COMPLEMENTARY PROTECTION IN AUSTRALIA

DECISIONS OF THE HIGH COURT, FEDERAL COURT & FEDERAL

2018

Last updated 25 January 2019

This is a list of decisions of the Federal Court of Australia and the Federal Circuit Court of Australia that are relevant to complementary protection. Key High Court decisions are also listed. The decisions are organised by court, in reverse chronological order for 2018. Decisions from 2012 (when the complementary protection regime commenced in Australia) to 2014, 2015-2016 and 2017 are archived on the Kaldor Centre website.

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

The list may also include cases in which the complementary protection provisions have not been directly considered, but which may be relevant in the complementary protection context. For example, the list may include cases which clarify a point of law relating to Australia's *non-refoulement* obligations, considered in the context of visa cancellation and extradition.

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

FEDERAL COURT OF AUSTRALIA

Case	Decision date	Relevant paragraphs	Comments
CLJ15 v Minister for Immigration and Border Protection [2018] FCA 1638 (Unsuccessful)	31 October 2018	7, 14-15, 31, 39-42, 52, 58	In this case, the Federal Court discussed the correct test in section 36(2B)(c) of the Migration Act – whether the "real risk is one faced by the population of the country generally and is not faced by the non-citizen personally" – and the meaning of "country" in that section. The Tribunal had applied a more generous standard than that of *SZSPT v Minister for Immigration and Border Protection* [2014] FCA 1245, but the applicant, who argued that the Tribunal had applied the wrong test, could not be granted relief because the outcome would have been the same had the correct test been applied. 'On 18 December 2012, the applicant applied for a protection visa. The applicant set out his claims for protection in a statutory declaration accompanying his protection visa application. The applicant claimed that, if returned to Afghanistan, he would be harmed by the Taliban because he had been "explicitly accused of having links with the American forces through [his] father-in-law's activities and was threatened to death by the Taliban". In this statutory declaration the applicant further claimed that: (1) his father-in-law was killed, including beheaded, by the Taliban because he was working as a truck driver for American forces in

			Afghanistan; (2) the applicant and his brother received a threatening letter from the Taliban shortly after the father-in-law's death, stating the Taliban had killed him because he was betraying the country, that the brothers were suspected of being American spies, and that they too would suffer the consequences of cooperation with foreign forces; and (3) that the applicant and his brother left Afghanistan and went to Pakistan on the same day that they received the letter "to protect [themselves] from the imminent risk of harm directed at [them] by the Taliban".' (Para 7). 'Further, and relevantly for the present application, under the heading "complementary protection" the Tribunal set out terms of s 36(2B)(c) of the ***Migration Act*** *1958* (Cth), which is in the following terms: (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that: ... (c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.' (Para 14). 'The Tribunal then referred, at [79] of its reasons, to the test set out in ***SZSFF*** *v Minister for Immigration and Border Protection* [2013] FCCA 1884, stating: In *SZSFF v MIBP* [2013] FCCA 1884 the presiding judge considered the qualification in s 36(2B)(c) to the complementary protection criterion. The Court stated:

			... 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**. (Footnote omitted; emphasis added).' (Para 15). 'In support of ground 1(a), the applicant contended that the primary judge erred in concluding that the Tribunal's application of the wrong test with respect

			to s 36(2B)(c) of the *Migration Act* did not warrant the grant of relief because "[n]o different result would or could have been reached by the Tribunal had it applied [the correct test in] *SZSPT*".' (Para 31). 'Proposed ground 1(a) arose from the primary judge's discussion of s 36(2B)(c) of the *Migration Act*. In particular, her Honour stated, at [26]-[27] of her reasons, that: … [27] 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 39). 'As indicated already, the parties accepted that the standard to be applied in determining if s 36(2B)(c) was engaged was the standard to which Rares J referred in *SZSPT*, rather than in *SZSFF*. In *SZSPT* at [11] Rares J said: In my opinion, the natural and ordinary meaning of the exception in s 36(2B)(c) is that, if the Minister, or decision-maker, was satisfied that the risk was faced by the population of the country generally, as opposed to the individual claiming complementary protection based on his or her individual exposure to that risk, the provisions of s 36(2)(aa) were deemed not to be engaged.' (Para 40). 'It was common ground that the decision of Buchanan J in ***BBK15*** *v Minister for Immigration and Border Protection* [2016] FCA 680; 241 FCR 150 at [30] was consistent with this approach. In *BBK15* at [30], Buchanan J stated that "s 36(2B)(c) draws attention to a circumstance where a real risk of harm faced by a visa applicant is a risk shared with the general population, rather than one to which the visa applicant particularly is exposed in some individual or personal sense", adding that "[a] risk shared with the general population is taken not to be a 'real risk of harm' for the purpose of s 36(2)(aa)." When his Honour applied this test in that case he said, at [31]:

			In substance, the Tribunal found that the appellant did not face a particular, personal risk of harm in the Sadda area, if returned to Pakistan, and that any risk of harm he did face was one which arose from sectarian or generalised violence in Pakistan. In reaching those conclusions, the Tribunal explicitly rejected the appellant's claims that he would be targeted by the Taliban or was of interest to the Taliban. The Tribunal found, so far as the possibility of generalised and/or sectarian violence was concerned, that the appellant did not have a "profile, religious, political or otherwise, that would make him a target for sectarian or ethnic or political related violence". In substance, in my view, the Tribunal concluded that the appellant was not more exposed to a real risk of significant harm than other members of the general population.' (Para 41). 'The standard proposed in *SZSFF* (and applied by the Tribunal in this case) was a little different. It was said (at [33]) in that case that the risk referred to in s 36(2B)(c) "must be a risk which is faced by the individual personally in light of the individual's specific circumstances", adding (at [34]): [W]here serious human rights violations in a particular country are so widespread or so severe that almost everyone 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 ... 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 42). 'The fact that the test applied, incorrectly, by the Tribunal was more favourable to the applicant than the test that ought to have been applied by it provides a basis for saying that the Tribunal would have reached the same result even if it had applied the correct test. More importantly, however, the fact that the Tribunal considered both the risk of harm faced by the population in Afghanistan generally and the risk to which the applicant was exposed, including in his particular circumstances if he returned to his home region, confirms that the Tribunal would have reached the same decision had it applied the correct test. The Tribunal's consideration of both the risk of harm in Afghanistan generally and the risk to the applicant if returned to his home region is apparent in the Tribunal's reasons at [80]-[85], which are set out below in considering ground 1(b). The Tribunal's discussion shows that it would have reached the same result had it applied the test in *SZSPT*, rather than the test in *SZSFF*. Ground 1(a) is, for these reasons, not made out on appeal.' (Para 51). 'An issue before the Tribunal was whether the generalised violence in Afghanistan was such as to give rise to a real risk of significant harm as defined in s 36(2A) of the *Migration Act*. The applicant submitted that Parliament made a deliberate choice to use the term "country" in s 36(2B)(c), and that this Court must therefore give meaning to the term and find work for it

			to do. In this regard, the applicant noted that a "country" is different from other geographical or political units such as a "city", "province", "region", "territory", "State" etc. It followed, so the applicant said, that the Tribunal must make factual findings by reference to the relevant "country" if s 36(2B)(c) is to be engaged. The applicant argued that reliance upon factual findings made by reference to a smaller geographical or political unit, such as a "city", for the purpose of a finding under s 36(2B)(c), would be inadequate and, in consequence, any purported reliance on such findings for the purpose of a finding under s 36(2B)(c) would not be lawful. The applicant submitted that the Tribunal in his case made findings regarding generalised violence in the applicant's home region, rather than by reference to Afghanistan. In these circumstances, the applicant submitted that it was not open to the Tribunal to dispose of the applicant's complementary protection claim on the basis of s 36(2B)(c) of the *Migration Act*.' (Para 52). 'The DFAT report evidently disclosed a good deal of information about conditions in Afghanistan, which was not specifically set out in the Tribunal's reasons. I would not, however, infer from the absence of this information from the Tribunal's reasons that the Tribunal focussed on the conditions in the applicant's home region **instead of** the conditions in the country as a whole, as the applicant contended. The Tribunal's reference to the rise of Da'esh in Afghanistan, for example, indicates that it considered the conditions in the country as a whole and drew on the country

			information before it in so doing. This is consistent with its finding at [83] concerning the prevalence of violence in Afghanistan and its finding at [84] that it did not accept that "the level of generalised violence in Afghanistan and in [the applicant's home region] in particular is so widespread that the applicant faces a real risk of significant harm, as defined in the [Migration] Act". I accept that, as the Minister submitted, the Tribunal's conclusion was that the applicant's risk of harm in Afghanistan was one shared with the rest of the general population, **including** members of the general population in the applicant's home area. The reference to the applicant's home region was not only appropriate, for the reasons explained in relation to ground 1(a), but natural, given that the applicant might reasonably be expected to return there. For the reasons stated, ground 1(b) is not made out on the appeal.' (Para 58).
AVQ15 v Minister for Immigration and Border Protection [2018] FCAFC 133 (Successful)	13 September 2018	1, 13, 16, 23, 26-29, 40-41, 62-64, 66-74	In this case the Full Federal Court found that the Tribunal had failed to carry out its statutory task in determining the harm the applicant would face in detention in Sri Lanka. The Court clarified the task of the Tribunal in making its determination whether an applicant faces a risk of 'significant harm' under the Act. The judgment also includes principles in relation to credibility assessments and the appropriate way to deal with inconsistencies. 'The appellant is from Sri Lanka. He arrived in Australia by boat on 25 July 2012. He travelled with his

			brother and his brother-in-law. He claimed protection on the basis of a fear of harm because of his Tamil ethnicity, his imputed political opinion as a person who supported the LTTE, his Hindu religion and his status as a person who had breached Sri Lanka's departure laws and sought asylum in Australia.' (Para 1). 'The notice of appeal dated 26 July 2018 contained the following two grounds of appeal (noting that the appellant was represented by *pro bono* counsel in the appeal): '…2.The primary judge erred by failing to find that the Tribunal had constructively failed to exercise its jurisdiction or failed to carry out its statutory task by failing to consider relevant information. c. The Tribunal found that the appellant would, if returned to Sri Lanka, spend up to several days in remand in a Sri Lankan prison pending a bail hearing in connection with a charge of having left Sri Lanka illegally. d. With respect to the complementary protection criterion in section 36(2)(aa) of the Act, the Tribunal purported to accept that "prison conditions in Sri Lanka are generally poor and overcrowded"; "[h]owever, the Tribunal does not accept on the evidence before it that there is a real risk that the appellant would be subjected to treatment constituting significant harm as that term is exhaustively defined in section 36(2A) ...

			during the short period that he would spend in remand awaiting a bail hearing". e. The Tribunal was required to consider whether it was satisfied that the appellant would suffer the conditions identified by the appellant in a Sri Lankan prison and, having regard to those conditions the appellant would suffer, whether the Tribunal accept that those conditions would involve "significant harm" when experienced for several days (and if not why not). f. No such analysis is apparent from the Tribunal's statement of reasons. In particular, the Tribunal gave no explanation for why it did not consider the conditions that it described as "generally poor and overcrowded" would not be such as to involve "significant harm". g. In the absence of such stated reasons, the primary judge erred by failing to conclude that the Tribunal made a jurisdictional error. The error may be explained in various ways, such as that the Tribunal failure to consider relevant information to the standard required, or more generally that the Tribunal failed to perform its statutory task with respect to that information.' (Para 13). 'The appellant acknowledged that the Tribunal stated that it had "considered" the material relied upon by the appellant and that it also found that prison conditions in

			Sri Lanka were generally poor. The appellant submitted, however, that the Tribunal needed to consider whether the conditions involved "significant harm" if he were to be remanded for up to several days and that this required the Tribunal to engage in an "active intellectual process", which it failed to do. Mr Wood, who appeared *pro bono* for the appellant, drew attention to the Minister's submission to the Full Court in *SZTAL v Minister for Immigration and Border Protection* [2016] FCAFC 69; 243 FCR 556 (***SZTAL***) at [32] and [34] in support of his contention that, as a matter of principle, the issue whether exposure to poor prison conditions in Sri Lanka constituted significant harm within the meaning of s 36(2A) of the *Act,* required an analysis of the specific circumstances in a particular case.' (Para 16). 'At [71], the Tribunal repeated its finding about the real risk the appellant might be held on remand: For the reasons set out above, the Tribunal has accepted that the applicant will be questioned at the airport upon his return to Sri Lanka, that he will likely be charged with departing Sri Lanka illegally and that he could be held on remand for a brief period usually being less than 24 hours but possibly as long as several days while awaiting a bail hearing.' (Para 62). 'It then rejected the appellant's evidence that he faced a real risk of torture either during questioning or on remand, and made the following finding:

			The Tribunal has considered the independent sources cited in the applicant's representative's submissions and accepts that prison conditions in Sri Lanka are generally poor and overcrowded. However the Tribunal does not accept on the evidence before it that there is a real risk the applicant would be subjected to treatment constituting significant harm as that term is exhaustively defined in section 36(2A), either during his questioning at the airport or during the short period that he would spend on remand awaiting a bail hearing.' (Para 63). 'From this, the Tribunal concluded (at [72]): On the evidence before it the Tribunal does not accept that there is a real risk the applicant would be subjected to treatment constituting significant harm as that term is exhaustively defined in section 36(2A) as a result of being questioned or monitored upon his return to [his hometown]. Therefore the applicant does not satisfy the criterion set out in s.36(2)(aa).' (Para 64). 'The language chosen by Parliament in s 36(2A)(c)-(e) reflects the fact that the "protection obligations" assumed through the complementary protection criterion in s 36(2)(aa) reflect the terms of Art 7 of the*International Covenant on Civil and Political Rights*, in respect of cruel or inhuman treatment or punishment and degrading treatment or punishment and which are also found in Art 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* in respect of torture:*SZTAL v Minister for*

			Immigration and Border Protection [2017] HCA 34; 91 ALJR 936 at [33], [43]-[44] and [52] per Gageler J.' (Para 66). 'Since the matters in s 36(2A) are listed in the alternative, it is clear Parliament intended that "cruel or inhuman treatment or punishment" is treatment of a kind different in nature and quality to "degrading treatment or punishment"…' (Para 67). 'The need for, and meaning of, the mental aspect of these definitions is what was in issue in the High Court in *SZTAL*. A majority of the Court held that what was required was an actual, subjective intention: see [26], [68]; cf Gageler J at [54], [58].' (Para 68). 'The appellant relied upon, and the Minister did not dispute, the following statement made on behalf of the Minister in submissions to the Full Court in *SZTAL v Minister for Immigration and Border Protection* [2016] FCAFC 69; 243 FCR 556 at [32], as an accurate summary of the appropriate approach by a decision maker (whether delegate or Tribunal) to considering whether a person might suffer "significant harm" in accordance with s 36(2A), in relation to short periods of detention: In the Minister's supplementary submissions, the Minister clarified his position with respect to the disposition of these appeals, as follows: In light of the conflict in the authorities concerning Art 7, the Minster does not submit that the risk that the

			appellant will be exposed to poor prison conditions during a short period on remand in Sri Lanka is necessarily incapable of constituting a breach of Art 7, and thus necessarily falls outside the definition of [cruel or inhuman treatment or punishment] in s 5 of the [Migration] Act irrespective of the meaning of the phrase "intentionally inflicted". That follows because it is possible as a matter of law that, had the Tribunal made findings about exactly where the appellant would be detained and the conditions he would have experienced then, depending on the content of those findings, Art 7 might have been engaged. It follows that the Minister does not submit that, even if the appellant's arguments are accepted, the appeal should nevertheless be dismissed on the basis that it would be futile to remit the matter to the Tribunal by reason of paragraph (c) of the definition of [cruel or inhuman treatment or punishment] (or paragraph (a) of the definition of "degrading treatment or punishment"). (Underlining in original.)' (Para 69). 'And then at [34] in *SZTAL*, the Full Court recorded the following submission made on behalf of the Minister: Citing cases such as *MSS v Belgium* [2011] ECHR 108; (2011) 53 EHRR 2 at [219] and *Kalashnikov v Russia* [2002] ECHR 596; (2003) 36 EHRR 34 at [95], the Minister made a further submission that, as matter of principle, exposure to poor prison conditions should be found to constitute a violation of Art 7 only after an analysis of the specific circumstances in a particular case, because it is only following such a specific and

			individualised analysis that it is possible to assess whether poor prison conditions cause individualised harm of sufficient severity to engage Art 7.' (Para 70). 'These approaches, read with the High Court's decision in *SZTAL*, frame the statutory task to be undertaken by the Tribunal, in order to determine on review whether a person satisfies the criteria for complementary protection, and specifically, whether the person faces a risk of "significant harm", as that phrase is to be understood in the light of s 36(2A).' (Para 71). 'The task is unlikely to be performed according to law by a summary and formulaic finding such as that made by the Tribunal in its reasons and which we have extracted at [63]-[64] above. The Tribunal was not only required to determine the appellant's contentions about a risk of torture. The Tribunal was required to decide whether it was satisfied there was a real risk the appellant would suffer "degrading treatment", and to undertake that task it needed to understand what degrading treatment was in the statutory context, and then by reference to the evidence and material before it, explain why it did or did not consider that that was the kind of treatment the appellant had a real risk of facing if he were to be remanded for a period of several days, including determining whether there was an "actual subjective intention" to inflict degrading treatment, or cruel and inhuman treatment.' (Para 72).

