COMPLEMENTARY PROTECTION IN AUSTRALIA

ADMINISTRATIVE APPEALS TRIBUNAL

Last updated 30 April 2019

On 1 July 2015, the Refugee Review Tribunal (RRT) was merged with the Administrative Appeals Tribunal (AAT). Previous RRT decisions can be found in the separate RRT table (archived on the Kaldor Centre website). Pre-1 July 2015 AAT decisions (also archived on the Kaldor Centre website) relate to cases where a visa was cancelled or refused on character grounds (including exclusion cases). Tribunal cases from 2015-2016 and from 2017 are in separate Tribunal tables archived on the Kaldor Centre website).

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Case	Decision date	Relevant paragraphs	Comments

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1602303 (Refugee) [2018] AATA 4750 (Successful)	3 December 2018	13-14, 30-34	In this case the Tribunal granted complementary protection to a gay claimant from Bangladesh whose risk arising from Islamic extremists would be faced personally rather than by the population generally. '[The applicant]'s new claims relate to fear of persecution in Bangladesh for reasons of being a gay male. He claims he self-repressed growing up in Bangladesh. He claims that to the extent that he had mutually motivated contact as a young teenager with a younger "girlish" male neighbour, he self-justified it at the time as a means of relieving pressure. He said he was nevertheless secretly infatuated with "girlish" boys at school.' (Para 13). '[The applicant] said his sexuality had been a very private issue for a long time, given his role and activities in the Catholic church. He told me at the Tribunal hearing that he had nevertheless "come out" to his parents during a visit they made to Australia and that they had come around to accepting him. He said that this as when he should have disclosed his sexual orientation to the Department. He and his adviser spoke in more detail to this issue in written submissions and, taken together with all of the evidence in this case, the explanations and arguments in those submissions are reasonable.' (Para 14). 'I find that [the applicant] is in a genuine consensual, evidently exclusive, sexual relationship with [Mr A].

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			Whereas I have some understandable concerns as to the delay in [the applicant]'s sexual orientation claims being brought to light, I accept that his subjective religious disposition prevented him for many years from dealing with his sexuality without fear and self-denial. He is helped in this matter by the evidence of [Mr A] and [Ms B].' (Para 30). 'I accept that gay males face a real risk of significant harm in Bangladesh in the form of cruel or inhuman treatment or punishment, degrading treatment or punishment, torture and even arbitrary deprivation of life, all intentionally inflicted.' (Para 31). 'Accordingly I accept that [the applicant] faces a real risk of significant harm in Bangladesh owing to his being a gay male.' (Para 32). 'As s.377 of Bangladesh's Penal Code and the stigma it reportedly helps to feed is in force at least in principle throughout Bangladesh, and since a conservative and reactionary teaching of Islam is reportedly inspiring violent action against secularism and persons with profiles (including sexual profiles) considered *haram*, I find that relocation within Bangladesh is not a viable option for [the applicant], such as would catch him under s.36(2B)(a). On the evidence before me, I also find that state protection of a kind acknowledged in s.36(2B)(b) is not available. I find that [the applicant]'s sexual orientation distinguishes him from the

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			Bangladeshi population generally, and the harm being perpetrated by Islamic extremists is targeted at LGBT-identifying persons, such that [the applicant] is not caught by s.36(2B)(c).' (Para 33). 'Accordingly, I am satisfied that I have substantial grounds for believing that, as a necessary and foreseeable consequence of being removed from Australia to Bangladesh, there is a real risk that [the applicant] will suffer significant harm. He meets the criteria of s.36(2)(aa).' (Para 34).
1613833 (Refugee) [2018] AATA 5069 (Successful)	16 November 2018	12, 33, 62, 66-67, 70-73, 77	This case is an example of a relocation analysis under complementary protection. The Tribunal found that it was unreasonable to expect the applicant to relocate given his mental health diagnosis. The Tribunal had not found the applicant to be a refugee because the relocation enquiry looked solely to safety in the place of relocation. 'The applicant claims to be a citizen of Pakistan who was born in [Village 1] in the Swat district of Khyber Pakhtunkhwa province, [Pakistan]. He states he belongs to the Baba Khail (Pashtoon) ethnic group, is a Sunni Muslim, and that he speaks, reads and writes Pasto, Urdu and English. He indicates that he has never married or been in a de facto relationship. The applicant indicates he departed Pakistan legally [in] September 2014 and arrived in Australia [in] September 2014, entering on a Student visa.' (Para 2).

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			‘The applicant claims to fear serious harm from the Taliban and their supporters because of his and his father’s activities in support of the ANP, the VDC and because he is from a prominent and influential family in [Village 1] in the Swat district of Khyber Pakhtunkhwa province which opposes the Taliban.’ (Para 33). ‘The Tribunal has considered these matters as well as the representative’s submissions that decision makers must consider whether applicants can safely and lawfully access the relevant area. In this case the Tribunal considers that the applicant could fly in to Pakistan directly to Islamabad or Lahore and so is satisfied that he could safely reach those areas. As Article 15 of the Pakistan Constitution guarantees the right of freedom of movement in Pakistan the Tribunal is also satisfied that the applicant could lawfully access these areas. While the Tribunal accepts the assertions that there remains some risk to the applicant in cities like Lahore and Islamabad, noting that there is not country information indicating that VDC members who have relocated from Swat to Islamabad have been targeted there, and the DFAT advice that target killings in Islamabad are of ‘high profile community leaders’ the Tribunal considers that the applicant would not face a real chance of suffering persecution involving serious harm for one or more of the reasons set out a s.5J(1)(a) of the Act in Islamabad or Lahore.’ (Para 62).

