COMPLEMENTARY PROTECTION IN AUSTRALIA

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

2017

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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. Key High Court decisions are also listed. The 2017 decisions are organised by court, in reverse chronological order. Decisions from 2012 (when the complementary protection regime commenced in Australia) to 2014 and 2015-2016 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).

HIGH COURT OF AUSTRALIA

Case	Decision date	Relevant paras	Comments
SZTAL v Minister for Immigration and Border Protection; SZTGM v Minister for Immigration and Border Protection [2017] HCA 34 (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ) (Unsuccessful)	6 September 2017	7-8, 11-12, 17-18, 23-29, 43-54, 58-59, 62, 66, 78-80, 84-89, 103, 114	This case considered the requirement of intention in the definitions of 'cruel or inhuman treatment or punishment' or 'degrading treatment or punishment' in s5(1) of the Migration Act 1958 and whether intention can be established by knowledge or foresight of pain or suffering or extreme humiliation. Kiefel CJ, Nettle and Gordon JJ – 'The issue before the Tribunal, relevant to these appeals, was whether, in sending the appellants to prison, Sri Lankan officials could be said to intend to inflict severe pain or suffering or to intend to cause extreme humiliation. The Tribunal concluded that the element of intention was not satisfied. The country information before it indicated that the conditions in prisons in Sri Lanka are the result of a lack of resources, which the Sri Lankan government acknowledged and is taking steps to improve, rather than an intention to inflict cruel or inhuman treatment or punishment or to cause extreme humiliation.' (para 7). 'The Federal Circuit Court (Judge Driver) considered[4], correctly in our view, that the Tribunal is to be understood to have concluded that "intentionally inflicted" in the definition of "cruel or inhuman treatment or punishment" connotes the existence of an actual, subjective, intention on the part of a person to bring about suffering by his or her conduct. His Honour

			considered the same to be true with respect to the words "intended to cause" in the definition of "degrading treatment or punishment". His Honour found no error in that reasoning, and a majority of a Full Court of the Federal Court (Kenny and Nicholas JJ)**[5]** agreed. Buchanan J dismissed the appeals on other grounds.' (para 8). 'Applying the appellants' construction to the present cases, it is said that, if officials in Sri Lanka were to cause the appellants to be detained, those officials would intend to inflict pain or suffering or cause extreme humiliation because they must be taken to be aware of the conditions giving rise to such harm in the prisons to which the appellants would be sent.' (para 11). 'The meaning of "intention" for which the appellants contend is the second, alternative, meaning of "intention" with respect to a result in s 5.2(3) of the *Criminal Code* (Cth)**[10]**. This meaning also appears in the definition of "intention" given in the Rome Statute of the International Criminal Court (1998)**[11]**. The first meaning given in s 5.2(3) accords with the ordinary meaning adopted in *Zaburoni*.' (para 12). 'The context of the Act does not tell against the ordinary meaning of "intention" accepted in *Zaburoni*. To the contrary, the fact that the element of intention is contained in the definition of "torture", from which the definitions in question are derived, tends to confirm it. A perpetrator of torture, clearly enough, means to inflict

			suffering because it is part of his or her ultimate purpose or design to subject the victim to pain and suffering in order, for example, to obtain a confession.' (para 17). 'It is, of course, possible that words taken from an international treaty may have another, different, meaning in international law. In such a case their importation into an Australian statute may suggest that that meaning was also intended to be imported**[18]**. But as Edelman J explains**[19]**, there is no settled meaning of "intentionally" to be derived from any international law sources. In particular, the decisions of the International Criminal Tribunal for the former Yugoslavia, to which this Court was referred, do not provide any settled meaning.' (para 18). 'When the complementary protection regime was inserted in the Act in 2012 it would have been a simple enough matter to have adopted the *Criminal Code* definition of "intention" if it had been thought appropriate to its purposes, but there is no reference to that definition and nothing to suggest that it was considered to be appropriate. Applying the alternative meaning of "intention" would have the consequence that the ambit of the protection afforded by the complementary protection regime of the Act would be wider than the ordinary meaning of that word would allow. It is not immediately obvious that it was thought necessary or desirable to meet Australia's obligations under the CAT or the ICCPR in this way.' (para 23). 'Statutes *in pari materia*, in the sense that they deal with

			the same subject matter along the same lines, may form part of the context for the process of construction. Acts of this kind are said to form a kind of code or scheme, which arises from the degree of similarity involved[27]. Without this feature there is no warrant to transpose the meaning of a word from one statute to another or to assume, where the same words are used in a subsequent statute, that the legislature intended to attach the same meaning to the same words[28].' (para 24). 'The *Criminal Code* and the Act are not statutes *in pari materia*. The *Criminal Code* and the Act in its complementary protection provisions have in common that they give effect to Australia's obligations under the CAT, but they do so in different ways and for different purposes. The *Criminal Code* makes persons criminally responsible for acts of torture in the same way as they may be responsible for other offences involving intent. The provisions of the complementary protection regime in the Act offer protection against the return of a non-citizen to a country where the Minister has substantial grounds for believing that the person will be at risk of significant harm, by the grant of a visa enabling the person to stay in Australia. The Act is not concerned with whether country officials should be held criminally responsible but with the reality of the risk of harm from them. That risk is assessed by reference to what those officials might be understood to intend with respect to a non-citizen if the non-citizen is returned to that country.' (para 25). 'The reference in the Act to "intentionally inflicting"

			and "intentionally causing" is to the natural and ordinary meaning of the word "intends" and therefore to actual, subjective, intent. As *Zaburoni* confirms, a person intends a result when they have the result in question as their purpose.' (para 26). 'An intention of a person as to a result concerns that person's actual, subjective, state of mind. For that reason, as the plurality in *Zaburoni* were at pains to point out[29], knowledge or foresight of a result is not to be equated with intent. Evidence that a person is aware that his or her conduct will certainly produce a particular result may permit an inference of intent to be drawn, but foresight of a result is of evidential significance only. It is not a substitute for the test of whether a person intended the result, which requires that the person meant to produce that particular result and that that was the person's purpose in doing the act.' (para 27). Intention applied 'In the present cases the question for the Tribunal was whether a Sri Lankan official, to whom knowledge of prison conditions can be imputed, could be said to intend to inflict severe pain or suffering on the appellants or to intend to cause them extreme humiliation by sending them to prison. That question was to be answered by the application of the ordinary meaning of "intends", as the Tribunal concluded.' (para 28). 'As has been explained, evidence of foresight of the risk

			of pain or suffering or humiliation may support an inference of intention. In some cases, the degree of foresight may render the inference compelling**[30]**. But in the present matters, having regard to the evidence before the Tribunal (including evidence about what the Sri Lankan authorities might know), the Tribunal was entitled to conclude that it was not to be inferred that the Sri Lankan officials intended to inflict the requisite degree of pain or suffering or humiliation.' (para 29). Edelman J – 'There have been a number of judgments in this Court, relied upon by the appellants, that have described intention in terms which include within it this notion of oblique intention. Different formulations of oblique intention have insisted upon different degrees of foresight. Sometimes it has been said that the result must be foreseen as "inevitable" or "virtually certain". Sometimes it has been said that the result need only be foreseen as "probable". And the *Criminal Code* (Cth) has defined intention with respect to a result as existing where that result is expected to "occur in the ordinary course of events"**[65]**. The fundamental point of oblique intention is that foresight of a result is not used as a means to *infer* intention in the sense of an aim or purpose. The point is that voluntary conduct with a foreseen result means that the foreseen result is *also* intended.' (para 62). 'The appellants' first submission should not be accepted. No established, consistent definition of intention emerges from the international jurisprudence which the relevant provisions of the *Migration Act* could be

			thought to have adopted when they were inserted. The approach in the *Criminal Code*, which includes oblique intention, is not a uniform international model. In any event, the *Criminal Code*'s adoption of oblique intention was made in circumstances of controversy where a choice was taken to depart from the ordinary meaning of intention, which does not include oblique intention. The *Migration Act* did not include the extended, and controversial, *Criminal Code* definition.' (para 66). 'Unlike the definition of torture in s 5(1) of the *Migration Act*, which was derived closely from the Convention against Torture, the definition of "cruel or inhuman treatment or punishment" in s 5(1) departed significantly from the ICCPR. The ICCPR did not define "cruel, inhuman or degrading treatment or punishment". But s 5(1)of the *Migration Act* did define "cruel or inhuman treatment or punishment". It included a requirement of intention which was not present in the ICCPR. The s 5(1) definition of "cruel or inhuman treatment or punishment" is essentially an extension of the definition of torture where the pain or suffering was not inflicted for one of the purposes or reasons stipulated under the definition of torture**[75]**. The s 5(1)definition is as follows: "***cruel or inhuman treatment or punishment*** means an act or omission by which: (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or (b) pain or suffering, whether physical or mental, is

			intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission: (c) that is not inconsistent with Article 7 of the Covenant; or (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant."' (para 78). 'The consequence of this approach to "cruel or inhuman treatment or punishment" in the *Migration Act* is that the concept operates as an extension of the provisions in relation to torture rather than to implement any particular international obligation. At least in the requirement for intention in the definition of "cruel or inhuman treatment or punishment" in s 5(1), it was, therefore, common ground that the definition still left a "hole" in the *Migration Act* scheme. In circumstances in which an applicant for a protection visa would be returned to a country where the person would be subject to *unintended* cruel or inhuman treatment or punishment, the applicant would need to make a necessarily unsuccessful application for a protection visa, with a necessarily unsuccessful review by the Tribunal, before the application could be considered by the Minister.' (para 79). 'Did the *Migration Act* incorporate an international law

			meaning of "intention" from the Convention against Torture? The appellants' submission concerning an alleged international meaning of "intention", which included oblique intention, essentially involved three steps. First, the definition of cruel or inhuman treatment or punishment is essentially an extended application of the definition of torture. Therefore, "intention" in relation to cruel or inhuman treatment or punishment should have the same meaning as its use in relation to torture. Secondly, "intention" is a word that is capable of bearing more than one meaning. Thirdly, the 2012 amendments to the *Migration Act* adopted the international law meaning of intention, as that meaning is applied in the definition of torture in the Convention against Torture. The appellants submitted that according to the international law meaning, intention is "established once knowledge of the likelihood of the consequences of an act reaches a sufficient degree of certainty". As I have explained, this extension of intention to include foresight is oblique intention.' (para 80). 'The reason why the appellants' submission fails at the third step is that there is no established international law meaning of intention against which the use of that word in the *Migration Act* should be construed. The international law sources relied upon by the appellants are limited, are conflicting, and do not demonstrate any established or consistent meaning of intention. They can be divided into three categories. The first category

			involves decisions of the International Criminal Tribunal for the former Yugoslavia. The second concerns the Rome Statute of the International Criminal Court (1998) ("the Rome Statute") and the *Criminal Code*. The third category concerns a publication by the Immigration and Refugee Board of Canada[78]. The third category can be put to one side because the publication contained different meanings of intention in the text and the footnotes and, in any event, it was only a domestic publication provided by the Executive of one country for the use of a Tribunal in that country. Each of the first two categories can be examined in turn.' (para 84). 'As to the decisions of the International Criminal Tribunal for the former Yugoslavia, the appellants relied upon the decision of the Appeals Chamber in *Prosecutor v Kunarac*[79] and subsequent Trial Chamber decisions which followed the Appeals Chamber[80]. The accused persons in *Prosecutor v Kunarac* argued that rapes that they had committed did not fall within the definition of torture because their intention was "of a sexual nature". The Appeals Chamber rejected this submission.' (para 85). 'The Appeals Chamber said that the Trial Chamber had adopted a definition of torture with reference to the Convention against Torture and the case law of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. The definition was described as having the following three elements: (i) the infliction, by an act or

			omission, of severe pain or suffering, whether physical or mental; (ii) the act or omission must be intentional; and (iii) the act or omission must be aimed at one of the matters provided in the Convention against Torture[81].' (para 86). 'The text of Art 1 of the Convention against Torture, which the Appeals Chamber was explicating in the threefold definition, refers to "any act by which severe pain or suffering ... is intentionally inflicted". The threefold definition does not involve any element of oblique intention. It requires, as the third element, that the act be "aimed at" causing severe pain or suffering. This is a natural sense of intention. In a later passage in the Appeals Chamber's judgment it was said that, irrespective of the motive of the accused, their acts involved torture, since[82]: "In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims." This reference to the "normal course of events" does not appear to refer to the issue of intention in the third element of the definition. Instead, it appears directed to the first requirement, that the act inflicts pain or suffering. As Kiefel CJ pointed out during oral argument, this is a requirement of causation, not intention.' (para 87). 'The second category of international sources relied upon by the appellants includes the Rome Statute and

			the *Criminal Code*, which were said to be evidence of opinio iuris for an international definition of intention for the purposes of torture. The text of the Rome Statute was drafted and circulated in 1998. It entered into force on 1 July 2002. Article 7(1)(f) of the Rome Statute provides that torture may constitute a crime against humanity. Article 7(2)(e) defines torture consistently with the Convention against Torture. However, Art 30(2)(b) defines intention for the purpose of the whole of the Rome Statute. That definition of intention includes oblique intention. It applies in relation to a consequence where the "person means to cause that consequence or is aware that it will occur in the ordinary course of events". The same definition of oblique intention is given in the definition of intention with respect to a result in s 5.2 of the *Criminal Code*. That section of the *Criminal Code* defines intention "with respect to a result" as arising "if he or she means to bring it about or is aware that it will occur in the ordinary course of events".' (para 88). 'The definitions of intention in the Rome Statute and the *Criminal Code* do not establish an international law meaning of intention for the purposes of the Convention against Torture, which could then be transplanted to s 5(1) of the *Migration Act*. There is no evidence that the definitions in the Rome Statute and the *Criminal Code* were enacted to pick up the definition in the Convention against Torture. The definition in each is different from the approach taken by the Appeals Chamber in *Prosecutor v Kunarac*. In both cases, the definition applies to a wide range of offences. As for

			the *Criminal Code*, there is also the obvious difficulty in establishing international opinio iuris by reference to the practice of a single State actor.' (para 89). '103. The appellants' submission that the ordinary or natural sense of intention includes "oblique intention" should not be accepted. In ordinary or natural language, oblique intention is not intention at all. Nor should it attract that label in law. The same ordinary meaning applies in s 5(1) of the *Migration Act*. The application of the ordinary meaning of intention to these appeals, therefore, would ask whether a person (the relevant Sri Lankan official) will *mean* to produce a particular result such as the severe pain or suffering which is an element of the definition of cruel or inhuman treatment or punishment.' (para 103). 'The appeals must therefore be dismissed. The Full Court was correct that the Tribunal was required only to consider intention as meaning an "actual, subjective, intention". It was not sufficient for that intention to be proved by oblique intention. Foresight of consequences, especially with a high degree of perceived likelihood, is a matter from which intention can be inferred. But it is not part of the definition of intention. The appellants could only have established "intention" within par (a) of the definition of "cruel or inhuman treatment or punishment" in s 5(1) of the *Migration Act* if the Tribunal accepted that a relevant Sri Lankan official acted in a way meaning, in the sense of having as an aim or purpose, that "severe pain or suffering, whether physical or mental" would be inflicted. This conclusion

			was rejected by the Tribunal.' (para 114). Gageler J – (dissent) 'Critical to making the constructional choice presented by the statutory text in the present context is the purpose for which the complementary protection regime was introduced. That purpose was identified at the time of introduction as being "to allow all claims by visa applicants that may engage Australia's *non-refoulement* obligations under the [identified] human rights instruments to be considered under a single protection visa application process, with access to the same transparent, reviewable and procedurally robust decision-making framework ... available to applicants who make claims that may engage Australia's obligations under the Refugees Convention"**[49]**. The interpretation which would best achieve that identified purpose, and which is for that reason to be preferred to any other interpretation, is the interpretation which would more closely align the statutory criterion for the grant of a protection visa to Australia's obligations under Art 7 of the ICCPR and Art 3 of the CAT.' (para 43). 'To prefer the interpretation of "intended" and "intentionally" in the relevant statutory definitions which would more closely align the statutory criterion for the grant of a protection visa to Australia's obligations under Art 7 of the ICCPR and Art 3 of the CAT is not to invert the process of interpretation in the manner criticised in *NBGM v Minister for Immigration*

			and Multicultural Affairs[50]. Rather, it is to endeavour to adopt from a range of potentially available constructions that which best allows the domestic statutory language to fulfil its statutory purpose. There is no question that "it is the words of the Act which govern"[51]; the question is, and remains throughout the requisite analysis, as to the meaning of those words.' (para 44). 'The word "intentionally", as has already been mentioned, appears in the definition of "torture" in Art 1 of the CAT. The definition is framed relevantly to encompass "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for specified kinds of purposes. The word does not appear in Art 7 of the ICCPR, which states relevantly that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".' (para 45). 'Turning first to the context for the word as appearing in the statutory definition of torture within the complementary protection regime that is provided by the definition in Art 1 of the CAT, it is important to recognise that Australia's obligations under the CAT go beyond the obligation imposed by Art 3 not to "expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". They include as well the obligation imposed by Art 4 to "ensure that all acts of torture are offences under its criminal law", irrespective of where those acts might be

			committed, to which effect is given by the creation of an offence of torture under the *Criminal Code* (Cth)[52].' (para 46). 'Whereas the definition of torture within the complementary protection regime effectively adopts the language of the definition in Art 1 of the CAT, in referring to any act "by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person", the *Criminal Code* operates to translate that language into a physical element and a fault element. The physical element of the offence of torture spelt out in the *Criminal Code* is relevantly that a perpetrator "engages in conduct that inflicts severe physical or mental pain or suffering" on a victim[53]. The corresponding fault element spelt out in the *Criminal Code* is that of "intention"[54]. The requisite intention will exist in either of two scenarios. One is where the perpetrator means to engage in the conduct and means to bring about infliction of severe physical or mental pain or suffering on the victim. The other is where the perpetrator means to engage in the conduct and is aware that infliction of severe physical or mental pain or suffering on the victim "will occur in the ordinary course of events"[55].' (para 47). 'Admittedly, the two scenarios in which the requisite fault element of intention will exist are the product of application to the particular crime of torture of general principles of criminal liability set out in the *Criminal Code*. But application of those general principles of criminal liability to that crime can hardly be

			characterised as unthinking. Before insertion of the offence of torture into the *Criminal Code* by the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act* 2010 (Cth), the same general principles of criminal liability had applied**[56]** to the crime of torture as then created by the *Crimes (Torture) Act* 1988 (Cth). Those general principles of criminal liability could easily have been modified. They were not. The effect of applying them was and remains to make the mental element of the crime of torture as defined in Australia correspond with the mental element of the crime of torture as defined in the Rome Statute of the International Criminal Court**[57]**. Australia is a party to the Rome Statute and Parliament has facilitated compliance with Australia's obligations through the enactment of the *International Criminal Court Act* 2002(Cth).' (para 48). 'Whilst it might be open to Parliament to adopt one approach to the definition of torture in Art 1 of the CAT in the legislative implementation of Australia's obligation under Art 3 of the CAT and another approach to the same definition in the legislative implementation of Australia's obligation under Art 4 of the CAT, for Parliament actually to do so would be strangely inconsistent. No reason appears for thinking that Parliament would have done so. In particular, no reason appears for attributing to Parliament a legislative intention to take a narrower view of torture for the purpose of protecting the victim than the view of torture it has expressly spelt out for the purpose of punishing

			the perpetrator.' (para 49). 'Turning from the definition of torture within the complementary protection regime to the definitions of cruel or inhuman treatment or punishment and of degrading treatment or punishment respectively, there is no reason to think that Parliament adopted the same word or a cognate word in definitions introduced at the same time as part of the complementary protection regime yet intended that word to have a different meaning. The underlying notion of intention in each of the three definitions must be the same.' (para 50). 'There is another and somewhat broader contextual reason to think that the wider notion of intention is appropriate. It lies in the scope of Art 7 of the ICCPR, to which the definitions of cruel or inhuman treatment or punishment and of degrading treatment or punishment are directed.' (para 51). 'The proscription in Art 7 of the ICCPR that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" is mirrored in the proscription in Art 3 of the European Convention on Human Rights that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". In *Kalashnikov v Russia*[58], the European Court of Human Rights concluded that Art 3 had been violated by the gaoling of a prisoner for a long period in overcrowded and unsanitary conditions resulting in an adverse effect on his physical health. In reasoning to that conclusion, the European Court

			accepted that there had been "no indication that there was a positive intention of humiliating or debasing" the prisoner, saying that "although the question whether the purpose of the treatment was to humiliate or debase [the prisoner] is a factor to be taken into account, the absence of any such purpose cannot exclude a finding of violation of Art 3"[59].' (para 52). 'Treating the reasoning in *Kalashnikov v Russia* as transferable to Art 7 of the ICCPR, that reasoning indicates that a positive intention on the part of the perpetrator to bring about cruel, inhuman or degrading treatment or punishment is not essential to the occurrence of a violation. The reasoning indicates in turn that the introduction of the concept of intention into the statutory definitions of cruel or inhuman treatment or punishment and of degrading treatment or punishment might in some cases produce a result in which a victim of cruel, inhuman or degrading treatment or punishment would be denied complementary protection in circumstances in which Australia's protection obligation under Art 7 of the ICCPR would be engaged. That the introduction of the concept of intention narrows the scope of complementary protection provides no reason for treating the particular notion of intention that is incorporated into the definitions as a narrow one. To the contrary, it confirms the appropriateness of understanding the sense in which intention has been invoked to be a wide one.' (para 53). 'The circumstances of the prisoner who was the victim in *Kalashnikov v Russia* can be treated as illustrative of

			the circumstances of a person who would come within the scope of Australia's protection obligation under Art 7 of the ICCPR. What the illustration shows is that to understand the underlying notion of intention in each of the three statutory definitions as met where a perpetrator acts with awareness that the consequence to the victim will occur in the ordinary course of events is to adopt a construction which allows the statutory criterion for the grant of a protection visa better to meet Australia's obligation under Art 7 of the ICCPR, and which for that reason best achieves the purpose for which the complementary protection regime was introduced.' (para 54). 'For the reasons given, I consider that the view of intention endorsed by the plurality in the Full Court and now endorsed by the majority in this Court is too narrow. On the construction of the definitions I think to be preferable, the requisite intention will exist in either of two scenarios: where the perpetrator means to engage in conduct meaning to bring about the result adverse to the victim; and where the perpetrator means to engage in conduct aware that the result adverse to the victim will occur in the ordinary course of events.' (para 58). 'I would allow each appeal and make the consequential orders sought by the appellants.' (para 59).