			‘The Tribunal faced a similar task to determine whether it was satisfied that there was a real risk the appellant would suffer “cruel or inhuman treatment”.’ (Para 73). ‘The appellant had presented ample evidence and argument on these matters. The Tribunal did not grapple with them sufficiently as required by law, and had we not upheld Ground 1, we may well have been persuaded that its failure to do so revealed a jurisdictional error of the kind articulated by the applicant under Ground 2.’ (Para 74). <u>On credibility assessments:</u> ‘A decision-maker is entitled to rely upon inconsistencies in assessing a visa applicant’s credibility but it is important that the process be conducted fairly and reasonably, taking into account that the assessment of the reliability, and credibility, of accounts given by asylum seekers is well recognised as involving a number of particular features and considerations, and calls for a careful and thoughtful approach.’ (Para 23). ‘Consistently with its task on review, and bearing the reality to which the Full Court in *W375/01A* referred steadily in mind, appropriate attention has to be given by a decision-maker (here, the Tribunal) to all relevant material in making a finding of inconsistency which then underpins an adverse credibility assessment. As will shortly emerge, this did not occur here because the Tribunal overlooked what the appellant had earlier told

			a Departmental officer at the appellant's interview and this material was highly relevant to the question whether the appellant had given inconsistent evidence in support of his case.' (Para 26). 'Secondly, the term "inconsistency" should be used with appropriate caution and an appreciation of the danger of using labels or formulae which mask the need for deeper analysis. As we have noted above, adverse credibility findings might be based on a variety of matters, including inconsistencies between, for example, evidence or claims made at different stages of the decision-making process or differences between oral evidence and contemporaneous documents. In some circumstances a visa applicant may raise a claim for the first time at an advanced stage of the decision-making process and the failure to raise the claim previously may well be relevant to credibility, but that is not to say that this is correctly described as an inconsistency.' (Para 27). 'Thirdly, even where it is reasonably open to find that a person has given inconsistent evidence, the decision-maker needs to assess the significance of that inconsistency and the weight to be given to it. This requires consideration of, for example, the significance of the inconsistency having regard to the person's case as a whole and whether the inconsistency is on a matter which is central to the person's case or is at its periphery and involves an objectively minor matter of fact. It also requires the decision maker to remain conscious of the particular challenges facing asylum

			seekers in giving accounts of why they fear persecution, including that they may have to give multiple accounts, using interpreters, and that they may reasonably expect an interview or a review process will provide an opportunity for them to elaborate on, or explain, the narratives they have previously given. Consideration should also be given to whether there is an acceptable explanation for the person having given inconsistent evidence such that the fact of the inconsistency should attract little, if any, weight. How all these matters are weighed and evaluated in a particular case is a matter for the decision-maker, but a failure by the decision-maker to appreciate the particular nature of the task, or to perform it reasonably and fairly, may be the subject of judicial review.' (Para 28). 'With those general observations in mind, we will now explain why we consider ground 1 should be upheld. As the following analysis reveals, the Tribunal's finding of inconsistencies in the appellant's evidence, which findings underpinned its adverse assessment of the appellant's credibility, overlooked significant information which was before it and which potentially put a different light on those findings. This information is recorded in the first paragraph of the appellant's statutory declaration and in the written transcript of the appellant's earlier interview with the Departmental officer, a copy of which was before the Tribunal. Inexplicably, in its reasons for decision the Tribunal made no express reference to the transcript of interview. This was notwithstanding that the appellant declared in his statutory declaration that he would provide further

			information to the Department in support of his case.' (Para 29). 'Relevant legal principles guiding judicial review of adverse credibility findings and whether or not the failure to take into account relevant material in making such findings give rise to jurisdictional error have been discussed in several cases, including *WAGO of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 437; 194 ALR 676 (***WAGO***) at [51]-[54] per Lee and R D Nicholson JJ, whose reasoning in these paragraphs was agreed to by Carr J at [57]; *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317; 212 FCR 99 at [77]- [115] per Robertson J; *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146; 253 FCR 496 at [37]- [38]; *ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174; 250 FCR 109 at [62]- [66]; *DAO16 v Minister for Immigration and Border Protection* [2018] FCAFC 2 at [30]; *DYS16 v Minister for Immigration and Border Protection* [2018] FCAFC 33at [19]; *BZD17 v Minister for Immigration and Border Protection* [2018] FCAFC 94 at [32]- [38]; *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116 at [28] and *CWR16 v Minister for Immigration and Border Protection* [2018] FCA 859 at [60]- [65] per Allsop CJ.' (Para 40).

			'For convenience, the principles which have relevance to the particular facts and circumstances here may be summarised as follows. (a) The issue whether or not an administrative decision is affected by jurisdictional error requires a careful examination of the relevant statutory framework, with a particular emphasis on provisions which determine the decision-maker's powers, procedures, functions and obligations. (b) While findings as to credit are generally matters for the administrative decision-maker, they may be amenable to judicial review on several grounds including legal unreasonableness, reaching a finding without a logical, rational or probative basis, failure to perform the required statutory task of review, and failure to take into account material critical to the formation of the requisite state of satisfaction. (c) Whether or not a credibility finding is affected by jurisdictional error is a case specific inquiry, and should not be assessed by reference to fixed categories or formulae. Merely because a decision-maker has ignored "relevant material" does not always give rise to jurisdictional error in the present context. The importance or cogency of the material, its place in an assessment of the appellant's claim and in the performance of the statutory task are matters of fundamental importance in a protection visa case. Those matters inform an assessment of the seriousness or gravity of the error.

			(d) Even if an aspect of reasoning, or a particular finding of fact, is shown to be irrational or illogical, jurisdictional error will generally not be established if that reasoning or finding of fact was immaterial, or not critical to, the ultimate conclusion or end result (such as, for example, where it is but one of several findings that independently may have led to the ultimate decision). (e) Merely because there is no reference in the decision-maker's reasons for decision to particular material does not necessarily give rise to an inference that the material was not considered. Nonetheless, in the case of the Tribunal, which is required by s 430 of the *Act* to make a written statement setting out its reason for decision and its findings on material questions of fact, and to refer to the evidence on which such findings were based, a failure to refer to evidence that on its face bears on a finding may indicate that that evidence has not in fact been considered and, in some cases at least, disclose jurisdictional error in the decision-making (see *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323 at [10] per Gleeson CJ). (f) Considerable caution must be exercised before concluding that errors in an adverse credibility assessment result in the decision being affected by jurisdictional error, in order to avoid judicial review transgressing into the impermissible area of merits review.' (Para 41).

BQL15 v Minister for Immigration and Border Protection [2018] FCAFC 104 (Unsuccessful)	3 July 2018	6-9, 16-19,	In this case, while the Court found that the Tribunal's reasoning implied consideration of Ministerial Direction No 56 (which requires decision-makers to take into account the Complementary Protection Guidelines), it stressed the importance of complying with Ministerial Directions and the fact that failing to do so would be a jurisdictional error. The Court expressed concern at having to imply compliance and stated that '[i]t is highly desirable, if not essential, that reasons clearly expose consideration being given to directions lawfully given by a Minister'. 'The two principal questions to be resolved in the present appeal are: whether the Administrative Appeals Tribunal failed to "*comply with a direction*" given by the Minister pursuant to s 499 of the *Migration Act 1958* (Cth) when making its decision in July 2015 to affirm the decision not to grant to the Appellant a protection visa; and, if so: whether the failure to do so vitiated the decision of the Tribunal by reason of jurisdictional error.' (Para 6). 'The direction in question is *Direction No 56 – Consideration of Protection Visa applications* (the "*Direction*") made by the Minister on 21 June 2013 under s 499 of the *Migration Act* requiring decision-makers to take account of (relevantly) the *PAM3: Refugee and humanitarian – Complementary Protection*

			Guidelines (the "*Guidelines*") to the extent that they are relevant. The aspect of the *Guidelines* which was allegedly not complied with concerned the circumstances in which poor prison conditions may amount to cruel, inhuman or degrading treatment or punishment.' (Para 7). 'It is concluded that the Appellant fails at the first hurdle. No failure to comply with the *Direction* has been established.' (Para 8). 'Notwithstanding that conclusion, it should be noted at the outset that Counsel on behalf of the Respondent Minister accepted that a failure to comply with a direction lawfully given pursuant to s 499(1) could constitute a jurisdictional error. The task of the Tribunal, it was accepted, was not merely to undertake a review of the decision made by the delegate pursuant to the jurisdiction entrusted to it by s 500 of the *Migration Act*; the task extended to exercising that jurisdiction in accordance with law. The requirement to do so in accordance with the *Direction* necessarily followed from the duty imposed by s 499(2A) of the *Migration Act* that "[*a*] *person or body must comply with a direction under subsection (1).*" The Tribunal, just as much as a delegate, "*must comply with a direction*": *Steve v Minister for Immigration and Border Protection* [2018] FCA 311 at [21] per Bromwich J. The Tribunal itself has acknowledged that it must comply with Ministerial directions: e.g., *Re Healy and Minister for Home Affairs (Migration)* [2018] AATA 1051 at [13]; *Re GSKD and Minister for Immigration*

			and Border Protection (Migration) [2018] AATA 1078 at [25].' (Para 9). 'In the circumstances of the present case, it is concluded that the primary Judge was correct to conclude that the Tribunal had implicitly taken into account the *Guidelines* and thereby "*compl*[*ied*]" with the*Direction*: [2017] FCCA 1976 at [52], (2016) 323 FLR at 208. A "*fair reading*" of the Tribunal's reasons for decision, the primary Judge correctly concluded, led to the conclusion that the argument then advanced should fail: [2017] FCCA 1976 at [55], (2016) 323 FLR at 209.' (Para 16). 'The implication that the Tribunal had taken into account the *Guidelines* follows primarily from its reasoning at para [69]. Contrary to the submission of Counsel for the Appellant, it is concluded that: para [69] is not merely an elaboration of the statutory requirements imposed by ss 5(1) and 36(2A) of the *Migration Act*, but extends to: a consideration of the text of the *Guidelines*, as evidenced by the reference in para [69] to the "*cramped, uncomfortable and unsanitary*" conditions experienced in prison conditions local to Sri Lanka – that being language not found in the statutory

			provisions but rather language drawn from the *Guidelines*. The balance of the Tribunal's reasoning process, moreover, exposes a consideration of: the claims made by the Appellant and, in particular, his reliance upon a newspaper article published on 8 December 2012. So much necessarily follows from the express reference to that article in the footnote to para [58] of the Tribunal's reasons for decision.' (Para 17). 'Considerable disquiet may nevertheless be expressed at the fact that compliance with the Ministerial *Direction*, being a direction with which the Tribunal "*must comply*", was ultimately left to a process of implication. In expressing such disquiet, it may readily be accepted as a practical matter that: compliance with a Ministerial direction is no mere formality. Ministerial directions are given not merely for the purpose (*inter alia*) of achieving consistency in decision-making but also serve as a useful touchstone for decision-makers to ensure that their task is undertaken in accordance with law…' (Para 18). 'Insistence upon compliance with a Ministerial direction, it is respectfully considered, should not be left to an uncertain process of lawyers and courts drawing implications from ill-expressed administrative reasons. It is highly desirable, if not essential, that reasons clearly expose consideration being given to directions

			lawfully given by a Minister. Without insisting upon unnecessary formality, properly drafted reasons should disclose a consciousness of those matters set forth in any applicable Ministerial direction. Mere adherence to the statutory scheme does not, of itself, establish that there has been compliance with a Ministerial direction. A Ministerial direction ensures, in a very real sense, an additional safeguard or protection to those claiming protection – one level of protection is the necessity for a decision-maker to comply with the statutory scheme; the second level of protection is the necessity for a decision-maker to separately consider whether a decision reached "*compl*[*ies*]" with the relevant Ministerial directions.' (Para 19).
BPF15 v Minister for Immigration and Border Protection [2018] FCA 964 (Successful)	26 June 2018	18-19, 62, 68-72, 79-88, 99-101, 102-105, 107	The Court considered whether the Tribunal took into account the possibility of torture in their assessment of "significant harm" in relation to the Sri Lankan Tamil applicant, and whether there is a requirement for an act or omission to occur in an official capacity in the definition of "significant harm". The Court also records the Minister's submissions on the meaning of 'incidental to' in relation to the lawful sanctions exception but declines to rule on it. 'Further, the Tribunal accepted that upon the appellant's return to Sri Lanka, at the airport in Colombo the appellant would be questioned by the authorities and they would likely establish that he had departed Sri Lanka in breach of the relevant *Immigrants and Emigrants Act*. And the Tribunal accepted that the appellant would then be detained in Negombo prison

			for a few days before appearing before a magistrate and being bailed pending the imposition of a fine. But the Tribunal found that the Sri Lankan laws in relation to illegal departure were laws of general application that were applied in a non-discriminatory manner, and which served a legitimate purpose of dealing with people who had departed Sri Lanka unlawfully.' (Para 18). 'In relation to the appellant's complementary protection claim, the Tribunal considered whether there was a real risk that the appellant would face significant harm whilst being detained pending an appearance before a magistrate. The Tribunal accepted that there were concerns about overcrowding, poor sanitary facilities, limited access to food, the absence of basic assistance mechanisms, a lack of reform initiatives and instances of torture, maltreatment and violence in prisons in Sri Lanka. But the Tribunal found that the appellant would likely be remanded for only a short period, up to several nights. The Tribunal did not accept that a relatively short period of remand amounted to the intentional infliction of significant harm. Moreover, the Tribunal did not accept that there was an intention by the Sri Lankan authorities to inflict cruel or inhuman treatment or punishment or degrading treatment through the temporary detention of returnees pending the grant of bail.' (Para 19). 'Ground 2 asserts that the primary judge erred in failing to conclude that the decision of the Tribunal was affected by jurisdictional error because the Tribunal

			asked itself the wrong question or applied the wrong test. This ground relates to the Tribunal's consideration of the complementary protection claim(s). It is said that the Tribunal erred by treating the length of imprisonment as determinative of the question of whether imprisonment amounted to significant harm. The appellant particularised this ground in the following fashion: (a) It is said that the Tribunal found that on the appellant's return to Sri Lanka he would be remanded for a short period. (b) Further, it is pointed out that the Tribunal accepted that there were concerns about overcrowding, poor sanitary facilities, limited access to food, the absence of basic assistance mechanisms, a lack of reform initiatives and instances of torture, maltreatment and violence in prisons in Sri Lanka. (c) It is then said that in determining whether the appellant's experience whilst in prison amounted to serious or significant harm, the Tribunal considered only the period of time that the appellant would be incarcerated. (d) But it is said that the Tribunal failed to take into account the other forms of harm, namely, torture, maltreatment and violence, instances of which it is said that the Tribunal accepted were a concern in relation to prisons in Sri Lanka…' (Para 62)

			‘But the appellant before me says that, in contrast, in the present case the Tribunal accepted that torture, maltreatment and violence were matters of concern in prisons in Sri Lanka (at [116]). It is said that such a finding includes acts that are intentional and cannot be conflated with a finding in relation to the conditions in prison and acts the Tribunal has found are not or could not be intended.’ (Para 68). ‘Therefore, so the appellant submits, the Tribunal’s finding that torture, maltreatment and violence was a concern in prisons in Sri Lanka was left unresolved as it related to the appellant. The appellant says that such a finding could not be resolved by only considering the length of detention to which the appellant would be subjected. The Tribunal was required to consider, but failed to consider, whether there was a real risk that the appellant would be subjected to torture, maltreatment or violence that was intentionally inflicted.’ (Para 69). *Analysis* ‘Now before I proceed further, there is a question of principle that I need to consider relating to the meaning of “torture”. Does “torture” as defined in subs 5(1) of the Act require an act or omission of a State actor, its agent, anyone acting in an official capacity or with the State’s actual or apparent authority? In other words, can “torture”, in this context within a prison in Sri Lanka, be say through a third party actor such as another prisoner?’ (Para 70).

			‘There is no requirement of any act or omission in or of an “official capacity” in paras 36(2A)(c) to (e)…’ (Para 71). ‘Specifically, there is no requirement in para 36(2A)(c) or indeed in the definition of “torture” in subs 5(1) that the torture be committed by a person who is a public official or acting in an official capacity. This is confirmed by the explanatory memorandum to the Migration Amendment (Complementary Protection) Bill 2011 (Cth) (the Explanatory Memorandum) at [52] which states: The purpose of stating expressly what ***torture*** does not include, is to confine the meaning of ***torture*** to the meaning expressed in international expert commentary (for example, commentary by relevant international human rights treaty bodies) on the meaning of that term as defined by this item. As for items 2 and 3, this definition covers acts or omissions which, when carried out, would violate Article 7 of the Covenant. For the purposes of this definition, the act or omission is not limited to one that is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity as is required under Article 1(1) of the CAT [Convention against Torture]. Torture may be committed by any person, regardless of whether or not the person is a public official or person acting in an official capacity. In choosing to adopt a definition that is broader than the definition outlined in Article 1(1) of the CAT, Australia is mindful that Article 1(2) of the CAT enables States

			Parties to adopt national legislation that contains provisions of wider application than the CAT definition.' (Para 72). 'Neither of the above definitions contain a requirement that the significant harm be perpetrated in an official capacity and no such requirement is to be read into these definitions. Moreover, paras 36(2A)(d) and 36(2A)(e) are to be read in the context of the remainder of subs 36(2A), and the associated definitions in subs 5(1). There is no reference to an official capacity requirement in any of the paragraphs, which set out, exhaustively, what constitutes significant harm.' (Para 79). 'Further, the Explanatory Memorandum does not refer to an official capacity requirement for paras 36(2A)(d) and 36(2A)(e). Moreover, the purpose of the introduction of subs 36(2A) and, more broadly, the "complementary protection" regime was to (Explanatory Memorandum at p 1): establish an efficient, transparent and accountable system for considering complementary protection claims, which will both enhance the integrity of Australia's arrangements for meeting its *non-refoulement* obligations and better reflect Australia's longstanding commitment to protecting those at risk of the most serious forms of human rights abuses.' (Para 80).