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			‘Having regard to its findings of fact set out above, the Tribunal finds that there is a real risk that the applicant would suffer treatment amounting to significant harm, as defined at s.36(2A)(a)-(e) of the Act, as a necessary and foreseeable consequence of his being removed from Australia to Pakistan. In particular, the Tribunal finds that there is a real risk that the applicant will be arbitrarily deprived of his life; and/or will be subjected to torture; and/or will be subjected to cruel or inhuman treatment or punishment; and/or will be subjected to degrading treatment or punishment, by the Taliban or associated militant groups and/or their supporters, should he be returned to Pakistan.’ (Para 66). ‘In reaching this conclusion the Tribunal has considered the exceptions at s.36(2B) of the Act. In relation to s.36(2B)(a) of the Act the Tribunal finds that in the applicant’s particular circumstances it would not be reasonable, in the sense of practicable, for the applicant to relocate to an area of the country where there would not be a real risk that he would suffer significant harm.’ (Para 67). ‘The evidence before the Tribunal indicates that the applicant suffers from Depression and symptoms consistent with PTSD. He has been prescribed anti-depressant medication. The Tribunal discussed with the applicant at the hearing country information indicating that, while mental health services in Pakistan clearly are not at the same level as in Australia, psychiatric and

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			psychological services are available in major hospitals (public mental health treatment is free with free medication) and in the private healthcare system (which has proliferated and been embraced by the majority of Pakistanis due to the generally poor quality of the public health system); and medication is easily available.[39] The applicant responded that before he came to Australia he did not know about treatment for mental health issues or that there were psychologists and psychiatrists. He said that if such services are available in Pakistan it is difficult to benefit from them when you have 'fear in the heart'. He commented that he would be afraid of his own shadow and does not know how he would be able to go out and get treatment and deal with 'that situation' again. This is consistent with the psychologist's observations in her most recent report that the applicant would be expected to struggle more greatly in coping with risk environments compared to previously and that exposure to incidents such as bomb or gun attacks are most likely to heighten his PTSD symptom, and his ongoing hyper-vigilance would have a negative impact on all areas of his functioning. The psychologist stresses that safety is critical to effective management of PTSD symptoms.' (Para 70). 'In submissions to the Tribunal it is asserted that the applicant is a vulnerable and psychologically infirm applicant who has been receiving continuing psychological care and that it would not be reasonable

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			to expect him to adjust to life and find accommodation and employment for himself in a place of relocation, where he has no family support and where he would be treated with suspicion and hostility. The Tribunal accepts these submissions. The Tribunal accepts the applicant's evidence that he is able to manage these issues in Australia, in an environment where he feels safe and where he has support from his psychologist, but would not be able to do so in an environment where he would be fearful, unsupported, and unable to access the same level of mental health care as he has been able to access in Australia. The Tribunal notes that when considering the complementary protection criterion the delegate found that it would be reasonable, in the sense of practicable, for the applicant to relocate to Islamabad. In reaching this conclusion, however, the delegate does not appear to have given consideration to the applicant's mental health issues as set out in the first letter from his psychologist of [July] 2017, which was provided to the Department.' (Para 71). 'On balance, and considering the totality of his circumstances, the Tribunal accepts that, given the applicant's significant mental health concerns and lack of family support outside of Swat, returning to Pakistan and having to relocate to a city like Islamabad or Lahore, where he would need to find accommodation and employment and might suffer harassment by police and security forces because his identity documents indicate that he is from [Village 1] in Swat district,

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			would be a major stressor on the applicant which could result in a significant decline in his mental health. Given the applicant's mental health concerns and associated vulnerability, and his lack of family support outside of the Swat district, the Tribunal concludes it would be very difficult for the applicant to re-establish his life outside the Swat district. For these reasons, the Tribunal does not consider it would be reasonable to expect the applicant to relocate himself to another part of Pakistan where he has no family or social supports, to escape the real risk of significant harm he faces in Khyber Pakhtunkhwa province.' (Para 72). 'In relation to s.36(2B)(b) of the Act, the Tribunal finds that the applicant could not obtain, from an authority of the country, protection such that there would not be a real risk that he would suffer significant harm. In this case, the harm that the applicant fears from the Taliban and related extremist groups is from non-state agents and the applicant claims that the Pakistani authorities cannot protect him from that harm.' (Para 73). 'For the reasons given above, the Tribunal finds that there is a real risk that the applicant would suffer significant harm as a necessary and foreseeable consequence of being removed from Australia to Pakistan. Accordingly, the Tribunal is satisfied that the applicant meets the criterion set out in s.36(2)(aa) of the

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			Act and therefore is a person in respect of whom Australia has protection obligations.' (Para 77).
1507725 (Refugee) [2018] AATA 3775 (Unsuccessful)	11 September 2018	21, 84, 86-87, 121, 126, 129-137	The Tribunal considered the risk to the applicant of gang violence in El Salvador, concluding that the risk she faced was one faced generally and not personally and thus not a real risk pursuant to s 36(2B)(c). In doing so, the Tribunal considered whether she faced a risk of differential treatment or risk because of sufficiently distinguishing characteristics. 'The applicant claimed to be born on [date] in [Town 1] in El Salvador and claimed to be a citizen of El Salvador. She does not claim to have citizenship of any other country.' (Para 21). 'The Tribunal…accepts that a plausible incident of harm did occur in and around July 2011 involving criminals connected to MS-13, whereby the applicant had been physically assaulted and threatened. It also accepts the applicant was not threatened again and that she did not report the matter to the police given the inaction and corruption in El Salvador's criminal justice system, which the Tribunal accepts to be reasonably advanced.' (Para 84). 'While the applicant claimed that she feared being forced to join MS-13 or M-18 and the threat of extortion, she did not claim that she had ever been invited to join one of these criminal outfits and she

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			admitted that neither her nor her mother nor brother had experienced extortion in the past. This testimony indicates that the applicant did not hold urgent fears of gang violence or that she was targeted in the past.' (Para 86). 'The applicant also claimed in her written claims that one of the triggering reasons for departing El Salvador for Australia had been the killing of her best friend's husband. As mentioned above, the Tribunal accepts this and that he was killed for refusing to join one of these gangs. However, although this event informed the applicant's fear in remaining in [Town 2], this killing does not indicate that the applicant was specifically a targeted person of interest to the gangs as a recruit or as a victim in the past, given she had not been subjected to such demands in the years and months leading up to her departure.' (Para 87). 'The Tribunal accepts that the harm faced by the applicant amounts to being significant through frequent psychical harassment and the infliction of severe pain and suffering, both mental and physical, through extortion, theft and threats of physical harm and kidnapping by criminal gangs for ransom.' (Para 121). 'However and notwithstanding s.36(2B), it is satisfied that the applicant faces a real risk of the harm that amounts to significant harm by being subjected to cruel