FEDERAL COURT OF AUSTRALIA

Case	Decision date	Relevant paragraphs	Comments
Minister for Immigration and Border Protection v CRY16 [2017] FCAFC 210 (Robertson, Murphy and Kerr JJ) (Successful)	14 December 2017	6, 76, 81-82	This case concerned the Immigration Assessment Authority's (IAA) discretion to request new information. The Court found that the IAA had acted unreasonably in not considering whether to give the respondent an effective opportunity to address the issue of relocation which had not been considered previously by the delegate and was a dispositive issue. 'The Authority found the respondent's fear of harm from sectarian violence did not relate to all areas of Lebanon and that he could relocate to Beirut where he would not face a real chance of persecution for any Refugees Convention reason (cf s 5J(1)(c)). This meant that the respondent was not a refugee: s 5H(1).Similarly, in relation to the respondent's claims for complementary protection, the Authority found that, as a Sunni, the respondent faced a real risk of significant harm in his place of habitual residence but that the real chance of harm did not extend to all areas of Lebanon, namely to Beirut. He could reasonably relocate to Beirut where he would not face a real risk that he will suffer significant harm (cf s 36(2B)(a)).' (para 6). 'The Authority knew or must be taken to have known that the question of relocation had not been considered by the delegate. The Authority must also have been taken to have known that the question of relocation

			depended on the particular circumstances of the respondent. As found by the primary judge, there was nothing in the interview with the delegate that concerned the question of relocation. The transcript of that interview is before the Court and we agree with that finding.' (para 76). 'We do not accept the Minister's submission that where there is a new situation in the referred applicant's country of nationality, or if new information were obtained that meant there was a complete change of circumstances in the referred applicant's country of nationality after the delegate's decision, there was no obligation on the Authority to consider whether to bring it to the referred applicant's attention. We understood this submission to mean that those circumstances could not give rise to legal unreasonableness.' (para 81). 'Our conclusion is that it was legally unreasonable, in the circumstances, not to consider getting documents or information from the respondent. The legislature is to be taken to intend that the Authority's statutory power in s 473DC will be exercised reasonably. The failure to consider the exercise of that discretionary power lacks an evident and intelligible justification in circumstances where the Authority knew that it did not have, but the respondent was likely to have, information on his particular circumstances and the impact upon him of relocation to Beirut. The Authority did not have that information because the question of relocation, either at all or to Beirut, was not explored, or the subject of findings, by the delegate. The Authority's failure to

			consider the exercise of that discretionary power meant that it disabled itself from considering what was reasonable, in the sense of "practicable", in terms of relocation. In our opinion, as a consequence, the review by the Authority under s 473CC miscarried for jurisdictional error.' (para 82).
Minister for Immigration and Border Protection v BBS16 [2017] FCAFC 176 (Kenny, Tracey and Griffiths JJ) (Unsuccessful)	10 November 2017	16, 23, 44-45, 47-50	This case concerned the extent to which the terms of the ICCPR are relevant to a complementary protection assessment. 'Thirdly, the primary judge found that the IAA fell into error, with particular reference to its consideration of the first respondent's claim to complementary protection. It is desirable to set out [75] of the primary judge's reasons for judgment which contains his Honour's reasoning for this conclusion: Nevertheless, I accept that the IAA fell into error, in particular in considering the applicant's claim to complementary protection. The IAA appeared to accept the country information from DFAT and the UK Home Office that Arabs were subject to significant harm if they asserted political, economic and cultural rights. The IAA's finding that the applicant had not and would not publicly agitate in support of such rights was not a complete answer to the applicant's claim to complementary protection. The IAA needed to consider whether the denial of such rights by the Iranian state involved a relevant breach of the International Covenant on Civil and Political Rights (ICCPR) such that the mere act of asserting those rights would expose a person to a real risk of significant harm. This, in my

			opinion, necessarily involved a dual consideration of, first, whether there was a relevant denial of rights under the ICCPR and, secondly, whether the applicant's non exercise of those rights was a consequence of that denial, and because of the risk of harm resulting from an attempted exercise of them.' (para 16). 'In support of ground 2, which relates to the primary judge's identification of error by the IAA in respect of the complementary protection claim, the Minister submitted that the primary judge made the following three errors: (a) The terms of the ICCPR were not relevant to the determination of the first respondent's claims for complementary protection under s 36(2)(aa) of the *Act*, which does not directly incorporate any international convention or treaty into Australian domestic law. That provision contains an exhaustive definition of the phrase "significant harm" and the definitions and text of s 36(2)(aa) indicate that the Parliament did not intend by those provisions to implement in their entirety Australia's obligations under, relevantly, the ICCPR. This was said to be consistent with *MZYYL* at [18]-[20] and also with the observations of Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 (***SZTAL***) at [1]-[5] in explaining that the text of the *Act* is not the same as that which is used in the ICCPR.

			(b) It was wrong of the primary judge to have assumed that the reasoning in *Appellant S395/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] HCA 71; 216 CLR 473 (***S395***) applied to s 36(2)(aa). That is because, in contrast with s 36(2)(a), the complementary protection provision does not operate by reference to the traits or characteristics of a particular person. Furthermore, s 36(2)(aa) requires that the real risk that must be established has to arise as a necessary and foreseeable consequence of the protection visa applicant's removal from Australia to a receiving country. Accordingly, a risk of harm that arises only because of some choice by such an applicant upon being returned to his or her country of origin is not a necessary consequence of that person's removal. Rather, the risk arises from the person's own conduct and choice. Thus, any risk of harm to the first respondent would not necessarily follow as a result of his being returned to Iran, but would only arise if and when he chose to engage in such conduct… (c)…' (para 23). 'For the following reasons, ground 2 of the notice of appeal should be upheld. The primary judge was wrong to conclude in [75] that the IAA needed to consider whether the denial of the first respondent's political, economic and cultural rights involved a relevant breach

			of the ICCPR.' (para 44). 'The particular significance which the primary judge attached to the ICCPR was inconsistent with several binding authorities. These authorities make it clear that, although some aspects of the ICCPR were incorporated into domestic law by operation of some provisions in the *Act*, the ICCPR has not been incorporated in its entirety. The primary judge's reasoning at [75] reveals that his Honour took a much broader view of the relevance of the ICCPR to the first respondent's claim for complementary protection. With respect, his Honour's view was inconsistent with at least three decisions of the Full Court of this Court and the High Court's recent decision in *SZTAL* (which post-dates his Honour's decision).' (para 45). 'In *SZSWB* at [30], a Full Court constituted by Gordon, Robertson and Griffiths JJ followed the approach in *MZYYL* in emphasising that the "starting point" in respect of a claim for complementary protection is the words of the legislation, particularly those in s 36(2)(aa).' (para 47). '*MZYYL* was then applied by another Full Court (Kenny, Buchanan and Nicholas JJ) in *SZTAL v Minister for Immigration and Border Protection* [2016] FCAFC 69; 243 FCR 556. In that decision, the Full Court rejected the appellants' submission that *MZYYL* was plainly wrong. The Full Court did not accept the appellants' contention that the jurisprudence concerning Art 7 of the ICCPR (or the equivalent

			provision in Art 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (opened for signature 4 November 1950. 213 UNTS 221 art 4(2). (entered into force 3 June 1952)) assisted in resolving the meaning of some contested definitions relating to complementary protection in s 5(1) of the *Act*. Their Honours stated at [61] that, while it was true to say at a general level that the statutory complementary protection regime was enacted to give effect to Australia's obligations under several international instruments, including the ICCPR, the relevant definitions in the Act "show that the Parliament did not intend by these provisions to implement the relevant obligations under ... the ICCPR in their entirety". Where, however, the statutory regime adopts the standards of an international treaty, it is necessary to consider the relevant treaty provisions and relevant jurisprudence (at [65]).' (para 48). 'On appeal, a similar approach was taken by the High Court in *SZTAL*, which is summarised in [42] above.' (para 49). 'For these reasons, in our respectful view, the primary judge erred in the emphasis he gave to the ICCPR in [75] of his Honour's reasons for judgment. It is important to note that this paragraph was primarily directed to the first respondent's claim for complementary protection…' (para 50).
Steyn v Minister for Immigration and Border	25 September 2017	1, 11-12, 15-20	This is a visa refusal decision under section 501(2) where the Federal Court refused to distinguish *BCR16 v*

Protection [2017] FCA 1131 (Successful)			*Minister for Immigration and Border Protection* [2017] FCAFC 96 (see below). Therefore, the decision in *BCR16* applies to 501(2) cases as well. 'The principal issue in this matter is whether *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96 should be distinguished. If not, as a single judge, I am bound to apply the same reasoning with the consequence that the Minister's decision to cancel the applicant's visa under s 501(2) of the *Migration Act 1958* (Cth) must be set aside.' (para 1). '**First**, it was submitted that the requirement for the Minister to form a state of satisfaction in s 501CA(4) was central to the majority's conclusion in *BCR16*, does not exist under s 501(2) which involves a broad discretionary power. I disagree. While Bromberg and Mortimer JJ characterised the error in multiple ways it is apparent that at least one basis was a constructive failure to perform the function required by s 501CA(4) by reason simply of misunderstanding the operation of the Act, specifically that it permitted an application for a protection visa to be refused on character grounds alone without consideration of the risk of harm to which an applicant might be exposed on return to the country of their nationality.' (para 11). '**Second**, it was submitted that s 501(2) is critically different from s 501CA(4) in that under s 501(2) the Minister need not consider non-refoulement obligations (*Minister for Immigration and Border Protection v Le* [2016] FCAFC 120; (2016) 244 FCR 56) or other

			factors personal to the visa holder (*Minister for Immigration and Multicultural and Indigenous Affairs v Huynh* [2004] FCAFC 256; (2004) 139 FCR 505). Accordingly, in contrast to *BCR16* a misunderstanding of the operation of the Act in respect of what must be considered on a protection visa application, in the context of a decision under s 501(2), cannot constitute jurisdictional error.' (para 12). **'**I do not find these arguments persuasive reasons to distinguish *BCR16*. It may be accepted that ss 501(2)and 501CA(4) are different. It may be accepted that in making a decision to cancel a visa under s 501(2) the Minister is not bound to consider non-refoulement obligations (*Le*) or matters personal to the applicant (*Huynh*). But the fact remains that in both ss 501(2) and 501CA(4) the Minister is vested with the power to exercise a discretion, under s 501(2) to revoke a visa and under s 501CA(4) to cancel the revocation of a visa. Under both sections, the discretionary power is available if certain criteria are satisfied or not satisfied. While s 501CA(4)(b)(ii) includes satisfaction of the criterion that "there is another reason why the original decision should be revoked", this provision was not an essential basis for the majority's conclusion in *BCR16*. In neither *BCR16* nor the present case is the argument one of a failure to consider a mandatory matter. The reasoning in *Le* and *Huynh* respectively was confined to the question whether in making a decision under s 501(2) the Minister was bound to consider non-refoulement obligations or matters personal to the applicant. The observations in *Huynh* at [80] do not

			extend beyond the proposition that the non-mandatory consideration in that case could not become a mandatory consideration merely because the Minister happened to refer to it in the course of making the decision. So much may be accepted; but it is not the argument put in the present case.' (para 15). 'In the present case what is put is that, as in *BCR16*, the Minister made a decision to revoke the appellant's visa which, in law and fact, was based on an erroneous understanding of the operation of the Act, specifically that non-refoulement obligations must be considered in the context of a protection visa application. It is not apparent to me that there is a legitimate basis to distinguish the reasoning in *BCR16* on the basis of *Le* and *Huynh* or by references to the functional and textual differences between s501CA(4) and 501(2). In both cases, an ultimately discretionary decision, in material part, relied upon a false premise with the consequence that, in law, the discretion was not exercised at all.' (para 16). '**Third**, it was submitted that in contrast to *BCR16*, the Minister in fact considered the applicant's fears about returning to South Africa. I disagree. The purported consideration of these fears was expressly qualified at [68] of the reasons as a consideration to "the extent that these fears are not addressed through a Protection visa application".' (para 17). '**Fourth**, it was submitted that in contrast to *BCR16*, there is evidence in the present case that if the applicant

			lodges a protection visa application non-refoulement obligations will be considered. Ms Miranda Lauman, Assistant Secretary in the Onshore Protection Branch within the Department of Immigration and Border Protection, provided an affidavit in which Ms Lauman said that, in her experience, all decision-makers consider non-refoulement obligations before considering other reasons to refuse to grant a protection visa. Ms Lauman also annexed the Procedures Advice Manual 3 (**PAM 3**) which states that decision-makers must determine whether any protection obligations are engaged even if a protection visa cannot be granted. PAM 3 also states that if a delegate finds that an applicant is a refugee or engages Australia's complementary protection obligations, consideration must be given to the character test.' (para 18). 'As the applicant submitted, this evidence should not lead to a different conclusion from that in *BCR16*. For one thing, the error in *BCR16* was one of law in that the Act does not require non-refoulement obligations to be considered in the course of refusing to grant a protection visa. For another, and consistently with the reasoning in *BCR16*, it is not apparent how consideration in the context of a protection visa application which must be refused on character grounds can protect a failure to decide based on the actual operation of the Act. Nor is it apparent to me that PAM 3 is binding on decision-makers or that Ms Lauman's experience was the foundation for the assumption of the Minister in the present case that the applicant is "not prevented by s 48A of the Migration Act from making

			an application for a Protection Visa. Thus it is unnecessary to determine whether non-refoulement obligations are owed to [the applicant] or the purposes of this decision.'" (para 19). 'For these reasons I am unable to conclude that here is a legitimate basis to distinguish the decision in *BCR16*. It follows that the applicant is entitled to the relief sought.' (para 20).
ALN17 v Minister for Immigration and Border Protection [2017] FCA 726 (Kenny J) (Successful)	15 June 2017	1, 15-16, 25-29	This case follows *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96, below. 'On 27 November 2015, a delegate of the respondent (the Minister) decided to cancel the applicant's refugee visa pursuant to s 501(3A) of the Migration Act 1958 (Cth) (the Act). The applicant subsequently asked the Minister to revoke, pursuant to s 501CA of the Act, the delegate's decision to cancel his visa. On 18 January 2017, the Assistant Minister for Immigration and Border Protection (the Assistant Minister) refused to revoke the delegate's visa cancellation decision.' (para 1). 'In this case as in *BCR16*, the applicant sought a favourable exercise of the discretion in s 501CA(4) of the Act to revoke the mandatory cancellation of his visa under s 501(3A). In *BCR16*, the applicant made claims to the effect that, by reason of his minority religious status and for other reasons, his own and his family's life would be in danger if returned to Lebanon. It may be accepted that these claims directed attention to

