior to final determination, notwithstanding the application was valid as at the time of lodgement’ (para 19). ‘The difficulty with this submission is that it ignores the text of item 35 of Schedule 1 to the Amending Act; the

			text contemplates that applications for Protection visas that had been made before Schedule 1 to the Amending Act came into effect would remain valid applications for Protection visas. That point was made by Judge Smith in SZUZM v Minister for Immigration, where his Honour said: However, the point that the applicant could not resist is there is nothing in the Amending Act that either on its face or by any necessary implication affected the validity of any application that had been made prior to its introduction. Indeed, it is clear that the terms of item 35 of sch.1 to the Amending Act proceed on the basis that applications that were valid before the date of the operation of the amendment continued to be valid. If that were not the case, there would have been no work for item 35 to do at all. The purpose of that item was to enable people who had already applied for a protection visa to support that application by reference to the additional criterion. On the applicant's case, that purpose would not be met because the Amending Act would have automatically rendered each visa application invalid' (para 20). 'The applicants have identified no other statutory provision on the basis of which they submit that the Original Protection visa application ceased to be a valid application for a Protection visa. It follows, therefore, that the Original Protection visa application, which was made by three of the applicants, retained its character of a valid application for a Protection visa and, because that application had been refused, s.48A(1) of the Act prevents three of the four applicants from making a further application for a Protection visa. It also follows

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

			Schedule 1 to the Amending Act. As I have already noted, the effect of that item is that the amendments effected by Schedule 1 to the Amending Act applied to applications that had been made before the amendments took effect but which had not been finally determined before those amendments took effect. Thus, in relation to those applications, the Minister would not have been obliged to issue any form of application because the applications that had been made remained valid' (para 25). 'These conclusions apply only to three of the four applicants. The submissions the applicants have made against the Original Protection visa application being a valid application for a visa do not apply to the application for a Protection visa made on behalf of the fourth applicant. That is so because those submissions rely on the coming into effect of Schedule 1 to the Amending Act after the Original Protection visa application was lodged, but before that application was finally determined. As the Minister submits, however, the fourth applicant's application for a Protection visa was made after Schedule 1 to the Amending Act had come into effect. The applicants have not submitted that that application was not a valid application for a Protection visa' (para 26). 'The Original Protection visa application was a valid application for a visa. So too was the application the fourth applicant lodged on 28 February 2013. The grant of Protection visas in response to those applications has been refused. It follows, therefore, that the delegate was

			correct to conclude that s.48A of the Act applied to prevent each of the applicants from making a further application for a Protection visa' (para 27). The Court ordered that the application be dismissed (para 28).
SZVJE & Ors v Minister for Immigration & Anor [2016] FCCA 594 (Judge Driver) (Successful)	18 April 2016	3-5, 12, 15-18, 20-21, 26-32, 38, 44, and 46	This case relates to: • whether the 'Tribunal's findings with regard to a real chance of persecution and real risk of significant harm were based on an incorrect test' (para 12). The applicants were citizens of Pakistan (para 3). 'The first applicant is the wife of the second applicant (wife and husband). The third applicant is their daughter who was born in Australia in 2010' (daughter) (para 3). 'The wife and husband each made claims for protection' (para 4). 'In their applications, the wife and husband each made claims to fear persecution in Pakistan because they were Shia Muslims who are members of prominent families known to be Shia. The wife also claimed to fear persecution because she is a Shia lawyer and because she wrote newspaper columns on social issues including women's rights; the husband made claims relating to his family's involvement in organising religious events. Those claims were supplemented in September 2013 by more detailed statements which raised new claims of

			physical violence and torture. Their migration agent also provided a written submission including eight separate "social group" claims, and documents said to support their claims' (para 5). The applicants pursued two grounds of appeal (ground 2 and ground 3) (para 12). *Ground 2:* 'The Tribunal's findings with regard to a real chance of persecution and real risk of significant harm were based on an incorrect test' (para 12). *Particulars of Ground 2:* 'The Tribunal accepted that the level of sectarian violence in Lahore was "extremely serious", but was "less severe" than in other parts of Pakistan. The test of a real chance or real risk is whether the chance or risk actually faced by the applicant is not remote, insubstantial or far-fetched. It is not a relative test to be measured against other parts of the country' (para 12). *Consideration of Ground 2:* 'The applicants claim that they are owed protection obligations by Australia both under the Refugees Convention and Protocol and the "complementary protection" provisions' (para 15). 'The test for whether a person has a well-founded fear

			of persecution within the meaning of the Convention is whether there is a real chance that the claimed persecution may occur. A real chance is one that is not remote, insubstantial or far-fetched and may be statistically less than 10 per cent' (para 16). 'The test of whether there is, within the meaning of s.36(2)(aa), a real risk of significant harm is the same as the test of whether there is a real chance of persecution' (para 17). 'The applicants had been living in Lahore before coming to Australia. The Tribunal considered evidence of the level of sectarian violence directed towards Shias in Pakistan, some supplied by the applicants and some from its own sources' (para 18). 'The test of whether there is a real chance or a real risk of harm is not a relative one. It is not determinative whether the risk in one place is "less severe" than the risk in another place. What matters is the actual level of risk in any particular place. The applicants contend that, at no point in its reasoning does the Tribunal make an absolute assessment of the level of risk the applicants would face in Lahore (although it accepts at [99] that the situation there is "extremely serious")' (para 20). 'To reach the conclusion that there is only a remote chance of harm based on a comparison of risk between Lahore and other places in the country is to apply a test that is not supported by the High Court in *Chan* or the Full Federal Court in *SZQRB*, or by any other authority

			for that matter' (para 21). 'I have considered at the outset whether, regardless of the asserted errors made by the Tribunal, there was an independent basis for the Tribunal's reasoning in that the Tribunal found that the applicants did not genuinely fear persecution in Pakistan. I have concluded that the Tribunal's reasoning in that regard could not be relied upon as an independent basis for the Tribunal's decision for three reasons: first, the issue was only lightly touched upon at the trial of this matter in oral submissions; secondly, if the matter were to be remitted to the Tribunal, differently constituted, a different view might be taken on the issue of subjective fear; and thirdly, in my opinion, the issue of subjective fear is only relevant to the refugee criterion for a protection visa, not the complementary protection criterion' (para 26). 'In my opinion, the applicants have established error by the Tribunal in respect of this ground, and the error goes to jurisdiction. It is true, as the Minister submits, that the Court should not approach the Tribunal's reasoning with an eye too keenly attuned to error. Further, if the Tribunal begins and ends with the correct test and what is impugned is merely some unfortunate phraseology in between, a conclusion of jurisdictional error should not be reached' (para 27). 'It is, in my opinion, sufficiently clear from the Tribunal's reasoning in both [100] and [99] that the Tribunal was reasoning essentially on the basis of

			relative risk within Pakistan rather than focusing on the degree of risk in Lahore itself. It was no answer to the applicants' claim that they would be worse off elsewhere in Pakistan. The Tribunal accepted that the situation in Lahore was "extremely serious" (whatever that might mean) and accepted that there was sectarian violence in Lahore (as elsewhere). What follows, however, is simply an examination of relative risk between Lahore and elsewhere rather than an analysis of the real risk in Lahore itself' (para 28). 'It is true that the Tribunal refers at [100] to "all of the evidence" before it, but what was that evidence? I reject the Minister's contention that it included the evidence of the first applicant's profile, because the Tribunal was not here considering the claims of that profile, but rather the general claim of sectarian violence. The applicants could be caught up in that violence regardless of their profile. The only evidence referred to by the Tribunal in considering that claim was the relative incidence of violence. The question for the Tribunal, however, was whether the established level of sectarian violence in Lahore constituted a real risk to the applicants' (para 29). 'A proper foundation was not laid by the Tribunal for its conclusion that there was not a real chance that the applicants would suffer persecution in the context of sectarian violence in Lahore' (para 30). 'In my opinion, the error is repeated in relation to the complementary protection criterion at [114]' (para 31).