			‘The non-refoulement obligations arise from Australia’s ratification of international treaties including the Covenant, the *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*, the *Convention on the Rights of the Child* and the Convention Against Torture (Explanatory Memorandum at p 1).’ (Para 81). ‘The terms “cruel or inhuman treatment or punishment” and “degrading treatment or punishment” as they appear in the wording of paras 36(2A)(d) and 36(2A)(e) are derived from art 7 of the Covenant (Explanatory Memorandum at [20] and [24]). Article 7 states: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.’ (Para 82). ‘Further, the Covenant does not contain any definition of torture, cruel, inhuman or degrading treatment or punishment. In particular, the Covenant does not contain any requirement that torture, cruel, inhuman or degrading treatment or punishment be perpetrated by someone acting in an official capacity.’ (Para 83). ‘Further, the United Nations Human Rights Committee which monitors the implementation of the Covenant has

			stated that art 7 of the Covenant does not require the perpetrator to be acting in an official capacity: The aim of the provisions of article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, *whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity*. [emphasis added] UN Human Rights Committee, *General Comment 20: Article 7 (Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (10 March 1992) at [2].' (Para 84). 'Further, Australia's non-refoulement obligations are not to be narrowed by reading into paras 36(2A)(d) and 36(2A)(e) an official capacity requirement. This would be contrary to the purpose of the introduction of the complementary protection regime, namely, to establish an accountable system to enable Australia to meet its non-refoulement obligations. Subsection 36(2A) was inserted into the Act to respond to non-refoulement obligations on Australia arising under particular treaties to which Australia is a party (see the Explanatory Memorandum at p 1 and *Minister for Immigration and Citizenship v MZYYL* [2012] FCAFC 147;(2012) 207 FCR 211 at [18]). Those treaties impose obligations on the State-parties to those treaties to adhere to particular human rights standards. Those treaties contain express

			and implied obligations on a State not to return a person to a place where he or she will face a real risk of a significant breach of his or her rights (*Minister for Immigration and Citizenship v MZYYL* at [18]). Further, subs 36(2A) is a part of a code which ought to be given effect in its own terms (*Minister for Immigration and Citizenship v MZYYL* at [18] to [20]), even accepting that where legislation is intended to respond to Australia's obligations under a treaty, it may be permissible to refer to the terms of the treaty to confirm the meaning of the words used in the domestic statute (*Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53;(2006) 231 CLR 1 at [34] per Gummow ACJ, Callinan, Heydon and Crennan JJ).' (Para 85). 'Now it is apparent that paras 36(2A)(d) and (e) are intended to embrace, at least in part, art 7 of the Covenant.' (Para 86). 'Of course, art 7 must be read with art 2, which obliges States to take measures to ensure people within its territory enjoy the rights recognised in the Covenant or to have available a remedy in the case of a breach of those rights. So, arts 2 and 7 do not directly fix a State with responsibility for conduct of non-State actors. Rather, States are obliged to take steps to ensure the relevant rights are enjoyed and there is a remedy for their breach.' (Para 87). 'In summary, in my view the wording of subs 36(2A) together with the relevant definitions in subs 5(1) do not

			distinguish between acts or omissions of State and non-State actors. Accordingly, if the act or omission is sufficient to amount to one of the defined harms, that is sufficient under the legislative scheme for the harm to amount to "significant harm" including "torture", even if carried out by a non-State actor.' (Para 88). 'The Tribunal accepted that within Sri Lanka prisons there were "concerns about ... instances of torture, maltreatment and violence" (at [116]). But the Minister says that having regard to the Tribunal's conclusion that the appellant would be subject to a law of general application, but taking into account any "concerns" about "torture, maltreatment and violence" perpetrated by non-State actors within the prison, and bearing in mind that the Tribunal had concluded that returnees were not being mistreated by authorities, the question is whether the possibility of any such treatment would be "incidental" to a lawful sanction, and therefore not "significant harm" for the purpose of the Act.' (Para 99). 'I would note that the word "incidental" relevantly means "[o]ccurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part; casual" (*Oxford English Dictionary*). According to the Minister, in the case of the relevant definitions in subs 5(1), that means that although a person placed in a gaol might suffer actions from other prisoners that might otherwise amount to significant harm, if that is "casual" or not directly relevant to the operation of the law of general

			application, then it will not amount to significant harm for the purpose of the Act.' (Para 100). 'In this case, so the Minister contends, having regard to the Tribunal's conclusion that the appellant's treatment would be in accordance with a non-discriminatory law of general application, any risk of torture, maltreatment or violence by a non-State actor could only be *incidental* to the lawful sanction being applied under the relevant Sri Lankan law. Accordingly, so the Minister contends, it follows that the Tribunal was not obliged to consider whether there was a real risk that the appellant would suffer "torture, maltreatment and violence" whilst on remand because even if he were to do so it could not fulfil the statutory definition of significant harm.' (Para 101). 'First, the Tribunal accepted that the appellant was likely to be imprisoned for a short period. Further, the Tribunal accepted that there were instances of torture in prisons (at [116]). And as I say, such torture can be by a non-State actor and meet the subs 5(1) definition.' (Para 103). 'Second, the Tribunal appears to have failed to consider the combination of the short period and torture together. Its reasons at [116] appear to be based upon considering the combination of a short period with discomfort. Moreover, in the last two sentences of [116] it is apparent that it was considering but rejecting various characterisations of the "short period of remand" and looking at the "short period of remand" as to whether it

			or its imposition amounted to the relevant act or omission.' (Para 104). 'Third, and consistently with what I have just said, when it was looking at the question of subjective intention, it was only considering the "intention by the Sri Lankan authorities" (see at [118]). It was not considering the intention of non-State actors engaging in torture in prisons. This confirms the second point I have just made, namely, that the Tribunal did not consider the combination of a short period of detention and torture together.' (Para 105). 'Fifth, the Minister has put a persuasive argument referring to the carve out to the definition of, inter-alia, "torture", which "does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant". The Minister may well be correct as to this argument, but it seems to me that this is a matter for the Tribunal to consider and determine. I cannot say now on the limited material before me that the Minister's contention would be unanswerable by the appellant and that therefore remitting the matter back to the Tribunal would be an exercise in futility.' (Para 107).
CSV15 v Minister for Immigration and Border Protection [2018] FCA 699 (Unsuccessful)	21 May 2018	8, 14, 32-35	In this case, the Court considered whether depression qualified as significant harm under the complementary protection scheme and found that harm that is not caused by the acts of others, such as depression, falls outside of the regime.

			‘Before the Tribunal, the appellant claimed that she left India because her father was a strict Sikh and that she had disagreements with her father because she does not adhere or respect Sikhism. Before leaving India, the appellant entered into a love marriage, but was later divorced, and later entered into a de facto relationship with a Sikh male from a different caste. As a result, the appellant claimed that she will be subject to emotional abuse by her father and that she would be killed if she returned to India. The appellant claimed that she would be an outcast and would receive no support from her relatives or the community. She also stated that she would not survive in India because she suffered from depression and was suicidal.’ (para 8). ‘The appellant has included the following ground in her notice of appeal: 1. The Federal Circuit Court fell into error, in that it failed to find that the Tribunal had committed error by: a. Failing to put to me for comment certain ‘country information’ it relied upon to conclude that I did not face harm in India of being a woman (at para [56]); and b. By arriving incorrectly at the conclusion that the impact on my mental health of return to India ‘does not involve the conduct of another person or persons’ and therefore ‘does not

			constitute serious or significant harm' (at para 55]).' (para 14). 'Section 36(2)(aa) of the Act specifies the complementary protection criterion, namely that a criterion for a protection visa is that the person is: a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm ...' (Para 32). 'Relevantly, pursuant to s 36(2A) of the Act a non-citizen will suffer "significant harm" if: (a) the non-citizen will be arbitrarily deprived of his or her life; (b) the death penalty will be carried out on the non-citizen; (c) the non-citizen will be subjected to torture; (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or (e) the non-citizen will be subjected to degrading treatment or punishment.' (Para 33). 'This definition is framed in terms of harm suffered by a non-citizen because of the acts of other persons. Like s 36(2)(a), s 36(2A) does not encompass the harm the

			appellant claims she will suffer from depression if she returned to India, just as it does not cover the harm that a person would suffer as the result of any other illness arising on the return to the receiving country.' (para 34). 'In my view the Tribunal gave adequate consideration to the appellant's claims regarding her depression, as well as to a letter provided by the appellant's *de facto* partner expressing concerns for the appellant's mental health. The Tribunal was correct in its finding that the appellant's risk of depression upon returning to India did not satisfy the requirements of ss 36(2)(a) or (aa) of the Act.' (para 35).
CIC15 v Minister for Immigration and Border Protection [2018] FCA 795 (Successful)	18 May 2018	3, 6-8, 11, 15, 25-29	In this case, the Court considered that credibility findings are susceptible to review on a number of grounds. A credibility finding in relation to this applicant's refugee claim was found to be in error for illogicality due to the fact that a credibility analysis in relation to a 'critical' part of the claim relied on 'minor or trivial' inconsistencies. 'The appellant made a number of claims before the Tribunal. Only one of the claims for protection there made is relevant to the disposition of this appeal. Relevantly, and in broad outline, the appellant claimed that he had, shortly before leaving Sri Lanka, given assistance to his neighbour who was involved in people smuggling. He claimed that, largely without being conscious throughout the whole of the period that his neighbour was so involved, he assisted by driving his

			neighbour who was engaged in gathering clients for a people smuggler to transport those people out of Sri Lanka. He claimed that when he recognised what was happening, and that he may be identified as being involved in people smuggling, he became concerned. He claimed that he discovered that two officers of the Criminal Investigation Department of Sri Lanka (**"CID"**) came to his neighbour's house and asked for him by name as the driver of the vehicle involved in the neighbour's operations and that, as a consequence, he became concerned and left Sri Lanka on a boat bound to Australia.' (Para 3). 'The appellant appeared before me unrepresented but assisted by an interpreter. He relied on an outline of written submissions in which he contended that the Tribunal had been too stringent in its approach in relation to the credibility finding made against him, and that this constituted an error of law and a failure by the Tribunal to exercise its jurisdiction. The Minister submitted that the credibility findings which were made by the Tribunal were open to it on the materials before it and rejected the appellant's allegation that in making the credibility finding that it did, the Tribunal committed jurisdictional error. I will return to those submissions later.' (Para 6). 'I should first deal with one aspect of the Minister's submission to the effect that the making of credibility findings is a function of the primary decision-maker par excellence and that, accordingly, if a credibility finding is open on the materials, it ought not be disturbed on

			judicial review. That proposition is not entirely supported by the relevant authorities. The authorities recognise that a credibility finding may well constitute jurisdictional error. As Robertson J stated in *Minister for Immigration and Citizenship v SZRKT* [2013] FCA 317 (***"SZRKT"***) at [78]: It is not, in my opinion, the case that a finding in relation to credit may never found a conclusion of jurisdictional error, particularly where a finding on credit on an objectively minor matter of fact is the basis for a tribunal's rejection of the entirety of an applicant's evidence and the entirety of the applicant's claim.' (Para 7). 'The relevant principals were summarised by Griffiths, Perry and Bromwich JJ in *ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174 (***"ARG15"***) at [83] as follows: Many of the relevant legal principles which guide the review or a judicial review of findings concerning credibility were recently discussed by the Full Court in *CQG15 v Minister for Immigration and Border Protection* [2016] FCAFC 146 (*CQG15*) at [36]-[44] per McKerracher, Griffiths and Rangiah JJ. They may be summarised as follows: (a) McHugh J's oft quoted comments in *Ex parte Dumairajasingham* (which were cited by the primary judge in the proceedings here) to the effect that a finding on credibility is the function of the primary

			decision-maker (or Tribunal) par excellence, does not mean that such findings are not susceptible to review for jurisdictional error on several potential grounds; (b) the issue whether or not a credibility finding is tainted by jurisdictional error is "a case specific inquiry" and it is not one which should be analysed by reference to fixed categories or formulas (*SZRKT* at [77] per Robertson J); (c) in each case, what the decision-maker has decided must be analysed in detail in order to determine whether or not a jurisdictional error has occurred (*SZRKT* at [77] per Robertson J); and (d) without derogating from what is said above regarding the danger of relying too heavily on "fixed categories or formulas" (which includes the danger of blindly repeating McHugh J's comments in *Ex parte Dumairajasingham*), adverse credibility findings might involve jurisdictional error on recognised grounds such as: (i) failure to afford procedural fairness; (ii) reaching a finding without a logical or probative basis; (iii) unreasonableness; and/or (iv) other grounds as discussed by Flick J in *SZVAP v Minister for Immigration and Border Protection* [2015] FCA 1089; 233 FCR 451 at [20]- [21]and in *SZSHV v Minister for Immigration and Border Protection* [2014] FCA 253 at [31], as referred to approvingly by the Full Court in *CQG15* at [40]-[42].' (Para 8).

			‘It is evident from those authorities that an irrational or illogical finding, or irrational or illogical reasoning, leading to a finding made by a decision-maker that an applicant is not a credible or honest witness may lead to a finding of jurisdictional error. That is particularly the case where the adverse credibility finding was critical to the decision of the decisionmaker and is based on minor or trivial inconsistencies.’ (Para 11). ‘The Tribunal at [21]–[25] then set out each of the inconsistencies or discrepancies it found. These are conveniently summarised in the submissions of the Minister as follows: (1) In his statutory declaration, the appellant claimed to have driven his neighbour around in a tuk tuk for “around a month in April-May”, whereas at the Tribunal hearing, he claimed to have done so for a period of two months, up until a few days before leaving Sri Lanka on 28 June 2012. (2) In his statutory declaration, the appellant claimed to have been paid 400 rupees a night by his neighbour which the appellant then gave to the tuk tuk owner, whereas at the Tribunal hearing he claimed to have been paid anywhere between 400 and 750 rupees per night. (3) At the Tribunal hearing the appellant claimed that when he spoke to his neighbour about whether he was involved in people smuggling, his neighbour neither admitted nor denied such an involvement, whereas in his statutory declaration the appellant stated that his neighbour told him that he was gathering people for

			someone else who was organising the boats. (4) In his statutory declaration, the appellant stated that he continued to drive his neighbour for a week after he "knew what he was doing was wrong, and I could get in trouble for helping him, but he was pestering me", whereas at the Tribunal hearing the appellant claimed to have only driven him another two or three times over a two-week period because his neighbour only had one leg, and there was no-one else to take him. (5) In the delegate's decision, the appellant was recorded as stating that CID officers went to his neighbour's house and asked his wife about the whereabouts of her husband, whereas at the Tribunal hearing the appellant said that they had not identified themselves as CID.' (Para 15). 'As earlier stated, particularly when a credibility finding on a matter critical to a claim is based on minor or trivial discrepancies, jurisdictional error may be apparent and a lack of logicality or rationality may be the cause. The criticality of the credibility finding made by the Tribunal in this case to the claim made by the appellant and the disposition of the Tribunal's function is evident. I consider that the Tribunal's reasons for concluding that the applicant had fabricated his evidence that he had been involved in assisting his neighbour lack a rational basis and are based on illogicality.' (Para 25). 'As I have said, each of the five discrepancies identified by the Tribunal was, of itself, minor or trivial, and each was recognised by the Tribunal as being explicable by

			reason of the passing of time. If each discrepancy is explicable by reason of the passing of time, each discrepancy, on its own, contributes nothing towards a conclusion that the appellant fabricated his story. I recognise that the Tribunal came to its conclusion relying on the sum of the five discrepancies but the difficulty with that reasoning is that if none of the discrepancies of itself contributed any weight in favour of the conclusion, it does not follow that the sum of the weight of the five discrepancies supports the conclusion. In plain language, five times nothing equals nothing; it does not equal something.' (Para 26). 'It may be that the Tribunal intended to say that three inconsistencies are explicable by reason of the passing of time, but that five inconsistencies are not. However, if all of the discrepancies were trivial or minor and each the possible product of poor recollection it is difficult to understand how three may be explicable but five are not. Once it is accepted that a person's recollection of trivial matters will be poor, it logically follows that all or most trivial matters will be equally affected. It does not then logically follow that five rather than three discrepancies in relation to matters that are trivial, supports a conclusion that each such discrepancy is based on a fabrication.' (Para 27). 'The Minister submitted that each of the inconsistencies went to essential elements of the story. I do not accept that submission. It seems to me that the discrepancies were inconsistencies as to detail, not as to the essential facts of the story. It is, I think, for that reason that the

			Tribunal itself characterised the inconsistencies as minor or trivial. In any event, even if the inconsistencies had touched on matters more germane to the fundamentals of the story, so long as the matters were trivial, what I have said in relation to a lack of logicality remains.' (Para 28). 'For those reasons, I am satisfied that the decision of the Tribunal is infected with jurisdictional error, and that jurisdictional error was not identified by the primary judge, although no criticism can be made of the primary judge given that the appellant relies on a new ground.' (Para 29).

Ali v Minister for Immigration and Border Protection [2018] FCA 650 (Unsuccessful)	10 May 2018	1-5, 11, 18, 19-34	In this case, the Court considered the application of *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96 in light of Ministerial Direction No 75. 'The Applicant in the present proceeding, Mr Nouroz Ali, is a citizen of Afghanistan.' (Para 1) 'He previously held a Class XB Subclass 202 Global Special Humanitarian visa.' (Para 2). 'In October 2016, that visa was cancelled by a delegate of the Respondent Minister for Immigration and Border Protection under s 501(3A) of the *Migration Act 1958* (Cth). When making that decision, there was no question that the Applicant had committed a number of criminal offences between October 2012 and January 2014 for which he had been sentenced to an aggregate sentence of imprisonment of six and a half years.' (Para 3). 'On 25 October 2017, the Assistant Minister for Immigration and Border Protection decided not to revoke the delegate's decision pursuant to s 501CA(4).' (Para 4). 'Mr Ali has filed in this Court an *Originating Application* seeking review of the decision of the Assistant Minister.' (Para 5). 'The principal argument advanced on behalf of Mr Ali, namely the first of his two *Grounds*, focussed upon the

			decision of the Full Court of this Court in *BCR16 v Minister for Immigration and Border Protection* [2017] FCAFC 96, (2017) 248 FCR 456 ("*BCR16*"). An application for special leave to appeal from that decision to the High Court has been dismissed: *Minister for Immigration and Border Protection v BCR 16* [2017] HCATrans 240.' (Para 11). 'Presumably in order to address the conclusions of the Full Court in *BCR16*, and in particular the conclusions at para [68], the Minister on 5 September 2017 gave a direction under s 499 of the *Migration Act*. That direction, "*Direction No 75*", addresses the refusal of Protection visas relying on s 36(1C) and s 36(2C)(b).Part 2 of *Direction No 75* provides in part as follows: In considering elements of the Protection visa assessment for applicants who raise character or security concerns, decision-makers are to follow the order set out below. 1. The decision-maker must first assess the applicant's refugee claims with reference to section 36(2)(a) and any complementary protection claims with reference to section 36(2)(aa) before considering any character or security concerns. Where a decision-maker finds the claims do not meet the refugee or complementary protection criteria, the

			decision-maker must refuse to grant the visa.' (Para 18). 'In expanding upon the first *Ground*, the written submissions filed on Mr Ali's behalf summarised the conclusions reached by the Full Court in *BCR16* which were said to apply in this case as follows (without alteration): 16.1. First, that the Assistant Minister's decision proceeded on an assumption that non-refoulement obligations would be examined during the protection visa determination process being an assumption that was wrong at law, and not proven as a fact as a protection visa application could be refused in circumstances where "*the Minister or the Minister's delegate would, lawfully, never reach active consideration of the criteria in s 36(2)(a) and (aa) of the Act*" (at [35] – [47]) (the Factual Assumption); 16.2. Second, that "*the circumstances in which consideration of non-refoulement occurs are quite different as between an exercise of the revocation power in section 501CA(4) and an exercise of power*" by a delegate of the Minister under the protection visa framework (at 48 – 51) (the Distinction in Powers); and 16.3. Third, that "*the harm comprehended by such [non-refoulement] obligations ... does not describe the universe of harm which could be suffered by a person on return to her or his country of nationality*", as a consequence of which the failure by the Assistant

			Minister to consider those matters led to jurisdictional error (at 70 – 72) (the Private Harm).' (Para 19). Notwithstanding the considerable care with which Counsel on behalf of Mr Ali developed these written submissions, it is concluded that there has been no error of the kind identified in *BCR16* committed by the Assistant Minister in the present proceeding.' (Para 20). 'On the facts of the present case, the Assistant Minister was making a decision pursuant to s 501CA(4)confined to a decision not to revoke the cancellation of a visa. In exercising that statutory power, the Assistant Minister did not: o misunderstand the nature and extent of the power being exercised and, more particularly, did not misunderstand the "*likely course of decision-making*" or any necessity to consider non-refoulement obligation if a Protection visa application were to be made; or o fail to consider the submissions made as to why an adverse decision should not be made pursuant to s 501CA(4). The latter issue falls for consideration when resolving the second *Ground*. Of present concern is the first *Ground*.' (Para 21).