			Australia's international obligations, including non-refoulement obligations.' (para 15). 'In the present case, the applicant made analogous claims. A letter dated 28 June 2016, which was written by Victoria Legal Aid on his behalf, noted that the applicant had been granted "a Refugee and Humanitarian visa on the basis that he was deemed to be owed protection by Australia". The letter stated that the applicant was a Christian of Assyrian ethnicity from Northern Iraq and that the "available country information on Iraq established that it has become an incredibly dangerous country for religious and ethnic minorities such as Assyrian Christians, who face persecution from both Islamic State as well as others". The letter stated that, in this context, if returned to Iraq, the applicant "would be a returnee from a western country with a long absence from Iraq"; and that "[t]his would render him extremely visible and vulnerable to persecution from Islamic [State]". The letter also noted that the province that the applicant was from in Northern Iraq had reportedly "one of the highest populations of internally [dis]placed persons (IDPs) in all of Iraq". The letter expressly submitted that the applicant was "owed protection by Australia as he has a well-founded fear of persecution in Iraq based on his Assyrian ethnicity; his Christian religion; [and] his membership of the particular social group of returnees from Western countries"; and further that he was "owed protection by Australia as there exist[ed] substantial grounds for believing that, as a necessary and foreseeable consequence of his removal from Australia,

			there [was] a real risk that he will suffer significant harm in Iraq, in that he may be arbitrarily deprived of his life; or be subjected to torture; or cruel or inhuman treatment or punishment; or degrading treatment or punishment".' (para 16). 'In the present case, the Assistant Minister also misunderstood the likely course of decision-making under the Act. There is no relevant difference between the circumstances of the appellant in *BCR16* and the applicant here. It was noted that the briefing note for the Minister in the applicant's case was slightly different in its terms. Importantly, however, it provided no analysis as to whether or not the Assistant Minister might consider the issue of Australia's non-refoulement obligations in the exercise of the discretion in s 501CA(4). Under the heading "International non-refoulement obligations" the briefing note merely stated: [The applicant's] legal representative submits [the applicant] was granted a Refugee and Humanitarian visa on the basis he was deemed to be owed protection by Australia. It is submitted that [the applicant] "has well-founded fear of persecution in Iraq on the basis of his Assyrian ethnicity, his Christian religion and his membership of the particular social group of returnees from Western countries". [The applicant's] legal representative also submits that [the applicant] would "suffer significant harm" if returned to Iraq and "he may be arbitrarily deprived of his life, or be subjected to torture or cruel and inhuman treatment or

			punishment, or degrading treatment". It is also submitted [the applicant] is of Assyrian ethnicity, he is Christian and is from [a province] which is in the far Northern part of Iraq and has the highest populations of internally displaced persons in the world. It is further submitted that while [the applicant] may have the "right to apply for a protection visa there is no guarantee that a visa will ultimately be granted". As counsel for the applicant submitted, there is nothing in the briefing note that contradicts the statement in the Assistant Minister's reasons that it was unnecessary to determine whether non-refoulement obligations were owed to the applicant for the purposes of making a decision under s 501CA(4) because the applicant could make application for a protection visa, when this issue would arise for consideration.' (para 25). 'In this case, as Bromberg and Mortimer JJ stated in *BCR16* at [68]: There is no evidence of consideration of the course of decision-making on a protection visa application made by a person in the appellant's position: that is, a person whose visa had been cancelled under the mandatory terms of s 501(3A), and a person whom the Assistant Minister had personally decided should not be subject to a favourable revocation decision under s 501CA, because of the risk of harm he posed to the Australian community. The Assistant Minister's reasons do not advert to the character criteria for a grant of a protection visa. Her reasons disclose no consciousness that the

			appellant's protection visa application may be required to be refused because of non-satisfaction of character criteria, so that considerations of risk of harm might never be reached.' (para 26). 'It is plain enough that the applicant's case is not materially distinguishable from *BCR16*; and it follows that in this case too the Assistant Minister misunderstood the effect of the relevant provisions of the Act and misunderstood "the course of any consideration of a protection visa application made by the appellant, and that issues concerning risk of harm might never be reached": see *BCR16* at [66].' (para 27). 'The applicant's case that there was jurisdictional error in the Assistant Minister's decision as identified in ground 2 was made out; and for this reason the Court made the orders it did after the hearing last week.' (para 28). 'I note that, as in *BCR16* so in this case, a second misunderstanding of the law on the Assistant Minister's part was also said to arise. This was that s 197C of the Act would also relevantly preclude any consideration of non-refoulement obligations. The applicant in this case contended that it was incumbent on the Assistant Minister to turn his mind to s 197C in the event of any refusal to revoke the visa cancellation decision but that his reasons indicated that he did not do so and, in consequence, that he misunderstood the relevant law. In *BCR16* Bromberg and Mortimer JJ declined to rule on this submission, on the basis that it should await an

			appropriate case for consideration. So too, it being unnecessary to do so, I would not rule on this submission in this case.' (para 29).
BCR16 v Minister for Immigration and Border Protection [2017] FCAFC 96 (Full Court: Bromberg, Davies and Mortimer JJ) (Successful – Bromberg and Mortimer joint judgment).	13 June 2017	20, 35-37, 42-46, 69-73, 86-92, 94	The case related to the correct approach to be taken to the exercise of the discretionary power in s 501CA(4) of the Migration Act, where the person raises a fear of harm in their home country as a reason for revocation of a mandatory cancellation of their visa. The Full Court comments on the nature of *non-refoulement* obligations in the revocation discretion as opposed to s36 of the Migration Act and the grant of visas under s 65 and 36(2)(a) and (aa) of the Migration Act. 'Those amended grounds were: 1. The Court erred by failing to conclude that the Assistant Minister denied the Appellant procedural fairness, constructively failed to exercise her jurisdiction, or otherwise failed to carry out her statutory task, by failing lawfully to consider a 'reason' claimed by the Appellant as to why the Delegate's visa cancellation decision should be revoked. .... 2. The Court erred by failing to conclude that the Assistant Minister denied the Appellant procedural fairness, constructively failed to exercise her jurisdiction, or otherwise failed to carry out her statutory task, by failing lawfully to consider a 'reason' claimed by the Appellant as to why the Delegate's visa cancellation decision should be revoked. Further or

			alternatively, the Assistant Minister failed to take into account the Act and its operation in making her decision, or misunderstood the Act and its operation in making her decision.' (para 20). 'In oral submissions, counsel for the appellant developed this argument by submitting that the use of the word "thus" in [19] of the Assistant Minister's reasons indicated a connection in the Assistant Minister's reasoning between the premise (that the appellant has capacity to apply for a protection visa) with the Assistant Minister's conclusion (that it was unnecessary to determine non-refoulement). That connection was said to be the assumption that non-refoulement obligations will be examined during the protection visa determination process. The appellant contends that is wrong as a matter of law and has not been proven as a matter of fact by the Minister.' (para 35). 'Although the appellant accepts that the criteria for a protection visa at the relevant time specified in s 36(2) of the *Migration Act* were intended, at least in part, to give effect to Australia's non-refoulement obligations under the Refugees Convention, and under the CAT (*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987)) and the ICCPR (*International Covenant on Civil and Political Rights*, opened for signature 16 December 1996, 999 UNTS 171 (entered into force 23 March 1976)), he submits

			that there was, at the time of the Assistant Minister's decision, nothing in the Act or in the *Migration Regulations 1994* (Cth) which governed the manner in which the Minister (or the Minister's delegates) were required to consider whether the criteria for a protection visa were satisfied, for the purposes of the task in s 65 of the *Migration Act*. There was, he submitted, nothing to govern the order in which the criteria needed to be considered. The logical consequence, the appellant submitted, was that the Minister and the Minister's delegates were free to decide the manner in which a protection visa application would be considered, the steps taken in that consideration, and the order in which criteria for a protection visa would be evaluated.' (para 36). 'That submission should be accepted.' (para 37). 'Thus, the Act envisages non-satisfaction of health criteria could result in a duty to refuse a visa. There is nothing in the scheme to prevent or preclude health criteria being examined first.' (para 42). 'Pertinently there is also nothing in the legislative scheme to prevent the character criteria to which s 65(1)(a)(ii) refers being considered first. The Minister or the Minister's delegates could decide to examine, first, the criteria in public interest criteria 4001 (which applies by reason of cl 866.225 of Schedule 2 to the Migration Regulations…' (para 43). 'The appellant's protection visa application could therefore be refused under s 65 purely on character

			grounds pursuant to public interest criteria 4001 (a) or (b), and the Minister or the Minister's delegate would, lawfully, never reach active consideration of the criteria in s 36(2)(a) and (aa), nor would the s 501(1) discretion ever have been engaged.' (para 44). 'Likewise, s 36(1B) and (1C) are also mandatory criteria…' (para 45). 'Neither of these criteria involve any consideration of the protection obligation criteria in s 36(2) of the Act.' (para 46). 'A person in the appellant's position would be applying for a protection visa in a very particular set of circumstances. The scheme of the Act intends that a person in his position be subject to automatic cancellation of his current visa on character grounds, and that he be compelled to seek a favourable exercise of discretion to have it reinstated. A person in his position has failed to persuade the Assistant Minister such a course should be taken because the Assistant Minister has given primary weight to character concerns and the risk posed by the appellant, in the Assistant Minister's opinion, to the Australian community. In order for the scheme of the Act to retain any integrity and consistency, those particular considerations would inevitably intrude on any decision-making process in relation to an application for a protection visa. The Assistant Minister's reasons disclose no awareness of this.' (para 69).

			If contrary to the opinion we have expressed above, there was no misunderstanding by the Assistant Minister of the course any application for a protection visa by the appellant could be likely to take, we would in any event accept the appellant's alternative submission that an error of the kind identified by Robertson J in *Goundar* is present in the Assistant Minister's reasoning process.' (para 70). 'Both the briefing note, and the Assistant Minister's reasons, move immediately to describing the relevant issue as "whether non-refoulement obligations are owed to [the appellant]". We respectfully agree with Robertson J in *Goundar* that the harm comprehended by such obligations, whether under the Refugees Convention or under CAT and the ICCPR, does not describe the universe of harm which could be suffered by a person on return to her or his country of nationality. Rather, those international instruments are directed at state parties' obligations to avoid particular kinds of harm befalling a person who may be returned to her or his country of nationality (and in the case of the Refugees Convention, for particular reasons).' (para 71). 'Here, as we have noted several times in these reasons, the appellant did not describe the harm he feared by reference to "non-refoulement". It may well be the case that the harm he identified was not viewed as having a sufficient likelihood to bring him within either kind of international protection obligations. Or, it may be the nature of the harm he feared was necessarily outside

			either kind of international protection obligations. The Assistant Minister's reasons disclose no understanding of those possibilities. Rather, her reasons betray two misunderstandings: first that the appellant was identifying non-refoulement obligations as a concept when he had not; and second that the harm he feared was necessarily within that protected by Australia's international non-refoulement obligations. Whether or not the harm the appellant feared had a "private quality" as the harm identified in *Goundar*, there were other reasons it might be harm outside the kind covered by Australia's international non-refoulement obligations. Nevertheless, the harm as the appellant expressed it was put forward by him as a "reason" the Assistant Minister should revoke the cancellation. She did not consider it. Her failure to do so flowed from the misunderstandings we have identified and is properly characterised as an error of a jurisdictional kind because it went to the lawful discharge of her task.' (para 72). 'We reject the Minister's submission that it is enough to avoid error on the part of the Assistant Minister that there was a "real possibility" the risk of serious or significant harm to the appellant might be addressed during consideration of any protection visa application he made. There are several reasons for this. First, as we have noted above, the kind of harm identified by the appellant was not restricted to harm as that concept is understood in either set of domestic protection obligations, or in either kind of international non-refoulement obligations. Second, as we have noted above, the role of the consideration of whether serious

			or significant harm might befall the appellant in Lebanon (for Convention or non-Convention related reasons) has a quite different place in a discretionary decision about revocation, to the place it may have, if reached, in a protection visa assessment. In the former, it need not have any particular quality to affect the exercise of discretion – the weight of the prospect of harm is a matter for the Assistant Minister rather than part of any fixed visa criterion. That is in stark contrast to the role these matters play under s 65 of the Act.' (para 73). 'It is true that the Full Court in *Le* then said, at [60]: To sum up, we do not consider that there is any material inconsistency in the Full Court decisions referred to above. These decisions illustrate the potential complexity of the issues. There is a potentially wide range of factual circumstances which can arise when consideration is being given to the exercise of the significant powers in s 501(1) and (2). Those factual circumstances may relate to the individual's personal circumstances, which can themselves vary enormously. The matter is further complicated by the possibility that the individual's legal status as an unlawful non-citizen (which necessarily flows from the cancellation decision and the operation of s 501F) might change because, for example, the person has a right to apply for another visa, including a protection visa. The consideration of any such subsequent protection visa application will require an assessment of Australia's non-refoulement obligations and the prospects of the person being detained indefinitely. Another relevant factor is

			whether, at the time of considering the exercise of the powers in s 501(1) or s 501(2), there is any material which is relevant to the likelihood of the Minister exercising his or her personal powers under provisions such as s 195A to grant the person a visa (even in the absence of a visa application) which would have the effect of bringing to an end that person's detention and displace the duty to remove the person under s 198. Another relevant matter is the operation of s 197C of the Migration Act, which makes plain that Australia's non-refoulement obligations are not a relevant consideration when an officer comes to discharge the statutory duty imposed by s 198 to remove an unlawful non-citizen as soon as reasonably practicable. Necessarily, therefore, to the extent that that issue is material it must be addressed at an earlier stage in the decision-making process.' (para 86). 'The statement in the middle of that paragraph ("[t]he consideration of any such subsequent protection visa application will require an assessment of Australia's non-refoulement obligations and the prospects of the person being detained indefinitely") must be read in the context of the entire paragraph. Arguments such as those put in this appeal were not put to the Full Court in *Le*, and their Honours' obiter use of the phrase "*will* require an assessment" should be understood in that light.' (para 87). 'Further, the context of *NBMZ* and the cases to which the Full Court referred in *Le* was whether the exercise of a discretionary power (refusal or cancellation of a

			visa under s 501(1) or (2)) was conditioned by a mandatory consideration: namely, the legal consequences (and, at least per North J at [107] in *Cotterill*, the "practical" consequences) for a particular person of exercising the discretion to refuse or cancel a visa. Indefinite detention as a legal consequence was identified, in the particular case, as a real possibility and thus formed part of the relevant consideration.' (para 88). 'The possibility, in some cases, of a further visa application in the form of a protection visa application was raised in the passage extracted from *Le* at [88] above as a factual circumstance which, in a given case, may affect whether and how the spectre of indefinite detention is to be taken into account as a "mandatory" relevant consideration.' (para 89). 'That is expressly not the context in which the appellant's contentions are framed. This is not an appeal about mandatory considerations, and what facts or evidence may need to be taken into account by a decision-maker where such a consideration arises. We do not understand any of the authorities expressly to identify Australia's international non-refoulement obligations as part of the now established mandatory consideration of "the legal consequences" of a refusal or cancellation under s 501(1) or (2). Indeed, the Minister's argument is quite the opposite. The courts in these cases were simply not asked to grapple with the argument now put to this Court: namely that the legislative scheme which centres on s 65 does not

			require the s 36(2)(a) and (aa) criteria to be addressed in considering a protection visa application if a decision-maker elects to consider other criteria first, and finds other criteria not satisfied. At that point the duty to refuse crystallises, and may do so without s 36(2)(a) and (aa) having been addressed at all, or without having addressed in particular what might be comprehended by the phrase "Australia's non-refoulement obligations", itself a difficult phrase within the scheme of Act as it now exists, including s 197C .' (para 90). 'Although refusal on character grounds under s 501 is contemplated by s 65(1)(a)(iii) as one of the circumstances which would "prevent" the grant, relevantly, of a protection visa, and thus might be thought indirectly to incorporate into the assessment under s 65 of the matters now found to be mandatory considerations under s 501 (i.e. the legal consequences of refusal or cancellation on character grounds), this only serves to confirm the point we are seeking to explain. A decision-maker who is determining whether to refuse a protection visa under s 501(1) on character grounds must, the authorities ending with *Le* tell us, take into account the legal consequences of such a refusal which may – in a given case – include a person being held in indefinite detention. Why a person may be detained indefinitely may vary – as *Cotterill* demonstrates, and may or may not have anything to do with risks of harm in a person's country of nationality. It may, for many such persons, be because they are stateless and there is nowhere to return

			them to. It is not possible, even through the terms of s 65(1)(a)(iii) read with s 501(1), to find that the risk of harm to a person which by the Refugees Convention, CAT or the ICCPR Australia is obliged at international law to avoid, will necessarily fall for active consideration by the decision-maker.' (para 91). 'Therefore, the ratio of *Le* and the cases which precede it concerning s 501(1) does not alter our opinion about the nature of the jurisdictional error made by the Assistant Minister in her decision about the appellant.' (para 92). 'Nor are any of the cases ending with *Le* concerned with a discretionary revocation under s 501CA, where possible future harm was put forward by a person as "another reason" for revocation, for the purposes of s 501CA(4). That matter alone marks out decisions under s 501CA from this line of authority. These factors combine to render the line of authority culminating in *Le* distinguishable from the present circumstances of the appellant.' (para 94).
AVU15 v Minister for Immigration and Border Protection [2017] FCA 608 (Bromberg J) (Successful)	1 June 2017	3, 10-16, 19-23	The case evidenced a failure of the Tribunal to consider a claim raised by the applicant that a brief period in detention on return to Sri Lanka may amount to 'significant harm'. 'The statutory task of the Tribunal was to consider the claims expressly made by the appellant or which clearly arise on the material before the Tribunal: *NABE v Minister for Immigration and Multicultural and*

			Indigenous Affairs (No 2) [2004] FCAFC 263;(2004) 144 FCR 1 at [61]–[63] (Black CJ, French and Selway JJ). An apparent claim includes a claim in fact appreciated by the Tribunal: *NAVK v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1695 at [15] (Allsop J).' (para 10). 'It is not in contest that the valid consideration of a claim required the Tribunal to give it proper, realistic and genuine consideration (*Khan v Minister for Immigration and Ethnic Affairs* [1987] FCA 713 (Gummow J)), however in making any such assessment a Court must exercise caution that its scrutiny does not slip into impermissible merits review: *Minister for Immigration and Citizenship v SZJSS* [2010] HCA 48; (2011) 243 CLR 164 at [26]–[33] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ). What was required was a genuine and active intellectual engagement by the Tribunal with the claim: *Lafu v Minister for Immigration and Citizenship* [2009] FCAFC 140 at [49] (Lindgren, Rares and Foster JJ).' (para 11). 'If the Tribunal's written reasons had grappled with the contentions put in support of the claim and, in accordance with the requirements of s 430 of the Migration Act, set out the findings on material questions of fact and the evidence or other material on which those findings were based, it could not have been doubted that the claim was duly considered. However, the inverse conclusion does not necessarily follow. The fact that the reasons of a decision-maker fail to grapple

			with contentions and evidence addressing a claim or issue do not lead to the automatic conclusion that the claim was not considered. As I explained in *Alexander v Australian Community Pharmacy* Authority (2010) 233 FCR 575 at [84]–[89], it may be the case that inadequate reasons reflect an inadequate recording of what was considered rather than establish that the claim was inadequately considered. All of the circumstances need to be taken into account.' (para 12). 'The choice between competing inferences will be influenced by the statutory context in which the decision was made and the reasons prepared. Where, as here, the decision-maker was required by law to provide reasons, the statement of reasons "generally will (subject to a contrary finding of fact), be taken to be a statement of those matters adverted to, considered and taken into account; and if something is not mentioned, it may be inferred that it has not been adverted to, considered or taken into account": *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38; (2014) 220 FCR 1 at [16] (Allsop CJ and Katzmann J) citing *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; (2001) 206 CLR 323 at [5] (Gleeson CJ), [37] (Gaudron J), [69], [89] (McHugh, Gummow and Hayne JJ) and [133] (Kirby J).' (para 13). 'In *Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 184; (2003) 236 FCR 593, French, Sackville and Hely JJ recalled (at [46]) that it is unnecessary for a tribunal

			in its written reasons to refer to every piece of evidence and every contention made, and that a tribunal is not a court and that its reasons are not to be scrutinised with an eye keenly attuned to error. At [47] their Honours said this: The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with that issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point. It may be that it is unnecessary to make a finding on a particular matter because it is subsumed in findings of greater generality or because there is a factual premise upon which a contention rests which has been rejected. Where however there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference that it has been overlooked.' (para 14). 'Dealing with the particular circumstances of that case, their Honours (at [49]) determined that although the tribunal had recounted the impugned claim early in its reasons "its failure to consider the evidence and the contention [led] to the inescapable conclusion that it failed to address the issue".' (para 15). *'MZYPW v Minister for Immigration and*

			Citizenship [2012] FCAFC 99 is a further authority of relevance. In that case, despite the decision-maker's reasons referring to the claim as part of its dispositive reasoning, Flick, Jagot and Yates JJ determined that the claim had not been considered or resolved. Flick and Jagot JJ held (at [19]) that the decision-maker's reference to the claim was made in the context of recording a submission and that the resolution of the submission was left unstated. Their Honours concluded at [20] that issues relevant to the assessment of the claim were not taken into account. Yates J (at [38]) concluded that although the decision-maker's reasons stated that the submission was "considered", it had, in fact, been "simply side-stepped". (para 16). 'Before the primary judge the appellant pressed two grounds of review. Whilst two grounds of appeal were included in the appellant's Notice of Appeal in this Court, the appellant, who was legally represented, pressed only the second ground of appeal. That ground mirrors the second ground of review dealt with by the primary judge. That appeal ground is as follows: The primary judge erred in finding that the decision of the Tribunal was not affected by jurisdictional error on the basis that the Tribunal failed to consider, in the sense of have genuine and active intellectual engagement with, the applicant's claim, or submission, or argument, or evidence, that being detained for any period of time in a Sri Lankan prison may amount to serious or significant harm.' (para 3). 'Read fairly and in its entirety, the submission made by