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

			there is either no unifying factor drawing people at risk to Shia causes or Shia organisations or that, if there is a unifying factor, it is something other than the Shia religion. That assumption could hypothetically be tested to see if it is sound. For example, is there any evidence of non Shia lawyers being killed while working for Shia organisations or for Shia causes? Secondly, if there was evidence of non Shia lawyers being killed while working for Shia organisations or working on Shia causes, were they killed because of what they were doing or because they were taken to be Shia?' (para 44). 'Nevertheless, the Tribunal's reasoning, while dubious, is but one part of a detailed and comprehensive set of reasons that drew the Tribunal to a conclusion that it could not attain the level of satisfaction required for the purposes of s.65 of the Migration Act. In order to establish jurisdictional error the applicants would have to persuade the Court not only that the Tribunal's reasoning in the particular paragraph was irrational but also that it bore so strongly on the Tribunal's conclusion pursuant to s.65 of the Migration Act that that conclusion was unreasonable. I am not so persuaded (para 44). 'In view of the applicants' success in relation to Ground 2, I will grant the relief they seek' (para 46).
MZAKC v Minister for Immigration & Anor [2016] FCCA 834 (Judge Riley) (Successful)	14 April 2016	3, 5, 8, 13-14 and 22-25	This case relates to: • the requirement that a decision maker must consider the personal circumstances of an applicant when assessing an applicant's complementary protection claim.

			The applicant was a citizen of Pakistan (para 3). The applicant submitted two grounds of review. *Ground 1:* 'The decision of the Tribunal in RRT Case Number 1403721 was affected by jurisdictional error, being that the Tribunal failed to perform the requirement under s 424(1) of the Migration Act 1958 (Cth) in that the Tribunal got information it considered relevant, but did not have regard to that information in making the decision' (para 5). *Consideration of Ground 1:* 'The applicant argued that the Tribunal in the present case made a jurisdictional error by considering that the chance of the applicant suffering significant harm in the Swat Valley was remote because 1.8 million people live there' (para 8). 'The Tribunal concentrated on the applicant's Pashtun ethnicity. However, that was not relevant to the applicant's claim in relation to arbitrary deprivation of life. His claim about arbitrary deprivation of life was based on random violence' (para 13). 'As is often the case, the Tribunal dealt with both the claims of serious harm (persecution) and the claims of significant harm (complementary protection) in the

			same paragraphs. That is fine, as long as there is actually an intellectual engagement with both aspects of the matter' (para 14). The Court was not 'persuaded that the Tribunal in this case did any more than determine that the applicant was not at risk of significant harm in the Swat Valley because he is just one person and the population of the Swat Valley is 1.8 million people. For the reasons described in DZADQ, that is a jurisdictional error' (para 22). *Ground 2:* 'The decision of the Tribunal in RRT Case Number 1403721 was affected by jurisdictional error, being that the Tribunal failed to give proper, genuine and realistic consideration to the claimed fear of significant harm' (para 23). *Consideration of Ground 2:* For the reasons given in relation to ground one, the Court held that Ground 2 should also succeed (para 24). The matter was 'remitted to the Tribunal for determination according to law' (para 25).
MZAEN & Ors v Minister for Immigration & Anor [2016] FCCA 620 Judge Riley (Successful)	24 March 2016	1-2, 27-29, 42-43, 45-58 and 73-81	This case relates to: • whether the Tribunal was required to consider 'the questions of serious or significant harm arising from the separation of family members'

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

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

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

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

			the Second Applicant's claim, namely whether she was at real risk of significant harm in the form of mental suffering amounting to cruel or inhuman treatment by virtue of being separated from and / or denied access to her two young children, one of whom was only six months old' (para 54). *Consideration of Ground 2:* 'For the reasons set out above, this ground must succeed' (para 55). *Ground 3:* 'The Tribunal erred by misapplying the decision in SZRSN v Minister [2013] FCA 751 to the evaluation of the child applicant's claims' (para 56). *Consideration of Ground 3:* For the reasons set out above, this ground must succeed (para 57). *Ground 4:* 'The Tribunal erred by conducting a hearing in breach of its obligations under s 420 of the Migration Act, namely by conducting a hearing when one applicant, who is the mother of another applicant, was three days from giving birth' (para 58). *Consideration of Ground 4:*

			‘It is true that there was no medical evidence. However, there was evidence in the form of the second applicant’s affidavit. That evidence was not challenged. Its gist is that the second applicant was too overwhelmed and exhausted to say all that she wished to say, or to express herself well. That is not consistent with what she told the Tribunal during the hearing’ (para 73). ‘In any event, the applicant has not adduced any evidence that, if she had felt better during the hearing, she would have said anything differently or additionally that could have altered the outcome’ (para 74). ‘It is also clear that the second applicant was represented during the Tribunal process by a solicitor and migration agent. The solicitor attended the Tribunal hearing by telephone, and became aware during the first day of the Tribunal hearing of how advanced the second applicant’s pregnancy was. He could have spoken to the applicant between the first and second days of the Tribunal hearing to obtain instructions. If he had thought it would have been advantageous, he could have asked the tribunal for further time, after the second applicant gave birth, to put in further evidence or submissions. He did not do so’ (para 75). ‘In all the circumstances of this case, I am not persuaded that the second applicant was not afforded a meaningful opportunity to put her case. This ground is not made out’ (para 76).

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

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

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

			'The Tribunal stated at paragraph 87 'I do not accept that there is a real risk that [the applicant] will be marginalised in Pakistani society as a Shia Muslim or that he will face discrimination for reasons of his religion amounting to "significant harm" as defined in subsection 36 (2A) of the Migration Act.... that he will suffer significant harm because he is a Shia Muslim..., because his father holds a senior position in the Post Office in Pakistan, because of any political opinion which you may hold or which may be imputed to him or because of his membership of any of the particular social groups which he and his representatives have suggested based on those circumstances' (para 35). *Consideration of Ground 2(a):* The applicant made the 'additional point that the reason for any harm is irrelevant to whether or not a complementary protection obligation arises and thus the Tribunal committed jurisdictional error by taking account an irrelevant consideration' (para 37). 'The applicant's submissions misconstrue the Tribunal's reasoning. The substance of the argument advanced by the applicant in relation to complementary protection was that he was at real risk of significant harm because he was a Shia, because his father was a high government official and because he was a member of a number of social groups. The definition of some of these social groups in turn referred to the applicant's application for asylum, alleged illegal departure and flight to the West and supposed failure of his

			application for asylum and return to Pakistan' (para 39). 'Apart from the allegation that he was at risk because he left with the assistance of a smuggler all the claims to complementary protection were couched in terms of Convention grounds. In assessing whether there was a real risk of significant harm it was necessary that the Tribunal consider and refer to the reasons for that possible harm. It is hardly conceivable that the Tribunal could consider whether there was a real risk of significant harm without reference to the reasons advanced by the applicant and, in this case, that necessarily involved reference to the Convention grounds advanced by the applicant. Further, the reference in the Tribunal's reasons in its consideration of complementary protection to a ground other than a Convention ground, that is leaving Pakistan with the assistance of a smuggler, indicates that the Tribunal did not wrongly apprehend its task. This ground is rejected' (para 39). *Ground 2(c):* 'Ground 2(c) asserts jurisdictional error because the Tribunal wrongly identified attacks in Peshawar which exposed the applicant to risk as non-sectarian. The applicant criticises the reasoning in paragraph [73] of the Tribunal's reasons, the relevant part of which is as follows: ... I accept that there is some level of risk to [the applicant] in the context of the sort of terrorist attacks in Peshawar to which his representatives referred in their submissions and which I accept

			continue to occur in Peshawar such as the suicide bombing in a market in October 2009, the attack on a political rally protesting against electricity cuts in April 2010 and the attack on the US Consulate in Peshawar in the same month. However, I do not accept that one or more of the five convention reasons is the essential and significant reason for the persecution to which [the applicant] may be exposed in this context as required by paragraph 91R(1)(a) of the Migration Act. I consider that the risk to him in this context is the same as that to any other citizen of Pakistan' (para 40). *Consideration of Ground 2(c):* 'I do not accept this characterisation of the Tribunal's reasons. The attacks referred to by the Tribunal were not expressly identified as sectarian or non-sectarian but their description: an attack on a market and a political rally protesting electricity cuts, implies that they were indiscriminate terrorist attacks. The attack on the US consulate was not, presumably, a sectarian attack. The point of the Tribunal's discussion of these attacks was to illustrate its conclusion that, while terrorist attacks had occurred in Peshawar, these were generally not directed at ordinary Shias. The ground appears to assert, in substance, that the Tribunal erred in finding facts. Unless there is irrationality or unreasonableness, which is not asserted, this is not a proper ground of judicial review. This ground is rejected' (para 42). *Ground 3:*