			'The Assistant Minister's reasons in respect to the first *Ground* were as follows: **<u>International non-refoulement obligations</u>** 19. Mr ALI's migration agent, Dr Daawar, submits that '*Australia has protection, non-refoulement and humanitarian obligations to Mr ALI*', as his father was killed by the Taliban, he himself was almost killed at the same time and his family was warned to leave the country. His family members echo these concerns. 20. I am aware that my Department's practice in processing Protection visa application is to consider the application of the protection-specific criteria before proceeding with any consideration of other criteria, including character-related criteria. To reinforce this practice, I have given a direction under s. 499 of the Act (Direction 75) requiring that decision-makers who are considering an application for a Protection visa must first assess whether the refugee and complementary protection criteria are met before considering ineligibility criteria, or referral of the application for consideration under s. 501. 21.Accordingly, I consider that it is unnecessary to determine whether non-refoulement obligations are owed in respect of Mr ALI for the purposes of the present decision as he is able to make a valid application for a Protection visa, in which case the existence or otherwise of non-refoulement obligations

			would be considered in the course of processing that application.' (Para 22). 'Paragraph [20] of these reasons is unquestionably an attempt on the part of the Assistant Minister to address the concerns expressed by the Full Court in *BCR16*. The Assistant Minister was obviously fully aware of *Direction No* 75.' (Para 23). 'Read literally, para [20] is an express finding as to the Departmental practices to be followed in "*processing Protection visa applications*" and a finding that the matter "*first*" addressed is the question as to whether a visa applicant meets "*the refugee and complementary protection criteria*". The reasons at para [20] demonstrate that the Assistant Minister had no "*misunderstanding*" as to the sequence in which matters are considered and no "*misunderstanding*" as to the future necessity to first address "*the refugee and complementary protection criteria*" as required by the terms of *Direction No 75*.' (Para 24). 'Paragraph [20] was a necessary part of the reasoning process of the Assistant Minister given the claim made by the Applicant that Australia would be in breach of its non-refoulement obligations should he be forcibly returned to Afghanistan.' (Para 25). 'But there nevertheless remained, on the case advanced on behalf of the Applicant, a further "*misunderstanding*". As the case for the Applicant

			evolved, it was understood that that argument seized upon: > the possibility that the Minister could make a decision under s 501 to refuse to grant a visa to a person on character grounds without the necessity to consider the criteria prescribed by s 36(2) or to form any separate assessment as to whether those criteria were satisfied or should prevail. That possibility would emerge if the Minister were to form the view that, whatever the merit of the claim to refugee status may be, the visa applicant did not pass the character test (s 501(1)) or if the Minister reasonably suspected that the person did not pass the character test and was satisfied that a decision to refuse the visa was in the national interest (s 501(3)); and/or > the lack of utility in "*putting off*" any consideration as to whether the Applicant satisfied the criteria prescribed by s 36(2). There would be no utility in "*putting off*" any assessment as to "*the refugee and complementary protection criteria*" if the inability to satisfy the character test would or could ultimately result in the refusal or cancellation of a visa, regardless of the conclusion reached as to any protection obligations that may be owed to the Applicant. A person with no lawful authority to remain in Australia, but who could not be returned to the

			country of origin because of Australia's non-refoulement obligations under international law, could be exposed to indefinite detention. There is a certain initial attraction in the case advanced on behalf of the Applicant.' (Para 26). 'But the case for the Applicant is to be rejected.' (Para 27). 'At the end of the day, the decision sought to be reviewed in the present proceeding is the decision made on 25 October 2017 to not exercise the power conferred by s 501CA(4) to revoke the original decision. That decision-making process relevantly required a state of satisfaction to be formed – not as to whether a person satisfied the criteria prescribed by s 36(2) – but a state of satisfaction as to whether "*there is another reason why the original decision should be revoked*" for the purposes of s 501CA(4)(b)(ii).' (Para 28). 'To the extent that the Applicant raised claims for consideration in the submission made on 31 October 2016 – and, more specifically, the submission that he claimed to fear persecution and that his return to Afghanistan would be contrary to "*Australia's obligations under the non-refoulement principle*" – that was a submission which was addressed when making the decision on 25 October 2017. The Assistant Minister considered it "*unnecessary to determine*

			whether non-refoulement obligations are owed".' (Para 29). 'To the extent that an application may be made at some point of time in the future for a Protection visa, that being an application which may well be expected given the fact that the visa cancelled by the delegate was a Global Special Humanitarian visa and the submission already made as to non-refoulement, that would be an application to be resolved if and when it was made and resolved in accordance with *Direction No 75*.' (Para 30). 'To the extent that the Applicant may at some point of time in the future make an application for some other kind of visa other than a Protection visa (or even a future application for a Protection visa) and that application was considered by the Minister rather than a delegate of the Minister, that application would confront the Minister with the need to then consider whether: o that application should again be refused pursuant to s 501(1) or 501(3) upon the basis that the Applicant does not satisfy the character test; and/or o the Applicant should be given some form of visa, possibly subject to conditions, to regularise his continued presence in Australia.

			The difficulties confronting the Minister would then be considerable. One possibility to be raised only to be rejected would be the prospect that the Applicant would be returned to Afghanistan in breach of Australia's international obligations. That, at least to the knowledge of Senior Counsel for the Respondent Minister, has never happened in the past. Nor would such a possibility be lightly entertained. But the difficulty then confronting the Minister could be compounded by the fact that a person who is not lawfully entitled to remain in Australia is to be removed as soon as practicable. And s 197C provides that, for the purposes of s 198, "*it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen*".' (Para 31). 'The prospect of regularising the status of the Applicant such that he would not face refoulement to Afghanistan in breach of Australia's international obligations may well lead the Minister to grant some form of visa, with or without conditions, notwithstanding the inability of the Applicant to satisfy the character test.' (Para 32). 'But these are all decision to be made and – if necessary – reviewed at some point of time in the future. The prospect that future decision-making may confront the Minister with difficult choices, it is respectfully considered, cannot presently impact upon the present exercise of the power conferred by s 501CA(4). No matter how real the prospect may be of future decisions being impacted upon by the adverse assessment made by the Assistant Minister on 25 October 2017 for the

			purposes of s 501CA(4)(b)(i), the power exercised on that date was to be exercised – and was in fact exercised – by reference to the facts and circumstances then prevailing.' (Para 33). 'Of present concern is the fact that the reasoning process of the Assistant Minister in respect to the decision now under review exposes no misunderstanding as to the power then being exercised. That reasoning process exposes no misunderstanding as to: the sequence in which claims would be resolved in accordance with *Direction No* 75. Nor does the reasoning process expose any misunderstanding, or even say anything with respect to: the manner in which any future applications may be resolved or the decisions which may be made by the Minister if called upon to do so.' (Para 34).
SZSZQ v Minister for Immigration and Border Protection [2018] FCA 403 (Successful)	28 March 2018	2, 28, 44, 57-62, 64-69, 70, 90-95, 105-111	In this case, the Court found that the Tribunal had committed jurisdictional errors by failing to engage with the substance of the applicant's claims and, in failing to advert to the definitions in the Act, by reaching a conclusion without considering the question of what constitutes 'significant harm'. It also considered the relevance of international jurisprudence to the meaning of 'significant harm'.

			‘The appellant is a Sri Lankan national of Tamil ethnicity. He left Sri Lanka illegally by boat, landing at Christmas Island without a passport on 1 May 2012. He later applied to the Minister for Immigration and Border Protection for a protection visa, claiming to fear persecution in his country of nationality. But the Minister, through his delegate, refused to grant it and the Refugee Review Tribunal (the functions of which are now performed by the Administrative Appeals Tribunal) affirmed the delegate’s decision. The appellant then sought judicial review of the Tribunal’s decision but his application was dismissed. This is an appeal from that decision.’ (para 2). ‘The Tribunal’s reasons on the complementary protection criterion were brief. In short, the Tribunal repeated its conclusion as to the appellant’s credibility on his refugee claims and, although it accepted that on his return he would likely be arrested, charged and convicted of an offence or offences relating to his illegal departure and that he could be imprisoned albeit only for “a relatively brief period while awaiting a bail hearing”, it concluded that this would amount to neither serious harm “in a Convention sense” nor significant harm “in terms of Australia’s complementary protection arrangements”.’ (para 28). ‘Ten grounds of appeal were pleaded in the notice of appeal. Two (grounds 9 and 10) were not pressed. Without alteration the remaining eight grounds are: 1. The Federal Circuit Court (The Court) erred by concluding that the Tribunal’s finding

			that the applicant “could well be” held on remand on return to Sri Lanka was not a finding that detention was “likely”. 2. The Court also concluded the use of the words “could well be” and “possibly” indicated that the Tribunal had considered that the conditions the applicant faced on remand were not necessarily cramped and uncomfortable. The judge should have concluded that these words, if used to diminish the significance of the harm faced by the applicant such that there was not a real likelihood that it would occur, or in some other way affected the seriousness of the harm faced by the applicant, in fact supported the applicant's argument that the Tribunal misunderstood the applicable test. The Judge erred in failing to so conclude. 3. The Court erred in concluding that the Tribunal had not erred in its understanding of the applicable law when it found that 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 not reasonably be said to amount to significant harm within any of the concepts defined in s.5(1) of the Act. 4. The Court erred in finding that International jurisprudence about poor prison conditions for those convicted of offences was not directly relevant.to the question of whether imprisonment on remand (with convicted

			criminals and others on remand) was significant harm. 5. The Court erred in finding that International jurisprudence about poor prison conditions was not relevant to the question of whether imprisonment on remand in Sri lanka was significant harm. 6. The Court erred in finding that the Tribunal had meaningfully engaged with the submissions of the applicant's adviser that detention in poor prison conditions for even a short period of time could amount to significant harm. 7. The Court erred in finding that a claim to fear paramilitaries did not arise clearly from the material. 8. The Court erred in finding that the Tribunal considered the bases underlying any fear of paramilitary groups generally on the part of the Applicant and such findings were sufficiently broad to encompass any claimed fear of paramilitaries arising on the material before the Tribunal.' (para 44). 'There are two important deficiencies in the way in which the Tribunal in the present case carried out its review, which resulted in a constructive failure by the Tribunal to exercise its jurisdiction. First, it did not consider the appellant's claims by reference to the statutory definition of "significant harm" and, in particular, by reference to the component parts of that definition, themselves the subject of statutory

			definitions. This caused the Tribunal to overlook a substantial and clearly articulated argument. Secondly, to the extent that the Tribunal did consider the appellant's claims on the issue of prospective detention for having left Sri Lanka illegally, it did not engage with the appellant's submissions or, save for one newspaper article, the material upon which he relied. The two errors are inter-related.' (para 57). 'The appellant submitted that in order to answer the statutory question the Tribunal was required to consider whether the conditions in which the appellant "could well" have been held while awaiting bail (in the likely event that he would be charged with an offence arising from his illegal departure from Sri Lanka) fell within the definition of "significant harm" in s 36(2A) of the Act. That in turn required the Tribunal to consider whether those conditions would satisfy the definitions in s 5 of "torture", "cruel or unusual treatment or punishment" or "degrading treatment or punishment", particularly the latter. In the light of the definition of "degrading treatment or punishment", it was necessary for the Tribunal to decide whether the prison conditions in Sri Lanka would amount to "extreme humiliation". The Tribunal did not undertake this exercise and so fell into jurisdictional error and the primary judge erred by failing to come to this conclusion. The submission was based on the following matters.' (para 58). 'First, save for the reference (at [8] of its reasons) to the appellant's submission that "any period of detention ... would expose [the appellant] to significant harm, in

			particular torture, cruel or inhuman treatment or punishment or degrading treatment or punishment", the Tribunal did not mention the definition of "significant harm" in s 36(2A). Contrary to the primary judge's opinion (at [73]), the mere reference to this submission was not a matter of any moment. Without more, it does not demonstrate that the Tribunal had regard to the statutory meaning of "significant harm".' (para 59). 'Second, the Tribunal did not advert to the definitions in s 5. The term "extreme humiliation" did not appear anywhere in its reasons. These omissions of themselves indicate that the Tribunal did not ask itself the right questions. In essence, the member reached a conclusion (as to the absence of a risk of significant harm) without applying his mind to the question of what constitutes significant harm within the meaning of the Act.' (para 60). 'Third, a wealth of independent country information from a variety of reliable sources was presented to the Tribunal. It vividly demonstrated that prison conditions, for both convicted and remand prisoners, were deplorable: chronically overcrowded and unsanitary. These were conditions which the appellant expressly contended (in the March 2013 submission to the Tribunal) amounted to "extreme humiliation".' (para 61). 'In these circumstances, the appellant submitted, the Tribunal's assertion that the conditions in which the appellant could be detained on his return to Sri Lanka

			"could not reasonably be said to amount to significant harm" cried out for an explanation. In the absence of an explanation, the appellant submitted, the Court should conclude that the Tribunal did not understand that it was required as a matter of law to consider "whether the prison conditions would expose the [appellant] to extreme humiliation".' (para 62). 'This Court has held that the level of risk for significant harm is no different from the risk involved in the real chance test of serious harm required to satisfy the refugee criterion: *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33; (2013) 210 FCR 505 at [246]–[247] (Lander and Gordon JJ) (Besanko and Jagot JJ agreeing at [296] and Flick J at [342]). The effect of the decision of the High Court in *Chan* is that "a substantial basis for a fear may exist even though there is far less than a 50 per cent chance that the object of the fear will eventuate": *Guo* at 572. It follows that a real possibility of significant harm will suffice to establish the existence of a "real risk" of such harm.' (para 64). 'For this reason I consider that the emphasis the primary judge placed on the possibility, rather than probability, of overcrowding and unsanitary conditions was a distraction. The appellant was correct to submit that the Tribunal's assessment that the appellant could well be held on remand and that there was a possibility that the conditions there would be overcrowded and unsanitary were findings in favour of his claim.' (para 65).

			‘It is possible but unlikely that the Tribunal was not cognisant of the definition of “significant harm” in s 36(2A). It seems to me that on this matter the Tribunal’s reference at [8] of its reasons to the appellant’s submission is proof enough.’ (para 66). ‘The failure to advert to the definitions in s 5, however, is troubling. In the circumstances of this case, where the appellant had submitted that there was a real risk that the conditions in which the appellant could be detained would subject him to “extreme humiliation”, the absence of any reference to the term “extreme humiliation” rather suggests that the Tribunal did not consider the statutory meaning of “degrading treatment or punishment”. The primary judge held otherwise. But apart from the acknowledgment of the appellant’s submission in [8] of its reasons (see [59] above), which failed to mention the definitions in s 5, the only matter upon which her Honour relied was the reference by the Tribunal in [32] to “the absence of reports of returnees held in Negombo prison on remand being subjected to ‘torture’ or ‘other forms of deliberate mistreatment’”.’ (para 67). ‘The primary judge considered that this reference was “relevant to the ‘intention’ aspect of the definitions in issue”. It is far from clear, however, that this reference was intended to pick up the definitions of “cruel or inhuman treatment or punishment” and “degrading treatment or punishment”. Indeed, I think it unlikely, given that at this point in the Tribunal’s reasons it was

			not dealing with the complementary protection criterion and therefore had no cause to consider the definitions of "significant harm". It is difficult to see how the primary judge could be satisfied that the Tribunal had considered the elements of the statutory test for significant harm, including the requirement for intention. "Serious harm" under s 91R may amount to "significant harm" under s 36(2A) but the two expressions are not synonyms.' (para 68). 'On balance, I respectfully disagree with the primary judge on this point. I am of the opinion that the Tribunal member did not turn his mind to the questions posed by the definitions in s 5(1). Strictly speaking, this is probably not a case of the Tribunal misunderstanding the law but of failing to apply itself to it. Either way, it was a jurisdictional error: *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* [1933] HCA 30; (1933) 50 CLR 228 at 242–243; *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at [31].' (para 69). 'The appellant's contention, in essence, is that the Tribunal did not carry out the review required by s 414 of the Act because it failed to consider in any meaningful way a clearly articulated submission about a matter of substance.' (para 70). 'It is true, as the primary judge observed, that the Tribunal spoke of a submission concerning "the poor standard of prison conditions" and that it implicitly

			rejected the appellant's submission that any period of detention would expose him to significant harm. What it did not do, however, is consider whether the prison conditions in which he could well be held while awaiting bail satisfied the statutory definition of "cruel or inhuman treatment or punishment" or "degrading treatment or punishment".' (para 90). 'In his submissions counsel for the appellant focussed on the question of "degrading treatment or punishment". It will be recalled that, omitting the exception, "degrading treatment or punishment" is defined in the Act to mean "an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable". Yet the Tribunal failed to advert to the definition. Nor did it refer to the appellant's submission that if he were subjected to the kind of prison conditions described by the independent country information and international jurisprudence, "his mistreatment would result in extreme humiliation". Moreover, it made no relevant finding on this question. Having regard to the submission, it was necessary for the Tribunal to form a view about the relevance and reliability of the material in the various reports to which it referred and consider whether, if the appellant were to be held in conditions of the kind described in them, albeit for a matter of days if not longer, he would be subjected to acts and/or omissions that cause extreme humiliation and, if so, whether that was unreasonable and intentional.' (para 91).