			RILC was sufficient to have raised the claim that as a consequence of his illegal departure, the appellant, if remanded, may face the risk of significant harm as a consequence of prison conditions in Sri Lanka and that the complementary protection criteria specified in s 36(2)(aa) of the Migration Act were thereby engaged. As I will explain, the Tribunal's reasons, when read in the context of the submissions made by the appellant, acknowledge the making of that claim. I am satisfied that the impugned claim was made.' (para 19). 'Returning to the last four sentences of [106] of the Tribunal's reasons, read against the background of the submissions, I take the Tribunal in the first three of those sentences to have accepted the appellant's claim that he will be charged and convicted under the *Immigrants and Emigrants Act*, but to have rejected the appellant's primary submission that he will be sentenced to incarceration. Instead, the Tribunal determined that the appellant would likely be convicted and fined but acknowledged that prior to that the appellant "may be detained or gaoled for up to a few days". In other words, the Tribunal accepted that the appellant may be detained on remand for up to a few days. Having said that, the Tribunal then said this: The Tribunal has also considered the conditions of detention or imprisonment for a brief period.' (para 20). 'That sentence, it appears to me, acknowledges the Tribunal's understanding that the conditions of detention, if the appellant were to be remanded, were

			claimed by the appellant to constitute significant harm. That understanding is not inconsistent with [81] of the Tribunal's reasons, where the Tribunal summarised the appellant's submissions to include "claimed complementary protection because of ... [d]egrading treatment or punishment".' (para 21). 'The last sentence of [106] is to be understood as the Tribunal stating that the impugned claim was considered. Although not expressly stated, given that the Tribunal affirmed the delegate's decision not to grant the appellant a protection visa, the sentence must also be taken as intending to record the Tribunal's rejection of the claim. Given its placement within the Tribunal's dispositive reasoning, the last sentence of [106] may be fairly read as saying that the Tribunal has considered the conditions of detention for a short period but does not accept that there is a real risk that the appellant will suffer significant harm for that reason. Nothing else is otherwise said in the Tribunal's reasons about the impugned claim. Subject to one suggested explanation given by the Minister to which I will return, why the claim was rejected is left unexplained. Not only do the reasons fail to demonstrate that the claim was grappled with intellectually, the reasons also fail to recount either the evidence or the contentions made in support of the claim. The claim may have been subsidiary to the primary claim that the appellant would be sentenced to imprisonment, but it was not dependent on or subsumed by the primary claim such that the rejection of the primary claim necessitated the rejection of the subsidiary claim, and the submissions in support

			of it were not so insubstantial or so obviously untenable as to be deserving of dismissal without some explanation. There is no fact that the Minister has pointed to which provides a contrary indication to the inference available on the face of the reasons that the impugned claim was not the subject of proper and genuine consideration. On balance, the preferable inference, taking into account the importance of the issue in question, is that the claim was not considered in a manner consistent with the Tribunal's statutory task. That suffices to demonstrate jurisdictional error.' (para 22). 'In arriving at that conclusion, I do not accept the Minister's contention that the last sentence of [106] implies the basis for the rejection of the claim. The Minister contended that the reference to "a brief period" of detention should be understood as giving the Tribunal's reason for concluding that the appellant did not face a risk of significant harm caused by the conditions of detention in Sri Lanka. That is, because detention for "a brief period" is insufficiently severe to amount to significant harm. That is a strained reading of the sentence in question. On an ordinary or plain reading, the sentence sets out the nature of the claim said to have been considered rather than the basis for its rejection. Whilst it is appropriate to read the Tribunal's reasons generously and whilst the brevity of any detention may have been a rational basis for the rejection of the claim, in the face of the language actually utilised by the Tribunal, the Minister's contention is simply speculative. That is illustrated by

			the fact that a number of variables, including the severity or nature of the harm or the presence of the necessary intention, may each be determinative of a finding that claimed harm does not amount to "significant harm". As I have said, I accept that the sentence does more than simply advert to the making of the claim. Implicitly, the sentence must be read as a rejection of the claim. That explains its placement in the dispositive reasons of the Tribunal. However, the Minister's suggestion that that placement is supportive of providing the reason for the rejection overstates the inference available to be drawn.' (para 23).
AEK16 v Minister for Immigration and Border Protection [2017] FCA 625 (Mortimer J) (Unsuccessful)	1 June 2017	17, 22, 30-32, 34	The FCA found no error in the Tribunal's finding that discrimination in the form of denial of transport and vendors' refusal to sell goods and services did not amount to 'significant harm'. 'The appellants' ground of appeal in this Court is expressed in the following way: Grounds of appeal 1. His Honour erred at paragraphs [27] & [28]: (a) By finding that the Second Respondent considered, other than by a conclusory statement, whether the Appellants being Muslims, who were found by the Second Respondent at [36] to be subject to a range of discriminatory behaviour in Burma, had a real chance of suffering harm in the reasonably foreseeable future in their home region in Burma. (b) By failing to note that the Second Respondent referred to a UNHCR test of when discrimination will amount to persecution but failed to apply such test.

			(c) By stating that the Tribunal determined that as a matter of degree the discriminatory treatment was not sufficiently serious to bring the Appellants within the definition of Refugees for them to satisfy the complementary protection criteria. (d) By failing to find that the Second Respondent failed to deal with the denial of services in buses and taxis which was capable of supporting a finding of serious harm under s5J (5) (e) of the Migration Act 1958.' (para 17). 'Neither the submissions on behalf of the appellants, nor the submissions on behalf of the Minister developed or addressed in any detail the authorities concerning the distinction between persecution and discrimination for the purposes of the Refugees Convention. Nor did they address or develop in any detail the authorities dealing with what constitutes "significant harm" for the purposes of complementary protection…' (para 22). 'What was more obviously developed by the appellants and does appear to have been a matter raised before the Federal Circuit Court, was the asserted failure of the Tribunal to deal with the first appellant's claims that she was denied transport on buses and taxis in Yangon, Myanmar, and was denied goods and services by some vendors, thus personally experiencing discriminatory treatment because she was a Muslim. The thrust of the appellants' submission on this issue appears to be that although the Tribunal noted these claims by the first appellant as part of her overall claims, it did not, in its reasoning, turn its mind to whether there was a real

			chance or a real risk that on return to Myanmar, the appellants would again personally experience this kind of harm. I infer the submission then proceeds along the lines that without considering this claim in particular, the Tribunal consequently failed to consider whether harm of that kind was capable of constituting persecution for the purposes of the Refugees Convention or "significant harm" for the purposes of the complementary protection provisions.' (para 30). As the Federal Circuit Court noted in its reasons, the Tribunal did record these particular claims made by the first appellant at [17] of its reasons, where the Tribunal stated: The applicant then said that 'they' had received death threats from people saying they hated them (allegedly since 2011). She said they had also been abused with 'bad language' and had been hit on the street (though the applicant confirmed at the Tribunal hearing that neither she nor her husband had ever been physically assaulted). She also said they had been denied (some) transport on buses and in taxis; and that (some) vendors would not sell them products such as food and household items. She said they were discriminated against, 'as if they were third class citizens and even as slaves'. The applicant also said they saw strangers roaming around their local suburbs at regular intervals. The police do not assist; and she believed the persons she feared were connected to the police.' (para 31). 'In the summary of its findings, which I have extracted at [8] above, the Tribunal accepted that the appellants

			had experienced "some limited discriminatory treatment as Muslims in Burma, particularly since 2011". On a fair reading of the Tribunal's reasons it is clear in my opinion that what the Tribunal characterises as "some limited discriminatory treatment as Muslims in Burma" is a reference to the kind of treatment claimed by the appellants and summarised by the Tribunal at [17] of its reasons. Further, I consider it clear this is the kind of treatment which the Tribunal characterises at [36] of its reasons as a "range of discriminatory behaviour in Burma".' (para 32). 'While the Tribunal at [37] of its reasons acknowledged the first appellant found this kind of treatment distressing, it is clear that the Tribunal considered the treatment did not rise to the requisite levels to satisfy either the Refugees Convention or the complementary protection provisions. On the present state of authority and the statutory scheme, I do not consider this approach by the Tribunal discloses any obvious jurisdictional error. As I have noted, the appellants' ground of appeal did not depend on, or develop, any particular line of argument about what level of harm should be considered to constitute persecution, nor did they seek to review the Tribunal's failure to refer to s 91R and/or s 5J of the Act. Those would have been quite different challenges to the Tribunal's decision and reasons for decision.' (para 34).
BRY15 v Minister for Immigration and Border Protection [2017] FCA 600	30 May 2017	32, 35-38	This case related to the extent to which case-law of the United Nations Human Rights Committee (HRC) (the body charged to hear complaints made by victims of

(Bromwich J) (Unsuccessful)			violations of the ICCPR) must be referred to by the Minister or other decision-maker. In the circumstances of this case, the FCA found that it was not mandatory to refer to the UNHRC's case of *Portorreal v Dominican Republic*, Comm No 188/1984, UN Doc CCPR/C/OP/2 (5 November 1987), whether it was included in Ministerial Direction No. 56 or not. 'The substance of this ground of review and now of appeal is that the Tribunal failed to take into account a relevant consideration in relation to complementary protection, being the prior decision of Portorreal v Dominican Republic, Comm No 188/1984, UN Doc CCPR/C/OP/2 (5 November 1987) by the Human Rights Committee (HRC), a body established by the International Covenant on Civil and Political Rights to ensure compliance with that instrument by State parties. In that decision, the HRC's close analysis of the conditions in which a person had been detained led to its conclusion that there had been a violation of article 7 of the ICCPR, notwithstanding that the detainee's period of exposure to those conditions was no longer than 50 hours. The primary judge acknowledged that the Tribunal did not refer to that particular decision, but noted that this did not necessarily mean that the Tribunal did not consider it. His Honour assumed that the decision was referred to in the PAM3 guidelines, but given that he was not satisfied the Tribunal did not consider those guidelines, his Honour was not satisfied the Tribunal did not consider that decision.' (para 32). 'In common with Nicholas J [in *AYI15 v Minister for*

			Immigration and Border Protection [2016] FCA 1554], I do not accept that an obligation under with Direction No. 56, which required the Tribunal to take into account the PAM3 complementary protection guidelines, required reference to, or reliance upon, each and every detail of those guidelines. The evident purpose of those guidelines is to ensure that matters required to be considered are taken into account if relevant to the case at hand, and only to the extent of such relevance. The HRC case referred to is illustrative of the need to look to the particular circumstances in which a person may be detained upon the basis that even if the detention is not of an extended duration, it may yet amount to a risk of significant harm for the purposes of complementary protection.' (para 35). The HRC case illustrated the duration of detention may not of itself be determinative of whether the requisite threshold of a risk of significant harm is exceeded, depending on what is likely to happen during that period. The likely circumstances of such detention in a particular case may require closer examination. There is no proper basis for suggesting that the Tribunal has not carried out the required task, including by reference to the relevant substance of Direction No. 56. The Tribunal did consider not just the likely duration of detention, but the conditions in which it was likely to take place. The situation which the Tribunal identified as being likely is to be contrasted with the circumstances in the HRC case, the relevant passages of which were reproduced in the primary judge's reasons at [28] as follows:

			2.2 Later the same day, the author was allegedly separated from the other political opposition leaders and transferred to another cell (known as the “Viet Nam cell”), measuring 20 by 5 metres, where approximately 125 persons accused of common crimes were being held. Conditions were allegedly inhuman in this overcrowded cell, the heat was unbearable, the cell extremely dirty and owing to lack of space some detainees had to sit on excrement. The author further states that he received no food or water until the following day. ... 9.2 Mr. Ramon B. Martinez Portorreal is a national of the Dominican Republic, a lawyer and Executive Secretary of the Comite Dominicano de los Derechos Humanos. On 14 June 1984 at 6 a.m., he was arrested at his home, according to the author, because of his activities as a leader of a human rights association, and taken to a cell at the secret service police headquarters, from where he was transferred to another cell measuring 20 by 5 metres, where approximately 125 persons accused of common crimes were being held, and where, owing to lack of space, some detainees had to sit on excrement. He received no food or water until the following day. On 16 June 1984, after 50 hours of detention, he was released. At no time during his detention was he informed of the reasons for his arrest.’ (para 36). ‘It follows that I do not accept the premise contained within ground 3 of review, repeated as the third ground

			of appeal. In the circumstances, it was not a relevant consideration in the sense of being mandatory that the Tribunal have regard to the Potorreal decision, whether contained in the guidelines in or not, in considering what may happen to a protection visa applicant upon return and whether that could amount to a real risk of suffering significant harm for the purposes of the complementary protection criteria.' (para 37). 'This ground of appeal must therefore fail.' (para 38).
CPE15 v Minister for Immigration and Border Protection [2017] FCA 591 (Mortimer J) (Unsuccessful)	26 May 2017	32-36, 39, 51, 57-63	This case concerned whether the Tribunal had committed jurisdictional error (classified as failure to provide procedural fairness) by failing to deal with the appellant's arguments about the situation in Afghanistan in the future. The FCA discussed the meaning of 'reasonably foreseeable future' in both refugee and complementary protection claims. 'The appellant contended that the Tribunal had failed to deal with an argument put on his behalf by his migration agent, both to the delegate and to the Tribunal on review, to the effect that the situation in Kabul would descend into even greater instability when the international military forces then present in Afghanistan departed. In other words, as counsel for the appellant accepted during oral argument, the contention made on behalf of the appellant was that there would be a change of circumstances in the security situation in Kabul as a result of the departure of the international military forces that had been stationed there.' (para 32). 'The appellant contended this was a substantial and

			clearly articulated argument in both the submissions before the delegate and the submissions to the Tribunal. It was more than the identification of country information in a submission, but rather was a positive argument put on behalf of the appellant.' (para 33). 'The appellant submitted that the Tribunal did not mention this argument at any stage in its reasons and the Court should infer the Tribunal did not consider it.' (para 34). 'Authority for the proposition that the failure of the Tribunal on merits review under the *Migration Act 1958* (Cth) to deal with a substantial argument put to it on behalf of an applicant constituted jurisdictional error can be found in the reasons for judgment of Griffiths J in *SZSSC v Minister for Immigration and Border Protection* [2014] FCA 863; 317 ALR 365.' (para 35). 'At [75] to [82], Griffiths J set out in detail many of the authorities dealing with this species of jurisdictional error that is at times characterised as a denial of procedural fairness (see *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26; 197 ALR 389 at [24], Gummow and Callinan JJ); or is sometimes identified as a constructive failure to exercise the jurisdiction to "review" the delegate's decision (see, for example, *Dranichnikov* at [25] (per Gummow and Callinan JJ) and [95] (per Hayne J)).' (para 36). 'As a matter of principle, in a case such as the present

			one, I prefer the characterisation of an error of this kind as a denial of procedural fairness. That is because what has occurred, on the appellant's contention, is that he put an argument in submissions, which was not considered. Subject to exceptions not presently relevant, part of an applicant's entitlements on merits review before the Tribunal is to have an opportunity to give evidence and present arguments: see s 425(1) of the Migration Act and see generally, *Minister for Immigration and Citizenship v SZKTI* [2009] HCA 30; 238 CLR 489 at [36], [49]-[51] (French CJ, Heydon, Crennan, Kiefel and Bell JJ); *SZFDE v Minister for Immigration and Citizenship* [2007] HCA 35; 232 CLR 189; *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; 228 CLR 152. Whether those arguments be as to established facts, or as to law (see [41] below), the opportunity in s 425(1) is a component of the Tribunal's procedural fairness obligations.' (para 39). 'The appellant relied in particular on the fact that the Tribunal's reasons extracted paragraph 2.31 of this report, which noted that "ANDSF are quick to respond to insurgent attacks when they occur". The appellant submitted this indicated the Tribunal had been put on notice by the country information that the presence of international forces in Kabul was one of the mechanisms by which risks to Hazara Shias were kept in check. Nevertheless, the appellant submitted, the Tribunal failed to deal with the argument made on his behalf about what would happen when international forces withdrew. The appellant also relied on some

			earlier descriptions in this section of the Tribunal reasons about the security situation as the "current security situation".' (para 51). 'The Minister relied in particular on the passage in [47] of the Full Court's reasons where the Full Court said it may be unnecessary to make a finding on a particular matter because that matter is "subsumed in findings of greater generality". Here the Minister submitted that the Tribunal's choice to rely on the September 2015 Department of Foreign Affairs and Trade report, read with its conclusions at [44] and [45], gave rise to the inference that as matter of fact finding the Tribunal did not see the foreshadowed departure of international forces as something that was likely to lead to a qualitative deterioration in the security situation in Kabul and a correlative rise in the risk of significant harm to Hazara Shia such as the appellant.' (para 57). 'The second response given by the Minister to the new proposed ground of appeal was that even if the Tribunal had overlooked this specific argument, it was not an argument of sufficient cogency or substance as to attract the principles set out by Griffiths J in *SZSSC*. The Minister submitted that the Tribunal performed its task without error by asking itself the right question: namely whether the appellant would be at risk of significant harm in the "foreseeable future" should he be compelled to return to Afghanistan. Overlooking the appellant's argument that there would be a significant change in the security situation on the departure of the international forces was not, in the context of the very

			recent country material before the Tribunal and on which it placed great weight, something that was capable of affecting the discharge of its task on review. This situation was, the Minister submitted, quite different from the one with which the Full Court dealt in *MZYTS* at [52].' (para 58). 'In my opinion, the prospects of success of the proposed new ground of appeal depend in part on the understanding of what is meant by the now well-established and orthodox approach to the determination of risk of harm to a person occurring in the future: that is, is there a real chance a person may suffer serious harm on return to her or his country and nationality: see generally *Chan Yee Kin v Minister for Immigration* (1989) 169 CLR 379 at 389 (Mason CJ), 398 (Dawson J), 407 (Toohey J), 429 (McHugh J). To make that assessment, there must be speculation about the future, and the period of time throughout which that speculative task must be carried out has been expressed to include so much of the future as is "foreseeable" or "reasonably foreseeable": see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; 185 CLR 259 at 279 (Brennan CJ, Toohey, McHugh and Gummow JJ); *NAHI v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 10 at [13]; *Iyer v Minister for Immigration and Multicultural Affairs* [2000] FCA 1788 at [27] (Heerey, Moore, Goldberg JJ); *SZQXE v Minister for Immigration and Citizenship* [2012] FCA 1292 at [7] (Flick J).' (para 59).

			‘The “reasonably foreseeable future” is something of an ambulatory period of time, but the use of reasonable foreseeability as the benchmark concept indicates that the assessment is intended to be one which can be made on the basis of probative material, without extending into guesswork. It is also intended to preclude predictions of the future that are so far removed in point of time from the life of the person concerned at the time the person is returned to her or his country of nationality as to bear insufficient connection to the reality of what that person may experience. The purpose of the “well-founded” aspect of the Art 1A test is, after all, to be an objective but realistic and accurate assessment of what risks a person may face in the practical “on the ground” circumstances she or he will be living in. Using “reasonably foreseeable” also carries with it a rejection of an assessment which becomes too remote from a person’s expected life circumstances. These are not matters which can be expressed sensibly with any more precision.’ (para 60). ‘In my opinion the Tribunal appropriately addressed its task of determining, in relation to the criteria in s 36(2)(a) and (aa) and their components drawn from their respective international treaties as interpreted by Australian courts, whether there was either a real chance of persecution or substantial grounds for believing there was a real risk of significant harm to the appellant, were he to be returned to Kabul.’ (para 61). ‘I do not read the Tribunal’s reasons as confined in time in the way the appellant submitted. Where the Tribunal

			used the word "current", in my opinion, the Tribunal should be taken to mean the situation likely to face the appellant on return to Afghanistan in the foreseeable future. To read "current" literally, as referring only to the time immediately after the appellant would be returned to Kabul, or a period even before this, would not be to read that small part of the Tribunal's reasons in its larger, and proper, context.' (para 62). 'In my opinion it is clear, particularly from [44] of the Tribunal's reasons, that the Tribunal focused in its fact finding on the control exercised by the Afghan government over the security situation in Kabul. It did so on the basis of country information then recently available in the September 2015 Department of Foreign Affairs and Trade report, which the Tribunal clearly found persuasive, as it was entitled to. In that sense the appellant's arguments about the impact of any reduction in the presence of international forces in Afghanistan, on the security situation in Kabul were subsumed in the Tribunal's findings about the security situation in Kabul in the foreseeable future. I consider this was clear in the Tribunal's reasons as expressed.' (para 63).
DMH16 v Minister for Immigration and Border Protection [2017] FCA 448 (North J) (Successful)	3 May 2017	12, 18-19, 22-31 In particular, para 30	This case, while not on the complementary protection provisions, relates to *non-refoulement* obligations in light of requirements on decision-makers in refusal decisions under s 501(2) and the interaction with s 197C of the Migration Act which sets out that Australia's *non-refoulement* obligations are irrelevant to removal of unlawful non-citizens under section 198.