			'Ground 3 asserts jurisdictional error because the Tribunal did not give the applicant procedural fairness. The applicant claims that the Tribunal failed to alert him to the fact that his claim to fear persecution by reason of his membership of a particular social group constituted by young educated male persons who do not share the views of the majority in Pakistan was one of the "issues arising in relation to the decision under review" for the purposes of section 425 (1) of the Migration Act' (para 43). *Consideration of Ground 3:* The 'delegate expressly rejected the applicant's claim to fear of persecution based on his membership of the particular social group of "young educated male persons who do not share the views of the majority in Pakistan". That finding was one of the determinative or dispositive issues against the applicant identified by the delegate. Accordingly, this was not a new issue or, in the words of SZBEL, "some issue other than those that the delegate considered dispositive" and the Tribunal was not obliged to give the applicant notice of the potential finding. This ground is rejected' (para 47). 'These conclusions dispose of the grounds of review advanced by the applicant but, as mentioned, I sought further submissions from the parties about whether the reference in the DFAT document to Shias relocating to Peshawar supported the conclusion of the Tribunal that the risk to the applicant from sectarian attacks in Peshawar was "very remote"' (para 48).

			The Court held that 'the Tribunal in reaching its conclusion has properly had regard to the country information and that conclusion possesses an evident and intelligible justification' (para 52). 'The application is dismissed with costs' (para 53).
SZUDH v Minister for Immigration & Anor [2016] FCCA 413 (Judge Nicholls) (Successful)	4 March 2016	3, 18, 23-24, 37-39, 43, 54-56	This case relates to: • whether the Tribunal adequately considered the applicant's complementary protection claim. The applicant was a citizen of India (para 3). The applicant submitted two grounds of appeal. *Ground 1:* 'The Tribunal failed to consider whether the Applicant's actions in Australia would bring him within the scope of s36(2)(aa)' (para 18). *Particulars of Ground 1:* 'The Tribunal considered that the Applicant would not engage in same-sex activity if he returned to India. However, it failed to consider whether the Applicant's activities in Australia might become known in India giving rise to a real risk of serious harm to him' (para 18). *Consideration of Ground 1:*

			'The Tribunal's analysis was that it accepted that the applicant had engaged in homosexual activities in Australia ([71] at CB 357 to CB 358). When it came to consider s.36(2)(aa) of the Act, it found that he could not engage in such activities if he were to return to India and therefore, on that basis, found there were no grounds to believe that there was a real risk he would suffer significant harm' (para 23). 'The Tribunal, however, did not consider whether he would face significant harm if the activities in Australia became known to his family and the Sikh community in India. It was this aspect of the applicant's claim that he now says was not considered by the Tribunal' (para 24). 'At [72] (at CB 358) the Tribunal's analysis was that it relied on an earlier expressed finding that the applicant would not engage in homosexual activities if he were to return to India. The Tribunal then expressed its conclusion that there were no grounds for believing the applicant would face significant harm on return' (para 37). 'A part of the applicant's claim to fear significant harm that he feared such harm from his family and the Sikh community if they were to become aware of his homosexual activities in Australia. On a fair reading, I cannot see that the Tribunal addressed this aspect of the applicant's claim when it considered complementary protection at [71] (at CB 357) to [72] (at CB 358)' (para 38).

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

			application as her dependent. Plainly, that is what the Tribunal stated at [58] of its decision record (at CB 356). The applicant did not satisfactorily establish that there was any other information in this context that it could be said was considered by the Tribunal it to be a part of the reason for affirming the delegate's decision' (para 54). 'The applicant did not satisfactorily distinguish the current circumstances from what was in *SZTGV*. On this basis, I apply what was held there to this ground. Ground two is, therefore, not made out' (para 55). In relation to Ground 1, the Court granted the relief sought by the applicant (para 56).
SZVCH v Minister for Immigration & Anor [2015] FCCA 2950 (Judge Driver) (Successful)	18 November 2015	3, 13, 26, 30, 35-36, 41, 43-4 and 47	This case relates to: • Whether there is a jurisdictional limitation on a decision maker 'which prevents them from considering the refugee criterion where a valid visa application has been made on the basis of the complementary protection criterion' (para 26) The applicant was a citizen of Bangladesh and sought review on the following three grounds (paras 3 and 13). *Ground 1*: 'The Tribunal erred by failing to consider whether Australia had protection obligations under the Refugees Convention and Protocol in respect of the Applicant' (para 13).

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

			part of assumptions concerning the actions of others that were unreasonable, lacking in evidence intelligibility, or not based on any evidence' (para 13). *Particulars of Ground 3*: 'The Tribunal made findings as to the timeliness of police intervention in a shooting incident and the actions of third parties which it claimed undermined the Applicant's credibility concerning a central claim. The Tribunal referred to no evidence or basis for its understanding of what was a reasonable or expected timeframe for police intervention in those circumstances and gave no reason for rejecting the Applicant's explanation of those actions' (para 13). *Consideration of Ground 1:* The Court held that the decisions 'relied upon by the Minister correctly establish that if a visa application can only be validly made on the basis of the complementary protection criterion, there is in general no obligation on either the Minister or the Tribunal to consider the refugee criterion' (para 26). 'It is, however, a significant further step to assert that there is a jurisdictional limitation on both the Minister and the Tribunal which prevents them from considering the refugee criterion where a valid visa application has been made on the basis of the complementary protection criterion' (para 26). The Court held that there 'no support for that proposition can be found in either the Migration Act or

			the decision of the Full Federal Court in *SZGIZ'* (para 26). 'There is no doubt in this case that the applicant made a valid visa application based upon the complementary protection criterion, which was accepted as valid by both the Minister's delegate and the Tribunal' (para 26). 'The delegate was under no duty to consider the refugee criterion but elected to do so' (para 26). The Court held that 'the delegate committed no jurisdictional error in so doing. The delegate having made a valid decision, the Tribunal came under a duty to review that decision in its entirety. It did not do so' (para 26). 'The Tribunal considered wrongly that it was under a jurisdictional limitation which prevented it from doing so. That conclusion by the Tribunal was wrong and the Tribunal thus fell into jurisdictional error' (para 26). *Consideration of Ground 2*: The Court held 'the psychological evidence was referred to by the Tribunal in its reasons on several occasions. Further, on two occasions the Tribunal expressly engaged with the issue that the applicant now agitates, which is whether the applicant's psychological condition (as detailed in the reports) adequately explained his inconsistent evidence' (para 30).

			'This is not a case where the Tribunal rejected the expert opinion. The Tribunal did not dispute that the applicant suffered from mental illness (as outlined in the reports), it simply did not accept that this illness explained the extent of the applicant's inconsistent evidence' (para 35). 'In order to demonstrate irrationality, it must be shown that the Tribunal's finding was not open on the evidence' (para 36). The Court held that 'the applicant gave inconsistent evidence about important details concerning an event which was crucial to his claims. The Tribunal identified a large number of inconsistencies. Notwithstanding the evidence the applicant suffered from mental illness, it was open to the Tribunal to rely on these inconsistencies when rejecting the applicant's claim' (para 41). *Consideration of Ground 3*: 'The applicant challenges this reasoning on the basis that it is not supported by evidence. The challenge is flawed as a matter of law. The Tribunal made no positive finding of fact, it simply disbelieved the applicant's account. The "no evidence" ground of review can have no application to such a finding' (para 43). 'Any challenge on the basis of irrationality must also fail. The applicant has not demonstrated that the

			inferences drawn by the Tribunal were illogical. The applicant's argument is that the Tribunal made assumptions about police and emergency response times in Dhaka. Those assumptions have not been shown to be incorrect. At its highest, the applicant complains that the Tribunal made assumptions without any evidentiary basis. The complaint of irrationality is, therefore, simply a repetition of the complaint that the Tribunal made a finding without evidence' (para 44). In concluding the Court held that 'the applicant has established that the decision of the Tribunal is affected by jurisdictional error' and made 'orders in the nature of the constitutional writs of mandamus and certiorari' (para 47).
MZAGW & Ors v Minister for Immigration & Anor [2015] FCCA 2857 Judge Hartnett (Successful)	23 October 2015	2, 4, 26-28, 30 and 32-7	This case relates to: • the application of the "real chance" test with regard to s.36(2)(aa) of the Act • risk of harm deriving from a former soldier's imprisonment in a civilian jail The applicant was a citizen of Lebanon and sought review on the following two grounds (para 4). *Ground 1:* 'The Second Respondent failed to exercise its jurisdiction by failing to consider the claim made by the Applicant that he feared persecution as a member of a particular social group, being former soldiers of the Lebanese Armed Forces ('LAF') who face imprisonment' (para 2).