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			and inhuman treatment and punishment, as defined in s.36(2A)(d) of the Act.' (Para 126). 'It was also further discussed in the scheduled hearing that the Tribunal held concerns the applicant's circumstances may be at odds with that the final qualification in criterion regarding taken not to be a real risk to the applicant facing significant harm: s.36(2B)(c).' (Para 129). 'As part of the applicant's post hearing response, the applicant's representative argued that the applicant was *'distinguishable as a teacher, a returnee from overseas who is likely to be perceived as wealthy, a person likely to resisted authority and to compound the risk, a single female'*, and as such faced a real risk of significant harm personally and not one faced by the population generally. It is also noted the representative wished the Tribunal has had to have specific regard to case law raised by the applicant's representative: *SZSRY v MIBP* [2013] FCCA 1284 by Judge Driver. The finding about distinguishable characteristics was *obiter* to the specific jurisdictional error identified.' (Para 130). 'The Tribunal, however, notes that *obiter* finding went beyond the language of s.36(2B)(c).' (Para 131). 'The Federal Court has subsequently held that the natural and ordinary meaning of s.36(2B)(c) requires

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			the decision-maker to determine whether the risk is faced by the population of a country generally as opposed to the individual claiming complementary protection based on his or her individual exposure to that risk.[33]In *SZSPT v MIBP* [2014] FCA 1254, the Court held that, while every citizen who broke a law of general application would necessarily face a risk of punishment personally, s.36(2B)(c) applied because it was no different from the risk faced by the population generally.[34] The Court's reasoning suggests that the 'faced personally' element of this qualification requires the individual to face a risk of differential treatment, or because of characteristics that distinguish them from the general populace.' (Para 132). 'Furthermore in *BBK15 v MIBP* [2015] FCA 680, it was noted that the then Tribunal Member was correct to draw attention to a circumstance where a real risk of harm faced by a visa applicant is a risk shared by the general population, rather than one to which the visa applicant particularly is exposed in some individual or personal sense and upheld that the appellant was not more exposed to real risk of significant harm. 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).' (Para 133). 'The Tribunal has already made specific and cumulative findings that it does not accept the applicant will be targeted for any Convention and other reasons,

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			including as a teacher, her gender, her marital status, a forced returnee or as someone who is perceived to be wealthy, a wealthy returnee or someone who resisted gang violence in the past or based on a combination of these reasons. These are the same risk factors the Tribunal has considered under the complementary protection criterion. Based on the Tribunal's assessment of the country information and the applicant's accepted personal circumstances, none of these risk factors, neither specifically nor cumulatively, substantially elevate or heighten the applicant's risk of significant harm arising from gang related generalised violence over and above the general population.' (Para 134). 'In this matter, the Tribunal finds those accepted risk factors, cumulatively considered, are not sufficiently distinguishable for the purposes of s.36(2B)(c), if she were to return to [Town 2], as it is assessed the risk of significant harm to the applicant are not distinctly or differentially greater than the risk facing other residents of [Town 2] or those residing throughout El Salvador due to violent gang members and the low capacity of the authorities to protect the population in general.' (Para 135). 'The Tribunal makes further findings that the risk of significant harm faced by the applicant, who has not claimed to have broken any law or to have any other residual claims to consider in this review, is not one faced 'personally' by the applicant or is particular to her

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			or that she faces a risk of differential treatment due to any of the accepted characteristics that distinguish her from the rest of the population. Instead the risk of significant harm faced by the applicant is attributable to her membership of the population of El Salvador and is shared by that population group in general.' (Para 136). 'Accordingly, as there is not taken to be a real risk the applicant will face significant harm in her country of reference, as the Tribunal is satisfied the real risk is one faced by the population generally and not faced by her personally, pursuant to s.36(2B)(c), if she were to be removed from Australia to [Town 2] specifically or El Salvador more generally.' (Para 137).
1719766 (Refugee) [2018] AATA 4024 (Unsuccessful)	5 September 2018	14, 62-67, 69	The Tribunal considered, and rejected, the argument that suffering from autism and experiencing social stigma arising from being born out of wedlock amounted to 'significant harm' under the Migration Act in relation to a child applicant from China. 'The following written statement was provided on behalf of the applicant as to her claims for protection (not corrected for spelling and grammar): My name is [name], I was born in Australia, my mother is [Ms A], I do not know who my father is, my mother is still single, I have an elder sister [Ms C]. Since we have born, we attended the Church every week, my mother is a Christian, and she sometimes

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			reads the Bible to us. I am always thinking about who is my father, but I did not have any idea at all. I think my mother is very impossible to take us to CHINA, as the children of a single mother, we could not be registered into the household in CHINA, we will become the black children, as a result, we are not able to attend the school. We cannot get the social welfare. My mother does not want us to live in the unfair environment. I like Church, while I do not know the meaning of Bible at all, I like the atmosphere, I know I am also the Child of God, I am also loved by him, I think I will be the lucky child to be born in the Christian family, I can feel the love from God, and I understand even I do not have father around me, but I am happy. I know if I return to China, I will face very difficult situation, I will not be able to accept the education, not household registration, no medical support. I will lose the opportunity to attend the Church; I will become empty, hopeless and miserable. I do not know what will happen on me. It is very hard for my mother to raise us up, without the support and the love from Church, we will not be like today. I would like to ask for your consideration, as the Child like me, I want to have my future, I want to serve God and when I grow up I can return to the society, although

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			I do not have father, but I will be stronger because I have God on my side.' (Para 14). 'A claim has been made that the applicant would be discriminated against because her parents are not married.' (Para 62). 'Regarding societal attitudes towards children born out of wedlock, DFAT advised in February 2010, that 'in remote regions, children born out of wedlock without a household registration may have experienced discrimination in the past due to traditional and cultural disapproval'. DFAT assessed, however, that social acceptance of children born out of wedlock is 'likely to have improved'. In 2010, the Tribunal contacted Dr Alice de Jonge, a Senior Lecturer of Business Law and Taxation at Monash University, for information about children born out of wedlock in China. According to information provided on the Monash University website Dr de Jonge has 'lived and studied in China and was a Visiting Scholar at Nanjing University, China'.[8] In her response, Dr de Jonge stated: '[Children born out of wedlock] are still regarded with pity and disdain. They are teased at school.'' (Para 63). 'The Tribunal accepts there may be a degree of social stigma towards the applicant as a result of her being a child of a single mother with no father in China. The independent evidence indicates that the difficulties have been greater in remote regions of China. There is no