			‘The argument on this application for review concerns the way the Minister dealt with the international non-refoulement obligations of Australia in respect of the applicant. As to that matter, the Minister’s reasons state: 41. [The applicant] is a Syrian citizen. [The applicant] has made claims in his application for Protection visa lodged on 5 November 2015. 42. I accept that the department has found that Australia has non-refoulement obligations towards [the applicant]. 43. The existence of a non-refoulement obligation does not preclude refusal of a non-citizen’s visa application because Australia will not remove a non-citizen, as a consequence of the refusal of their visa application, to the country in respect of which the non-refoulement obligation exists. I understand that if I decide to refuse his visa application, in light of the above considerations [the applicant] will be unable to apply for any other visa. If I decide to refuse his application for a Protection visa, [the applicant] will be prevented by s 501E of the Migration Act from making an application for another visa, other than a Protection visa or a Bridging R (Class WR) visa (as prescribed by regulation 2.1A of the Migration Regulations). Also, in terms of a Protection visa, [the applicant] will be prevented by s48A of the Migration Act from making a further application for a Protection visa while he is in the migration zone (unless the Minister determines that s48A of the Migration Act does not apply to him – s48A and s48B of the Migration Act refer). 44. The statutory effect of a decision to refuse the visa application is also removal of [the applicant] from

			Australia as soon as practicable, and in the meantime, detention. In making my decision I am aware that while [the applicant] will not be removed from Australia if his visa application is refused (notwithstanding s197C of the Act), he may face the prospect of indefinite immigration detention because of the operation of s189 and s 196 of the Migration Act. I acknowledge that this is likely to have adverse impacts on his psychological and physical health. 45. I accept that indefinite detention is likely to have an ongoing adverse effect on [the applicant]. 46. I am aware of and have had regard to the existence of a non-refoulement obligation in this case and I have carefully weighed this factor against the seriousness of [the applicant's] criminal offending in the making of my decision whether to refuse [the applicant's] visa application.' (para 12). 'Mr Wood, who appeared as counsel for the applicant, argued that the Minister had fallen into jurisdictional error because he misunderstood the legal consequences of the exercise of his power.' (para 18). 'It was common ground that if the Minister did misunderstand those consequences, and that misunderstanding materially affected his decision, then his misunderstanding would constitute jurisdictional error.' (para 19). 'On the first argument, Mr Wood contended that there was no information before the Minister that it was not reasonably practicable to remove the applicant to Syria.

			The existence of non-refoulement obligations in respect of the applicant did not mean that it was not reasonably practicable to remove him. In view of s 197C he could no longer be detained. That is to say because of s 197C he could not be detained indefinitely. Rather, he had to be returned to Syria. That was the legal consequence of the Minister's decision to refuse to grant a protection visa. Immediately after rejecting the application for a protection visa the Minister agreed to consider alternative management options. In accordance with *SZSSJ* the applicant could be detained until the Minister completed that consideration. However, once the Minister refused to consider, or did consider and rejected, the exercise of power under s 195A, then s 197C required that the applicant be removed to Syria, notwithstanding the fact that Australia had been found to owe non-refoulement obligations in respect of him.' (para 22). 'Mr Wood said that the introduction of s 197C was directed to overcoming the reasoning in cases such as *Plaintiff M70/2001 v Minister for Immigration and Citizenship* [2011] HCA 32 and *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33which held that Australia could not remove an unlawful non-citizen to a country in breach of its non-refoulement obligations. Such persons could be lawfully detained for the purpose of removal even if it was uncertain when or if that result would occur. Such detention was described as indefinite.' (para 23). 'Mr Wood contended that where the Minister stated in

			[44] of his reasons that the effect of the refusal of the protection visa was that the applicant may face the prospect of indefinite detention, the Minister failed to understand that the effect of the refusal of the protection visa would allow the applicant to be detained, but only until the Minister decided whether to consider exercising his power under s 195A. If he decided not to do so, s 197C operated so that the applicant had to be removed to Syria. That did not expose the applicant to the risk of indefinite detention. The detention was limited to a time within the control of the Minister to consider whether to exercise his power under s 195A. The reference to indefinite detention was an erroneous reference to the situation as it would have existed before the introduction of s 197C.' (para 24). 'Mr Hill, who appeared a counsel for the Minister, contended that the Minister's reference to indefinite detention had to be read in context. First, Mr Hill contended that the Minister's statement at [44] that the applicant "will not be removed from Australia if his visa application is refused" should be read as a statement of intent from a policy perspective, rather than a statement relating to legal power. However, that contention does not deal with the Minister's statement that the applicant may face the prospect of indefinite detention. Regarding that point, Mr Hill submitted that the relevant context of that statement was that the Minister had determined to consider the alternative management option. Consequently, by indefinite detention the Minister meant detention for the period necessary to consider those alternative management

			options.' (para 25). 'The argument for the Minister only needs to be stated to expose its weakness. The reference to indefinite detention must be read in a very different way to the words used in order to have them mean that the detention would be limited to the time taken for the Minister to consider the alternative management options. The Minister's reasons disclose that he understood that if the protection visa application was refused, the applicant could be detained in Australia for an indefinite period. In fact, by the operation of s 197C, if the protection visa was refused the applicant would either be removed to Syria immediately, or, if the Minister decided to consider alternative management options, be detained for a definite period, namely, until the Minster considered whether to exercise the power under s 195A. Then if the Minister refused to exercise the power, the applicant would be removed to Syria.' (para 26). 'That view of the Minister's reasons is supported by the advice provided in the submission to the Minister at [73], which erroneously stated that s 197C does not abrogate, for the purposes of Australia's domestic laws, Australia's non-refoulement obligations assumed under international law. That is an incorrect understanding of the operation of s 197C in conjunction with an officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under s 198. The submission was signed by the Minister personally and a decision was made that the Minister would personally consider the

			case being presented. At [7] of his reasons, the Minister stated, "...having assessed the information set out in the Issues Paper and attachments..." Thus, it can be inferred that the Minister considered the submission: *Ayoub v Minister for Immigration and Border Protection* [2015] FCAFC 83 at 49.' (para 27). 'Mr Hill then submitted that, even if the Minister misunderstood the effect of the refusal of the protection visa, the misunderstanding could not have materially affected his decision. The question was whether the error could have deprived the applicant of the possibility of a successful outcome.' (para 28). 'Mr Hill contended that the applicant was not deprived of the possibility of a successful outcome because even if the Minister had correctly understood the consequence of his decision, he would have nevertheless made the same decision. Thus, the contention is that because the Minister was prepared to countenance indefinite detention, he would have been prepared to countenance detention for the period until he considered whether to exercise power under s 195A, because detention for the lesser period was less prejudicial to the applicant.' (para 29). 'That argument should not be accepted. It relies upon the assumption that the only relevant consequence of the refusal decision was that the applicant would be detained for a short period before a decision was made in relation to the s 195A power. However, there is no reference in the reasons of the Minister to his decision

			to consider alternative management options. That decision was independent of the decision to refuse the protection visa. The response of the Minister recorded on the submission from the Department shows that the decision to consider alternative management options was made after the protection visa application had been rejected. Thus, at the time of refusal decision, the consequence of the decision was not a short period of detention, but rather the removal of the applicant to Syria. Had the Minister properly understood the consequence of the refusal of the protection visa at the time he made the decision there is a possibility that he would have granted the protection visa in order to avoid the consequence that the applicant would be returned to Syria in contravention of Australia's non-refoulement obligations in respect of the applicant.' (para 30). 'It follows from these reasons for judgment that the decision of the Minister to refuse to grant the applicant a protection visa is quashed and the Minister is to determine the applicant's application for a protection visa in accordance with law. The Minister must pay the applicant's costs of this review.' (para 31).
MZANX v Minister for Immigration and Border Protection [2017] FCA 307 (Mortimer J) (Successful)	28 March 2017	8, 9, 45, 46, 50, 51, 55-58, 61, 62, 69, 70	This case related to the level of factual enquiry a decision-maker must undertake in assessing the reasonableness limb of a relocation inquiry in the context of complementary protection [sub-section 36(2B)(a) Migration Act]. The Court relied on the rights in the Refugee Convention in discussing the level of access to basic rights that must be assured for relocation to be reasonable.

			‘The appellant was 24 years old when he applied for protection in late 2011. He is of Hazara ethnicity, a Shia Muslim and comes from Ghazni province in Afghanistan. He had left Afghanistan for Iran in 2009 when he was 22, and secured work there in a bag factory. As I have noted, his wife moved with him to Iran, and gave birth to their child there in January 2011. The appellant’s son was therefore just under two years old at the time of the reviewer’s decision.’ (para 8). ‘The appellant’s claims for protection related to two matters: a violent vendetta from his uncle, which had claimed the life of his father; and his fear of harm from the Taliban, who controlled much of Ghazni province. The two issues were connected by the appellant’s claim that his uncle collaborated with the Taliban, and informed for them.’ (para 9). ‘The single issue, crystallised in the appellant’s submissions, is whether in addition to considering and assessing the chance of harm to the appellant if he were to relocate to Kabul (on both the refugee and complementary protection bases), the reviewer was obliged, but failed, to consider and determine the reasonableness and practicability of the appellant relocating to Kabul, in terms of his individual circumstances and by reference to the relocation objections he expressly raised.’ (para 45). ‘The appellant contends the reviewer did not examine this issue separately, and the Federal Circuit Court

			failed to identify this error. The appellant's main point is that the reviewer did not consider and determine all of the objections to relocation proffered by the appellant. As I understood the appellant's submissions, this failure is said to be illustrative of the reviewer's error in not examining the "practical realities" of the appellant relocating to Kabul.' (para 46). 'It is also to be assessed by reference to the individual circumstances of the person concerned, and what is practicable and reasonable *for that person*, taking into account what it is really like to live in the place said to be safe. In *SZATV v Minister for Immigration and Citizenship* [2007] HCA 40; 233 CLR 18 (*SZATV*) at [24] the plurality said: "What is 'reasonable', in the sense of 'practicable', must depend upon the particular circumstances of the applicant for refugee status and the impact upon that person of relocation of the place of residence within the country of nationality."' (para 50). 'In any context, whether refugee law or otherwise, what is "practicable" and "reasonable" for a person to do, or not to do, involves a fact intensive assessment. Generalities will not suffice. There must be a sufficiently detailed array of information about the individual concerned (and any family members) and a sufficiently detailed array of information about the putative safe location. An assessment must then be conducted of what this particular individual is likely to face in that particular location.' (para 51).

			‘In the context of relocation, detailed consideration of the circumstances “on the ground” in the area proposed for relocation will be required. General statements will be insufficient, because what is in issue is the practical and realistic ability of an individual to re-start her or his life in a new place, without undue hardship (see [60] to [61] below). Likewise, the circumstances of that individual – her or his personal strengths and weaknesses, skills, material and family support, will need to be considered in some detail. A broad brush approach will not satisfy the requirements of the task to be performed. In order to determine whether, as a conclusion, relocation is “practicable” and “reasonable” for a particular individual, a level of comfortable satisfaction based on probative material must be reached by the decision-maker about what will face that particular individual and how she or he will cope.’ (para 55). ‘Otherwise, the risk is that the assessment becomes formulaic, and removed from any real factual basis relevant to an individual person arriving in a place such as Kabul: in this case, to live with a partner and young child. That is, in fact, what will occur and there must be a considered attempt to assess what, in a real and practical sense, will happen to that individual and her or his family in those circumstances.’ (para 56). ‘How these inquiries are to be made will be informed, of course, by the nature of the claims made by an applicant, and what he or she says about the

			practicalities of relocation. This includes what has come to be described as "objections" to relocation. Recently, Markovic J in *SZVRA v Minister for Immigration and Border Protection* [2017] FCA 121 said at [18]: "Whether a claimant can reasonably be expected to relocate depends upon the framework set by an applicant's particular objection to relocation."' (para 57). 'There is no doubt that the "framework" set by an applicant may be an important factor. Indeed, the appellant submits the reviewer did not pay sufficient attention to the framework set by his adviser's submissions on the two questions of "insecurity, political instability and social problems" and "unemployment such as to impact his ability to meet his basic needs". However, it is important to recall that the task of the reviewer is to form a state of satisfaction on the basis of all the material before her or him, including what might reasonably be known because of the decision-maker's experience and expertise, and the material regularly provided to decision-makers for the purposes of making decisions about Australia's protection obligations. It is, as the courts have said many times, an inquisitorial task, informed by what an applicant puts forward, but not necessarily confined to those matters.' (para 58). One of the measures, to which Professors Hathaway and Foster point at p 357 of their text, is that the Refugees Convention itself contains a set of standards that must be observed by states granting protection.

			These are standards dealing with health, housing, education, employment, liberty, and freedom of speech – the civil and political, social and economic rights that are common, and fundamental, to all people. It is to those kinds of matters that a decision-maker must look in considering whether relocation is reasonable and practicable – these are the kinds of measures which give content to the concepts of reasonableness and practicability. That is not to say that any utopian aspirations, or Westernised standards are to be imposed, as the decisions in *Januzi* and *SZATV* make clear. Standards commensurate with reasonable expectations of the local community in which an applicant is expected to live would be appropriate. In *Januzi* at [47], Lord Hope expressed the standard (there, that relocation was not "unduly harsh") in this way: The words 'unduly harsh' set the standard that must be met for this to be regarded as unreasonable. If the claimant can live a relatively normal life there *judged by the standards that prevail in his country of nationality generally*, and if he can reach the less hostile part without undue hardship or undue difficulty, it will not be unreasonable to expect him to move there. "(Emphasis added.)' (para 61). 'As I have noted above, the factual context which arose for the reviewer's consideration was the reasonableness and practicability of the appellant, his wife and, at the time, almost two year old child relocating to Kabul. Issues concerning the availability of health care, the general situation of security, what kinds of housing might be available all fell to be considered by the

			reviewer in the context of the appellant and his wife having a young child. What might be "reasonable" or "practicable" for a resourceful young man with no family is not the same, at a factual level, as what might be reasonable and practicable for a young man, his wife and young child. To take two obvious examples: the kind of housing or accommodation required would be quite different; the need to have access to health care would be quite different.' (para 62). 'All these matters illustrate the fact intensive nature of the inquiry. What is reasonable and practicable for one Hazara person in terms of relocation to Kabul may not be for another. It may depend on whether she or he is accompanied by family members or has dependent children, on her or his level of education, her or his resourcefulness, psychological resilience, physical health, and knowledge of the Hazara community in Kabul. These are the kinds of inquiries necessary to reach a rational and reasonable conclusion on whether, as a matter of practical reality, an applicant can safely relocate. These matters are not addressed by stopping the inquiry at the level of generality evident in [85] of the reviewer's reasons, even if read with the findings in [84] about there being no risk of significant harm to the appellant and his family.' (para 69). 'In my opinion, the appellant is correct to contend that the reviewer failed to perform the task required of a decision-maker in order to determine whether a person can relocate to another part of her or his country of nationality so as not to be in need of the surrogate

			protection offered by the Refugees Convention, or by the complementary protection regime. The reviewer did not, as the appellant contends, deal at a factual level with the specific objections raised by the appellant, nor did she examine the material and make findings about whether the appellant as an individual with his wife and young child could, as a matter of practical reality, relocate to Kabul in a way which would allow them to meet their basic needs as individuals and as a family.' (para 70).
AAW16 v Minister for Immigration and Border Protection [2017] FCA 49 (Bromwich J) (Unsuccessful)	3 February 2017	2-5, 23, 39-42, and 47	This case raised the issue of whether (as contended by the Minister) the requirement not to expect an applicant to behave discreetly or to take steps to avoid harm do not apply in the complementary protection context. Bromwich J declined to decide the question because it was not necessary to decide on the facts. 'The applicant is a citizen of Egypt. On 19 May 2006, he arrived in Australia on a TU-572 Vocational Education and Training Sector visa, valid until 12 October 2008. On 14 September 2006, he lodged a protection visa application. He relied upon his homosexual orientation and personal history of homosexual and bisexual activity, together with his asserted fear of harm arising from adverse reaction to his sexual orientation and past sexual activities if he was made to return to Egypt.' (para 2). 'On 9 November 2006, the protection visa application was refused by a delegate of the Minister. On 28 February 2007, the Refugee Review Tribunal (**RRT**) affirmed the delegate's decision. On 8 August 2007 the

			Federal Magistrates Court (now the Federal Circuit Court of Australia) dismissed an application for judicial review of the RRT's decision. Subsequent student visa and partner visa applications were also unsuccessful.' (para 3). 'On 5 November 2012, the applicant made a further application for a protection visa. In ***SZGIZ*** *v Minister for Immigration and Citizenship* [2013] FCAFC 71; (2013) 212 FCR 235, the Full Court interpreted s 48A of the *Migration Act 1958* (Cth) as constituting a barrier only to more than one protection visa application on the same Refugee Convention grounds, and therefore as permitting a second protection visa application based on the complementary protection regime in s 36(2)(aa) of that Act. Accordingly this further application, while valid, was confined to consideration of the applicant meeting the criteria for complementary protection.' (para 4). 'On 17 June 2014, a second delegate of the Minister refused the second protection visa application. On 16 July 2014, the applicant applied for merits review of the second delegate's decision. On 7 July 2015, the Tribunal affirmed the second delegate's decision. The Tribunal's decision was explicitly confined to consideration of satisfaction of the criteria for complementary protection. No issue was taken in the Federal Circuit Court or in this Court as to the correctness of that approach.' (para 5). The applicant submitted three grounds of appeal:

			1. 'The second respondent did not have the benefit of relevant and fresh evidence before the Tribunal when affirming the decision by the delegate to the Minister to refuse the applicant a protection visa. Particulars a) The applicant has separated from wife; b) The applicant has resumed his homosexuality.' (para 23). 2. 'In relation to the applicant's sexuality in Egypt, which is now treated as a second proposed ground of appeal, counsel for the applicant contended both before the primary judge and in this Court that the Tribunal fell into jurisdictional error by failing to consider the issue of persecution in relation to the "*particular social group*" of being a homosexual or bisexual man in Egypt. Counsel contended that the Tribunal wrongly required or expected the applicant to live discreetly or take reasonable steps to avoid persecutory harm.' (para 39). 3. 'Counsel for the applicant asserted that the primary judge erred in failing to find that there was an insufficient logical or evidentiary basis for the Tribunal to find that the applicant could "*safely*" and "*reasonably*" relocate within Egypt, and that accordingly the Tribunal's decision lacked an evident and intelligible justification of the kind described in *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332.' (para 47).