			'While the Tribunal noted that conditions for remand prisoners in Negombo prison had been described in media reports (citing the Doherty article as an example) as "overcrowded and unsanitary", it did not consider whether those conditions could amount to "extreme humiliation".' (para 92). 'Given the failure of the Tribunal to refer to the definition of "degrading treatment or punishment" or to the appellant's submission that his mistreatment would result in extreme humiliation, I respectfully disagree with the primary judge's conclusion, which the Minister sought to uphold, that the reference to the absence of reports of "torture or other forms of deliberate mistreatment" of returnees held in Negombo prison awaiting bail indicates that it considered that submission. The simple fact is that we do not know what the Tribunal member had in contemplation when he spoke of "deliberate mistreatment". I acknowledge that courts are not to be concerned with loose language or "unhappy phrasing" in the reasons of an administrative decision-maker: *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 456; (1993) 43 FCR 280 at 287. I accept that those reasons should be given a beneficial interpretation: *Wu Shan Liang* at 271–2. But in view of the fact that the words in question were used in the context of the Tribunal's consideration of the refugee criterion and that the Tribunal did not refer to the definitions in s 5, it would be a leap of faith to conclude that the Tribunal member had in mind the statutory definitions of "cruel or inhuman treatment or punishment" or "degrading treatment or punishment".

			As Stone J observed in *SZCBT v Minister for Immigration and Multicultural Affairs* [2007] FCA 9 at [26], the requirement to take a beneficial approach to the Tribunal's reasons does not mean that the Court should resolve every ambiguity in the Tribunal's favour.' (para 93). 'In any case, noting that there was an absence of reports that other returnees had been tortured or deliberately mistreated could not conclude the inquiry. The Tribunal had to assess the significance of the matter. After all, just as the absence of past persecution does not gainsay the real possibility of future persecution (*Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; (2003) 216 CLR 473 at [74] per Gummow and Hayne JJ), an absence of reports of past deliberate mistreatment does not deny the real possibility of it occurring in the future. What is more, the Tribunal had to assess the significance of the matter together with the material raised by the appellant's submissions against the statutory definitions of "torture", "cruel or inhuman treatment or punishment" and "degrading treatment or punishment". It did neither. Without taking the next step of reasoning from the absence of evidence that the risk of significant harm (as defined) was not a real possibility, the Tribunal did not complete its statutory task. In taking that step it would have to decide whether the descriptions of prison conditions in the reports to which the appellant referred in his submissions were apt to describe the conditions in which the appellant could be held. To that end it would need to evaluate the material

			upon which the appellant relied and decide, amongst other things, whether remand prisoners were held with convicted prisoners and whether conditions in all Sri Lankan prisons were alike.' (para 94). 'As the primary judge appears to have accepted, it is no answer to the appellant's argument to point to the Tribunal's reasons at [38]–[39]. They were merely conclusory. Whether there was a real risk of "significant harm" had to be determined by reference to the prospects that the appellant would be subjected to "torture", "cruel or inhuman treatment or punishment" or "degrading treatment or punishment" and it had to be determined after an evaluation of the appellant's evidence and arguments against the definitions of each term. It is an error to approach the assessment of "significant harm" in a "rolled-up" fashion as the Tribunal appears to have done.' (para 95). 'As I have already observed, the March 2013 submission drew attention to several cases in which the UN Human Rights Committee had found that detention for only a few days in overcrowded and unsanitary conditions amounted to both inhuman and degrading treatment. In some of these cases the conditions extended to exposure to cold; inadequate ventilation, bedding, clothing, and nutrition; a lack of clean drinking water; the inability to exercise; and the denial of medical treatment. One of these cases involved a Dominican man who was held for 50 hours in a cell measuring 20 by 5 metres with about 125 others who were accused of common crimes. According to the

			Committee, owing to lack of space some detainees had to sit on excrement. The Dominican detainee was deprived of food and water until the day after his arrest. The Committee apparently found that his treatment was both inhuman and degrading. In another case, the Committee apparently found that the treatment of a Zairean detainee who was deprived of food and drink for four days after his arrest and later "interned under unacceptable sanitary conditions" was inhuman.' (para 105). 'The appellant argued that, if he were subjected to interrogation and prison conditions of this kind, "his mistreatment would result in extreme humiliation". In this context, he referred to a judgment of the European Court of Human Rights in *Pretty v United Kingdom* [2002] ECHR 427; (2002) 35 EHRR 1 at [52]. There, the Court was considering the types of treatment which fall within the scope of Article 3 of the European Convention on Human Rights, which provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment of punishment". The Court said (case references omitted): Where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3 ...' (para 106).

			‘The primary judge considered that the Tribunal did not refer to international jurisprudence including the cases cited in the appellant’s March 2013 submission because it did not consider it was relevant in the particular circumstances of this case. Her Honour held that this was not indicative of jurisdictional error for two reasons. The first reason she gave was that the Tribunal did not accept that there was a real chance that the appellant would be imprisoned after conviction and the international jurisprudence concerned poor prison conditions for people who had been convicted. The second reason she gave was that the Tribunal did not base its decision on the aspects of the definitions in s 5, particularly the exceptions that refer to the ICCPR. In support of this latter reason her Honour relied on the joint judgment of Kenny and Nicholas JJ in the Full Court in *SZTAL* at [65].’ (para 107). ‘The appellant accepted that the international jurisprudence did not govern the construction of the expressions “cruel or inhuman treatment or punishment” or “degrading treatment or punishment” as used in the Migration Act. But he submitted that it was not irrelevant, given that the complementary protection provisions of the Act give “effect to Australia’s non-refoulement obligations under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) (the CAT) and the International Covenant on Civil and Political Rights (1966) (the ICCPR)”: *SZTAL* (HC) at [1] (Kiefel CJ, Nettle and Gordon JJ).’ (para 108).

			'Indeed, in *SZTAL* (HC), their Honours acknowledged at [18] that "words taken from an international treaty may have another, different, meaning in international law". The adoption of those words may in some cases be suggestive of a legislative intention to import that meaning. The focus of that case, however, was on the concept of intention in the definitions contained in s 5(1), which does not appear as an element of "cruel, inhuman or degrading treatment or punishment" in the ICCPR. Further, their Honours observed that the concept of intention does not have a settled meaning in international law and therefore international jurisprudence on that question would be of little utility. See also *Minister for Immigration and Border Protection v BBS16* [2017] FCAFC 176 at [42].' (para 109). 'I respectfully disagree with the primary judge's explanation for the Tribunal's failure to refer to the international jurisprudence in this case. First, as I have already observed, the material upon which the appellant relied showed that there was no material difference between the conditions in which remand and convicted prisoners were held. Secondly, the two cases I have referred to above involving the Dominican and the Zairean detainees dealt with detention for similar periods of time. On the face of things, the facts of those cases as outlined in the appellant's March 2013 submission were not so very different from the conditions described in the Doherty article and in the other reports referred to in that submission. Thirdly, her Honour's interpretation of the joint judgment

			in *SZTAL* (FC) was too narrow. More likely than not the international jurisprudence was not mentioned because the Tribunal did not give due consideration to the appellant's submission.' (para 110). 'That said, the real question is whether the Tribunal was required to consider the international jurisprudence cited in the appellant's March 2013 submission, either as a relevant consideration in its decision-making or as part of a substantial and clearly articulated argument. On balance, I do not think so. "Cruel or inhuman treatment or punishment" and "degrading treatment or punishment" are defined in the Migration Act. It is those definitions that mattered (as to which, see consideration of grounds 1–3 above). As the Full Court observed in *MZYYL* at [18], the definitions in the Act are different from those referred to in international human rights treaties and commentaries. No attempt was made (either in the submission to the Tribunal or on appeal) to explain the interaction of the international jurisprudence cited in the submission with the relevant terms of the Act.' (para 111).
Steve v Minister for Immigration and Border Protection [2018] FCA 311 (Unsuccessful)	16 March 2018	7, 38, 40, 44, 50-54	In this case the applicant argued that his removal from Australia, his own country, would violate Article 12(4) of the ICCPR. The Court found that Article 12(4) did not fall within Australia's international non-refoulement obligations. 'With the able assistance of pro bono counsel in Sydney, the assistance of whom is gratefully acknowledged by the Court, the applicant sought leave

			at the hearing to rely on a "*proposed further amended application for review of a migration decision*", advancing five grounds of review. Grounds 1, 4 and 7 do not depart from what is in the existing application, albeit that ground 7 has been renumbered. Former grounds 2 and 3 have been abandoned, while new or revised grounds are sought to be advanced by way of proposed grounds 5 and 6. It is convenient to maintain the numbering of the grounds that were pressed. Those grounds broadly fall into two categories: (1) … (2) The second to fifth grounds, comprising existing ground 4, proposed grounds 5 and 6 and the existing ground now renumbered as ground 7, concerns the effect of art 12(4) of the *International Covenant on Civil and Political Rights* (**ICCPR**), which states that "*no one shall be arbitrarily deprived of the right to enter his own country*".' (para 7). 'An essential component of the applicant's case under the grounds numbered 4 to 7 was the assertion that he has a human right to enter Australia as his "*own country*", as enshrined in art 12(4) of the ICCPR. Art 12(4) is in the following terms: No one shall be arbitrarily deprived of the right to enter his own country.' (para 38).

			'It was submitted on behalf of the applicant that this Court should find that the applicant's "*own country*" within the meaning of art 12(4) is Australia, notwithstanding his lack of citizenship. The Court was urged to have regard to the applicant's longstanding residence in this country, his close and enduring ties with Australia, and his lack of ties with any other country. It was emphasised that these factors are not contentious and were accepted by the Tribunal at [53], where it reproduced the statement by the applicant set out at [14] above as to his upbringing and substantial family connections in Australia and his lack of any family, friends or other connection with New Zealand.' (para 40). 'There are obvious similarities between the present case and those confronting the Committee in *Nystrom*. The applicant is a longstanding resident of Australia, with strong and enduring ties to this country, and a lack of any ties with New Zealand other than nationality. The Minister did not appear to resist this submission. In the circumstances, I am willing to accept, for the purposes of determining this application, that Australia may be regarded as the applicant's "*own country*" within the meaning of art 12(4) of the ICCPR.' (para 44). 'By ground 4, the applicant asserted that the Tribunal made a jurisdictional error by failing to take into account Australia's obligations contained in art 12(4) of the ICCPR. Those obligations were said to be a mandatory relevant consideration by reason of cl 14 of Direction 65.' (para 50).

			‘Clause 14 of Direction 65 states as follows: 14. Other considerations – revocation requests (1) In deciding whether to revoke the mandatory cancellation of a visa, other considerations must be taken into account where relevant. These considerations include (but are not limited to): a) International non-refoulement obligations; b) Strength, nature and duration of ties; c) Impact on Australian business interests; d) Impact on victims; e) Extent of impediments if removed.’ (para 51). ‘The applicant accepted that the matter of art 12(4) was not expressly included in the list of considerations dictated by cl 14 of Direction 65. It was submitted that the Direction may nonetheless make consideration of art 12(4) mandatory by implication, citing *Minister for Aboriginal Affairs v Peko-Wallsend* [1986] HCA 40; (1986) 162 CLR 24 per Mason J at 39-42. In particular, it was argued that “*international non-refoulement obligations*” should be read as encompassing consideration of the applicant’s rights under art 12(4). The basis for that submission was that the underlying concept of “*international non-refoulement obligations*” is that the decision-maker must consider an international legal obligation regarding movement across international borders, where the obligation could be breached by a decision resulting in the removal of a person from Australia.’ (para 52).

			‘The answer to the applicant’s contentions on this ground may be found within the terms of Direction 65 itself. The subclauses to cl 14 of Direction 65 provide further information to decision-makers on the nature of each of the considerations to be taken into account. Relevantly, cl 14.1(1) states that “*A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm* ...”. So understood, the consideration mandated by cl 14 of Direction 65 can in no way be seen to encompass, whether expressly or by any available implication, an obligation to consider a person’s right to enter Australia without arbitrary interference. Rather, it can only meaningfully be understood to refer to the distinct obligation not to *return* a person to a place or country where they may face harm of a particular kind. Unlike art 12(4), that obligation is a mandatory relevant consideration because it has been given force in domestic law by way of legislation under the *Migration Act*, such as by way of complementary protection. The mere fact that both art 12(4) and non-refoulement obligations concern movement across international borders is no basis for interposing art 12(4) as any part of the content of non-refoulement obligations.’ (para 53). ‘Accordingly, it cannot be accepted that Direction 65 requires consideration of Australia’s international obligations under art 12(4), and there was no error by the Tribunal in a failure to consider that matter. It follows that ground 4 must fail.’ (para 54).

CDY15 v Minister for Immigration and Border Protection [2018] FCA 175 (Unsuccessful)	28 February 2018	5, 6, 22-24, 27, 37-39	This case discussed the significance of the motivation behind inflicting harm on an applicant under a section 36(2)(aa) inquiry. 'In general terms, the first appellant claims that, in Malaysia, two of his brothers, who were members of a political party, were attacked by members of a gang as they were returning from a party meeting. It is said that the attack was politically motivated. One of the first appellant's brothers killed the alleged leader of the gang. That brother was tried, convicted and has been sentenced to death. The other brother involved in the attack was later killed in a car accident, which the appellants allege was suspicious and supposedly caused by the gang members. The first appellant claims that, subsequently, he has been threatened, attacked and harassed by the gangsters seeking retribution for the death of their leader. It is for that reason that he seeks a protection visa. The same grounds are relied upon for the purposes of claiming that they are entitled to a visa on the Complimentary Protection criterion in s 36(2)(aa) of the *Migration Act 1958* (Cth) (the Act).' (para 5). 'The appellants assert that the Court below erred by not finding that the decision of the Tribunal was affected by jurisdictional error because the Tribunal failed to deal with the Applicant's claims as they arose from the Tribunal's own findings or conclusions. The particulars of that are as follows:

			(a) The Tribunal accepted that the first appellant had been attacked and seriously injured on two occasions by unknown persons. (b) The Tribunal did not accept the first appellant's claim that those persons were members of a gang, whose former leader had been murdered by the Applicant's brother and who now seek revenge against the first appellant. On that basis, it affirmed the decision of the delegate to refuse the appellants' claims. (c) The Tribunal was required to, and did not, consider whether the appellants faced a real chance or real risk of serious or significant harm pursuant to ss 36(2)(a) and 36(2)(aa) of the Act, on the basis of the two attacks which the Tribunal accepted had occurred. (para 6).' 'In response to that suggestion, Mr Maloney submitted that the rejection by the Tribunal of the motivation for the attacks on the appellant was irrelevant to whether the facts of the matter satisfied the requirements of s 36(2)(aa). In doing so he relied upon the comments of Judge Driver in *SZSFK v Minister for Immigration and Citizenship* [2013] FCCA 7 at [91] where the learned judge seemed to suggest that findings by a decision maker as to the motivation behind the inflicting of harm on a visa applicant, although relevant to a convention ground, were irrelevant to the s 36(2)(aa) inquiry. I

			cannot agree with those views as expressed by the learned judge.' (para 22). 'The question to be determined under the s 36(2)(aa) is whether, as a necessary and foreseeable consequence of the applicant for a visa being removed to a receiving country, there is a "real risk" that he or she will suffer significant harm. That involves an evaluation of the harm which the applicant might suffer in the future and that assessment requires past facts and events to be evaluated for the purposes of ascertaining whether a propensity exists for the applicant to encounter harm in the future. Highly relevant to that inquiry is whether the applicant has suffered any previous infliction of harm and the circumstances in which it occurred. If it were the case that third parties inflicted harm on the applicant and had reasons and motivation for doing so and those reasons and motivations remained extant at the time when the decision is made, the decision maker might rightly assume that there exists a propensity for harm to be suffered by the applicant at the hands of those third parties in the future. Conversely, if the motivation or reasons behind the infliction of the initial harm have expired or lapsed, a decision maker might rightly consider that the prospect of the applicant suffering harm in the future from the identified third parties does not exist.' (para 23). 'That is not to say that the identification of motivation for the infliction of past harm is a necessary requirement. It is possible to contemplate circumstances where the motivation for prior incidents is not known

			but the frequency of the infliction of harm or the circumstances are such that it is possible to reach the conclusion that there exists a real risk of the applicant suffering significant harm in the future. That said, such circumstances (outside of war zones and the like) will be unusual and it is likely that they will only occur where they generate an assumed or implicit motivation for the infliction of past harm which can be seen to continue at the time of the making of the decision. Nevertheless, in general, as a matter of logic it is the motivation behind past inflictions of harm on an applicant which make that factor relevant to a consideration of whether similar harm is likely to be inflicted in the future. In circumstances where the reason or motivation for the past infliction of harm is not known, the fact that the applicant has sustained that harm, of itself, must necessarily be of little significance in deciding whether, in the future the applicant might be at risk of similar harm. Put another way, it must be that, in all but the most exceptional cases, the existence of prior acts of harm for which no reason or motivation is known cannot lead to the conclusion that the victim of those acts of violence faces any risk of similar harm in the future.' (para 24). 'The observations of Wigney J in *SZSXE* are plainly correct and applicable in the circumstances of the present case. Here the Tribunal applied its findings in relation to the question of whether there was any identifiable motivation for the previous attacks on the first appellant to both the Convention grounds claim and the s 36(2)(aa) claim. The findings of the Tribunal