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			suggestion that the applicant is from a remote area.' (Para 64). 'The unkindness of children to other children who have a different characteristic is well-known and is a hurdle that must be faced by many children in their formative years. Whilst accepting that the applicant may face some unkindness, the Tribunal is not satisfied, that the difficulties that would be faced by the applicant would be so significant that they would result in a real chance of her facing serious harm or fall within any enumerated definition of significant harm.' (Para 65). *Autism* 'Reference was made in the hearing by [Ms A] to the applicant suffering from autism. The relevant medical and service provider reports that were provided following the hearing indicate that the applicant has been diagnosed with autism spectrum disorder, mild to moderate delay in most areas of adaptive behaviour and a profound delay in communication and social skills. [Ms A] has referred to the positive treatment that the applicant is receiving in Australia with the implication that it is wished that this should continue.' (Para 66). 'No direct claim has been made that the applicant would meet the refugee criterion or the complementary protection criterion on return to China based on her medical condition. No evidence has been provided that

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			the applicant would not receive treatment for this condition on return to China.' (Para 67). 'In relation to the complementary protection criterion, there must be an intention by a person or entity to cause harm to the applicant. Harm suffered by the applicant as a result of the diagnosis of autism or inferior treatment in China to that which exists in Australia would not in itself create that requisite intention. For that reason, the applicant would not meet the complementary protection criterion as a result of her having a diagnosis of autism.' (Para 69).

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1510767 (Refugee) [2018] AATA 3382 (Successful)	24 August 2018	13-14, 41-48	The Tribunal found that the applicant, a gay Mongolian man, was owed complementary protection due to the higher standard of state protection required under this regime. Because the police would intervene and the legal system would be triggered only *after* the applicant had been harmed, the applicant would face harm on return and the 'stringent' test under section 36(2B)(b) was not met. 'The application for the Protection visa indicates the following in relation to the applicant. The applicant was born [in date]. He is a citizen of Mongolia. The applicant completed military service from June 1997 until June 1998. The applicant lists his occupation as [Occupation 1]. The applicant has never been married. The applicant indicates no close relatives in Australia. The applicant indicates that he is not in contact with relatives outside of Australia. The applicant indicates that he has no personal contacts in Australia. The applicant left Mongolia legally. The applicant travelled to China in September 2012 and March 2013. The applicant lists one address lived at in Mongolia from 1996 until June 2014. The applicant completed secondary school in [year]. The applicant undertook a [course] from September 1996 until April [1997]. From 1998 until 2008 the applicant [had] his own business. From 2008 to 2012 the applicant worked as [Occupation 1] in a club. From September 2012 until

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			the applicant left for Australia he worked [for] a [company].' (Para 13). 'The applicant's claims are set out in a written statement attached to the Protection visa application, which provides as follows: First of all I want to express my gratitude for having an opportunity to be able to submit my case to Australian immigration services. As for me I am a homosexual man who was living in Mongolia under difficult circumstances, constantly being harassed emotionally and physically and alienated…' (Para 14). 'The Tribunal is satisfied that the applicant would return to Mongolia as a homosexual and wish to enter into relationships with men. The Tribunal considers that the applicant would be reasonably discreet in relation to such relationships. That discretion would be because the applicant would be fearful of the consequences should he be more open about his sexuality. The Tribunal considers it not unlikely, notwithstanding discretion, that others in Mongolia are likely to become aware of relationships and the applicant's sexuality, as they have in the past.' (Para 41). 'Given the negative attitudes towards homosexuality in Mongolia, the Tribunal is satisfied that the applicant faces a real chance of both serious and significant harm,

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			as defined in the Act. Harm would include the real chance of physical harm, as it has in the past.' (Para 42). 'In terms of considering the applicability of the refugee criterion, the Tribunal notes s.5J(2) of the Act indicating that a person does not have a well-founded fear of persecution if effective protection measures are available to the person in the relevant country. Section 5LA further defines 'effective protection measures'. The Tribunal notes that the independent information contained in this decision indicates the view of DFAT that the legal framework recently introduced in Mongolia in relation to homosexuality offers adequate protection to the LGBTI community.' (Para 43). 'Given the existence of these laws, for the purpose of this decision only, and acknowledging that the extent to which there is practical adequate enforcement of those laws is not yet clear, the Tribunal would find that there are effective protection measures available to the applicant in relation to his sexuality and therefore he is not taken to have a well-founded fear of persecution. The Tribunal notes that under the definition of effective protection measures, police need to provide, not perfect protection, but reasonably effective protection.' (Para 44). 'This is not a finding that is determinative of the outcome in this matter because, in any event, the

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			applicant would satisfy the complementary protection criterion, in the Tribunal's view. This is because a different and stricter test applies in relation to effective protection as set out in s.36(2B)(b) of the Act. Under that section, protection must reduce the risk of harm to less than a real risk for the purpose of the complementary protection criterion. This is a more stringent test than s.5LA(2)(c).' (Para 45). 'The Tribunal is not satisfied on the evidence, given attitudes towards homosexuality in Mongolia, consistent with the applicant's past experiences, that the legal framework and police protection would reduce the risk of harm to the applicant based on his sexuality to less than a real risk. This is because there is the potential for the applicant to face physical harm before the involvement of police, who would be likely involved after the harm has occurred, or due to the operation of the legal system, which would not operate until after the harm had occurred. The Tribunal finds that the applicant would face a real risk of degrading treatment or punishment as well as cruel or inhuman treatment or punishment within the terms in s.36(2A) of the Act.' (Para 46). 'The Tribunal does not consider that the applicant can escape a real risk of harm by relocating because the risk of harm would be prevalent throughout Mongolia, and therefore s.36(2B)(a) does not apply.' (Para 47).