			In relation to ground 2: 'In relation to the applicant's sexuality in Egypt, which is now treated as a second proposed ground of appeal, counsel for the applicant contended both before the primary judge and in this Court that the Tribunal fell into jurisdictional error by failing to consider the issue of persecution in relation to the "*particular social group*" of being a homosexual or bisexual man in Egypt. Counsel contended that the Tribunal wrongly required or expected the applicant to live discreetly or take reasonable steps to avoid persecutory harm.' (para 39). 'Apart from the fact that this was a complementary protection claim, not a Refugees Convention claim, such that the requirements discussed below not to expect or require a protection visa applicant to behave discreetly or take steps to avoid harm arguably do not necessarily apply (as contended on behalf of the Minister, but something that it is not necessary to decide in this case), there is a more fundamental defect in the applicant's case on this issue. Counsel for the applicant relied upon a case that his client did not advance before the Tribunal and upon incorrect assertions as to the reasoning of the Tribunal.' (para 40). 'Furthermore, the Tribunal acknowledges that in *Appellant* *S395/2002* by majority, the High Court held it is an error to fail to consider whether the need to

			act discreetly to avoid a threat of serious harm constituted persecution. The unifying principle underlying the two joint majority judgments in *S395* was that asylum seekers are not required, nor can they be expected, to take reasonable steps to avoid persecutory harm. The Tribunal believes this authority is materially relevant when considering complementary protection claims. However, given my findings about the applicant's present sexuality, I am satisfied he would willingly disengage from any homosexual activity if returned to Egypt. Therefore, I do not accept he has a real risk of significant harm for this reason on return to Egypt.' (para 41). 'I do not accept that the passages from the Tribunal's reasons relied upon by counsel for the applicant, when considered in context, either by direct language or by inference, constitute any expectation or requirement on the part of the Tribunal that the applicant be discreet about his sexual activities or orientation, either homosexual or bisexual, as opposed to predicting that was what would happen if he returned to Egypt, based upon what he told the Tribunal. It is clear that the applicant expressly disavowed engaging in any such activities. The Tribunal regarded that as a free or voluntary choice, and found that this denied any material risk of the claimed feared persecution. I therefore do not accept the submissions by counsel for the applicant that the primary judge erred in [53] of his Honour's reasons.' (para 42).
BBS16 v Minister for	1 February 2017	1, 53, and 72-76	The court found an error in relation to the claimant's

Immigration & Anor [2017] FCCA 4 (Driver J) (Successful)			complementary protection claim by failing to consider whether the applicant was at risk of harm arising from a denial of ICCPR rights and whether his failure to attempt to exercise them was a result of fear of harm. 'The applicant seeks protection because of a fear of harm in Iran as a Sabean Mandean from Ahwaz in Iran. The Minister's delegate (delegate) refused a protection visa on the basis that the applicant was not active in his religion. In consequence of that refusal, the application was referred to the Immigration Assessment Authority (IAA) which affirmed the delegate's decision on 11 April 2016. The applicant now seeks judicial review of that decision.' (para 1). The applicant submitted two grounds of appeal; the first relating to the assessment of real chance/real risk andthe second relating to the invalidity of the certificate. The second ground was rejected and not relevant. The Minister argued, in relation to the applicant's real chance (refugee claim) and real risk (complementary protection) that: 'The applicant's description of the IAA's assessment of the DFAT and UK Home Office reports is not accurate. The IAA did not find that the applicant would be subjected to "intensifying official harassment"[51], "a high level of societal discrimination"[52] or a "dramatically increased risk of violence"[53] by reason of his association with the Iranian Arab community. Only those who "attempt to publically [sic] assert cultural or political rights", "participat[e] in various political protests" or participate

			in “demonstrations over the Ahwazi minority’s grievances” were said, in the two reports referred to above, to be at risk of harassment or violence. Further, only those who could not access employment, housing and services were said, in these reports, to face a high level of societal discrimination. The applicant, however, was found not to be such a person. Once that is accepted, the substance of the applicant’s submissions on this issue falls away.’ (para 53).‘In essence, the IAA reasoned that the applicant did not face a real chance of serious harm or a real risk of significant harm on return to Iran by reason of his religion and ethnicity unless he publicly asserted cultural and political rights. The IAA declined to take into account new information that the applicant had done so in the past and reasoned that the applicant would not do so in the future.’ (para 73). I do not agree with the applicant’s submission that the IAA’s assessment of past asserted harm, and its speculation about the risk of future harm, imported an obligation to consider what the risk would be if the IAA was wrong on its finding concerning an absence of past political activity. As I have noted above, there is no obligation on the IAA to consider by this route new claims that it has lawfully excluded from consideration in accordance with the Migration Act. I cannot discern any expression of doubt by the IAA in its reasons that would trigger an obligation to consider what the position would be if it had been wrong.’ (para 74). ‘Nevertheless, I accept that the IAA fell into error, in particular in considering the applicant’s claim to

			complementary protection. The IAA appeared to accept the country information from DFAT and the UK Home Office that Arabs were subject to significant harm if they asserted political, economic and cultural rights. The IAA's finding that the applicant had not and would not publicly agitate in support of such rights was not a complete answer to the applicant's claim to complementary protection. The IAA needed to consider whether the denial of such rights by the Iranian state involved a relevant breach of the International Covenant on Civil and Political Rights (ICCPR) such that the mere act of asserting those rights would expose a person to a real risk of significant harm. This, in my opinion, necessarily involved a dual consideration of, first, whether there was a relevant denial of rights under the ICCPR and, secondly, whether the applicant's non exercise of those rights was a consequence of that denial, and because of the risk of harm resulting from an attempted exercise of them.' (para 75). 'I find that the first ground has been established.' (para 76).

FEDERAL CIRCUIT COURT OF AUSTRALIA

Case	Decision date	Relevant paragraphs	Comments
BKX15 v Minister for Immigration & Anor [2017] FCCA 2972 (Nicholls J) (Unsuccessful)	4 December 2017	3, 6, 12, 22-26, 42-48, 51-55	In this case the Court considered that the Tribunal had adequately separately considered the Refugee Convention and complementary protection claims, even where the findings on each were within the same paragraph and the decision was not clearly organized. 'The applicant is a citizen of Sri Lanka. He is of Hindu religion and Tamil ethnicity (CB 32). He arrived in Australia as an "Irregular Maritime Arrival" on 16 July 2012 (CB 1 and CB 33). He applied for a protection visa on 21 December 2012 (CB 14 to CB 107). His application was refused by the delegate on 2 October 2013 (CB 124 to CB 152). The applicant applied for review to the Tribunal on 31 October 2013 (CB 154 to CB 160).' (para 3). 'The applicant claimed that he was "abducted" by occupants of a "white van" and taken to an "unknown house". He claimed that his hands and feet were tied, and that he was detained for three days until he was released by an "elderly man". The applicant claimed not to know the identities of the individuals who had abducted him (CB 9 and [11] at CB 47 to CB 48 to [13] at CB 48). After the abduction, the applicant claimed he did not feel it was safe for him to remain in Sri Lanka.' (para 6). 'Ground two asserts that the Tribunal's decision is

			affected by jurisdictional error because it failed to consider an integer of the applicant's claims when it considered the complementary protection criterion for the protection visa at s.36(2)(aa) of the Act.' (para 12). 'The applicant's argument was that at [39] (at CB 273 to CB 274) of the Tribunal's decision record, the Tribunal rejected that there was a "Refugees Convention link" to the abduction claim.' (para 22). 'In short, the Tribunal accepted that the abduction incident had occurred. It did not make a finding rejecting the details of the claim. Although it found that the incident had occurred, the Tribunal nonetheless found that the applicant would not suffer harm for any Refugees Convention reason.' (para 23). 'The Tribunal's error, however, is said to be that when it came to consider the complementary protection criterion (s.36(2)(aa) of the Act), it failed to consider those elements of the abduction claim which may have given rise, separately, to a claim of "significant harm". That is, elements of the abduction claim which the Tribunal either expressly accepted, or made no finding rejecting that they had occurred.' (para 24). 'Rather, the Tribunal relied entirely on its findings in the Refugees Convention context to also reject the proposition that the applicant would suffer "significant harm" on return to Sri Lanka. It did so without considering the "serious" events claimed separately, in the complementary protection context (s.36(2)(aa)of the

			Act).' (para 25). 'The applicant's position is that the Tribunal did not consider the likelihood of the abduction occurring again on the applicant's return to Sri Lanka, in the context of paramilitary groups having assumed a criminal focus and targeting people for reasons other than Refugees Convention reasons.' (para 26). 'Paragraph [39] (at CB 273 to CB 274) is the Tribunal's analysis of the consequence, in the context of a "real risk" of harm, of the applicant having been abducted in the circumstances as set out in all of [38] (at CB 273).' (para 42). 'The Tribunal's analysis, drawing on what was discussed at the hearing with the applicant, was that the applicant's own account of events did "not suggest that he was specifically targeted or that the incident was anything other than an unfortunate, random criminal act" ([39] at CB 273).' (para 43). 'The Tribunal considered the applicant's evidence that he would have been a target for abduction due to his family's connections with the LTTE. The Tribunal had rejected that claim as not being credible ([33] at CB 272). The Tribunal also considered the suggestions by the applicant that he may have been a target for abduction because of extortion ([39] at CB 273 to CB 274). The Tribunal rejected this because there was no evidence to suggest this was the case ([39] at CB 274).'

			(para 44). ‘Therefore the Tribunal’s third last sentence at [39] (at CB 274), is the conclusion of its analysis as to the nature of the abduction. That is, the abduction was “a random opportunistic act”. In my view, when the Tribunal’s decision is read fairly, the finding that the abduction was “random” and “opportunistic”, is the critical finding in relation to the applicant’s abduction claim. The penultimate sentence when read fairly, is an emphatic, colloquial expression of the same finding.’ (para 45). ‘What follows in the last sentence at [39] (at CB 274) is the consequence of that finding made in relation to the applicant’s claim that he had been abducted for reasons of political opinion, religion and the like. That is, a Refugees Convention reason.’ (para 46). ‘It may be that the Tribunal could have structured its decision record in such a way as to separate findings of fact about the claimed events, from its conclusions as against the Refugees Convention criterion. That is, to put them in separate paragraphs to avoid any doubt as to the nature of the findings that it was making. However, on a fair reading, the last sentence at [39] (at CB 274), even when read with the first sentence of [41] (at CB 274), in which the Tribunal finds that the applicant is not at risk of “serious harm”, does not represent the reason for the Tribunal’s factual conclusion that the applicant’s abduction was a “random opportunistic act”. Rather, the last sentence at [39] (at CB 274), is the

			consequence of applying that conclusion to the Refugees Convention criterion (s.36(2)(a) of the Act).' (para 47). 'In this light, when the Tribunal came to specifically consider the complementary protection criterion (s.36(2)(aa) of the Act) at [57] (at CB 279) to [59] (at CB 279 to CB 280), the absence of any specific reference to the abduction incident does not reveal error by the Tribunal, given that its earlier expressed factual findings meant that the Tribunal was not obliged to consider the matter in relation to s.36(2)(aa) of the Act.' (para 48). 'As the Minister submitted, it is important to note that that finding (that the abduction was "random" and "opportunistic"), did not include any element that any future abduction would not occur for any Refugees Convention reason, leaving open the question as to whether it may occur for any other reason.' (para 51). 'Rather, in context, the Tribunal found that the abduction, given its "random" and "opportunistic" nature, was not likely to occur again. I do not agree with the applicant that the Tribunal's reasoning, and implicit in its finding that the abduction was "random" and "opportunistic", was that the abduction would not occur again, but only in the context of the Refugees Convention criterion.' (para 52). 'In my view, the Tribunal rejected, as a fact, that an abduction of the applicant would likely occur in the

			future. That is, the "real risk" of an abduction occurring in the future was rejected.' (para 53). 'In this light, there was no occasion for the Tribunal to consider the abduction claim in the context of the complementary protection criterion (s.36(2)(aa) of the Act) at the paragraphs under the heading of "Complementary Protection". That claim did not survive the Tribunal's analysis and factual finding as to the likelihood of a future occurrence.' (para 54). 'I agree with the Minister that the words "for the reasons already provided" (as they appear in the second sentence of [58] (at CB 279) under the heading of "Complementary Protection"), refer, amongst other findings, to the abduction finding. These words inform the Tribunal's subsequent finding and provide the reference to the factual basis on which it concluded that it was not satisfied that the applicant faced a "real risk" of "significant harm" on return.' (para 55).
DKN16 & Anor v Minister for Immigration & Anor [2017] FCCA 2463 (Driver J) (Successful)	3 November 2017	5, 36, 43-45, 62-65	This case involved the duty to take into account relevant conduct in Australia. The Tribunal rejected the applicants' claim on the same basis as they had rejected the refugee claim and the failure to separately consider conduct in Australia in the complementary protection assessment was an error. 'The applicant claimed to fear harm on the basis of her Christian religion if returned to China. She claimed that her parents had helped to establish a house church in Fujian Province, that the church was declared a cult and

			that her parents experienced harm and mistreatment from Chinese authorities. The applicant claimed that she was expelled from school due to her religion. When the applicant came to Australia, she had difficulty finding a church that she could attend, but eventually joined the Christian Assembly of NSW in October/November 2013 and was baptised in early 2014. She claimed to attend Sunday services each week and a bible study group every one to three weeks. The applicant claimed that she sent religious materials to her parents in China and that the materials were discovered following a raid by the authorities of the parents' home just before Easter in 2014. The discovery of the materials led to her mother being detained for half a month, and then being placed under house arrest, while her father went into hiding.' (para 5). 'Two questions arise in these proceedings: the first is, did the Tribunal purport to apply s.91R(3) or s.5J(6) of the Migration Act in its complementary protection assessment and secondly, if so, did that amount to jurisdictional error?' (para 36). 'The applicants submit that there is no appreciation in the paragraphs of the Tribunal's reasons devoted to the complementary protection assessment that evidence of conduct disregarded for the purposes of the refugee claim is not disregarded for the purposes of the complementary protection assessment.' (para 43). 'They submit that it was not open to the Tribunal to

			simply say that it did not accept the applicant's claims for the reasons set out earlier in its decision and that it was incumbent on it to consider the applicants' activities in Australia in the context of s.36(2)(aa).' (para 44). 'The applicants further submit that since they relied on their conduct in Australia to support a claim for protection it was incumbent upon the Tribunal to consider that evidence in light of the test pursuant to s.36(2)(aa). In *SZTDM*, Judge Barnes relevantly stated:[47] *In my view it can be inferred that the Tribunal disregarded the Applicant's conduct in Australia pursuant to s.91R(3) of the Act for all purposes. However, given the Tribunal's acceptance of some of the Applicant's claims about his activities in Australia, it was incumbent on it to engage with the test for complementary protection and to consider the evidence about the Applicant's activities in Australia in the context of that provision. It did not do so. It failed to apply the correct test and fell into error in the manner contended for in ground 1(a) in the further amended application.'* (para 45). 'In my opinion, the Tribunal did fall into essentially the same error as identified by Judge Barnes in *SZTDM*in the case of the applicant and the second applicant. I accept that its reasoning is not identical to that of the Tribunal in that case. Nevertheless, there are a number of difficulties with the Tribunal decision. The first is that there is no reference in the Tribunal's reasoning in

			respect of complementary protection to any matter left unconsidered by reason of the application of s.91R(3) to the Tribunal's refugee assessment. That would not matter if it were clear that the Tribunal had made factual findings which were a complete answer to the claim for complementary protection. The Tribunal purports to say that, at [84] where it refers to its adverse credibility findings. That assertion, however, fails to deal with the facts accepted by the Tribunal at [73] but left unconsidered by the Tribunal because of the application of s.91R(3). 'The Minister seeks to avoid a finding of jurisdictional error by reference to what the Tribunal states at [77] of its reasons. That submission, however, raises further problems. To the extent that the Tribunal's reasoning at [77] purports to be a statement of factual findings, it should have preceded any determination by the Tribunal of the application of s.91R(3).[60] This is because the factual findings of the Tribunal will determine whether there is anything which the Tribunal should not consider by reason of the operation of s.91R(3).' (para 63). 'Alternatively, if what the Tribunal states at [77] purports to be a conclusion on the applicants' claims about their conduct in Australia advanced in support of their protection visa applications, that consideration was undertaken in defiance of the statutory command in s.91R(3) which the Tribunal purported to accept at [75]. The Tribunal's reasoning at [77] would have been material to the Tribunal's complementary protection

			assessment, and the Minister, in effect, relies on it for that purpose, but it is expressed to be consideration bearing upon the Tribunal's Refugees Convention assessment. In my opinion, it is not open to the Court to restructure the Tribunal's reasoning in order to afford the reasons a coherence free of jurisdictional error.' (para 64). 'I conclude that the Tribunal's failure to consider, in its complementary protection assessment, the conduct in Australia of the applicant and the second applicant engaged in for the purpose of strengthening their claims for protection is a jurisdictional error. Those applicants should receive relief in the forms of the constitutional writs of certiorari and mandamus. I will so order.' (para 65).
DFZ16 v Minister for Immigration & Anor [2017] FCCA 2427 (Smith J) (Unsuccessful)	2 November 2017	7. 8, 27, 37-42, 44, 49-55	In this case the FCCA considered the level of scrutiny required in the relocation enquiry under s36(2B) of the Act, finding that this level was to be determined in each case depending on the information put by the applicant to the decision-maker. 'The applicant claimed to have a well-founded fear of persecution based on his actual or imputed political opinion as a supporter of the Tamil National Alliance. He feared violent reprisals from the supporters of the local leader of the rival party, the Tamil Makkal Viduthalai Party, referred to as "Mr S" by the IAA. The applicant claimed that he fled Sri Lanka in September 2012 to avoid "Mr S", who was looking for the applicant at that time, following the provincial

			elections, and that he feared he would be tortured.' (para 7). 'The applicant further claimed to fear persecution on the grounds of his Tamil ethnicity and his status as a returning failed asylum seeker. He claimed to fear significant harm if he returned to Sri Lanka as a person who departed Sri Lanka illegally.' (para 8). 'The applicant contends that the IAA fell into error in its attempt to apply s.36(2B) of the Act. In particular, he contends that the IAA: a. failed to consider whether he would be able to find work in Colombo; b. did not explain how the ability to find work in the Middle East had any relevance in relation to finding work in Colombo; c. failed to consider whether a Tamil with three years of primary school education, whose only previous work in Sri Lanka was as a rice farmer, could secure similar work in Colombo to the work he had in the Middle East; and d. failed to give proper consideration to the absence of family connections.' (para 27). 'The applicant relied on the more recent decision of Mortimer J in *MZANX v Minister for Immigration & Border Protection* [2017] FCA 307 (***MZANX***). Given

			the extent of that reliance, it is necessary to refer to her Honour's reasoning in some detail.' (para 37). 'First, having referred to the relocation principle as it was explained in *SZATV*, her Honour said at [51]: *In any context, whether refugee law or otherwise, what is "practicable" and "reasonable" for a person to do, or not to do, involves a fact intensive assessment. Generalities will not suffice. There must be a sufficiently detailed array of information about the individual concerned (and any family members) and a sufficiently detailed array of information about the putative safe location. An assessment must then be conducted of what this particular individual is likely to face in that particular location.*' (para 38). Next, having referred to a number of authorities and authoritative texts, her Honour stated at [55]: *In the context of relocation, detailed consideration of the circumstances "on the ground" in the area proposed for relocation will be required. General statements will be insufficient, because what is in issue is the practical and realistic ability of an individual to re-start her or his life in a new place, without undue hardship (see [60] to [61] below). Likewise, the circumstances of that individual – her or his personal strengths and weaknesses, skills, material and family support, will need to be considered in some detail. A broad brush approach will not satisfy the requirements of the task to be performed. In order to determine whether, as a conclusion, relocation is "practicable" and "reasonable" for a particular individual, a level of*

			comfortable satisfaction based on probative material must be reached by the decision-maker about what will face that particular individual and how she or he will cope. ...' (para 39). 'Her Honour explained, at [56], that there must be a considered attempt to assess what, in a real and practical sense, will happen to that individual and her or his family in the circumstances.' (para 40). 'Although her Honour did not refer to the decision of the Full Court in *SZMCD*, her next statement at [57], was to the same effect of what was said by Tracey and Foster JJ in that case: *How these inquiries are to be made will be informed, of course, by the nature of the claims made by an applicant, and what he or she says about the practicalities of relocation. This includes what has come to be described as "objections" to relocation. Recently, Markovic J in* SZVRA v Minister for Immigration and Border Protection *[2017] FCA 121 said at [18]:* *Whether a claimant can reasonably be expected to relocate depends upon the framework set by an applicant's particular objection to relocation.*' (para 41). 'Her Honour went on to explain, at [58] that, while the "framework" set by an applicant was an important factor, the task of the reviewer was not confined to the matters raised by an applicant, but must be based on all

			of the material before it.' (para 42). 'Nothing in *MZANX* is inconsistent with what was said by Tracey and Foster JJ in *SZMCD*. The determination of the reasonableness of relocation in each matter will depend on the facts and claims before the relevant decision maker. The question of whether that determination has been undertaken according to law will, in turn, depend on a proper understanding of the reasons given by the decision maker for its conclusion.' (para 44). 'The IAA also considered factors that were not raised by the applicant but which arose from other material before it, particularly, a report from the Department of Foreign Affairs and Trade. These included an absence of family connections and a lack of financial resources, the cost of living, crime rates, the need to find employment and accommodation, and the applicant's low level of education.' (para 49). 'In light of that, the applicant's real complaint cannot be that the IAA overlooked any particular factor that arose in connection with the issue of relocation. It did not. Rather, his complaint is that the IAA did not apply the level of scrutiny which Mortimer J found was necessary on the facts of the case before her Honour. Thus, the applicant at [44] of his submissions, submitted that: o *The IAA failed to consider whether a Tamil with three years of primary school education, whose only previous work in Sri Lanka was as a rice*

			farmer, could secure similar work in Colombo to the work he had in the Middle East. ...' (para 50). 'The level of scrutiny referred to in *MZANX* is not a universally applicable one. What is required depends, as I have observed, on the facts of each case. In *Randhawa v Minister for Immigration, Local Government & Ethnic Affairs* (1994) 52 FCR 437; [1994] FCA 535 (***Randhawa***), a case of long-standing authority, criticism was made of the generality of the findings made by the decision maker. The reasons concerning the reasonableness of relocation are found at 440 and were: ▪ *the DFAT cables advise that there are large communities of Sikhs in several areas outside the Punjab, thereby providing the opportunity for the applicant to live within a Sikh community if he relocated; and* ▪ *the applicant has lived outside the Punjab previously.*' (para 51). 'The Court found that there was no error arising from the generality of those reasons. Black CJ said, at 443: *... Once the question of relocation had been raised for the delegate's consideration she was of course obliged to give that aspect of the matter proper consideration. However, I do not consider that she was obliged to do this with the specificity urged by counsel for the appellant. I agree that it would ordinarily be quite*

			wrong for a decision-maker faced with a relocation possibility to take the general approach that there must be a safe haven somewhere without giving the issue more specific attention, but the extent of the decision-maker's task will be largely determined by the case sought to be made out by an applicant. ...' (para 52). 'Beaumont J said, at 452: *... Whilst there is some force in the appellant's criticism of the generality and consequent lack of specificity in the delegate's reasoning on the critical question whether it was unreasonable for the appellant to relocate, the context, that is, the generalised character of the appellant's own material itself, must be taken into account. ...*' (para 53). 'No authority since *Randhawa* has put the correctness of those passages in any doubt. In *MZANX*, Mortimer J referred to *Randhawa* as authoritative and must be taken to have made her decision on the basis that it was correct. It is binding on this Court.' (para 54). 'The level of scrutiny and detail of reasoning given by the IAA in respect of the issue of relocation reflected the material before it, including the applicant's submissions. Its reasons disclose both that it considered all of the issues that arose on that material and came to a conclusion that was logically based on that material. It did not fail to properly determine the question posed by s.36(2B) of the Act. This ground is rejected.' (para 55).