			were to the effect that the appellants' explanations for the attacks on the first appellant were untrue and not accepted. This had the result that there was no evidence as to why the appellant was attacked on the two previous occasions. That had the dual effect of denying the possible existence of a Convention ground and removing the existence of any real risk of significant harm being suffered in the future.' (para 27). 'There is no jurisdictional error in the Tribunal applying its earlier findings (being the rejection of the appellants assertions as to why harm was inflicted upon him) for the purposes of determining whether or not he would face a real risk of harm if returned to Malaysia for the purposes of s 36(2)(aa). The rejection of the appellants' assertions as to the motivations for the attacks and their assertions of the circumstances surrounding them which suggested a motivation for the attacks, had the effect that the fact of the attacks having occurred carried with it no suggestion that similar harm would be suffered in the future.' (para 37). 'The short answer to the appellants' submission that the Tribunal was required to consider the circumstances of the attacks to the extent that they had not been rejected by the Tribunal for the purposes of its consideration under s 36(2)(aa), is that it did. All that relevantly remained of the appellants' narrative concerning those events was the fact of the attacks having taken place. As appears from the above cited paragraphs of the Tribunal's reasons that is what was considered and it

			was held not to give rise to any real risk of harm.' (para 38). 'Once the Tribunal had rejected the first appellant's evidence that he was being targeted because of the actions of his brother, it was not required to speculate as to why it was that he had been attacked on two previous occasions or whether he would be at risk of similar attacks in the future or face serious or significant harm in the future. In this latter respect Mr McDermott for the Minister referred to *MZZHA v Minister for Immigration and Citizenship* [2014] FCA 814; (2014) 224 FCR 365. That case concerned a slightly different context although the point of principle is applicable. The appellant in that case had sought a protection visa and although the Tribunal had accepted that he had been given the lash in Iran it did not accept the appellant's evidence as to why he had been so punished. The appellant claimed that the Tribunal was required to go further and ascertain why he had been punished and, without doing so, it was not able to make an assessment of the risk of harm to the appellant in the future. That argument was rejected by North J who said that the Tribunal was not required to speculate as to the reasons as to why the appellant had been punished and whether he would commit similar crimes in the future which might warrant such treatment. That conclusion can be applied to the present case. Here the Tribunal made findings which removed any rationale for the attacks which were inflicted upon him and that necessarily negated the prospect of the first appellant being at risk of similar violence in the future. The best that can be

			said of the past attacks is that they were serious and unfortunate events, but there is nothing in their circumstances, as found by the Tribunal, which suggest that they may reoccur.' (para 39). 'It is plain that the Tribunal correctly dealt with both the Convention grounds and the Complimentary protection criterion and that it was cognisant of the legal tests to be applied in each case. At the commencement of its reasons the Tribunal made a clear and distinct reference to the separate criteria required to be satisfied by s 36(2)(aa) (see, in particular, [15] – [17]) and after considering the evidence and material in detail undertook the task of making findings in relation to the claims advanced. There was no conflation of the tests or the reasoning relevant to each. The factual foundation of each claim was the same with the result that *the basis* for the rejection of the Convention claim could be relied on for the rejection of the claim based on the Complimentary protection criterion.' (para 41). 'It was urged upon the Court that various authorities required that the Tribunal deal with each of the claims in a self-contained manner. Whilst the extent or scope of that submission is not entirely clear, if it is intended to suggest that the Tribunal must undertake separate determinations of fact in relation to each ground it is misconceived. The Tribunal is entitled to make factual findings on the basis of the evidence provided to it by the applicant and what other evidence is available. If such findings of fact are relevant to the application of two or more statutory tests, the Tribunal is entitled to

			rely upon the finding in relation to each. To require the Tribunal or other decision maker to undertake a wholly nugatory task of considering the material a second time would be irrational. As was identified by Wigney J above it is not surprising in cases of this nature that a finding of fact by the Tribunal may well diminish the factual foundation of two or more distinct claims.' (para 42).
AXD17 v Minister for Immigration and Border Protection [2018] FCA 161 (Unsuccessful)	23 February 2018	5-6, 37, 69-75	In this case the judge accepted in principle that, in relation to the exception in s 36(2B)(c), there may be some cases where the level of generalized violence in a particular country is such that an applicant can show sufficient personal risk without distinguishing features. 'In his application, the appellant claimed he feared returning to Afghanistan because he had rejected Islam and converted to Christianity. He claimed that, because of this, he would be charged with apostasy and punished.' (para 5). 'The appellant stated he had suffered sexual violence in 2011 while he was in Afghanistan because he was suspected of having Christian beliefs. He claimed that after this incident he completely rejected Islam and subsequently started attending Christian bible classes in immigration detention in May 2016.' (para 6). 'To this effect, the appellant's lawyer filed an amended notice of appeal on 5 February 2018 abandoning the

			four grounds of appeal and advancing, in their place, new grounds 5, 6 and 7, as follows …Ground 7: Misapplication of the test for complementary protection … d. The Tribunal then found 'that the risk of harm from any insecurity or generalised violence in Afghanistan is a risk faced by the population generally and not by the applicant personally' (CB 265 [30]). In making this finding the Tribunal did not ask itself whether the Appellant was owed complementary protection because the levels of insecurity or generalised violence in Afghanistan also put him at personal risk so as to negate exclusion under s.36(2B)(c) of the Act (see *BOS 15 v Minister for Immigration* [2017] FCCA 745 at [29]- [30]). e. By not making an assessment of the risk of insecurity or generalised violence in Afghanistan, the Tribunal committed a jurisdictional error in relation to the Appellant's complementary protection claim.' (para 37). 'It is not argued that the appellant's profile is such that he individually or as a member of some identifiable social group was at risk of harm – he accepting at this point that the findings of the Tribunal against him being targeted as a Christian undercut this argument – but that

			the general state of insecurity in Afghanistan places anybody living or returning to Afghanistan at risk of relevant harm. By reference to *BOS15 v Minister for Immigration* [2017] FCCA 745, referred to in [24] of the appellant's submissions which are reproduced at [42] above and also by reference to what was said in *SZSFF v Minister for Immigration & Anor* [2013] FCCA 1884 and reproduced at [30] of the appellant's written submissions and reproduced at [43] above, the appellant submits, for example, by reference to a country such as Syria at present, that where serious human rights violations in a particular country are so widespread and so severe that almost anyone would potentially be affected by them, an assessment of the level of the risk to the individual may disclose a sufficiently real and personal risk to engage a nonrefoulement obligation under the *International Covenant on Civil and Political Rights*. Opened for signature 16 December 1966. 999 UNTS 171 (entered into force 23 March 1976) and/or the *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).' (para 69). 'As such, it is said, s 36(2B)(c) does not necessitate in all cases that the individual be singled out or targeted for any particular reason for the provision to apply. What is ultimately required, it is contended, is an assessment of the level of risk to the individual and the prevalence of serious human rights violations. The appellant submits it is this claim and this assessment

			which was not done and which should have been done by reference to the DFAT report.' (para 70). 'Accepting generally that there may be circumstances, in which for Australia to return a person to their country of origin may be to expose them to a sufficiently real and personal risk of harm without them being targeted as an individual or member of a relevant group, and thereby result in s 36(2B)(c) not having relevant application, was any such claim made in this case? In my view, it is, in the result, very difficult to see that such a claim was made. The decision in *NABE (No 2)* makes it plain that it is not only an express claim that should be considered by the Tribunal, but also ones which "clearly emerge" from the way an applicant has put his or her case. All that the Court knows – and counsel for the appellant was unable to refer to any other materials, such as transcript from the hearing – is what is contained in [30] of the Tribunal's decision record. It is appropriate to set out the whole of [30] here: The applicant mentioned at the hearing, although he did not formulate this as a claim, that Afghanistan is not a safe country. Under s.36(2B)(c) of the Act there is taken not to be a real risk that a person will suffer significant harm if the Tribunal is satisfied that the real risk is one faced by the population generally and is not faced by the applicant personally. Having rejected his claims to fear harm for his conversion to Christianity or perceived rejection of Islam, the Tribunal does not accept there is anything in the applicant's profile that

			means he has a real risk of being targeted personally for significant harm. The Tribunal finds the risk of harm from any insecurity or generalised violence in Afghanistan is a risk faced by the population generally and not by the applicant personally.' (para 71). 'In my view, even though the Tribunal has engaged in some analysis of the question of harm if the appellant were to be returned to Afghanistan, following the first sentence in [30], I do not consider that the "claim", as now formulated on behalf of the appellant, clearly emerged at the interview or hearing in the Tribunal. First, it is plain that the Tribunal did not see the question of harm in those terms to have been formulated as a "claim".' (para 72). 'The Tribunal has carefully used the verb "mentioned". The question of Afghanistan not being a safe country appears to have been something mentioned in passing by the appellant in giving evidence to the Tribunal. At that level of generality, it was not for the Tribunal to perceive what was mentioned either as a formal "claim" of harm or, in any event, as an assertion that the situation in Afghanistan was so dire that even though he may not be a member of a group or individually a person likely to be targeted for his beliefs or religious associations, he was nonetheless at risk of significant harm due to the general state of affairs in Afghanistan. If that had been the appellant's case in seeking a protection visa, one would expect it to have been mentioned at the front and centre of the claims he in fact made formally or in the course of his oral evidence

			in the Tribunal. Instead, his substantive claim was put on the basis that he would be targeted because he would be seen as an apostate in a predominantly Islamic country.' (para 73). 'On that basis, I do not consider that ground 6 can succeed. There was no obligation to consider the DFAT report in such a context because, in those circumstances, the report's content was not relevant to any claim made by or on behalf of the appellant in the Tribunal.' (para 74). 'For similar reasons, ground 7, which asserts the misapplication of the test of complementary protection, must also fail. Because the appellant did not claim to be at real risk of suffering significant harm throughout Afghanistan such as to negate exclusion under s 36(2B)(c), the findings of the Tribunal that the appellant did not face any real risk of significant harm on the basis that the risk he did face was one faced by the population of the country generally and not by him personally, or as a member of a targeted group, was not misconceived or made in jurisdictional error.' (para 75).
BTW17 v Minister for Immigration and Border Protection [2018] FCAFC 10 (Full Court) (Unsuccessful)	1 February 2018	5, 25-31	This case considered whether there was a real risk of the death penalty as a punishment for a criminal offence in Sri Lanka and found that, given the seriousness of the punishment, there had to be sufficient information to make an express finding that there was no real risk that the sentence would be carried out.

			'The Authority accepted the appellant shot a gang member in 2011 and it accepted that the appellant was arrested for attempted murder and spent 13 months on remand. Then after, whilst released on bail, the appellant did not report to police as required and subsequently left Sri Lanka illegally. The Authority was satisfied that the appellant may be identified and detained on arrival and that this would be the result of the lawful prosecution of the crime by Sri Lankan Authorities but did not of itself amount to persecution.' (para 5) 'The Authority dealt with the risk as to the death penalty at [36] of its statement of reasons saying: ... I have considered the [appellant's] concern that he would face the death penalty in Sri Lanka. Amnesty International advised that the death penalty continues to be passed as sentence for some serious crimes, however they reported that no death sentences have been carried out in over 10 years and describe Sri Lanka as 'abolitionist' in practice. DFAT advised that the last death sentence in Sri Lanka was carried out in 1976. I note that in September 2015 President Sirisena, in response to public concerns and media reports of violent crime, announced an intention to implement the death penalty from 2016. However, DFAT reported that as at January 2017 there was no indication that parliamentary approval for implementation of the death penalty would be provided. Taking account of the country information I find that there is not a real risk

			that the appellant would be subjected to the death penalty in Sri Lanka. [citations omitted]' (para 25). 'It is clear that the most current information before the Authority was the DFAT report. The Authority in the examination of the events, clearly and reasonably linked the appellant's alleged crime with 'serious crimes' for which the death penalty could be passed as a sentence but concluded that there was no real chance of the death penalty because the last death sentence in Sri Lanka was in 1976.' (para 26). 'However, this fails to address the most recent fact actually known in the material expressly relied upon, namely that the President had announced (more recently than the Amnesty International Report) an intention to implement the death penalty from 2016. The earlier historic material, which led to the conclusion that it was unlikely the death penalty would be imposed or more relevantly, implemented, had to be evaluated as against the new Presidential announcement which was quite to the contrary on its face. Amidst all of this, there are no indications of what the true state of the law is in Sri Lanka, that is, whether or not the President can implement the death penalty and the extent to which, if any, he would require Parliamentary approval to do so, let alone whether the fact that parliamentary approval had not been given at the time of the DFAT report meant that it could be assumed that such approval would not be given at a relevant foreseeable future date which could affect the appellant. Certainly the content of the DFAT report cannot be taken as a statement that

			Parliament had declined to give any approval which might be necessary for implementation of the death penalty. It does not say that. The better reading is that the President sought to reintroduce it and at the time of the DFAT report it was unknown whether or not he would have parliamentary support to do so.' (para 27). 'It is not a reasonable conclusion against that background that there is no real risk the appellant would be subject to the death penalty. The President has indicated he intends to reintroduce it and the position of Parliament is unknown. These events have taken place at a point in time after the Amnesty International report and in apparent response to public concerns and media reports of violent crime. The information as to the number of people on death row whose death sentences had not been executed and that Sri Lanka was effectively abolitionist in practice logically had to give way to the most recent fact – the President announcing that he intended to reintroduce the death penalty. The fact that this had not occurred as at the time of the DFAT report fell well short of a reasonable basis on which to conclude there was no real risk that the appellant might be exposed to a death sentence.' (para 28). 'Particularly in circumstances where the consequences of a conclusion are so serious, there is a paucity of information leading to that serious conclusion. The possibility of implementation of the death penalty has always and logically assumed importance in Australian jurisprudence and legislation. Although in dissent,

			Kirby J made the following remarks, with which there could be little dispute, in *Applicant NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 29; (2005) 216 ALR 1 (at [134]) that '[w]here there is any risk of death or disappearance, assumption is not good enough. Express findings must be made'. While the DFAT report reported that, as at January 2017, there was no indication that parliamentary approval would be provided, this was the slimmest of information on which the Authority could act.' (para 29). 'There was insufficient clear foundational material as to the Sri Lankan legal system and the state of affairs as between the presidential announcement and Parliament to warrant reasonably reaching the conclusion that the appellant was exposed to no real risk as to the death penalty.' (para 30). 'On this basis the appeal should be allowed. The second ground adds nothing to the first and is unnecessary to address.' (para 31).

FEDERAL CIRCUIT COURT OF AUSTRALIA

Case	Decision date	Relevant paragraphs	Comments

BXY15 v Minister for Immigration & Anor [2018] FCCA 2896 (Successful)	16 October 2018	2, 41, 47-48, 77-85, 91, 97-98, 102-104, 107-110	The Court found that the Tribunal had erred in its application of sections 36(2)(aa) and 36(2B)(c) of the Act by failing to consider the risk of generalized violence separately from violence arising for Refugee Convention reasons and by considering the risk to the population in the applicant's home area rather than the population of the country generally. 'The Applicant, a citizen of Pakistan, arrived in Australia on 22 July 2012. On 17 August 2012 he participated in an entry interview. He applied for protection in November 2012. His application was accompanied by a written statement of claims. He claimed to fear harm from the Taliban and/or associated groups because of his religion, ethnicity or membership of the particular social group of Pashtun Shias and because of his involvement in anti-Taliban protests.' (Para 2). 'The first ground is as follows: *1. The Tribunal misconstrued or misapplied s 36(2)(aa) of the Act.* *Particulars* *a. The applicant claimed to be unable to return to his home location in Kurram Agency, Pakistan, because he would be targeted because of his race, religion, membership of particular social groups and imputed political opinion: Tribunal's Decision at [23].*

			b. The applicant also claimed to be entitled to complementary protection: submission of 30 June 2015 at [84]-[96]. *c. The Tribunal rejected the applicant's claims to be entitled to protection as a result of his being a refugee on the basis that none of the applicant's race, religion, memberships of particular social groups or imputed political opinion gave rise a well-founded fear of persecution: Tribunal's Decision at [96].* *d. In the next paragraph, in dealing with the applicant's complementary protection claim, the Tribunal stated only that: "The Tribunal further finds, based on the consideration of the evidence above, that the applicant does not have a real risk of significant harm, either individually or cumulatively, for these reasons": Tribunal Decision at [97].* *e. In reasoning as set out in the preceding particular, the Tribunal erred as the complementary protection regime did not require the applicant to establish that he faced a real risk of significant harm on the basis of a Convention ground.*' (Para 41). 'The Applicant contended that while he claimed to fear harm from generalised violence in his home region (and the material before the Tribunal also raised such a claim), in considering whether he faced a real chance of serious harm **or** a real risk of significant harm from recurring violence in his home area the Tribunal had limited its findings (in paragraph 95 of its reasons (set out at [36] above)) to the chance or risk of future harm

			from recurring violence "*for the Convention reasons relied upon by the applicant*".' (Para 47). 'Counsel for the Applicant submitted that in circumstances where the country information cited by the Tribunal suggested there was a significant risk of generalised violence in the Applicant's home region (that is, violence that was not targeted at any person for a Refugees Convention reason), including evidence that, despite a decline in civilian deaths following a military offensive, the level of civilian deaths was still "*horrifically high*", the Tribunal had made the error of limiting its assessment of whether the Applicant faced a real risk of significant harm in his home area from such generalised violence to whether there was a chance or risk of the Applicant being harmed for the Convention reasons relied upon. It was submitted that the Tribunal's inquiry for the purposes of the complementary protection criterion in s.36(2)(aa) of the *Migration Act 1958* (Cth) (the Act) could not be confined to a consideration of whether the Applicant faced a real risk of significant harm from generalised violence in the Parachinar region for a Refugees Convention reason he had advanced.' (Para 48). 'In other words, in the conclusionary paragraph in relation to its consideration of the Applicant's claimed fear of harm from future recurring or generalised violence in his home area, the Tribunal expressly, and incorrectly, limited its consideration to "*the chance or risk*" of the Applicant being harmed "*for the Convention reasons relied upon*". This finding did not