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			'The Tribunal considers that the risk to the applicant is based on a particular characteristic, his homosexuality, and therefore the risk to him is not a risk faced by the population generally rather than the applicant personally, and therefore s.36(2B)(c) does not apply.' (Para 48).
1811335 (Refugee) [2018] AATA 3269 (Unsuccessful)	9 July 2018	20-21, 34, 44-45	The Tribunal considered, and rejected, the proposition that self-harm amounted to 'significant harm' under the Migration Act. 'When asked why he was seeking protection in Australia, [the applicant] stated that he was seeking protection in Australia so he did not have to return to Fiji. He wrote that he left Fiji because he no longer had any family in Fiji as his grandparents passed away and it was for that reason that his mother came to Fiji to bring him to Australia for a better life. He said that Australia is now his place and he is proud to call Australia home. He said that his grandparents looked after him when he was a kid. He wrote that if he returned to Fiji, he will be homeless and be separated from his family and friends as he has no ties to Fiji whatsoever. He wrote that he is [a relatively young age] and has his whole life ahead of him in Australia with his mum and his partner.' (para 20). 'He stated that he experienced past harm in Fiji and that he feels like he will self-harm every day in Fiji as he will miss his mum and partner a lot, especially at his

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			age and will have no one there to turn to for help. When asked whether he sought help within Fiji after suffering harm, he wrote that he has no one to turn to for help. He had no support from anyone over in Fiji because he does not have any family or friends. He wrote that when he came to Australia he got so much help from his mum and partner.' (Para 21). 'The applicant told the Tribunal that he had self-harmed a couple of times previously. He did this while he was in juvenile detention as well as when he was in immigration detention. The self-harm in detention occurred when he left [a particular immigration detention centre] and went to [another immigration detention centre]. He told the Tribunal that he tried to [commit suicide] because he had 'had enough of life' and told the Tribunal that he was not currently medicated.' (para 34). 'The Tribunal accepts that the applicant has previously self-harmed in Australia. It accepts his evidence that he did this twice while in juvenile detention and in immigration detention. That is very regrettable for the applicant and his family. The Tribunal accepts that these instances of self-harm have occurred because the applicant does not want to return to Fiji but finds that these events have occurred because he does not want to be separated from his family, not because he has any fear of harm if he were to return to Fiji. The Tribunal accepts that there is an inherent risk that the applicant,

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			as a person who previously self-harmed, may do so again if he is returned to Fiji. However, this harm has not been directed at the applicant by any external source. Rather, it is a voluntary act done by the applicant because he does not want to be separated from his family in Australia. The Tribunal does not accept that self-harm meets the definition of serious harm or significant harm on the basis that the self-harm is a voluntary act done by the applicant to himself.' (Para 44). 'When considering the evidence as a whole, the Tribunal is satisfied that the applicant has lodged a protection application because he does not want to be separated from his family. As a result of his visa being cancelled and his potential deportation to Fiji, he is understandably upset and has self-harmed because he does not want to be separated from his family. He does not have any genuine fear of serious harm or significant harm if he were to be returned to Fiji. The only harm that the applicant faces is that which he would do to himself because he does not want to leave Australia and this harm is not serious harm or significant harm under s.36(2)(a) or s.36(2)(aa) respectively.' (Para 45).
RGYW and Minister for Home Affairs (Migration) [2018] AATA 2076 (Unsuccessful)	3 July 2018	1, 3, 38, 120, 160, 163-166	In this case, the Tribunal stated that it must follow Australia's interpretation of international obligations (in the Migration Act). In this case, the interpretation of "own country" in Article 12(4) in the Human Rights Committee *Nystrom v Australia* case was rejected,

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			meaning that the applicant did not have a right not to be deported from Australia and his arguments in relation to harm arising from separation from his partner and family members in Australia upon his deportation were not relevant. 'RGYW was born in Tokoroa in New Zealand in 1975.[1] At the age of five, RGYW left New Zealand and arrived in Australia with his family. RGYW's father arrived first, followed by RGYW, his mother and two sisters (Sister 1 and Sister 2).' (Para 1). 'On 20 June 2017, RGYW's special category visa was mandatorily cancelled under s 501(3A) of the Act on account of him having a substantial criminal record. RGYW was convicted for approximately 60 offences, 30 of which he was sentenced to terms of imprisonment, including at least one which was longer than 12 months. RGYW is presently serving a term of imprisonment in a prison facility based in Victoria for two offences of burglary and theft that were committed in April 2016.' (Para 3). 'RGYW contended that where a statute is ambiguous, it should be given a construction consistent with Australia's international law obligations. He said that those interpreting the statute should assume that the legislature did not intend to repeal fundamental rights and liberties of a person, in the absence of clear words of statutory intent.[10] In that context, RGYW

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			contended that Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR) provided that "no one shall be arbitrarily deprived of the right to enter his own country", which is a protection implying a right, he contended, not to be deported. He referred to Nystrom v Australia, UN Doc CCPR/C/102/D/1557/2007 in which the 10:5 majority of the United Nations Humans Rights Committee expressed views expanding the scope of Article 12(4), namely, that it applied to non-citizens where they had sufficient ties to a country.' (Para 38). 'RGYW referred the Tribunal to the 10:5 majority view of the United Nations Human Rights Committee (Committee) in Nystrom v Australia, expanding the scope of article 12(4) of the ICCPR finding that it could apply to non-citizens where they were able to establish sufficient ties to a particular country.[28] The Committee considered Australia to be in violation of articles 17 and 23 of the ICCPR. However, the Australian government published a response, disagreeing with the majority views of the Committee in Nystrom v Australia and indicating that it would not take any action to comply with the Committee's requests.[29] The Tribunal agrees and is also bound to follow the approach of the High Court of Australia in Minister v Nystrom.' (Para 120). 'RGYW contended that if he were returned to New Zealand it would impact on his relationship with his de