BQL15 v Minister for Immigration & Anor [2017] FCCA 1976 (Manousaridis J) (Unsuccessful)	18 August 2017	2, 12, 23-24, 27-32, 34, 39, 51-56	This case concerned the nature of the duty to take into account Ministerial Direction No. 56 in complementary protection cases, and how it is to be decided that a decision-maker has fulfilled their duty. 'The applicant is a citizen of Sri Lanka, a Tamil, and a protestant Christian. He claimed protection on the grounds that he is a Tamil, that he will be imputed with a political opinion favourable to the Liberation Tigers of Tamil Eelam (**LTTE**), and that he is a member of a particular social group, namely, failed asylum seekers.' (para 2). 'The applicant relies on five grounds of application. The first ground is as follows: *The Tribunal failed to comply with Ministerial Direction Number 56 in contravention of s 499(2A) of the Migration Act 1958.* *Particulars* *The RRT* [sic] *failed to take into account the PAM3 Protection Visas Complimentary* [sic] *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 and in its consideration of whether that harm would be intentionally inflicted.*' (para 12). 'Direction 56 directs, – that is, it imposes a duty - on the

			persons or bodies to whom it is addressed to "*take into account*" two sets of guidelines, one of which is the Guidelines, "*to the extent that they are relevant to the decision under consideration*". Two questions arise. What is the nature of the duty imposed by the expression "*is to take into account*" the Guidelines? And how, in any given case, is it to be decided whether the Tribunal or any other decision maker has failed to comply with that duty?' (para 23). 'The first question has not been considered in any detail in the cases…' (para 24). 'Like all words used in a statute or legislative instrument, the meaning of "*take into account*" as used in Direction 56 must be considered in the context in which that expression appears. As the Guidelines themselves state, their purpose is to advise "*decision makers on the law relevant to the assessment of whether Australia owes protection obligations to applicants under the complementary protection provisions of the*" Act. The matters, therefore, that the decision maker is required to take into account are not matters of fact but statements, or, more accurately, opinions about the law that are relevant to determining whether a person meets the criteria for protection under the complementary protection provisions of the Act, and how those rules should or may be applied in any given case.' (para 27). 'This distinguishes the obligations imposed by Direction 56 on decision makers to take into account the Guidelines from obligations imposed by statutory or

			regulatory provisions, such as those considered, for example, by the High Court in *R v Hunt; Ex parte Sean Investments Pty Ltd*,[26] by Rares J and the Full Federal Court in *Telstra Corporation*,[27] by the Full Federal Court in *Lafu* and, by Perry J in *Sino Iron*. In those cases the relevant provision required the decision maker to take into account or have regard to matters of fact. These provisions have been interpreted as requiring the decision maker to give weight to each matter "*as a fundamental element in making his determination*".[28] That, however, does not accurately describe the nature of the obligation imposed by Direction 56 on decision-makers to take into account what amount to opinions about the law to be applied to the assessment of claims for complementary protection; and that is so for two reasons.' (para 28). 'First, the operation of any given rule of law depends on the existence or non-existence of a set of one or more facts. The set of facts that must exist or not exist for a rule of law to apply depends on the particular rule or rules of law that is or are relevant to the decision at hand. It may make little sense, therefore, to say that the obligation imposed by Direction 56 on decision makers to take into account the Guidelines requires the decision maker to give weight to the opinions of law stated in the Guidelines as a fundamental element in the making of a decision, because whether or not the rule can be said to form a fundamental element of the decision depends on whether or not the necessary facts for the operation of the rule are found by the Tribunal to exist or not exist. This may suggest that, at most, the obligation to take

			into account the Guidelines imports an obligation on the decision maker to consider whether the facts that are before him or her engage the legal rules identified and explained by the Guidelines and, if so, consider whether and, if so, to what extent, the opinions there stated represent the principles of law it should apply.' (para 29). 'Second, even if it is sensible to say that a decision based on an opinion of law as explained in the Guidelines amounts to a decision of which the opinion of law is a fundamental element, it would not be open to say that the duty of a decision maker is to apply as a fundamental element the opinion of law expressed in the Guidelines. That is so because the duty of the decision maker is to apply the law, and what is stated in the Guidelines is no more than opinions about the law. Stated another way, to the extent the decision-maker is under a duty to have regard to a principle of law as a fundamental element in the making of his or her decision, it is a duty to have regard to the law, and not to the opinions of the law expressed in the Guidelines.' (para 30). '**In my opinion, therefore, the duty of a decision maker to take into account the Guidelines is not a duty to have regard to any one or more of the matters contained in the Guidelines as a fundamental element in the making of the decision. It is a duty to acquaint himself or herself with the Guidelines for the purpose of the decision maker informing himself or herself of the law the decision**

			maker should apply when considering a claim for complementary protection, and the steps the decision maker may take to determine such claims according to the relevant legal principles, and determining which of the opinions are relevant to the decision the decision maker is required to make.' (para 31). (Emphasis added). 'The next matter to note is that Direction 56 directs decision makers to have regard to the Guidelines "*to the extent that they are relevant to the decision under consideration*"…' (para 32). 'Given the nature of the Guidelines – opinions about the law that apply or may apply to claims for complementary protection and how the law may be applied in particular circumstances – it is reasonable to suppose it would be rare to find the Tribunal has not taken into account the Guidelines or, if it has not done so, the Tribunal has committed a jurisdictional error for that reason. If it is apparent from the Tribunal's reasons that it asked the questions the law required it to ask and apply when considering a complementary protection claim, the inference will readily be available that the Tribunal took into account the Guidelines, assuming the Guidelines accurately state the law. Even if that inference is not available to be drawn it may be difficult to conclude that the Tribunal's not taking into account the Guidelines will result in any jurisdictional error if the Tribunal otherwise asked the questions the law requires it to ask, and has applied the correct law in relation to the claim for complementary protection that

			was before it. On the other hand, if it is apparent the Tribunal failed to ask the questions it was under the relevant legal rules required to ask, a jurisdictional error will be found, not, however, because the Tribunal failed to take into account the Guidelines, but because the Tribunal did not determine the claim according to law.' (para 34). 'Thus, in principle, if there is a basis in the Tribunal's reasons for inferring the Tribunal did not take into account the Guidelines, it is open to the Court to infer from those reasons that the Tribunal did not take into account the Guidelines.' (para 39). 'The Tribunal acknowledged that the applicant's claims required the Tribunal to consider not only whether the applicant satisfied the criterion specified in s.36(2)(a) of the Act, but also, if the applicant did not satisfy that criterion, whether the applicant satisfied the criterion specified by s.36(2)(aa) of the Act, which the Tribunal identified as "*the complementary protection criterion*".[60] The Tribunal then referred to Direction 56, noting that it is required to take into account, among other things, the Guidelines. After assessing and determining adversely to the applicant the applicant's claims based on s.36(2)(a) of the Act, the Tribunal considered whether the applicant satisfied s.36(2)(aa) of the Act. The Tribunal referred to "*significant harm, as provided in s.36(2A) and further defined in s.5(1) of the Act*";[61] and it then considered whether any one or more of the imposition on the applicant of a fine, or the applicant's being arrested, detained, and questioned at

			the airport, or the applicant's being remanded in custody for a relatively brief period awaiting a bail hearing, constituted significant harm.[62] The Tribunal particularly considered whether the "*cramped, uncomfortable and unsanitary*" conditions the applicant might experience while being briefly remanded would involve the applicant "*suffering severe pain or suffering or extreme humiliation amounting to cruel or inhuman treatment or punishment or degrading treatment or punishment*".' (para 51). 'In my opinion, from what the Tribunal did it is apparent, and I find, that it took into account the Guidelines, and identified and applied, or at least purported to identify and apply, to the circumstances of the applicant's case those principles or standards stated in the Guidelines the Tribunal considered were relevant. In particular, the Tribunal took into account, or at least purported to take into account, that part of the Guidelines that dealt with the circumstances in which detention may constitute a violation of Article 7 of the ICCPR.' (para 52). 'An underlying assumption of the applicant's case is that, on the evidence that was before the Tribunal, the conditions in which the applicant is likely to be detained on his return to Sri Lanka meritted the characterisation of "*extremely cramped or unsanitary*". As I have already noted, counsel for the applicant submitted that the Tribunal failed to have regard to international jurisprudence concerning "*extremely cramped and unsanitary*" conditions of detention, and it

			is on the basis of the Tribunal's not considering that international jurisprudence that the applicant submits the Tribunal failed to consider the Guidelines.' (para 53). 'The assumption on which the applicant relies, however, is unwarranted. The severity of the conditions of detention the applicant is likely to encounter on his return to Sri Lanka was a matter for the Tribunal to assess. Although the Tribunal found that the conditions in which the applicant is likely to be detained on his return to Sri Lanka will be "*cramped, uncomfortable and unsanitary*", the Tribunal did not find that those conditions would be "*extremely cramped or unsanitary*". In those circumstances, it is not open to infer from the Tribunal's not referring to international jurisprudence concerning "*extremely cramped and unsanitary*" conditions that the Tribunal did not take into account the Guidelines.' (para 54). 'The Guidelines referred to "*extremely cramped or unsanitary conditions*" as one of a number of examples of what has been held to constitute a violation of Article 7 of the ICCPR. The Guidelines prefaced those examples with the observation that "*particularly harsh conditions of detention may constitute a violation of Article 7*" if a minimum level of severity is present, and whether such minimum level of severity is present depends "*on all the circumstances of the case*". On a fair reading of the Tribunal's reasons for decision, the question the Tribunal considered was whether, in all the circumstances of the case, the conditions under which

			the Tribunal found the applicant would be detained on his return to Sri Lanka would amount to the applicant "*suffering severe pain or suffering or extreme humiliation amounting to cruel or inhuman treatment or punishment or degrading treatment or punishment*".'' (para 55). For these reasons, ground 1 fails.' (para 56).
DZU16 v Minister for Immigration & Anor [2017] FCCA 851 (Judge Driver) (Successful)	22 June 2017	3, 158-160,	This was a review of a Fast-Track decision made by the Immigration Assessment Authority (IAA) and related to the relocation test under the complementary protection provisions, in particular the reasonableness limb. The FCCA found that the IAA erred in only considering generalized violence in terms of safety rather than also considering it in in relation to the reasonableness of living in such conditions. 'The applicant is a citizen of Afghanistan and is 26 years of age. He is an ethnic Hazara and a Shia Muslim. He appears to have arrived in Australia in March 2013...' (para 3). 'I accept the Minister's submission, as set out at [137]-[140] above, that, following the insertion of ss.5H and 5J into the Migration Act, the Authority was not required to consider the reasonableness of relocation in its assessment of the applicant's claims to be a refugee. It remained necessary to consider the reasonableness of relocation in considering the complementary protection criterion. The question is whether the Authority erred in that regard. Given that the question of the

			reasonableness of relocation only arises in respect of the complementary protection assessment, the Court is entitled to expect a free standing assessment of that issue, and earlier Court decisions permitting decision makers to draw on assessments relevant to the refugee criterion should be treated with caution.' (para 158). 'In my view the Authority did fall into error in its relocation assessment, by failing to consider whether the level of violence in Mazar-e-Sharif rendered it unreasonable (as opposed to unsafe) to relocate. The Authority dealt with the issue of relocation at [47]-[61] of its reasons as follows: ... *I have found the applicant would not face a real chance of being seriously harmed in Mazar-e-Sharif for reasons relating to his religion, ethnicity, actual or imputed political opinion, membership of the particular social groups of returnees from the west (westernised) or failed (Hazara Shia) asylum seekers, or for any other profile arising from these characteristics. For the same reasons, I am satisfied that the applicant would not face a real risk of significant harm for these reasons in Mazar-e-Sharif.* *In terms of generalised violence, I accept the security situation in Mazar-e-Sharif is credible, but I give significant weight to the EASO assessment that the city is one of the safest in Afghanistan and, along with Herat, has the lowest numbers of civilian victims in its city centre.[131] I have also weighed the evidence about recent attacks in the city and the attack in Balkh district. While I accept there are credible security risks*

			in the city, when having regard to the size and diversity of the city, the presence of security and armed forces, and the applicant's lack of any profile or proximity to those with such a profile, I find the risk of the applicant being harmed in generalised violence as a civilian is remote, and therefore there is not a real risk of him facing significant harm on this basis within Mazar-e-Sharif. *Accordingly, I have considered whether it would be reasonable for the applicant to relocate from Qarabagh to an area of the country such as Mazar-e-Sharif where there would not be a real risk that he will suffer significant harm. The applicant claims that he cannot safely relocate within Afghanistan.* *The delegate asked him questions about relocation to Kabul in his visa interview, but not Mazar-e-Sharif. The delegate discussed with the applicant the better opportunities for employment and access to services, as well as security.* *The applicant responded that every moment that Hazaras live in Afghanistan they feel they are under threat. He stated that Hazaras feel at risk and are living under a high level of pressure. He stated that this is why he put his life at risk to seek asylum in a country with a bright future. He said in terms of remaining in Afghanistan, it is better to die than live in that situation. He stated that he hates the name of his country. His only aim is to remove his family from the country and give them safety.* *On 27 October 2016, I wrote to the applicant to invite his comment on country information about the security situation in Mazar-e-Sharif and Balk Province, and the*

			question of whether it would be reasonable for the applicant to relocate to the city. While the applicant sought an extension of time to respond to the invitation, no further comment or submission was received at the date of this decision. *I accept that relocating to Mazar-e-Sharif would be challenging, however there are a range of considerations that indicate the applicant could successfully relocate to the city and that it would be reasonable for him to relocate to this area.* *I accept that the applicant may be illiterate and have had little education. I have weighed that against the prospect of him relocating, however I also note that he has travelled through Iran, including living and working in the country without the assistance of his father. As a result he has several years of work experience as a painter and an ability to live independently. The applicant speaks Dari and Hazaragi, and has some English abilities, which he demonstrated during the interview clarifying his responses through English at times. While I accept that there are economic difficulties throughout Afghanistan, I have also noted above the range of factors that point to the strength of Mazar-e-Sharif, including its status as a commercial and financial centre, its diversity, and strong educational standards. Considering all the circumstances, I am satisfied that he would be capable of finding work and shelter and accessing essential services in the city.* *I accept that the applicant has not lived in Mazar-e-Sharif, but he has shown the resilience, adaptability, and capability of relocating himself elsewhere, as*

			evidenced by his time in Iran. *The representative has claimed that the applicant has for a long period of time been living in Iran, under a strict Shia regime in Iran. The applicant made little reference to his religious practice in the interview when questioned by the delegate. I accept he is a Shia, but I do not accept that his time in Iran would be so significant that this would be a barrier to him returning to Afghanistan, or relocating to Mazar-e-Sharif. I accept the applicant has the distinguishable physical appearance of a Hazara, but I do not accept this would prevent him from relocating to Mazar-e-Sharif. While Hazaras are not in the majority in this city, there is a reasonable Hazara population in the city, and I have found he would not be at risk of harm on the basis of his religion or ethnicity there.* *I accept that he would not have family or tribal support networks in the city. UNHCR and DFAT advice indicates that relocation to urban areas is more successful for those that possess family and tribal connections. The exception to this is single able-bodied men and married couples of working age without specific vulnerabilities.[132] The applicant is a young male, and while he has had some health issues in detention I am satisfied he is an able-bodied man. The applicant is not married and has no children. He speaks Hazaragi, Dari and some English, and while I accept that the stress and anxiety of detention has had a significant impact on him, the medical evidence before me does not point to the applicant having serious health concerns that require intervention. Allowing for those difficulties, I am satisfied he has no serious*

			vulnerabilities that would impact on his ability to relocate to Mazar-e-Sharif. *I accept there would be challenges in terms of him being unable to visit his family outside of Mazar-e-Sharif. However, I am not satisfied that those familial and social barriers outweigh the factors that suggest it would be reasonable for the applicant to relocate to Mazar-e-Sharif, and avoid the serious harm he fears in his home area. In terms of accessing Mazar-e-Sharif, I note that there remains general insecurity on the roads in Afghanistan, in particular in Ghazni and Zabul, however I could only identify one security incident on the Kabul-Mazar Highway.*[133] *I note that there is an international airport in Mazar-e-Sharif which accepts daily flights from Kabul.*[134] *On the information before me, I am satisfied the applicant would be able to safely access Mazar-e-Sharif from Kabul.* *Considering all the circumstances, I am satisfied it would be reasonable for the applicant to relocate to an area of the country such as Mazar-e-Sharif where there would not be a real risk that the applicant will suffer significant harm. As I am satisfied that the applicant could relocate to Kabul* [sic, Mazar-e-Sharif], *there is not a real risk that the applicant will suffer significant harm in Afghanistan.*' (para 159). 'It is apparent that, while the Authority considered the applicant would not face a real risk of significant harm in Mazar-e-Sharif, it did not consider whether the established risk of generalised violence in the city rendered it unreasonable for the applicant to relocate there. In considering the reasonableness of relocation,