			Ground 2: 'The Second Respondent wrongly applied the "real chance" test when considering the Applicant's claims under s.36(2)(aa) of the *Migration Act 1958* (Cth) ('the Act')' (para 2). *Consideration of Grounds 1 and 2:* 'The Applicant argued the Tribunal failed to consider what would occur to the Applicant if he were placed in a civilian jail rather than a military prison, as found by the Tribunal' (para 26). The Court accepted this argument (para 26). 'The Applicant argued this was a wrong finding or presumption made by the Tribunal because the Tribunal presumed the Applicant would be treated as a current member of the LAF rather than as a former member and now civilian' (para 26). The Court accepted this argument (para 26). 'The Applicant also argued the Tribunal failed to consider whether former LAF soldiers who will be imprisoned are a particular social group'. The Court held that 'the claim was raised on the material and not considered' (para 27). 'The question as to whether there is a real risk that the Applicant would suffer significant harm upon being

			imprisoned in a civilian facility and exposed to FAI [Fatah al-Islam] members was not asked by the Tribunal. Yet it was a necessary and foreseeable consequence of the Applicant's return to Lebanon' (para 27). The Court held that 'the Tribunal's finding that the Applicant would face his term of imprisonment in a military prison as opposed to a Lebanese civilian prison, is not supported by the evidence' (para 28). 'The Tribunal expressly rejected the Applicant's claim that he would be incarcerated in Roumieh prison rather than a military prison or detention centre'. The Court found that there 'was no proper basis for this finding' (para 30). 'Having found that the Applicant was likely to serve his sentence of imprisonment in a military prison, the Tribunal did not consider that the standard of the prison that the Applicant would be required to attend constituted a harm that would be of severity necessary to constitute torture, cruel or inhuman treatment or punishment; or degrading treatment or punishment within the meaning of the Act. As a consequence, the Tribunal considered that the Applicant did not face a real risk of significant harm for that reason' (para 32). 'The Tribunal did not consider whether the Applicant would be subjected to the harm feared if he were imprisoned in a civilian prison' (para 33).

			'When dealing with the Applicant's submission that anti-government insurgents would be found in any prison, and that members of the FAI could be incarcerated in all prisons in Lebanon, not just Roumieh Prison, the Tribunal only rejected the assertion that FAI militants would be found in military prisons' (para 33). 'The Applicant submitted to the Tribunal that if he were imprisoned in a civilian jail, he would be harmed or killed by FAI militants. The Tribunal did not deny, or make any positive findings, in relation to that claim' (para 34). The Court held 'that the communication from the Department of Foreign Affairs and Trade provided no certainty as to where the Applicant might be imprisoned' (para 35). 'The Applicant's exposure to a risk of harm, that risk being imprisoned in a civilian jail with FAI fighters, and the harm being tortured or killed by them was a necessary and foreseeable consequence of his return to Lebanon that ought to have been considered by the Tribunal' (para 36). In concluding, the Court held that the 'application shall succeed and costs will follow the event' (para 37).
ARS15 v Minister for Immigration & Anor [2015] FCCA 2135 (Judge Street) (Successful)	7 August 2015	1, 6 and 9-11	This case relates to: • the requirement that a decision maker takes the 'PAM 3 Protection Visas complementary protection guidelines' into account (para 1)

			The applicant was a citizen of Sri Lanka and sought review on the following two grounds: *Ground 1:* 'The RRT failed to comply with Ministerial Direction Number 56 in contravention of s 499(2A) of the Migration Act 1958'. Particulars: 'The RRT failed to take into account the PAM 3 Protection Visas complimentary protection guidelines when it made a finding on whether the treatment that applicant would face on being detained in Sri Lanka was degrading treatment or punishment or was cruel or inhuman treatment or punishment' (para 1). *Ground 2:* 'The RRT failed to take into account a relevant consideration' Particulars: 'The applicant repeats the particulars to ground 2' (para 1). The Court held that the Tribunal 'confined itself to the country information and the representative's submissions in relation to the critical findings about the prison conditions and the duration of imprisonment, required engagement with the guidelines' (para 6). The Court held 'that engagement was required both as to the principles impacting upon what might be seen to be reasonably regarded as cruel or inhumane in nature, degrading treatment or punishment, and then the

			application of those principles to the fact-finding as to the applicant in respect of imprisonment and prison conditions' (para 6). 'The delegate's decision also referred to the DFAT reports concerning the impact of the Immigrants and Emigrants Act 1949, and to the processing taking a few to 48 hours' (para 9). The Court was 'not satisfied that in this case, the reference to duration is one from which the inference should be drawn that there was intellectual engagement by the Tribunal with the requirements of the guidelines' (para 9). The Court held that the Tribunal 'failed to have regard to and engage with the guidance in the PAM 3 in relation to the imprisonment and prison conditions, which it was necessary for the Tribunal to do in light of the findings made as to the risk of imprisonment in this case' (para 10). The Court was 'satisfied that the failure to engage with the application of the PAM3 in this case amounts to a jurisdictional error' and rejected the 'submissions on behalf the first respondent that it is an error that could not have made any difference in this case' (para 11). 'Accordingly, there will be issued a writ of certiorari quashing the decision of the Tribunal dated 10 April 2015, and then a writ of mandamus requiring the Tribunal to determine the matter according to law' (para

			11).
SZUQZ v Minister for Immigration & Anor [2015] FCCA 1552 Judge Driver (Successful)	26 June 2015	3, 8, 15, 30, 32-33, 42-43 and 53-55	This case relates to: • the consideration by a decision maker of the *PAM 3 Protection Visas protection guidelines* The applicant was a citizen of Sri Lanka (para 3). The applicant sought four grounds of review. Grounds 1 and 2 analysed the application of the complementary protection criteria. *Ground 1 - The RRT failed to address an issue which arose on the material before it being whether the detention of the applicant on remand in Sri Lanka in the prison conditions prevalent there would be degrading treatment or punishment and cruel or inhuman treatment or punishment (para 8)* The Court held that the 'Tribunal was clearly directing itself to the applicable tests under the Migration Act as to whether the applicant faced either the risk of serious harm or the real chance of significant harm. The Tribunal may also be taken to have been aware of the tests by virtue of it having stipulated the tests in the attachment to its decision record' (para 15). *Ground 2 - The RRT failed to take into account the PAM 3 Protection Visas [complementary] protection guidelines when it made a finding on whether the treatment that [the] applicant would face on return to Sri Lanka might constitute significant harm within the meaning of the* Migration Act *(para 8).*