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			facto partner. He said he would also be prevented from seeing his sisters and other family members in Australia, including the Niece and Nephew, as well as his friends. He said he would no longer see familiar places and he would not be able to visit his mother's grave in Australia if he is deported. He said if he went to New Zealand he would have no supports there and would be "*sleeping rough*". He said he did not know whether he would be eligible for social services in New Zealand nor was he familiar with what they are. He said he was concerned that if he were deported to New Zealand it would cause his mental health to rapidly deteriorate, and without any support networks, he would become suicidal.' (Para 160). 'The Minister contended that RGYW's claims as to what he would face if he was deported to Australia "*do not speak to whether he faces serious or significant harm in New Zealand*".[37] The Minister contended that the Tribunal cannot be satisfied on the evidence before it that he suffered harm of the type that would give rise to international non-refoulement obligations and at best they raise considerations of the impediments he would face if returned to New Zealand and should be considered under paragraph 14.5 of Direction no.65, and not under paragraph 14.1.' (Para 163). 'The Tribunal agrees. I was unable to identify any real risk of significant harm that would face RGYW personally if he was returned to New

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			Zealand, as distinct from risks faced by the population of the country generally. RGYW points to the probability that he will be under supervision orders as a negative thing. However, the Tribunal considers that this will provide him with a layer of structure, assistance and intervention during his early days in New Zealand that is designed to increase his chances of settling in New Zealand without re-offending.' (Para 164). 'The Tribunal does not consider that deportation of RGYW to New Zealand would give rise to breaches of the CAT and ICCPR. The highlighted section of paragraph 14.1(1) in paragraph [156] requires the Tribunal to follow the tests enunciated in the Act with respect to Australia's interpretation of those international obligations. This would include Australia's rejection of the majority views of the United Nations Human Rights Committee seeking to expand the scope of article 12(4) of the ICCPR in *Nystrom v Australia*.' (Para 165). 'There is insufficient evidence for the Tribunal to conclude that RGYW would be at risk of a specific type of harm that would trigger an international non-refoulement obligation within the meaning of paragraph 14.1 of Direction no.65, if he were to be deported to New Zealand. I have taken into account the difficulties that RGYW is likely to face upon deportation to New Zealand under paragraph 14.5 of Direction no.65 in

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			paragraphs [177] to [190] inclusive of these Reasons for Decision.' (Para 166).
1510994 (Refugee) [2018] AATA 3026 (Unsuccessful)	20 June 2018)	7, 11-12, 18-25, 36, 52-60, 65-72	In this case, the applicant was found to be an Australian citizen and was thus unable to satisfy the requirements of section 36(2) of the Act and to be granted a protection visa. However, in considering whether to recommend the case to the Minister for intervention, the Tribunal considered whether Australia's non-refoulement obligations were engaged and in doing so, discussed the meaning of 'arbitrary deprivation of life' in the Act. 'In summary, the applicants claim that the first-named [applicant] has a well-founded fear of persecution for reasons of being a severely disabled person in Zambia, and that there is a real risk of significant harm under the complementary protection criteria. The other applicants claim to be members of the same family unit as the first-named applicant.' (Para 7). 'The first-named applicant is the primary applicant in the matter. He was born in Australia on [date], and he has been 'ordinarily resident' in Australia for [a prescribed period] years from his birth as he has been living in Australia. Thus, he automatically acquired Australian citizenship on [date]. This was discussed with the applicants at a hearing on 14 June 2018. They

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			agreed that the law was 'straight forward about this".' (Para 11). 'Therefore, the Tribunal is satisfied on the evidence before it that the first-named applicant is an Australian citizen. It follows that the first-named applicant does not satisfy the requirements of s.36(2), and cannot be granted a protection visa.' (Para 12). 'The Tribunal is satisfied on the basis of oral evidence of the applicants, detailed medical reports, and the first-hand experience of seeing [the first-named applicant] at the Tribunal premises, that [the first-named applicant] has had [Medical Condition 1] since birth, and is wheelchair bound and is unable to speak or eat on his own. The Tribunal is satisfied based on medical reports that he was born [prematurely], had a complicated neonatal course and spent 18 months in hospital. [Doctor A], [University 1], in a report dated 25 August 2011 stated that he was the treating and responsible specialist looking after [the first-named applicant]. He said that when [the first-named applicant] was born, he required substantial intensive care. His survival was the result of being in Australia, with a sophisticated health care system.' (Para 18). 'The report from the Paediatric Registrar at [Hospital 1] stated that [the first-named applicant] is on [medication] for [Medical Condition 2] which he has had since birth, and has severe global and developmental delay. The

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			Tribunal accepts [Doctor B], Specialist Paediatrician's assessment that he has [Medical Condition 1], and that he has limitations of movement in his [body]. He said that he requires feeding through apercutaneous gastroenterostomy (PEG) tube insertion. A letter from the Assistant Principal, [School 1], [State 1], dated 4 June 2015 stated that [the first-named applicant] was a student at the school, which is a specialist school for students with moderate, severe and profound learning disabilities. He had been enrolled since January 2015. He had development delay and complex needs. He has [Medical Condition 1] and [Medical Condition 2].' (Para 19). '[The first-named applicant] has little control of his body and requires assistance for all day to day needs. He uses an assisted wheelchair for all mobility and is given nutrition through a stoma in his stomach (PEG device) as he has [Medical Condition 3] and [Medical Condition 4] so is unable to eat and drink by mouth. He requires glasses and has hearing aids. He has communication difficulties and attempts to communicate by making sounds and eye gaze. Due to his complex needs, he requires care by [a range of medical professionals]. He requires specialist equipment, [details deleted] and other items tailored to his needs. [State 1] Health Department Children's Development Team therapists train school staff to plan, program and deliver safe and appropriate therapy programs. His educational program is guided by the

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			Australian Curriculum, General Capabilities at Level 1a which is the earliest stage of learning. He requires adult assistance to access learning tasks. Their classes have three specialist staff for six students. A trained [facilitator] works with [the first-named applicant] to develop skills to control his body. The dietician from [a health service] has reported that he relies on enteral nutrition support via a PEG for 100% of his nutrition and hydration.' (Para 20). 'The Tribunal is satisfied, based on the medical report of [Doctor B], that [the first-named applicant]'s condition is 'precarious' Considering all of the above, the Tribunal is satisfied that [the first-named applicant] could not survive on his own in Australia. His parents and sister are responsible for all of his financial, practical, physical and emotional needs. For example, they feed him five times a day through his PEG device after being trained how to use it. They connect a syringe and feed him water first, and then food. They have to go to the hospital every six months and a surgeon changes the PEG, with the use of local anaesthetic. There is usually one stomach nurse who can help, or a surgeon. It has to be done within two hours. Sometimes the PEG devices come out accidentally. Within two hours [the first-named applicant] has to be taken to emergency, otherwise the hole will close. Once recently the PEG device came out, and they had to rush to hospital.' (Para 21).