			as opposed to the risk of relocation, the Authority only considered the risk of violence in accessing the city, not living in it. This was the error identified by the Federal Court in *MZACX*, *MZZJY* and *MXYQU*, as referred to in the applicant's written submissions set out at [132]-[133] above. The risk might have been "remote" as found by the Authority, but it did not follow that the risk was so low as to avoid the need to consider it in relation to the reasonableness of relocation.' (para 160).
BOS15 v Minister for Immigration [2017] FCCA 745 (Judge Driver) (Successful)	16 May 2017	7, 11, 25-30	This case relates to the consideration of generalized violence in complementary protection claims. The FCCA found that the Tribunal cannot simply rely on Refugee Convention findings because those findings only relate to risk arising from Convention reasons. To properly assess risk arising from generalized violence the Tribunal ought to also consider the exclusionary provisions in section 36(2B). 'The applicant's case before the Assessor included claims and evidence that: a. he had a well-founded fear of persecution in Afghanistan due to a fear of mistreatment or violence from the Taliban because of his being of an ethnic and religious minority, that is, a Hazara and Shia Muslim. He also claimed to have a well-founded fear of persecution arising from being identified as pro-Western and/or anti-Taliban given that he had fled Afghanistan to seek asylum in Australia…' (para 7). 'There is one ground of review, namely that the Assessor misconstrued or misapplied the test for complementary protection in that he failed to separately

			consider whether evidence of a risk of harm which he implicitly accepted existed in relation to his consideration of Convention related grounds raised by the applicant, but which were not made out in relation to those Convention grounds, could nonetheless give rise to a complementary protection claim.' (para 11). 'The applicant contends that, given the findings referred to above, the Assessor in his reasoning in relation to the complementary protection criterion fell into error. The reason can be shortly stated; the Assessor implicitly found that the applicant was at some risk of harm in Kabul owing to insurgent attacks, but found these were not related to his Refugees Convention attributes, however, in the context of the complementary protection claim the fact the harm was not targeted at him because of those attributes was not relevant, and therefore the Assessor was then required, in order to adequately consider the complementary protection criteria, to independently consider whether or not this risk of harm could constitute a basis for a complementary protection claim. The applicant contends that the Assessor did not do this. The applicant had made explicit in his submissions that he relied on the evidence referring to the risk of harm in Kabul whether on the basis of a Convention reason or not. While there is nothing inherently wrong with a decision maker referring back to reasons and findings made in the context of Convention criteria when considering the complementary protection criterion and not engaging in a separate analysis, this approach cannot be taken where, as here, Convention claims are rejected because

			of a lack of a Convention nexus, but where there is still a harm identified which could be relevant to the complementary protection criterion.' (para 25). 'If there was no proper consideration of that risk of harm either in relation to the Refugees Convention assessment or the Assessor's general fact findings, there could not be a proper assessment for the purposes of the complementary protection assessment, given its extreme brevity. In the complementary protection assessment, the Assessor simply rejected the applicant's claims "for the same reasons" as had been given earlier.' (para 26). 'The Minister relies on the following paragraph under the heading "Is the Fear Well Founded?": ◦ *In considering the above cited country information relating to Kabul in conjunction with the claimant's background and circumstances, I find it is safe and reasonable for the claimant to reside in Kabul in the reasonably foreseeable future. Consequently, I find the claimant does not face a real chance of serious harm in Kabul by the Taliban or other AGEs for reason of his Hazara race, Shia religion or actual or imputed pro-Afghan, pro-West or anti-AGE political opinion. Therefore, I find his fear of serious harm in Kabul for these Refugees Convention reasons is not well founded*.' (para 27). 'There are two difficulties with reliance upon that paragraph for the purposes of the later complementary protection assessment. The first is the express link to

			the Refugees Convention referred to in the paragraph. Secondly, and perhaps more importantly, the finding purports to be a finding of absolute safety for the applicant in Kabul. If the Assessor was intending in that paragraph to deal with the claim of harm as a result of generalised violence in Afghanistan generally and Kabul in particular it was not open to him on the material before the ITOA, which identified in voluminous detail the numerous acts of violence perpetrated in Kabul and elsewhere. The only assessment available was that there was some risk of harm to the applicant as a result of generalised violence. The question to be determined was whether that was a real risk. The assessment of that risk logically and naturally arose as part of the complementary protection assessment, precisely because it was an assessment of the risk of generalised violence, not a risk of targeted harm in relation to a Refugees Convention attribute.' (para 28). 'In order to properly assess that risk the Assessor would have needed to consider not simply the risk of harm but also the exclusionary provisions in s.36(2B) of the Migration Act. In that regard, the observations of this Court in *SZSFF v Minister for Immigration*[31] are apposite: ◦*Nevertheless, the Minister accepts that s.36(2B)(c) contemplates that a risk may be faced by a section of the population and by the applicant personally, as the applicant states at particular (e). Properly construed, the complementary protection provisions and, specifically, s.36(2B)(c) emphasise the requirement that*

			the real risk of significant harm must be a personal risk. That is, it must be a risk which is faced by the individual personally in light of the individual's specific circumstances. ◦*The prevalence of serious human rights violations (in the context of generalised violence) in the destination country will not, of itself, be sufficient to engage a non-refoulement obligation for all people who may be returned to that country. However, where serious human rights violations in a particular country are so widespread or so severe that almost anyone would potentially be affected by them, an assessment of the level of risk to the individual may disclose a sufficiently real and personal risk to engage a non-refoulement obligation under the ICCPR and/or CAT. As such, s.36(2B)(c) does not necessitate in all cases that the individual be singled out or targeted for any particular reason. What is ultimately required is an assessment of the level of risk to the individual and the prevalence of serious human rights violations is a relevant consideration in that assessment*.' (para 29). 'In my view, there was no assessment of the risk of generalised violence in the Assessor's Refugees Convention assessment which foreclosed further consideration for the purposes of the complementary protection assessment. There was no meaningful engagement by the Assessor with the claimed risk of generalised violence for the purposes of the complementary protection assessment. The Assessor thus fell into error. The applicant is therefore entitled to the relief that he seeks.' (para 30).

SZSZQ v Minister for Immigration & Anor [2017] FCCA 592 (Judge Barnes) (Unsuccessful)	28 March 2017	36, 43-47, 73-80, 86-88	This case related to the extent to which a decision-maker must take into account Art. 7 of the ICCPR and the HRC's jurisprudence in determining the meaning of 'degrading treatment'. The FCCA affirmed that the finding in SZTAL was of general application. Therefore, in general it is unnecessary to consider the provisions of and the jurisprudence relating to the international treaties except where any statutory provisions adopt the standards of one of those treaties (which does include degrading treatment in s5(1) of the Migration Act). However, in these circumstances the Tribunal did not need to because the Tribunal did not accept factually that the applicant would face such conditions. 'The Applicant submitted that the Tribunal's "factual findings" about conditions in detention could not be reconciled with its assertion that being detained in such conditions "could not reasonably be said to amount to significant harm". It was said that the definition of "degrading treatment or punishment" in s.5 of the Act posed questions of law for the Tribunal, but that it had not asked itself whether overcrowding and unsanitary conditions might involve "extreme humiliation" within that definition and had erred in making no reference to the international jurisprudence cited in the Applicant's submissions. It was submitted that if the Tribunal had understood the applicable law it could not have reached the conclusion that detention in these conditions, even for a short term, "could not reasonably amount to" significant harm.' (para 36).

			‘The Applicant raised an additional contention in the supplementary submission to the effect that the Tribunal was jurisdictionally obliged to assess the content of the statutory definitions of conduct constituting significant harm as informed by the international law concerning the content of Australia’s international obligations under the CAT and the ICCPR. In essence, it was submitted that the Tribunal ought to have had regard to international jurisprudence when considering whether the Applicant’s detention on remand could lead to him suffering significant harm, in particular degrading treatment or punishment.’ (para 43). ‘The Applicant acknowledged that in *SZSZV* this court had concluded, having regard to comments made by the Full Court of the Federal Court in *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211; [2012] FCAFC 147 at [19]- [20], that there was no such jurisdictional requirement on the Tribunal. In *MZYYL* Lander, Jessup and Gordon JJ had stated at [19]-[20]: ◦ *19. Further, the test adopted in s 36(2)(aa), (2A) and (2B) is significant harm, not irreparable harm, being the test referred to in the General Comment No 31 on the ICCPR (Human Rights Committee, General Comment No 31: The Nature of the General Legal Obligations Imposed on State Parties to the Covenant, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) at [12]), or serious harm, being the standard referred to and*

			defined in s 91R of the Act. ◦ *20. It is therefore neither necessary nor useful to ask how the CAT or any of the International Law Treaties would apply to the circumstances of this case. The circumstances of this case are governed by the applicable provisions of the Act, namely s 36(2)(aa) and 36(2B), construed in the way that has been indicated.*' (para 44). 'However the Applicant contended that the decision in *MZYYL* was not binding on this question and that the decision in in *SZSZV* should not be followed in this respect.' (para 45). 'The Applicant submitted that *MZYYL* was not strictly binding in relation to the construction of the definition of "degrading treatment or punishment" in s.5 of the Act because the Full Court in that case was not considering the definitions in s.5 of the Act, but rather was considering the content of s.36(2B)(b) of the Act in exercising it original jurisdiction. It was acknowledged that the decision of the Full Court must nonetheless be given "due respect". However it was submitted that while the court in *MZYYL* had stressed that the task of the Tribunal was to apply the particular provisions of the Act in the circumstances before it and not to consider how the international treaties would apply to those circumstances, such a general admonition would in terms be inapplicable to the definition of "degrading treatment or punishment" in s.5 of the Act once the circumstances were found by the Tribunal to constitute

			"extreme humiliation which is unreasonable" as that definition then required the Tribunal to determine whether the circumstances would also be inconsistent with Article 7 of the ICCPR. On this basis it was contended that *MZYYL* could not prevent the Tribunal from making an assessment of whether there would be a breach of Article 7 in the particular circumstances before it.' (para 46). 'The Applicant submitted further that was a "necessity for circumstances to be found to be inconsistent with Article 7 of the ICCPR before they can fall within the definition of degrading treatment or punishment" and that this meant that the circumstances caught by this definition were a subset of the circumstances that were inconsistent with Article 7.' (para 47). 'Those earlier factual findings were based on country information cited, including DFAT Reports, and also the Applicant's personal circumstances. The Tribunal acknowledged the Applicant's submissions, which included the generally expressed submission that "[a]ny period of detention, including while awaiting a court appearance, would expose the Applicant to significant harm, in particular torture, cruel or inhuman treatment or punishment or degrading treatment or punishment". As indicated, such earlier findings also had regard to media reports (in particular a Sydney Morning Herald article cited by the Applicant's representative) which described conditions on remand as being overcrowded and unsanitary. However, while Tribunal accepted that the Applicant "could well be placed in remand", it did

			not accept that detention would likely be for a lengthy period or that conditions on remand in Negombo prison were necessarily cramped and unsanitary. Rather it accepted that the Applicant "could well be" detained on remand "for a few days in possibly cramped and unsanitary conditions" (emphasis added) while awaiting a bail hearing. However it also had regard to the absence of any reports that returnees held on remand in Negombo prison awaiting bail hearings had been subjected to torture "or other forms of deliberate mistreatment".' (para 73). 'It has not been established that these factual findings cannot be reconciled with the Tribunal's conclusion in relation to complementary protection such as to support the contentions that the Tribunal failed to appreciate the content of the statutory definition of "degrading treatment or punishment" and failed to apply the correct test. In the context of considering the complementary protection criterion the Tribunal reiterated its acceptance that the Applicant could well be placed in remand for a relatively brief period while awaiting a bail hearing. This must be seen as encompassing the Tribunal's earlier findings about "possibly" cramped and unsanitary conditions and the absence of evidence of deliberate mistreatment of returnees held on remand in Negombo prison awaiting his bail hearings.' (para 74). 'Moreover in the circumstances of this case the fact of the Tribunal's "rolled-up" conclusion about significant harm does not support the contention that it failed to

			appreciate the content of the concepts amounting to significant harm such as to establish jurisdictional error in the manner contended for by the Applicant. The Tribunal acknowledged the representative's submission that relevant categories of significant harm would be established in relation to any period of detention. However it also had regard to the absence of reports of returnees being held in Negombo prison on remand being subjected to "torture" or other forms of "deliberate mistreatment", relevant to the "intention" aspect of the definitions in issue. It is apparent that the Tribunal was not satisfied, having regard to the country information and its findings about the Applicant's personal circumstances, that the conditions in detention on remand for a relatively brief period while awaiting a bail hearing could reasonably be said to amount to significant harm within any of the concepts defined in s.5(1) of the Act.' (para 75). 'It has not been established that the Tribunal's failure to refer to international jurisprudence cited in the representative's submission, in particular decisions said to demonstrate that poor prison conditions could amount to degrading treatment or punishment, indicates or supports a conclusion that the Tribunal failed to appreciate the content of the Migration Act definition of "degrading treatment or punishment" (or the content of any of the other definitions of concepts constituting significant harm) and hence that it failed to apply the correct test. This contention was also put in slightly different terms in support of grounds 2 and 3.' (para

			76). ‘First insofar as reference was made by the Applicant’s representative to international jurisprudence to the effect that imprisonment in Sri Lanka in poor conditions may breach Article 7 of the ICCPR or may amount to degrading treatment or punishment, in this instance the Tribunal did not accept that there was a real chance that the Applicant would suffer post-conviction imprisonment. International jurisprudence about poor prison conditions for those convicted of offences was not directly relevant.’ (para 77). ‘Further, insofar as the Applicant sought to rely on Direction No. 56 and PAM3 Guidelines in relation to the relevance of international jurisprudence, this direction post-dated the Tribunal decision (as did the version of the Guidelines tendered in these proceedings) and hence was not binding on the Tribunal in this instance. In any event, as the Minister submitted, such later guidelines and the Direction in terms contemplate that the Tribunal is only obliged to consider the guidelines (or country information) to the extent relevant.’ (para 78). ‘As in *SZTMD*, in this case the inference can be drawn that the Tribunal did not refer to international jurisprudence (including that cited in the representative’s submission) as it did not consider it relevant in the particular circumstances of this case. This is not indicative of jurisdictional error, having regard to the Tribunal’s factual findings about the

			possible duration and circumstances of any detention on remand and also given that it is apparent that the Tribunal did not base its decision on the aspects of the s.5 definitions (in particular the exceptions) that refer to the ICCPR (see *SZTAL* at [65]). If the Applicant intended to submit that the Tribunal must always determine whether an act or omission is within the exceptions to the definition of "degrading treatment or punishment" or whether the circumstances would also be inconsistent with Article 7 of the ICCPR as considered in international jurisprudence, that is not so.' (para 79). 'In that respect, whether or not the decision of the Full Court of the Federal Court in MZYYL is strictly binding in relation to construction of the definition of "degrading treatment or punishment", in my view it cannot be disregarded in any consideration of the manner in which the Migration Act is to be read.'' (para 80). 'Had the Tribunal been considering whether conduct that otherwise constituted degrading treatment or punishment would not do so because the act or omission in question was not inconsistent with Article 7 of the ICCPR or was within the qualification or exception in relation to lawful sanctions not inconsistent with the Articles of the Covenant (see paragraphs (a) and (b) in the definition of "degrading treatment or punishment" and also paragraphs (c) and (d) in the definition of "cruel or inhuman treatment or punishment") then, as was made clear in SZTAL at

			[65]:◦ *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 86). 'However the Tribunal's findings in this case did not involve consideration of such exceptions.' (para 87). 'In the circumstances of this case and having regard to its findings, the Tribunal's failure to refer to international jurisprudence in the manner contended for by the Applicant is not demonstrative of jurisdictional error. In particular, in determining whether the treatment of the Applicant on return to Sri Lanka as a person who had departed illegally, including being that he "could well be" detained on remand for a few days in possibly cramped and unsanitary conditions amounted to significant harm, it was not necessary for the Tribunal to refer to international jurisprudence in making the findings that it made. It has not been established on this or any of the other bases contended for by the Applicant that the Tribunal failed to apply the correct test for degrading treatment or punishment.'

			(para 88).
CLJ15 v Minister for Immigration & Anor [2017] FCCA 467 (Judge Hartnett) (Unsuccessful)	8 February 2017	15-16, 23, 25-27	This case related to the exclusionary provision in s 36(2B)(c) (a risk faced by the population generally and not by a non-citizen personally is taken not to be a real risk). It addresses the various ways it has been interpreted by the FCCA and the FCA. 'The Applicant claimed that he would be persecuted for his actual or imputed political opinion as a perceived sympathiser of the American forces in Afghanistan because his father-in-law had been employed as a truck driver by the US forces in Afghanistan. The Applicant claimed in 2012, almost one month before the Applicant fled Afghanistan, the Taliban had stopped the Applicant's father-in-law, who was doing a night shift at the time, and brutally beheaded him. The Applicant's father-in-law was also the Applicant's uncle.' (para 15). 'The Applicant also claimed that he and his brother received a threatening letter from the Taliban about 25 days after the death of his father-in-law. That letter, it was claimed, said that the Taliban had killed the Applicant's father-in-law because he was betraying the country. The Applicant and his brother were suspected of being American spies and were told that they would "suffer the consequences of cooperating with foreign forces."' (para 16). '…In its consideration of sub-s.36(2B)(c) of the Act, the Tribunal noted that it had considered recent country information, the selection and weight given to such information being I note a matter for the Tribunal, and

			did not accept that the level of generalised violence in Afghanistan and in Kandahar in particular was so widespread that the Applicant faced a real risk of significant harm. The Tribunal was not satisfied that the Applicant was a person in respect of whom Australia had protection obligations under 36(2)(aa) of the Act.' (para 23). 'The grounds which may be said to arise in this application are: a. that the Tribunal made a biased decision. No evidence has been led by the Applicant in support of that claim and any finding of apprehended bias should not be lightly made. Essentially, the Applicant takes issue with the Tribunal's findings, but it is not permissible for this Court to conduct a merits review; b. that the Tribunal denied the Applicant procedural fairness. Again, the Applicant leads no evidence in support of that claim. The Tribunal did all that it was required, statutorily, to do. It invited the Applicant to a hearing and engaged with the Applicant as to his claims during the course of that hearing. Country information was referred to in the hearing and subsequent to the hearing, and on 23 September 2015, the Tribunal wrote to the Applicant, inviting the Applicant to provide comments in writing on the Department of Foreign Affairs and Trade's (DFAT) New Country Information Report (Assessment) of 18 September 2015, which had just been released; c. that the Tribunal failed to consider claims or any integers of a claim put before it by the Applicant. There is no evidence to support that ground. The Tribunal did consider, carefully, each of the claims made by the

			Applicant and made findings open to it on the evidence. Those findings included a consideration of relevant country information. The Applicant is inviting the Court to engage in an impermissible merits review (*Minister for Immigration and Ethnic Affairs v Liang* [1996] HCA 6; (1996) 185 CLR 259 at 272); d. the Applicant argues the Tribunal found the Applicant did not face a real risk of significant harm in the absence of "logical, probative evidence." This ground cannot succeed. It again invites the Court to engage in merits review. The Tribunal made findings on the evidence before it and it is clear that such findings were available to it on such evidence. 'Section 36(2B)(c) of the Act provides that a risk will not be regarded as a real risk of significant harm 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 26). 'In *SZSPT v Minister for Immigration and Border Protection* [2014] FCA 1245 ('SZSPT') the Court held that s.36(2B)(c) is engaged by a risk of harm (even amounting to torture) if the general population of which an applicant is a member was exposed to that risk. The widespread nature of the risk, whatever the specific gravity of it for an individual in the individual's circumstances was enough to engage the exclusionary provision. In the Tribunal hearing, the Tribunal applied a more favourable test to the Applicant deriving from a decision in *SZSFF v Minister for Immigration and Border Protection* [2013] FCCA 1884, which held that

			a widespread risk can amount to a real risk of significant harm in appropriate cases. Applying this more favourable test, as submitted by the First Respondent, the Tribunal still concluded that the Applicant was not entitled to complementary protection. No different result would or could have been reached by the Tribunal had it applied *SZSPT* as submitted by the First Respondent. No relief can be granted in respect of that error.' (para 27).