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

			other express reference to the Guidelines in name or in substance in the Tribunal's decision' (para 43). The Court held that 'it should be inferred that the Guidelines were either not taken into account or not considered relevant' (para 43). 'The decision in Lafu supports the proposition that consideration of the Guidelines is mandatory once the Tribunal determines that they are relevant to a particular case' and 'the decision in SZTMD establishes that the relevance of the Guidelines is for the Tribunal to determine' (para 53). The Court held that the Tribunal 'cannot simply avoid that determination by silence. Neither, in this case can that determination be inferred' (para 54). The Court held that the Tribunal did not consider the Guidelines, but 'the factual findings made by the Tribunal rendered the Guidelines at least potentially relevant and some engagement with the question of their relevance was necessary for the Tribunal to complete the review' (para 54). The Court held 'the Tribunal failed to consider the potential relevance of the Guidelines which, if relevant, were mandatory, and hence the Tribunal overlooked a relevant consideration' (para 54). In concluding, the Court held that the applicant had established that the Tribunal's decision had been

			affected by jurisdictional error and granted the relief sought by the applicant (para 55).
AGH15 v Minister for Immigration & Anor [2015] FCCA 1797 Judge Smith (Unsuccessful)	11 June 2015	3, 31, 34, 44 and 52-57	This case relates to: • the test as to what constitutes significant harm The applicant was a citizen of Sri Lanka (para 3). The applicant sought two grounds of review. *Ground 1 - The Tribunal erred by asking itself the wrong question as to what constitutes persecution.* The Court rejected the first ground (para 31). *Ground 2 - The Tribunal erred by applying the wrong test as to what constitutes significant harm.* The applicant submitted that 'the Tribunal erred by applying the wrong test as to what constitutes significant harm by failing to consider whether the enactment of the Immigrants and Emigrants Act by the Sri Lankan Parliament, constituted an Act for the purposes of definition of degrading punishment or treatment in the Act' (para 34). 'In order for there to have been jurisdictional error in the Tribunal's decision, there had to have been some obligation upon him (sic) to consider whether the enactment by the Sri Lankan Parliament of the Immigrants and Emigrants Act could have fallen within the description of degrading treatment or punishment

			mainly, and perhaps more particularly, that the Sri Lankan Parliament intended to cause extreme humiliation which was unreasonable, by enacting that Act' (para 44). The Court held 'the Tribunal was under no obligation to consider the argument, namely because it was never raised, even in the most obscure way, before it' (para 52). The Court held 'even if it was possible to find that the Sri Lankan Parliament intended to cause extreme humiliation by enacting the Immigrants and Emigrants Act, it was not incumbent upon the Tribunal to consider whether it was in that case, and any failure by it to deal with it did not amount to jurisdictional error' (para 53). 'In any event, the ground appears to have been dealt with by the Tribunal in two ways' (para 54). 'First, it found at [48] the relevant law was appropriate and adapted to meet a legitimate national interest in regulating and securing the country's borders' (para 55). 'Secondly, the Tribunal found that the applicant would only be fined at most and, possibly, if he arrived at the weekend or some public holiday, might be detained briefly while awaiting for a bail hearing' (para 56). The Court held that the Tribunal's finding, 'tells against the proposition not only that the Parliament intended that there be extreme humiliation by the operation of

			the Act but also that it caused such extreme humiliation. In effect, the Tribunal rejected the operation of the definition of degrading and humiliating treatment in respect of the facts that it found might happen to the applicant' (para 56). In concluding the Court dismissed the application (para 57).
SZURK v Minister for Immigration & Anor [2015] FCCA 472 Judge Driver (Successful)	29 April 2015	1, 4, 19 and 43-49	This case relates to: • consideration of the applicant's claims against the complementary protection criteria The applicant was 'an elderly Tamil woman from Sri Lanka'. She had 'lost her sight in one eye as a result of an injury sustained during the course of the Sri Lankan civil war'. She claimed that she 'was dependent in Sri Lanka upon her husband who is now deceased' and she had 'no close family remaining in Sri Lanka' (para 1). 'The applicant claimed to fear harm in Sri Lanka as an ethnic Tamil and imputed Liberation Tigers of Tamil Eelam (LTTE) sympathiser' (para 4). 'She also feared extortion demands and living alone as a widow' (para 4). The applicant sought one ground of review, namely that the RRT had failed to apply the correct test pursuant to s36(2)(aa) of the *Migration Act 1958* (Cth) (para 19). The Court held 'that it is not correct to contend that merely because material is put as giving rise to a claim

			on Refugee Convention grounds it automatically follows that the claim is required to be considered as a claim for complementary protection' (para 43). The Court accepted that: - 'although the applicant was not legally represented at the Tribunal hearing, the transcript reveals that the Tribunal explained to her that she could obtain a protection visa on the basis of the refugee and complementary protection criteria' (para 44), -'the Tribunal considered the applicant's claim and evidence that she received extortion demands from a paramilitary man in October 2012 and feared they might come again.' (para 45), - the Tribunal ultimately rejected these claims 'on the basis of adverse credibility findings' (para 45) and - the 'Tribunal also considered the applicant's claims that she was a widow and would be alone in Sri Lanka and had lost her right eye and had high blood pressure' and that 'she might face personal hardship' (para 45). The Court also accepted the Tribunal's findings that the applicant 'would not be refused help from her friends as she had claimed, she would be able to obtain her late husband's pension and would live in a predominantly Tamil neighbourhood in Colombo as she had done for many years' (para 46). The Court held that there was a 'distinction, albeit fine, between the Tribunal's rejection of the applicant's particular social group claim and the obligation on the Tribunal to consider whether the applicant faced a real

			risk of significant harm because of opportunistic crime in Sri Lanka' (para 47). The Court held that the Tribunal was required to consider 'whether the applicant, as an elderly disabled woman without family support, was at greater risk of significant harm than the population of Sri Lanka generally' (para 47). The Court held that the Tribunal did not 'make that assessment and it cannot be implied, simply based upon the consideration of the applicant's particular social group claim' (para 47). Therefore, the Court held that the 'Tribunal did not complete its review function' (para 48). In concluding the Tribunal held that there was 'a jurisdictional error and that 'the applicant should receive the relief she seeks' (para 49).
SZSZV v Minister for Immigration & Anor [2015] FCCA 622 Judge Barnes (Unsuccessful)	20 March 2015	2, 41, 73, 116-118, 153-154, 161-163, 175-177 and 187-188	This case relates to: • consideration of the applicant's claims against the complementary protection criteria • the definition of 'cruel or inhuman treatment or punishment' in section 5(1) of the Act • the application of the 'real chance' test The applicant was a citizen of Sri Lanka and of Tamil ethnicity (para 2), who sought four grounds of review. *Ground 1:*

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

			including about the prospect of detention and/or imprisonment as well as conditions and treatment in detention, of specific relevance to the particular circumstances of the Applicant as a returnee to Sri Lanka who was a failed asylum seeker who had departed illegally. It did so in the context of considering whether the Applicant met the statutory criteria for a protection visa. In these circumstances, even if the particularised reports did tend to show that conditions in Sri Lankan prisons for prisoners generally did not meet international standards, the Tribunal did not err in failing to refer expressly to such items of information' (para 116). Ground one was not made out (para 117). *Ground 2:* 'The Tribunal fell into jurisdictional error by misconstruing or misapplying the applicable law, being s36(2A) of the Act and the definition of "cruel or inhuman treatment or punishment" in s5(1) of the Act, or otherwise failing to ask itself the right questions' (para 118). *Consideration of Ground 2:* The Court held that 'while the proper construction of s.36(2)(aa) and the provisions which define significant harm and its constituent parts are informed by Australia's international obligations under the CAT and

			the ICCPR, unlike s.36(2)(a) of the Act, s.36(2)(aa) does not directly incorporate any international treaty obligation into domestic law (*MZYYL* at [18] – [20]). The definition of "cruel or inhuman treatment or punishment" contains its own test (albeit that the exception involves consideration of Article 7 of the ICCPR) as do the definitions of other kinds of significant harm' (para 153). 'The construction of the concept of significant harm and the definitions of the acts or omissions that constitute significant ham (sic) should not be approached as if one were directly applying the ICCPR (or indeed the European Convention)' (para 153). The Court noted 'that to amount to cruel and inhuman treatment or punishment within the s.5(1) definition, pain and suffering must be intentionally inflicted' (para 153). The Court held that 'this does not mean that a Tribunal or Court cannot have regard to international jurisprudence, however insofar as the Applicant contended that the Tribunal erred in failing to consider and adopt the approach taken in cited international jurisprudence in relation to prison conditions that would not of itself constitute jurisdictional error' (para 154). The Court held that 'the Tribunal in this case sufficiently addressed the criterion in issue. It reasoned that this Applicant would not be subjected to an act or omission that amounted to "cruel or inhuman treatment

			or punishment" (or degrading treatment or punishment or any other type of significant harm) whether or not intentional, because the risk of detention would only arise if the Applicant returned to Sri Lanka on a weekend or on a public holiday when the Magistrates Court was closed and that the likely period of detention on remand in prison in such circumstances would only be for a few days ("some" days as the Tribunal found (at paragraph 49)). It also found that there were no reports of deliberate or (as the Tribunal stated in the context of considering the complementary protection criterion) intentional mistreatment involving "cruel or inhuman treatment or punishment"' (para 161). The Court held that a necessary inference from such reasoning was 'that the Tribunal's view' was that the conditions in the Negombo Prison remand section were not so bad that detention for such a brief period would amount to "cruel or inhuman treatment or punishment" or "degrading treatment or punishment"' (para 161). Ground 2 was not made out (para 162). *Ground 3:* 'The Tribunal failed to respond to the applicant's claim to fear harm by reason of being held in executive detention without charge for three months under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979' (para 163).