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			‘Furthermore, according to the speech pathologist at [State 1] Department of Health, a report in 2016, although [the first-named applicant] is non-verbal, he is communicative and uses facial expressions to show happiness, pain or discomfort. He recognises different adults and acknowledges and reaches out to them with his hands. His emotional connection to his family was evident at the Tribunal hearing.’ (Para 22). ‘If his parents and sister were to be required to return to Zambia, they would need to take [the first-named applicant] with them, notwithstanding that he is an Australian citizen. The Tribunal is of the view that these are some of the strongest compassionate circumstances that have come before it. If not recognised, the Tribunal is of the view that there would be serious, ongoing and irreversible harm to [the first-named applicant], and very probably death of an Australian citizen. The reasons for this are set out below.’ (Para 23). ‘The Tribunal is satisfied on the evidence provided that the PEG device is not available in Zambia, and medical practitioners are not trained in its use. A letter from [Dr C], Consultant, Department of Paediatrics and Neonatal Surgery, Zambian Ministry for Health, stated that there were no PEG devices in Zambia, and they would be difficult and expensive to procure. He stated that children with [the first-named applicant]’s condition can be nursed in Zambia; however, they would lead much more miserable lives and have a shorter life span

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			compared to an environment where he is on special feeds. [Doctor B] has also stated in his report that the Nutrison Multi Fibre is only available through hospitals in Australia, and he believes it is not available in Australia, also confirmed by [Doctor C]. [Doctor D], who has travelled to Zambia and seen what was available, has said that in Zambia his essential feeding formula and the PEG technology would be unavailable, and his respiratory medications would be difficult to access. She also claimed that he would not have immunity to local pathogens such as malaria and tuberculosis which are prevalent.' (Para 24). 'The Tribunal is satisfied on the evidence of the applicants and medical reports, that as the PEG device needs monitoring and, on occasions, leaks or needs to be changed, that the absence of trained personnel in Zambia could lead to adverse health consequences and even death…' (Para 25). 'Considering this information cumulatively, and the medical reports about [the first-named applicant]'s status, there is a strong likelihood that [the first-named applicant] would at the least, undergo severe pain and suffering if he returned to Zambia, and at the worst, would not be able to survive. The Tribunal refers this to the Minister based on the unique and exceptional compassionate circumstances of the matter.' (Para 36).

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			'The Tribunal is satisfied that the circumstances of this family engage Australia's non-refoulment obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the family being removed from Australia to Zambia, [the first-named applicant] would suffer significant harm.' (Para 53). 'As set out above, there is evidence that people with disability in Zambia may not be able to access health care because of stigma and discrimination, as well as underfunding issues. The Tribunal is satisfied that there is a real risk to the applicant of arbitrary deprivation of life resulting from a lack of state commitment to providing health care for disabled people, as well as underfunding in health care generally.' (Para 54). 'In regards to the definition of 'arbitrary deprivation of life', while there is no restriction as to who must inflict the harm or for what reason, judicial comments in *MZAAJ v MIBP*, have indicated that this kind of harm concerns state actions.[22] In *MZAAJ v MIBP*, the applicant claimed that the Tribunal failed to consider that the applicant might face arbitrary deprivation of life because of the prospect that he might die as a result of his inability to access dialysis in Sri Lanka. The Court held that the Tribunal, which had considered the claim against the definitions of cruel/inhuman/degrading treatment or punishment, had implicitly found that this did not fall within the concept of arbitrary deprivation

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			of life, and was correct in so concluding. Judge Riley said in obiter dicta comments that, in regards to lack of availability of dialysis machines in Sri Lanka, '*the concept of arbitrary deprivation of life concerns such things as extrajudicial killing and the excessive use of police force. It does not concern the consequences of scarce medical resources in developing countries*'.[23]Clearly, the word 'deprived' imports an element of deliberateness, rather than death caused by absence of resources to keep a person alive.' (Para 55). 'The Tribunal notes that in relation to other types of significant harm, such as cruel and inhuman treatment or punishment, there must be intention to cause the harm. In *SZTAL v MIBP*, a majority of the High Court rejected the contention that knowledge or foresight of a result establishes the necessary intention element of the definitions of torture, cruel or inhuman treatment or punishment and degrading treatment or punishment.[24] While evidence of foresight of the risk of pain, suffering or humiliation may support an inference of intention (and in some cases may render the inference compelling), foresight of a result is of evidential significance only: [25]' (Para 56). 'The requirement for actual subjective intent is not applicable to 'arbitrary deprivation of life'. Clearly the legislators did not propose that 'arbitrary deprivation of life' would need to be 'intended', as the provisions do not include the requirement of intent as do the other

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			provisions. Although an element of deliberateness can be imparted into the words 'arbitrarily deprive', the Tribunal notes that the element of deliberateness suggested by the wording in relation to 'arbitrary deprivation' does not equate with intention in the same sense as in the other types of harm, where there must be actual subjective harm.[26] The Tribunal has therefore interpreted 'arbitrary deprivation of life' based on the ordinary meaning of the words, while also being guided by legislative intention as expressed in the Explanatory Memorandum and Second Reading Speeches to the relevant bills, and international jurisdiction.' (Para 57). 'Arbitrary deprivation' is not defined by the Act, such that the words 'arbitrarily deprived' are to be given their ordinary meaning. [27]'Arbitrarily' is defined in the Oxford Dictionary of English as 'on the basis of random choice or personal whim, without restraint in the use of authority'[28] and in the Macquarie Dictionary includes 'subject to individual will or judgment, discretionary, not attributable to any rule of law, accidental, capricious, uncertain, unreasonable, uncontrolled by law, using or abusing unlimited power'. [29]' (Para 58). 'Deprive' is defined in the Oxford Dictionary of English to mean 'prevent (a person or place) from having or using something'[30] and in the Macquarie Dictionary as 'to divest of something possessed or enjoyed; dispossess; strip; bereave' or 'to keep (a