			address the complementary protection claim based on generalised violence that was not for a Convention reason or for reason of a personal attribute of the Applicant giving rise to an attendant Convention reason. The express limitation to a consideration of harm for "*the Convention reasons relied upon by the applicant*" is not consistent with the interpretation contended for by the First Respondent. Insofar as "*for these reasons*" may be a broader concept, seen in this context it must be a reference to the reasons (that is, the attributes of the Applicant and Convention reasons) expressly addressed in paragraph 90.' (Para 77). 'In paragraph 96 the Tribunal made a general conclusion considering the Applicant's attributes and the "*attendant*" Refugees Convention grounds. It addressed those claims "*individually and cumulatively*".' (Para 78). 'The Tribunal's conclusion at paragraph 97 in relation to complementary protection was as follows: *The Tribunal further finds, based on the consideration of the evidence above, that the applicant does not have a real risk of significant harm, either individually or cumulatively, for these reasons.*' (Para 79). 'This was also a conclusionary finding, intended to consider previous findings individually and cumulatively. Hence it must be seen in light of the Tribunal's earlier findings. I have borne in mind that it

			is well-established that there is no jurisdictional error merely because a Tribunal refers to previous findings in considering the complementary protection criterion (see *SZSGA v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCA 774). To the extent that there is a factual foundation common to both the Refugees Convention and complementary protection claims if the Tribunal does not accept the factual foundation then jurisdictional error is not made out if the Tribunal simply refers to its earlier reasons in addressing s.36(2)(aa) claims (see *SZTQP v Minister for Immigration and Border Protection* [2015] FCAFC 121; (2015) 232 FCR 452 at [35]- [36]).' (Para 80). 'However that is not what occurred in relation to the Applicant's claimed fear of a real risk of significant harm from future generalised violence. While the Tribunal discussed the level of violence in the Applicant's home region, its conclusion in relation to the risk of harm to the Applicant from generalised violence was in paragraph 95 and was expressly limited to harm for the Convention reasons relied on by the Applicant.' (Para 81). 'Insofar as paragraph 97 is intended to be a "*catch all*" conclusion in relation to the complementary protection criterion, this would suffice in relation to the bases for harm addressed in paragraph 96 of the Tribunal's reasons. However paragraphs 95 to 97 did not address the claim based on a risk of harm to the Applicant from

			generalised (that is, non-targeted) violence in his home area.' (Para 82). 'Nor is this a case in which paragraphs 91 to 95 can be read as containing factual findings that are sufficient to dispose of this aspect of the Applicant's claims. Rather, consistent with the approach it took in paragraph 90, the Tribunal related its view of country information to the Applicant's claims to fear harm for particular reasons. Despite the Tribunal's optimism (in paragraphs 92 to 94) about an improvement in the security situation in the Applicant's home area, to the extent there is a finding in paragraph 95 about the Applicant's claimed fear of harm, it is expressly limited to whether there is a chance or risk of the Applicant being harmed for the Convention reasons relied upon. This may reflect the Tribunal's focus on the risk of sectarian violence. It is notable that in paragraph 95 the Tribunal made a finding based on the "*extent*" of the improvement in the situation in Parachinar. This might well relate to the "*moderate risk of sectarian violence*" identified by DFAT. In any event, given the limitation to harm for Convention reasons, this finding did not address the risk of significant harm to the Applicant from "*generalised violence*".' (Para 83). 'The fact that the Tribunal did not otherwise find that any of the Applicant's Refugees Convention claims failed because the harm inflicted was not for a Convention reason does not alter the fact that its express finding in relation to the risk of harm from recurrent violence in the Applicant's home region was

			expressly confined to harm for the Convention reasons relied upon.' (Para 84). 'In these circumstances and having regard to the country information about a significant degree of generalised violence and an "*horrifically high*" number of civilian deaths, the generally expressed conclusory paragraph 97 does not adequately address the Applicant's complementary protection claim to fear harm from generalised violence (that is, violence not targeted for a Convention reason) in his home area.' (Para 85). 'Ground 2 is as follows: *The Tribunal misconstrued or misapplied s 36(2B)(c) of the Act.* *Particulars* *a. The Tribunal considered that s 36(2B)(c) had application in the applicant's case on the basis that there was "nothing that would lead to the applicant being singled out by any party seeking to cause harm or violence in the applicant's home region": Tribunal Decision's (sic) at [100].* *b. The Tribunal's holding that the applicant would not be singled out by any party seeking to cause harm or violence in the applicant's home region did not provide any basis for the operation of s 36(2B)(c). The subsection is naot (sic) engaged in relation to risks that exist in an applicant's home region, as opposed to risks*

			faced by the population of the applicant's country generally.' (Para 91). 'The Applicant referred to *SZSPT v Minister for Immigration and Border Protection* [2014] FCA 1245 at [11] per Rares J referring to a risk faced "*by the population of the country generally*" and to *BBK15 v Minister for Immigration and Border Protection* [2016] FCA 680; (2016) 241 FCR 150 at [30] and [32] in which Buchanan J confirmed that s.36(2B)(c) applied only where the risk in question affected the "*general population*" of the country in question. Buchanan J also suggested that s.36(2B)(c) should only be discussed in circumstances where otherwise the requirements of s.36(2)(aa) would be met (see *BBK15* at [29]).' (Para 97). 'The Applicant submitted that while the first sentence in paragraph 101 of the Tribunal decision was somewhat opaque, it nonetheless reflected the Tribunal's conclusion in relation to s.36(2B)(c) in referring to a level of risk in the Applicant's "*home region*" and the population generally "*in his area*". It was suggested that the Tribunal had addressed risks of harm to the Applicant or the population generally "*in the applicant's home region*" and then reached a conclusion in terms which reflected its incorrect application of s.36(2B)(c) of the Act. It was pointed out that if the Tribunal had considered that there was no real risk of significant harm to the Applicant, there would have

			been no cause for it to refer to s.36(2B)(c) of the Act.' (Para 98). 'On the basis that the Tribunal had found that the Applicant did not face a real risk of significant harm in his area, the First Respondent submitted that the criterion in s.36(2)(aa) could not be satisfied, regardless of s.36(2B)(c) (*BBK15* at [29]). It was pointed out that s.36(2B)(c) was only engaged when there was a real risk of harm faced by an applicant that was a risk shared by the general population (see *BBK15* at [30]). In these circumstances it was contended that, having regard to the Tribunal's earlier findings, its references tos.36(2B)(c) "*were irrelevant to its reasoning*".' (Para 102). 'Counsel for the Minister accepted that it was incorrect for the Tribunal to have referred in the first sentence of paragraph 101 to the risk facing the population generally in the Applicant's "*area*" instead of in the country of Pakistan. However it was contended that when paragraphs 100 and 101 were read together, ultimately nothing turned on the reference to s.36(2B)(c) and what may be a misunderstanding by the Tribunal as to what s.36(2B)(c) required.' (Para 103). 'It was suggested that the Tribunal could not actually be applying s.36(2B)(c) because it had already found that the Applicant and the population generally in the Kurram Agency did not face a real risk of significant harm. On this basis the First Respondent submitted that

			the issue of s.36(2B)(c) did not properly arise in this case.' (Para 104). 'In *SZSPT* Rares J expressed the view (at [11]) that: > *In my opinion, the natural and ordinary meaning of the exception in s 36(2B)(c) is that, if the Minister, or decision-maker, was satisfied that* ***the risk was faced by the population of the country generally****, as opposed to the individual claiming complementary protection based on his or her individual exposure to that risk, the provisions of s 36(2)(aa) were deemed not to be engaged.* (emphasis added in Applicant's submissions)' (Para 107). > 'In *BBK15*, Buchanan J rejected a contention that for s.36(2B)(c) to apply the Tribunal had to be satisfied that the real risk of harm in question was "*faced by the population of the country generally*" and that it was not faced by the visa applicant personally, stating at [29], [30] and [32]: > *29. I do not accept that construction. If the Tribunal was satisfied that there was a real risk of harm faced by the population generally which was not faced by a visa applicant personally*

			then s 36(2)(aa) would not be engaged at all. There would be no need to refer to s 36(2B)(c). *30. In my view, s 36(2B)(c) draws attention to a circumstance where a real risk of harm faced by a visa applicant is a risk shared with the general population, rather than one to which the visa applicant particularly is exposed in some individual or personal sense (see also SZSPT... [2014] FCA 1245 at [11]). A risk shared with the general population is taken not to be a "real risk of harm" for the purpose of s 36(2)(aa).* *...* *32. I also reject the appellant's contention that s 36(2B)(c) only applies if a risk is faced by all members of the population of a country. In my view, the Tribunal was correct to understand that a reference to "the population of the country generally" is a reference to the commonly understood concept of the general population – i.e. there need not be a risk faced by all members of the population or by each citizen of a country for s 36(2B)(c) to apply.*' (Para 108). 'If s.36(2)(aa) (which sets out the complementary protection criterion) is not engaged, there is no reason to refer to s.36(2B)(c) of the Act, as it is one of the circumstances in which "*there is taken not to be a real*

			risk that a non-citizen will suffer significant harm in a country".' (Para 109). 'However in this case the Tribunal considered s.36(2B)(c) of the Act. In so doing it incorrectly confined the provision to risks in the Applicant's home region. As the First Respondent conceded in submissions, the Tribunal misconstrued s.36(2B)(c) of the Act. Reading paragraphs 100 and 101 of the Tribunal reasons together, it is clear that the Tribunal incorrectly understood that s.36(2B)(c) would apply to risks that existed in the Applicant's home region (which it had found at paragraph 61 was the Kurram Agency), instead of risks faced by the population of Pakistan generally in the sense explained by Buchanan J in *BBK15* at [30] and [32]. This was an error of law.'
CKX16 v Minister for Immigration & Anor (No.2) [2018] FCCA 2894 (Successful)	12 October 2018	4, 11, 23-24, 26-27, 32-33, 43-44	The Court considered whether the Tribunal was obliged to consider 'significant harm' that might occur in the future where the act causing it had occurred in the past. 'The applicant summarised the background to this matter in his written submissions that were filed on 12 April 2018 as follows: *4. The Applicant was born in Fiji on 22 July 1986. He came to Australia on an AH-101 (Child) Visa on 19 September 2001, when he was 15.* *5. The Applicant returned to Fiji on 14 December 2001 and stayed with his father for approximately a year.*

			6. The Applicant gave evidence to the Tribunal that, on a Friday afternoon in late 2002 on his walk home from school, he witnessed "a Fijian man, who had two bodyguards, slit the throat of another man with a machete" in the suburb of Nepani, near Suva, Fiji. The bodyguards were identifiably from the army. The Applicant also gave evidence that: *The man who did the killing saw the applicant, grabbed him and told him if the applicant returns, he will kill him. The applicant stated that the man went through the applicant's school bag and found his wallet, which had a proof of age card which detailed the applicant's name. The applicant stated he was the only witness to this murder, which took place on a back road short cut.* *7. The Applicant indicated on various occasions that he perceived the murderer to be an important and powerful individual. Moreover, the murderer was accompanied by "two army bodyguards", which he understood to demonstrate that the murderer was a member of the Fijian military.* *8. On 4 December 2002, a few weeks after witnessing the murder, the Applicant fled Fiji and has resided in Australia ever since. The Applicant's father died on 6 June 2015, leaving the Applicant with no immediate family in Fiji…*' (Para 4). 'The applicant argued that the Tribunal only considered whether the applicant faced a real chance of being killed or otherwise physically harmed if he returned to Fiji but failed to consider whether being returned to Fiji

			could cause the applicant severe mental pain or suffering.' (Para 11). 'The Minister's second argument in relation to ground 1 was that the definition of significant harm is forward-looking, and requires the cruel or inhuman act to occur in the future. The authority cited by the Minister for that proposition was *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (1997) 191 CLR 559; (1997) 48 ALD 481; (1997) 144 ALR 567; (1997) 71 ALJR 743; [1997] 9 Leg Rep 2; [1997] HCA 22 and *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1; (2004) 77 ALD 296;(2004) 205 ALR 487; (2004) 78 ALJR 678; [2004] HCA 18. Those cases obviously preceded the introduction of the complementary protection regime. It seems to me that they are of no assistance in the present context, save for the obvious requirement that an applicant faces a real chance of harm in the future.' (Para 23). 'However, the question at present is whether it would be sufficient for the applicant to face a real chance of harm in the future, namely, severe mental pain or suffering, as a result of actions in the past, namely, a gruesome murder in the applicant's presence and a threat to kill him if he returned to Fiji.' (Para 24). 'The applicant, without going into any detail, submitted that the act causing the harm could occur in the past,

			provided that the harm itself occurred in the future.' (Para 25). 'Paragraph 36(2)(aa) of the Act requires that, relevantly: ○ *... as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm ...*' (Para 26). 'That provision obviously requires the harm (the severe mental pain or suffering) to occur in the future but says nothing about when the action causing the harm (the threat) must occur.' (Para 27). 'It seems to me that a person *will be subjected to an act* in the future if the person suffers the consequences of the act in the future, even if the act itself is in the past. For example, a person going to Chernobyl next week will be subjected to an act (consisting of a nuclear meltdown that occurred over three decades ago) by which pain or suffering (in the form of high levels of radiation) is inflicted on the person next week.' (Para 32). 'Even if I am wrong about that, it seems to me, applying the *Project Blue Sky*[3] principles, that the Parliament must have intended to give complementary protection for future harm suffered in consequence of past actions. There is no conceivable policy reason to

			carve out from the complementary protection regime future harm that was caused by actions that occurred in the past. Consequently, I do not accept the Minister's second argument on ground 1.' (Para 33). 'Paragraph 64 of the Tribunal's reasons for decision is a conclusion that the applicant did not face a real risk of serious or significant harm for *this reason*. In context, *this reason* can only be understood as a reference to physical harm at the hands of the murderer. This paragraph does not deal with the present issue, which is the risk of significant harm consisting of severe mental pain or suffering arising from being returned to the place where the applicant witnessed a gruesome murder and where he was threatened with death if he returned.' (Para 43). 'I am not persuaded that the Tribunal made findings of greater generality or otherwise which addressed the question of whether the applicant might face a real chance of significant harm, consisting of severe mental pain and suffering, if he returned to Fiji. Consequently, ground 1 is made out.' (Para 44).
CVQ17 v Minister for Immigration & Anor [2018] FCCA 2121 (Unsuccessful) See also *DQA17 v Minister for Immigration & Anor*	7 September 2018	2, 12-13, 22, 37-38, 49-56	The Court considered the applicant's argument that country of origin information to be used in an enquiry into the reasonableness of relocation must be 'reliable'. In this regard, the Court considered the High Court's decision in *CRI026 v The Republic of Nauru* (2018) 355 ALR 216, a case which pertains to the Nauruan legislation.

[2018] FCCA 2418 (7 September 2018) – similar reasoning around relocation enquiry			'The applicant is a citizen of Afghanistan who comes from the Malistan district of Ghazni province. He arrived in Australia by boat on 23 September 2012.' (Para 2). 'The Authority next considered whether the applicant satisfied the criterion in sub-s.36(2)(aa) of the Act.' (Para 12). 'In this respect the Authority was satisfied, for the reasons that it had given in connection with the earlier criterion, that there were substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant's removal to Afghanistan, he would face a real risk of significant harm if he returned to, and lived, in his home area. The Authority noted however, that s.36(2B) of the Act provided that there is taken not to be a real risk that the applicant would suffer significant harm in Afghanistan if it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant would suffer significant harm. On the basis of its earlier findings concerning Mazar-e-Sharif, the Authority found that there was not a real risk of suffering significant harm in that city and then went on to consider whether it would be reasonable for the applicant to relocate to that place.' (Para 13). 'In his first ground the applicant's argument focuses on the manner in which the Authority relied upon country information in reaching conclusions regarding the circumstances that might affect the applicant upon

			return to Afghanistan. While the Authority's consideration of such information is, like its consideration of any other material, governed by the same principles of logic and reason as discussed immediately above, the identification of relevant information and the weight to be attributed to it is entirely a matter for the Authority: *NAHI v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 10 at [14]; *NBKT v Minister for Immigration & Multicultural Affairs* [2006] FCAFC 195; (2006) 156 FCR 419 at [81] and*SZUEP v Minister for Immigration & Border Protection* [2017] FCAFC 94 at [27].' (Para 22). 'After the hearing of this matter, the High Court handed down its decision in *CRI026 v The Republic of Nauru* (2018) 355 ALR 216. That decision was made on appeal from the Supreme Court of Nauru concerning the issue of internal relocation in the context of the *Refugees Convention Act 2012* (Republic of Nauru). The appellant contended that the question of reasonableness did not apply in determining whether there was an obligation of complementary protection under that Act because, if it did, it would be incumbent upon an applicant for complementary protection to undertake the practically impossible task of establishing that there is no place in his or her country of nationality to which he or she could reasonably relocate.' (Para 37). 'The Court rejected that contention:

			[39] That contention should also be rejected. Implicitly, it proceeds from the false premise that a claim for complementary protection is in the nature of an adversarial proceeding in which the burden of proof is on the applicant and, therefore, that, in the event of the applicant failing to discharge the burden of proof, the claim for complementary protection must fail. To the contrary, however, as appears from *BL v Australia*, before a decision maker may properly reject a claim for complementary protection on the basis of the availability of reasonable internal relocation, the decision maker needs reliable information as to the safety and suitability of the place of relocation. Moreover, as Gummow, Hayne and Crennan JJ observed in *SZATV v Minister for Immigration and Citizenship* in relation to a claim for refugee protection: 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. Accordingly, depending on the issues and circumstances identified by the applicant, the decision maker not only will need reliable information as to the safety and suitability of the place of relocation but also will need to pay

			careful regard to the applicant's personal and family circumstances. It is only when and if the decision maker concludes on that basis that internal relocation would be reasonable that the claim for complementary protection may be rejected on that basis. (Citations omitted)'. (Para 38) 'The applicant also argued that, in light of *CRI026*, the Authority could only be satisfied that it was reasonable for the applicant to relocate on the basis of reliable information about the relevant circumstances in Mazar-e-Sharif.' (Para 49). 'The passage in *CRI026* relied on by the applicant is set out at [36] above. He argues that this passage means that the Court must undertake an evaluation as to the accuracy and reliability of the country information considered by the Authority. His argument was that where, as here, there was information that was contradictory and inconsistent with the information relied on by the Authority, the latter information was, for that reason, unreliable and so the Authority's reliance on it was unreasonable.' (Para 50). There are many difficulties with that submission. Leaving to one side the different statutory context in which *CRI026* was decided, there are two particular issues. First, what was meant in *CRI026* by the word