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

			of the Applicant being detained for a prolonged period of time was remote. This finding was open to it on the material before it. Such finding necessarily incorporated the preliminary finding, based on all the evidence before it, that the Applicant would be released on bail with surety being provided by a member of his family. This preliminary finding was also open to it on the material before it' (para 187). Ground 4 was not made out (para 188). As none of the grounds relied on by the applicant was made out, the application before the Court was dismissed (para 188)
MZZKS v Minister for Immigration & Anor [2015] FCCA 532 Judge Lloyd-Jones (Unsuccessful)	18 March 2015	7, 11, 21, 27, 30, 34, 36, 42, 78 and 92-93	This case relates to: • The requirement to consider claims and factual findings with respect to a 'persecution claim' when considering a complementary protection claim The applicant was a citizen of Afghanistan. He was of Hazara ethnicity and a Shia Muslim (para 7). The applicant 'claimed to fear persecution from the Taliban who targeted Hazara Shia and that it was not safe travel outside Jaghori because of the Taliban threat' (para 11). The applicant claimed to fear significant harm based on the 'marginalisation and discrimination' experienced 'by Hazaras for reasons of their ethnicity and religion' (para 21).

			The Refugee Review Tribunal (Tribunal) considered the 'applicant's claims of discrimination as a Hazara Shia' but found he would not face a 'real risk' of significant harm in Afghanistan if he relocated to Kabul (paras 27 and 30). The applicant sought review by the Federal Circuit Court of Australia (Court) on the basis that the Tribunal 'in reaching its conclusions on complementary protection' 'did not explicitly address or purport to address the claim that the discrimination the applicant faced as a Hazara Shia in Kabul would in the circumstances be degrading because it was on the basis of race' (para 34). The applicant claimed that the 'Tribunal's failure to address or otherwise resolve the claim amounted to a failure to accord procedural fairness and a constructive failure to exercise jurisdiction' (para 36). The applicant submitted that 'the legal basis of the racial basis – degrading treatment claim was that discrimination based on race may, in certain circumstances, of itself amount to "degrading treatment" as defined in s.5(1) of the Migration Act' (para 42). The Court held that there was an 'overlap between the discrimination claim and the complementary protection claim, to the extent that the complementary protection claim depends upon the existence of

			discrimination against Hazaras' and if there was a 'finding of no discrimination', the 'complementary protection claim fails' (para 78). However, the Court held that there was a 'different factual basis to the racial basis claim and these further factual findings' were of 'the nature that render the different treatment degrading' (para 78). The Court did not accept the applicant's argument that 'none of these findings' were 'contained in the Tribunal's Decision Record' (para 78). The Court acknowledged that the Tribunal had 'not repeated all of the claims, together with all of the factual findings, that it made against the persecution claim' (para 92). However, the Court held that the 'Tribunal had no obligation to do so' as discussed in *Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 184 (para 92). The Court was satisfied that 'the Tribunal was clearly alive to the discrimination issue and made findings capable of disposing of the complementary protection claim by referring to the claim, to the specific aspects of the claim that is in question and deposed of it' (para 93). In concluding, the Court held that the Tribunal did not fall into jurisdictional error (para 93).

SZTMQ v Minister for Immigration & Anor [2015] FCCA 381 Judge Cameron (Unsuccessful)	24 February 2015	1, 10, 13-14, 18-20 and 23-28	This case relates to: • the application of s.36(2B)(b) of the Act with respect to claims for complementary protection The applicant was a citizen of Pakistan and claimed to fear harm 'because of his adherence to Shia Islam' (para 1). The applicant pursued two grounds of review: *Ground 1* 'The Tribunal applied a wrong test to determine whether the Applicant could obtain protection from an authority of his country of nationality' (para 10). *Ground 2* 'The Tribunal erred by failing to correctly consider whether there were substantial grounds for believing that, as a necessary and foreseeable consequence of the Applicant being removed from Australia to a receiving country, there was a real risk that he would suffer significant harm' (para 10). *Consideration of Ground 1* The applicant submitted that the Tribunal 'had applied the wrong test because it had referred to protection being of a reasonable level rather than the test as set out in s.36(2B)(b)' (para 13).

			The Court agreed that 'if the Tribunal had been expressing a conclusion that the applicant did not face a real risk of significant harm in Pakistan because state protection "of a reasonable level" was available then its conclusion would have been based on an incorrect test' (para 14). However, the Court held that the Tribunal's comments 'concerned the ability of the state of Pakistan to protect the applicant from Convention-related harm, not its ability to protect him from serious harm' (para 14). Therefore, the Court held that ground 1 was not made out (para 18). *Consideration of Ground 2* The applicant submitted that the 'Tribunal had not applied the complementary protection criteria correctly because it had not considered s.36(2B)(b) anywhere in its reasoning' (para 19). 'The applicant referred in this regard to *Minister for Immigration & Citizenship v MZYYL* [2012] FCAFC 147; (2012) 207 FCR 211 where it was held that s.36 requires the Minister to consider the complementary protection criteria as a whole' (para 20). The Court outlined that 'unlike the present applicant, who sought protection by reference to both the Convention and the Act's complementary

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

			In concluding the Court held that no jurisdictional error on the part of the Tribunal had not been demonstrated and the application was dismissed (paras 27 and 28).
SZSTZ v Minister for Immigration & Anor [2015] FCCA 93 Judge Driver (Successful)	24 February 2015	5, 19, 23, 30-31, 34, 42, 48, 51, 53-4, 59-60, 62, 66 and 68-70.	This case relates to: • The requirement to engage in a 'forward looking assessment' of the risk faced by the applicant, • The meaning of an 'unreasonable decision', and • The requirements with respect to considering s.36(2)(aa) of the Act, when the same facts are relied upon with respect to a claim under s.36(2)(a) 'The applicant claimed to have been abducted and held captive by the Taliban for six nights in 2010'. He claimed that 'being Tajik' and 'his imputed religious beliefs put him at risk' (para 5). 'Specifically, he had worked as a truck driver delivering goods that include alcohol to shops since 2005' (para 5). He believed 'that the Taliban became aware of his dealings in alcohol and they believed that anyone associated with alcohol is an infidel and must be punished' (para 5). He also claimed that a 'long-standing feud within his family led to his paternal cousin informing the Taliban of the nature of his work' (para 5) The judicial review application relied on three grounds:

			Ground 1: ‘In deciding to affirm the decision of the First Respondent, the Tribunal/Second Respondent committed an error of law amounting to a jurisdictional error by failing to carry out its statutory function to review the decision as required by s.414’ of the Act (para 19). Ground 2: 'The Tribunal’s decision is vitiated by an absence of an evidence and intelligible justification for the rejection of the applicant’s claims, thus giving rise to jurisdictional error for ‘illogicality’ or ‘unreasonableness” (para 19). Ground 3: ‘The Tribunal did not consider the Applicant’s claim for complementary protection separately from its consideration of the applicant’s claim for protection under the Refugees [C]onvention, thus failing to comply with its obligation under s.414 of the Act to review the decision and giving rise to jurisdictional error’ (para 19). *Consideration of Ground 1* ‘The main focus of this ground is the failure on the part of the Tribunal to deal with the claim by the applicant that he would face either Convention based harm, or that if returned to Afghanistan, there were substantial grounds for believing that he was at real risk of

			significant harm on the basis of his history of being an alcohol trader (para 23). Relying on *DZADC v Minister for Immigration & Anor (No.2)* [2012] FMCA 778 the applicant argued that 'after finding the applicant's claim to have been abducted and threatened not established, the Tribunal has not separately considered whether the established facts, namely that the applicant traded in alcohol and that, according to country information, the Taliban targets alcohol use and trading, give rise to a well-founded fear of persecution' (para 30). The applicant argued that in failing to consider whether the applicant was at risk of harm from the Taliban in that respect, the Tribunal had failed to carry out its review function (para 30). Moreover, the applicant submitted that, not only had the Tribunal not considered whether he was at risk from 'the Taliban in relation to his alcohol related activities', but it had also not considered the possibility that he was 'at risk of harm from the government as a consequence of that trade' (para 31). The applicant submitted that the 'Tribunal did not consider at all what might occur to the applicant were he to return to Afghanistan and resume his prior career as a dealer in alcohol' (para 31). The applicant submitted 'by failing to consider any real chance of persecution or future risk of significant harm

			the Tribunal, in the applicant's submission, has committed jurisdictional error and thus its decision should be set aside'(para 34). The Court held that there was 'a critical problem in the Tribunal's reasons in that it failed to engage in a forward looking assessment of the risk faced by the applicant should he return to Kabul and either once again engage in delivering alcohol, or be identified from his past involvement' (para 42). The Court held that the 'Tribunal fell into the same error as was identified' by the Full Federal Court in *Minister for Immigration v MZYTS* (2013) 136 ALD 547; [2013] FCAFC 114 at [46] and [62] (para 48). 'The Tribunal failed to complete the performance of its statutory task and hence there was a constructive failure of jurisdiction' (para 48). *Consideration of Ground 2* The applicant argued 'that the Tribunal's findings in respect of the claims arising from the applicant's involvement in the alcohol trade as well as his status as a failed asylum seeker were irrational and illogical' (para 51). The Court noted that an unreasonable decision is akin to a decision which is 'illogical', 'irrational', 'clearly unjust', 'arbitrary' or 'unjust' and is one which is 'not open on the evidence before the Tribunal' - *Minister for*

			Immigration v SZMDS [2010] HCA 16; (2010) 240 CLR 611 at [129]- [130] (para 53) The Court held that since the Tribunal had not 'completed its statutory function of review, because of a constructive failure of jurisdiction, it would seem premature to venture an assessment of the reasonableness of the incomplete exercise of jurisdiction' (para 54). However the Court noted that 'on the country information available, it would have been open for a hypothetical Tribunal to arrive at the same conclusion which this Tribunal did, if it had completed its function of review' (para 59). *Consideration of Ground 3* The Court held that there were 'two problems in the Tribunal's treatment of the applicant's complementary protection claim', the first being 'the brevity of its consideration' and the 'second is its factual findings' (para 60). The Court held that it 'was not correct to assert that the Tribunal failed to engage' with the complementary protection criteria and rather the Tribunal's factual findings related 'to both the refugee and complementary protection criteria' (para 62). The Court confirmed that when a 'Tribunal makes findings in respect of an applicant's refugee claims

			which undermine the factual basis for any complementary protection claims, it is not necessary for the Tribunal to repeat its findings when considering the same facts which are said to give rise to claims for complementary protection' (para 66). However, 'because the Tribunal did not complete its review of the applicant's claims in relation to the Refugees Convention, it cannot be taken to have completed its review of the applicant's claims to complementary protection' (para 68). Therefore the third ground was made out (para 69). In concluding, the Court granted 'the relief sought in the application', namely a writ of certiorari removing the record of the Tribunal's decision made on 26 March 2013 for the purpose of quashing it and a writ of mandamus, requiring the Refugee Review Tribunal to redetermine the review application before it according to law (para 70).
SZTAL v Minister for Immigration & Anor [2015] FCCA 64 Judge Driver (Unsuccessful)	24 February 2015	1, 4, 5, 10, 43-50, 52, 54, 65 and 70	This case relates to: • whether 'harm which is not intentionally inflicted but which may be inflicted because of recklessness or indifference can constitute "significant harm" for the purposes' of the complementary protection criteria in the Act, and • the application of the recent decision of the Federal Court in *WZAPN v Minister for Immigration and Border Protection* [2014] FCA

			947 in relation to the applicant's claim (para 1). The applicant was a citizen of Sri Lanka and of Tamil ethnicity (para 4). He claimed to fear 'significant harm involving detention, torture and other forms of mistreatment' (para 5) The two grounds for judicial review were as follows: 1. 'The Tribunal misconstrued or misapplied ss.5 and 36(2A) of the Act' 2. 'The Tribunal erred in failing to apply the approach taken by North J in WZAPN v The Minister for Immigration and Border Protection *[2014] FCA 947* in relation to the applicant's claim to fear harm as a person who had left Sri Lanka illegally' (para 10). *Consideration of Ground 1* The applicant submitted two propositions. Firstly, that the Tribunal erred 'because it only considered whether there was an "actual, subjective, intent" to cause harm to the applicant' (para 43). Secondly, the applicant contended that the 'Tribunal erred because it failed to identify the relevant acts or omissions that were relevant to the inquiry about intention in circumstances where the applicant himself

			did not identify those acts or omissions' (para 43). The Court rejected both of these propositions (para 44). *First proposition* With regard to the first proposition the applicant submitted that the Tribunal erred 'because it only considered whether there was an "actual, subjective, intent" to cause harm to the applicant (the harm being exposure to poor prison conditions) and failed to consider whether the Sri Lankan authorities had the necessary intent because they foresaw the consequences of their actions' (para 45). In support of this submission the applicant drew on a number of general authorities 'dealing with the issue of intent in criminal law' (para 46). The Court held that 'the statements in such authorities' did not 'bear upon the construction of provisions' of the Act (para 46). The Court further stated that 'the structure of the relevant definition provisions, and in particular the use of the emphatic phrase "intentionally inflicts", strongly indicates that there must be an actual, subjective, intention to cause harm' (para 46). The Court referred to the approach taken by Judge Emmett in *SZSPE v Minister for Immigration & Anor* [2013] FCCA 1989 in which the 'applicant claimed that

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

			extreme humiliation") there is no reason to suggest that something less than actual, subjective, intent is required' (para 49). The Court further explained that 'the relevant definitions in s.5(1) must be read harmoniously' (para 49). The Court accepted the Minister's submissions that 'having found that any discomfort to which the applicant might have been exposed would not be intentionally inflicted (bearing in mind that it was likely that he would only be detained for a very short period of time and would not be targeted in the penal system), it was not open to the Tribunal to conclude that applicant might suffer "significant harm" as that term is defined' (para 50). *Second proposition* The Court did not accept the applicant's submissions that the 'Tribunal fell into error because it failed to consider whether the gaolers, police officers etc "[knew] of the probable consequences of their acts and omissions, or [foresaw] the possibility of those consequences" and failed to identify the acts or omissions' relevant to the inquiry into intention (para 52). The Court held that the 'applicant did not make any submissions identifying a particular act or omission; nor did the applicant identify any person who he feared

			would carry out an act or omission' (para 54). The Court also held that the 'Tribunal was not required to conduct an inquiry of its own to attempt to identify any such person' (para 54). *Consideration of Ground 2* The Court held that the applicant's case was to be 'distinguished from *WZAPN* because there was no question of the law being applied arbitrarily (in the sense of being applied to some but not others)' (para 65). That is, 'the Immigrants and Emigrants Act is applied to all persons who depart Sri Lanka illegally, it cannot be said that the "essential and significant reason" for the enforcement of the statute against the applicant would be a Convention reason' (para 65). The Court detailed that 'another way of analysing the problem is to consider whether "different treatment of different individuals and groups" is appropriate and adapted to achieving some legitimate government object" (para 65). The Court held 'that question did not arise as the Tribunal found that there is no differential treatment insofar as enforcement of the Immigrants and Emigrants Act is concerned' (para 65). In concluding the Court held that the applicant 'failed to

			demonstrate any jurisdictional error in the decision of the Tribunal' (para 70). Therefore, the application before the Court was dismissed (para 70).
SZWCH v Minister for Immigration & Anor [2015] FCCA 325 Judge Lloyd-Jones (Successful)	17 February 2015	1, 3, 4, 6, 9 and 15-16	This case relates to: • whether the publication of the applicant's personal details enlivened Australia's *non-refoulement* obligations The applicant sought 'an interlocutory injunction to restrain the first and second respondents, by the first respondent himself or by his Department, officers, delegates or agents, from removing the applicant pursuant to s.198 of the Act' (para 1). *Background* The applicant arrived in Australia on 10 January 2002 on a 'fake Korean passport', holding a tourist visa valid for three months. The applicant said that he was of Korean ethnicity and a Chinese citizen. 'He entered Australia using a name which he later admitted was false' (i.e. "Name 1") (para 3). 'He was located by Departmental Compliance Officers on 14 January 2014 and detained in Villawood Immigration Detention Centre' under s.189 of the Act. When he was interviewed by a Departmental Officer he indicated that his name was different (i.e. "Name 2") to that identified on his tourist visa. He lodged a protection visa application using the identity of Name 2 on 22

			January 2014 (para 3). On 6 February 2014 the applicant's protection visa application was refused (para 9). <u>*Application before the Court*</u> 'On or about 11 February 2014, the first and/or second respondent, by their servants or agents, released the applicant's personal information by publishing it on the World Wide Web. The applicant's personal information which was released included his name, date of birth, nationality, gender, details about his detention (where detained, the reason for the detention and where) and also details of the identity of any family members in detention.' (para 4). It was claimed by the applicant that the release of the applicant's personal information had caused the 'applicant to have a well-founded fear that his removal from Australia and return to China will involve a breach of Australia's *non-refoulement* obligations under the Refugees Convention; or the Convention Against Torture; or the International Covenant on Civil and Political Rights' (para 6). The Court held 'that there is at least an arguable question that the release of the applicant's personal information has caused the applicant to have a well-founded fear that his removal from Australia and return to China has not been subject to any consideration or assessment by the first or second respondent' (para 15).

			The Court granted the injunction, as sought by the applicant (para 16).
SZSWF & Anor v Minister for Immigration & Anor [2015] FCCA 250 Judge Barnes (Unsuccessful)	11 February 2015	2, 3, 16-18, 59, 75, 99 and 100	This case relates to: • whether the applicant was properly notified as to the result of her application for a protection visa pursuant to s.36(2)(aa) of the Act. The first applicant (mother) and second applicant (daughter) were citizens of the People's Republic of China (para 2). The second applicant was included in the first applicant's protection visa application, as a member of the first applicant's family unit (para 2). The first applicant claimed to fear harm based on her religious beliefs and her membership to an 'underground Catholic church' in China (para 3). The first applicant sought review of the Refugee Review Tribunal's (Tribunal) decision based on the following three grounds: 1. 'The delegate made an error within s.494C(7) of the Act in that the name of the addressee on the envelope containing the notification letter was incorrectly described as Ms [family name] followed by [given name] whereas she should have been addressed as Ms [given name] followed by [family name] and hence that as the

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

			Therefore, the notification met s.66(2)(b) of the Act (para 75). In concluding, the Court dismissed the application before the Court (100).
SZTPH v Minister for Immigration & Anor [2015] FCCA 258 Judge Manousaridis (Unsuccessful)	10 February 2015	1, 2, 45, 48 and 52-55	This case relates to: • the whether the Refugee Review Tribunal (Tribunal) improperly applied its finding with respect to s.91R(3) of the Act to the Tribunal's assessment of the complementary protection criteria The applicant was a citizen of Bangladesh and claimed to fear harm based on being 'a single woman in Bangladesh without male protection' (para 1). The applicant sought review of the Tribunal's decision based on the following two grounds: 1. 'Whether there clearly arose on the material before the second respondent (Tribunal) a claim (alleged claim) that the applicant has a well-founded fear of persecution in Bangladesh because she is a member of a particular social group, or there is a real risk she will suffer significant harm because she is a member of that particular social group. The particular social group of which, under the alleged claim, the

			applicant is said to be a member is women in Bangladesh, single women in Bangladesh, or single women in Bangladesh without male protection' (para 1). 2. 'When considering whether the applicant's claims fall within s.36(2)(aa) of the *Migration Act 1958* (Cth) (Act), whether the Tribunal disregarded evidence purportedly in reliance on s.91R(3) of the Act' (para 2). Grounds 1 and 2 were not made out (para 45 and 53). With respect to ground 2 the applicant submitted that the use of the words 'for the reasons discussed above' indicated that the Tribunal was 'drawing support from an earlier section of its reasoning to which it was not permitted to have regard' (para 48). The applicant submitted 'that the Tribunal made the finding that it was not satisfied the applicant engaged in church activities in Australia as a result of any genuine Christian beliefs for the purposes of determining under s.91R(3) of the Act whether the applicant engaged in conduct otherwise than for the purpose of strengthening her claim to be a refugee, and the Tribunal, therefore, applied s.91R(3) when determining the applicant's claim for complementary protection' (para 48). The Court held that 'the Tribunal was of the view that whether the applicant had a genuine Christian belief was relevant to assessing whether the applicant faced a

			real risk of suffering significant harm if she were to return to Bangladesh. It was open to the Tribunal to hold that view. The Tribunal was not satisfied the applicant had such belief; and it based that conclusion, not on the operation of s.91R(3) of the Act, but on the reasons the Tribunal had already given for finding that "*the applicant's involvement with the Christian churches in Australia was solely for the purpose of strengthening her protection visa application*". Those reasons were the Tribunal's credibility findings that were adverse to the applicant, the Tribunal's finding that the applicant did not convert to Christianity in Bangladesh, the applicant's inconsistent evidence about her attendance at church in Australia, and the letters of support which suggested the applicant only converted in 2012, being around the time the applicant lodged her protection visa' (para 52). In concluding, the Court held that the 'Tribunal did not apply s.91R(3) of the Act when considering the applicant's claims under s.36(2)(aa) of the Act' (para 54). The application before the Court was dismissed (para 55).
SZTTI & Ors v Minister for Immigration [2015] FCCA 236 Judge Nicholls (Unsuccessful)	6 February 2015	1, 4, 14-15, 31, 34-35 and 47-49	This case relates to: • the application of s.48A of the Act to applications for protection visas which were lodged before the introduction of s.36(2)(aa) to the Act

			The applicants (wife, husband and two children) were citizens of Fiji (para 4). The first applicant's (wife) 'claims to protection were based on what she said was the abuse of her human rights in Fiji, concerning her employment. The applicant claimed to have been dismissed from her employment with the Fijian Native Land Trust Board, and then, subsequently, dismissed from the Fijian Lands Department on instruction from the Fijian Prime Minister's office. She was unable to find subsequent employment' (para 35). 'Her husband and two children made no claims to fear harm in their own right, they applied as members of her family unit' (para 34). The first applicant sought review of the decision made by the delegate of the respondent Minister on 3 January 2014 that 'the second application made by the applicants for protection visas was not valid' (para 1). *Chronology* On 20 March 2012, the applicants lodged their first application for protection visas (para 4). On 24 March 2012, s.36 of the Act was amended by the *Migration Amendment (Complementary Protection) Act 2011* (Cth) (para 4). The applicants' protection visa application was refused

			by a delegate of the respondent on 11 July 2012 (para 4). The applicants sought review by the Refugee Review Tribunal (Tribunal) of the delegate's decision on 25 July 2012. The Tribunal affirmed the decision of the delegate on 2 April 2013 (para 4). On 3 January 2014, the applicants sought to lodge a further application for a protection visas, expressly relying on s 36(2)(aa) of the Act (para 4). By letter dated 3 January 2014, an officer of the Department of Immigration 'notified the applicants to the effect that their application for protection visas was not valid by virtue of s.48A of the Act' (para 4). The applicants' argument before the Court was that the second protection visa application was a valid application, because s.48A of the Act did not apply in the applicants' circumstances. That is, the first protection visa application was made before the introduction of s.36(2)(aa) into the Act. The applicants relied on SZGIZ v Minister For Immigration & Citizenship [2013] FCAFC 71 ("SZGIZ") (para 14). 'The relevant circumstances in *SZGIZ* were that the applicant had made an application for a protection visa, which was refused by the delegate, and whose decision was affirmed by the Tribunal, and this all occurred before the introduction of s.36(2)(aa) to the Act (see *SZGIZ* at [2] to [7])' (para 15).

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

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