			"reliable"; and secondly, whether the information here was "reliable".' (Para 51). 'The applicant contends that information is reliable if it is "suitable or fit to be relied on" and "of proven consistency in producing satisfactory results". The error in this approach is that the words of the High Court in *CRI026* are not to be examined as though they were part of the Act. The Court adopted this word from a communication of the United Nations Human Rights Committee[3] concerning whether Australia would breach its obligations under the *International Covenant on Civil and Political Rights*[4] if it were to return a citizen of Senegal to Senegal. In a concurring opinion, one of the members of the committee said[5]: > ... The duty of ascertaining the location where adequate and effective protection is available in Senegal does not rest upon the authorities of [Australia]. Their duty is limited to obtaining reliable information that Senegal is a secular State where there is religious tolerance.' (Para 52). 'There is nothing in either *CRI026* or the communication from the United Nations Human Rights Committee to suggest that information had to be consistent with all other information before it could support the view that relocation would be reasonable. It may be accepted for present purposes, and without the benefit of any argument from the Minister on the point, that any administrative decision must be based on

			"reliable" information in the sense that the information must provide a logical basis for the decision maker to be satisfied of the likelihood of the existence of a fact in issue. Even if "reliable" required more, as suggested by the applicant, it was not, and could not have been, submitted that there was no such information here.' (Para 53). 'The Authority relied on information from sources including DFAT and the UNHCR. It would be surprising if the views of the Australian government or the international agency with responsibility for the Refugees Convention[6] could not be a sufficient basis for determining the question of reasonableness of relocation: see, albeit in a different context, *Chan v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379 at 428 (McHugh J).' (Para 54). 'The fact that there may have been information inconsistent with the information relied on by the Authority did not mean that either information was unreliable. Contrary to the applicant's argument, the High Court in *CRI026* did not overrule the well-established principle that it is a matter for the Authority, and not the Court, to decide what information it accepts: *NAHI* at [11]. The High Court did not specifically refer to that proposition because it was not relevant to any of the issues before the Court. It is not only a principle stated in a decision binding on me but is also consistent with a long line of authority about the limits of the Court's role in the judicial review of administrative action: see, for example, *Attorney-*

			General (NSW) v Quin (1990) 170 CLR 1 at 35-36 (Brennan J).' (Para 55). 'For those reasons, I am not satisfied that the Authority failed to address either the questions posed by sub-s.5J(1)(c) or sub-s.36(2B)(a) or that its conclusions in respect of those questions were not open to it on the material before it.' (Para 56).
FOD17 v Minister for Immigration & Anor [2018] FCCA 1635 (Unsuccessful)	25 June 2018	4-5, 8, 17-19, 52-58	The Court considered whether the application of Taiwanese criminal law would amount to "significant harm", and considered the potential for double jeopardy in this regard. 'The applicant claimed to fear harm from "gang members" in Taiwan. He claimed to have been a "real estate developer" and due to "cash flow issues", the applicant and his business partner borrowed "1.6 million from loan sharks". Subsequently, in September 2016, "policies adverse to [the] real estate market were released". The applicant's "project" could not be sold in "a short time", and the applicant could therefore not repay his debts (CB 36).' (Para 4). 'The applicant claimed to have been "hunted by gang members" as a result. He claimed that he had been "falsely imprisoned" and that gang members injured his left hand and shoulder "severely". He claimed that his family was also threatened by the gang members, and he went to the police but they would not assist him. The

			applicant claimed that he had to leave Taiwan to "survive" (CB 36 to CB 38).' (Para 5). 'The Tribunal noted that when the applicant arrived in Australia on 10 November 2012, he was arrested at the airport for importing illegal substances. He subsequently pleaded guilty to "importing a 'marketable quantity' of a border controlled drug" into Australia and was sentenced to 6 years and 9 months in jail, with a non-parole period of 4 years and 6 months ([2] at CB 88).' (Para 8). 'The Tribunal also considered charges of fraud and forgery awaiting the applicant in Taiwan, but found that any consequences for the applicant would be as a result of the "non-discriminatory enforcement of laws of general application" ([56] – [58] at CB 97). Therefore, there was not a real chance that the applicant would face serious harm for this reason.' (Para 17). 'The Tribunal accepted that there was a real chance that the applicant could face further imprisonment in Taiwan for the drug offences he was convicted of in Australia. However, the Taiwanese laws in this regard were also laws of general application and there was no evidence that they would be applied to the applicant in a discriminatory manner ([59] at CB 97). The Tribunal found that there was not a real chance that the applicant would suffer serious harm for this reason.' (Para 18). 'The Tribunal also considered the applicant's likely "re-prosecution" in Taiwan for the drug offences he was

			convicted of in Australia. The Tribunal found that this would not breach Article 14(7) of the *International Covenant on Civil and Political Rights* ("ICCPR") and further, the prison conditions in Taiwan would not be intentionally inflicted such that they come within the definition of "cruel or inhuman treatment or punishment" ([56] at CB 97 to [74] at CB 100).' (Para 19). 'Both definitions explicitly do not include "an act or omission" which, amongst other things, is not inconsistent with Article 7 of the ICCPR (see also the definition of "covenant" also in s.5(1) of the Act).' (Para 52). 'In this light, and in the circumstances, it was appropriate and necessary for the Tribunal to have regard to Article 7 of the ICCPR. The Tribunal properly identified the remaining issue (in light of its factual findings) as whether the relevant sanctions in Taiwan were inconsistent with the articles of the ICCPR ([64] at CB 98).' (Para 53). 'The Tribunal found that the prohibition on double jeopardy, in relation to the drug matter, would not apply, given the language of Article 14(7) of the ICCPR, which appeared to limit the concept to charges and prosecutions within one jurisdiction. This finding was reasonably open to the Tribunal, given the language of Article 14(7) of the ICCPR (and see also the references to other authorities to which the Tribunal had regard (at [67] at CB 98 to CB 99)). As set out

			above, "fraud" and "forgery" were not matters arising in Australia.' (Para 54). 'The Tribunal's finding that Article 14(7) of the ICCPR limits the concept of double jeopardy to within one jurisdiction, and the findings that informed it, were reasonably open to the Tribunal on what was before it. Importantly, I cannot see that the Tribunal misapplied the relevant statutory provisions.' (Para 55). 'The Minister's fifth matter outlined in his second written submissions was that the Tribunal's assessment of "significant harm" was not only confined to the consideration of ICCPR.' (Para 56). 'In this light, the Tribunal also considered the question of imprisonment in Taiwan. It accepted that the applicant would be likely to face a prison sentence in Taiwan as a consequence of any re-prosecution (with reference to the drugs matter) and separately, would be likely to face a prison sentence in Taiwan as a consequence of a conviction for the charges of fraud and forgery ([69] at CB 99).' (Para 57). 'The Tribunal had regard to relevant country information and the applicant's evidence ([71] – [72] at CB 99). It found that it was not satisfied that the applicant would suffer significant harm due to any imprisonment. In this assessment, the Tribunal had appropriate regard to relevant Full Federal Court and High Court authority (*SZTAL v Minister for Immigration and Border Protection* [2016] FCAFC

			69; (2016) 243 FCR 556 and *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 91 ALJR 936). The Tribunal's conclusion in this regard, and the findings that informed it, were reasonably open on what was before it. No legal error is revealed in this regard.' (Para 58).
SZDCD v Minister for Immigration & Anor [2018] FCCA 1029 (Unsuccessful)	18 April 2018	15, 34, 36, 49, 59-63	This case concerned an applicant from Bangladesh with heart problems who feared being deprived of his life due to unavailability of treatment. The Court applied the High Court's finding in relation to the intention element of complementary protection in this health context. 'At the hearing before me today, the Applicant pressed the two grounds appearing in the application, which are as follows: *1) That the [T]ribunal member erred in law when he disregarded my documents as evidence on the basis that documents are easily forged in Bangladesh.* *2) That the [T]ribunal erred in law that he failed to consider that I would not be able to get adequate treatment for my health conditions were I returned to Bangladesh. He failed to consider that, as a result of lack of treatment that I may end up dead.*' (Para 15). 'As to his third claim, his medical claim, the Tribunal records the Applicant said since he had been in Australia, he had suffered two heart attacks and that he had problems with his eyes. The two medical reports

			provided by him show that he is under treatment, at least as at the time of the Tribunal decision. He has glaucoma and as at 11 September 2014, he was prescribed eye drops, which he must continue.' (Para 34). 'As to his third claim, his medical claim, the Tribunal records the Applicant said since he had been in Australia, he had suffered two heart attacks and that he had problems with his eyes. The two medical reports provided by him show that he is under treatment, at least as at the time of the Tribunal decision. He has glaucoma and as at 11 September 2014, he was prescribed eye drops, which he must continue.' (para 36). 'The Tribunal member stated that the definitions of "*torture*" and "*cruel or inhuman treatment or punishment*" require that pain or suffering be "*intentionally inflicted*" on a person while the definition of "*degrading treatment or punishment*" requires that the relevant act or omission be "intended to cause" extreme humiliation. As is apparent from [51] of the Tribunal's decision, the Tribunal did not accept from the evidence before it, namely the two doctors' reports and country information, that there is an intention to inflict pain or suffering, or to cause extreme humiliation to people suffering the sort of health problems, which the Tribunal member accepted that the Applicant has, in Bangladesh.' (Para 49).

			'There was no evidence before the Tribunal, as the Tribunal states in its decision, and the Applicant has not pointed to any evidence, to suggest that the government of Bangladesh has limited treatment on an arbitrary basis for people with the sort of health problems the Applicant. What the Tribunal did was look at the medical evidence and apply the provisions of the Act, namely s.36(2)(aa), the definition of significant harm in s.36(2A), and the definitions in s.5(1) of the Act as to the various terms used within s.36(2A). As the First Respondent's legal representative put it, the prospect of dying of a health condition that the Applicant suffers from is not, "*without more",* a subject matter than enlivens the application of the criterion for complementary protection under the Act.' (Para 59). 'Under s.36(2A), and the definition in s.5(1) of the Act, a non-citizen would suffer significant harm, in the present case, in Bangladesh, if, among other things, they would be "*arbitrarily deprived of life*", or subject to "*torture*" or "*cruel or inhuman treatment or punishment*". There is no evidence that the Applicant would be denied medical treatment on an arbitrary basis if he was returned to Bangladesh. It is also apparent in [51] of the Tribunal's decision, that the Tribunal had regard to the definitions of "*torture*", and "*cruel or inhuman treatment or punishment*" which requires that pain or suffering be "*intentionally inflicted*", and the definition of "*degrading treatment or punishment*", which requires the act or omission be "*intended to cause*" extreme humiliation. Having regard to the definitions of "*torture*", and "*cruel or inhuman*

			treatment or punishment" in s.5(1), there is no evidence that the Applicant would be intentionally subjected to these sorts of harm if he was returned to Bangladesh.' (Para 60). 'Given that lack of evidence I have referred to, it was open to the Tribunal to find that the evidence did not disclose any intention to inflict pain or suffering, or cause extreme humiliation to people suffering from the sort of health problems which the Applicant has, and, I note, which the Tribunal accepted that the Applicant has.' (Para 61). 'In short, the findings of the Tribunal in relation to ground 2 were findings that were open to the Tribunal on the evidence before it, and I so find. The application of the requirement for a relevant intention by the Tribunal is consistent with *SZTAL v the Minister for Immigration and Border Protection* (2017) HCA 34; (2017) 347 ALR 405 at [26], which is to the natural and ordinary meaning of the word "*intends*", and therefore to actual subjective intent, to achieve, in the present case, the relevant harm, cruel or inhuman treatment, or punishment, or to arbitrarily deprive the Applicant of life: *[26] 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 62). 'I find that the Tribunal approached the claim of the Applicant as to his health concerns correctly, and applied the correct test. Ground 2 otherwise seeks a merit review. That is not a review available in this Court on this application for judicial review.' (para 63).
BHQ15 v Minister for Immigration & Anor [2018] FCCA 181 (Successful)	26 February 2018	4, 5, 36-41	In this case the Tribunal was found to have erred by failing to properly apply the real risk test in circumstances where it used the word 'likely' in its assessment, without setting out the precise test and without showing that the 'not likely' events were remote or far-fetched. 'In relation to the applicant's claims and evidence the Tribunal: …n)in its assessment of the applicant's claims under the complementary protection criterion in s.36(2)(aa) of the *Migration Act*, having regard to its earlier findings, did not accept that there were substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Iran, there is a real risk that the applicant would suffer significant harm as defined in s.36(2A) of the *Migration Act*: CB 217-218 at [88]-[95]. In particular, the Tribunal did not accept that the applicant had genuinely converted to Christianity or would seek to practise or promote Christianity in Iran, or that anyone in Iran is or was aware, or is likely to become aware, that the applicant had any interest in Christianity

			or had been baptised or attended church, and was therefore not satisfied that there were substantial grounds for believing that there was a real risk that the applicant will suffer significant harm on his return to Iran, and consequently did not accept that there were substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Iran, there is a real risk that he will suffer significant harm on the basis of his claims: CB 217 at [89].' (para 4). 'Pursuant to orders made by the Court on 20 May 2016 the applicant filed an amended Judicial Review Application ("Amended Judicial Review Application") on 30 June 2016 containing a single ground of application as follows: *1. The Second Respondent erred in law by misapplying the test of whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of the Applicant being removed from Australia to a receiving country, there is a real risk he will suffer significant harm.* ***Particulars*** *a) The Applicant raised a claim under s.36(2)(aa) of the Migration Act 1958 (Cth) (Act), that as a necessary and foreseeable consequence of him being removed from Australia to Iran, he 'is likely to suffer cruel, inhuman and degrading treatment perpetrated by agents of the Iranian government'.*

			*b) The Second Respondent accepted 'that there is a real risk the applicant would be questioned and monitored on returned to Iran' but did not accept that 'anyone in Iran is or was aware, or is **likely** to become aware that [the Applicant] has any interest in Christianity or been baptised or attended Church' [emphasis added].* *c) Consequently, the Second Respondent was 'not satisfied that there are any substantial grounds for believing that there is a real risk that the applicant will suffer significant harm on his return to Iran.'* *d) The Applicant may still face a 'real risk' of significant harm even if such harm is not 'likely' to occur.* *e) In finding that the Applicant would not face a 'real risk' of significant harm because such harm was not 'likely', the Second Respondent made an error of law.* (para 5). 'It is plain that the Tribunal understood the "real chance" test, the nature of which it set out and described in the Tribunal Decision: CB 201 at [4] and 220 at [108]. Mere recitation of the correct test is not however a substitute for its proper application no matter how lengthy and detailed the Tribunal Decision might be: *SRBB* at [28]-[30] per Mansfield J; *SZGTS* at [23] per Tracey J. It can be accepted that the "real chance" test is the same as the "real risk" test: *SZQRB* at [242] and [246] per Lander and Gordon JJ. It is not so readily apparent however that the Tribunal appreciated this, and whilst a court might ordinarily infer this having regard

			to the nature and frequency of the functions carried out by the Tribunal, the Court notes that nowhere is the equivalence between the "real risk" and "real chance" tests referred to in the Tribunal Decision.' (para 36). 'The Court notes that the Tribunal accepted that there was a real risk that the applicant would be "questioned" and "monitored" on return to Iran: CB 218 at [93]. The Tribunal went on to find that the applicant would be questioned about why he was away and why he left, and to further find that that did not constitute significant harm within the meaning of ss.5 and 36(2A) of the *Migration Act*. The Tribunal, however, said nothing about the nature of any monitoring of the applicant on Iran, despite having accepted that the applicant being monitored was a real risk upon his return to Iran: CB 218 at [93].' (para 37). 'The fact that there was a real risk that the applicant would be monitored on his return to Iran was not considered by the Tribunal having regard to country information set out earlier in the Tribunal Decision (albeit in relation to the applicant's Muslim friend who was said to have converted to Christianity) that: *The Tribunal also has regard to the DFAT report that perceived apostates are likely to come to the attention of the Iranian authorities in any event through public manifestations of their new faith, attendance at Church or informants and that there are also allegations that the authorities monitor attendances at*

			Church on religious holidays to ensure no Muslim is present. CB 210 at [53].' (para 38). 'Although the Tribunal did not accept that the applicant would seek to practise Christianity in Iran or that anyone was "likely" to become aware that he was interested in Christianity or had been baptised or attended church in Australia, the use of "likely" in that context leaves open the real possibility that his activities in Australia might come to the attention of the Iranian authorities, particularly in circumstances where it is possible that he would be monitored by the Iranian authorities or be informed upon by informants and be exposed to "the penalties for apostasy" in Iran: CB 210-211 at [55], which, according to country information which was available to the Tribunal, included the death penalty: see CB 119 (Freedom House report); CB 123 (The Guardian) and CB 127 (Amnesty International). That possibility is exposed in a passage in which the precise test applied is not set out, and the likelihood of someone in Iran becoming aware that the applicant had an interest in Christianity or had been baptised or attended church in Australia, is not couched in language, particularly against a factual background of informants and monitoring acknowledged by the Tribunal, that makes that possibility (or likelihood) far-fetched, or remote. In the circumstances, that is sufficient to indicate that there was a real ground for the applicant having a well-founded fear of persecution

			which was not considered by the Tribunal because it did not properly apply the real risk test.' (para 39). 'The Court further notes that a finding that the applicant is not a Christian does not suffice to exclude the possibility that the activities of baptism and church attendance in Australia might be matters brought to the attention of the Iranian authorities, and which would not preclude the applicant having a well-founded fear of persecution on the basis that he had engaged in those activities in Australia, even if, as found by the Tribunal he is not a Christian or will not or does not intend to practise Christianity if returned to Iran.' (para 40). 'In all of the above circumstances, the Court has concluded that the Tribunal did not apply the real risk test to the applicant for the purposes of assessing the applicant's complementary protection claim in relation to whether anyone in Iran might become aware that the applicant had any interest in Christianity, or had been baptised or attended church whilst in Australia, and whether that gave rise to a well-founded fear of persecution upon the part of the applicant. That suffices to establish jurisdictional error in the Tribunal Decision as alleged by the sole ground of the Amended Judicial Review Application.' (para 41).