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			person etc.) from possessing or enjoying something withheld'. [31]' (Para 59). 'The Tribunal has considered carefully whether there would be 'arbitrary deprivation of life' through consideration of the ordinary meaning of the words, in the sense that [the first-named applicant] would be prevented, dispossessed, kept from, or divested, randomly, capriciously or unreasonably from access to health care. This has been considered in the context of withholding of health care due to lack of resources due to poverty, and withholding of health care due to state decisions about where health care should be allocated.' (Para 60). 'The Second Reading Speeches and Explanatory Memoranda to the 2009 and 2011 Bills refer to Articles 2, 6 and 7 of the Covenant, Articles 1 and 3 of CAT, Article 1 of the Second Optional Protocol to the Covenant, Articles 6 and 37 of CROC, indicating that the complementary provisions have drawn heavily on these international treaties, and the language is very similar. Thus in construing the complementary protection provisions, the Tribunal has been informed by decisions in international jurisdictions.' (Para 65). 'The meaning of articles in the international treaties can be taken from the views of the UN Human Rights Committee and the Committee on the Rights of the Child. The interpretations of these committees are

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			found in their General Comments on treaty provisions, Concluding Observations on country reports and views on individual cases, considered by the Human Rights Committee pursuant to the Optional Protocol. The decisions of these Committees are not binding on states; however, they have strong influence and represent the views of experts. Further, in Europe, the European Court of Human Rights has developed extensive jurisprudence and their determinations are binding on states.' (Para 66). 'The 'arbitrary deprivation of life' provision in Australia is based on Article 6 of the Covenant, which states that 'every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life'. It is paralleled in Article 2 of the European Convention of Human Rights.' (Para 67). 'Obligations of the State under the Covenant to protect people from 'arbitrary deprivation of life' mean that a state must itself refrain from killing people, and also that it must exercise due diligence in preventing people from being killed by other actors.[37] The provision requires that States adopt positive measures 'to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics'.[38] The European Court of Human Rights has confirmed that a 'public authority may be in breach of the right to life if it has undertaken

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			to provide a particular form of treatment generally and has limited treatment on an arbitrary or discriminatory basis, putting an individual's life at risk.[39] ' (Para 68). 'The UN Human Rights Committee has acknowledged that Article 6 has a socio-economic component.[40]Discussion by commentators has indicated that 'arbitrarily' in this context is intended to reflect more than intentional killings.[41] An analysis of the views of the Committee has suggested that right to life must be actual or imminent, not a hypothetical risk.[42] The Human Rights Committee has confirmed that protection of the right to life requires that states adopt positive measures[43] and that it should not be interpreted narrowly.[44] The Committee has viewed issues such as homelessness[45], infant mortality[46] and life expectancy[47] as falling within its scope. There have been a number of decisions which have recognised positive obligations on health authorities to adopt appropriate measures for protecting lives in European Convention on Human Rights decisions. This may include in limited circumstances funding minimum levels of health services or medication, and accounting for resource allocation[48] Where life-saving treatment is denied, 'they (states) must explain the priorities that have led them to decline to fund the treatment'. [49]' (Para 69). 'CROC, Article 6, states that parties shall recognise that every child has the inherent right to life and that state

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			parties shall ensure to the maximum extent possible the survival and development of the child. The Committee on the Rights of the Child has stated the need to implement this holistically, 'through the enforcement of all the other provisions of the Convention, including rights to health, adequate nutrition, social security, an adequate standard of living, a healthy and safe environment'.[50] In *Re MQF*, the Immigration and Refugee Board of Canada found that a nine year old child had protection needs on the basis of risk to life. His biological family was unknown and he would be at risk of becoming a street child who would be homeless and prey to prostitution.[51]' (Para 70). 'The Tribunal notes the formulation of the complementary provisions is not in exactly the same form as the provisions in the international treaties. However, taking into account the Australian legislative intentions to ensure that through the complementary provisions Australia would comply with its international treaty obligations, and analysing how international jurisdictions have interpreted parallel provisions, it is clear that there may be arbitrary deprivation of life where there is arbitrary state action or inaction in relation to decisions on health. In the very extreme case that is the subject of this decision, the Tribunal is satisfied that because of lack of monitoring, enforcement of legislation and appropriate legislation and policies in Zambia in relation to disabled people, underpinned by stigma, as well as lack of resources,

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			there is a real risk that the applicant would be arbitrarily deprived of life, due to lack of access to the kind of health care which would allow him to live. This could include both access to the PEG device, as well as its maintenance, emergency treatment, treatment for disease and asthma, and ongoing holistic care necessary for his survival.' (Para 71). 'The Tribunal if of the view that these circumstances engage Australia's non-refoulment obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of them being removed from Australia to Zambia, [the first-named applicant] would suffer significant harm in the form of arbitrary deprivation of life.' (Para 72).
1512102 (Refugee) [2018] AATA 1302 (Successful)	27 March 2018	26-27, 35-37, 44-48, 55	In this case the applicant's particular circumstances (mental illness) influenced the Tribunal's finding that he would face a risk of harassment and other harm and that this harm would amount to cruel or inhuman treatment. The applicant's representative had referred to *D v United Kingdom* (European Court of Human Rights), Application No 30240/96 (2 May 1997) in submissions. 'It is clear to the Tribunal from the medical evidence before it that the applicant suffers from serious mental health problems which are complex, long standing and worsening. He has been diagnosed with [details of condition deleted]. Whilst in Australia he has been

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			admitted to psychiatric inpatient care in hospitals a number of times, as recently as September/October 2017. This included an admission to [Hospital 1] shortly after the Tribunal hearing in March 2017. He has avoided contact with his legal representatives and become increasingly reluctant to engage in therapeutic care.' (Para 26). 'The Tribunal has formed the view on the evidence before it that the applicant is unfit to participate in the hearing and is expected to be unfit for the foreseeable future: *Kalinoviene v MIAC* [2011] FMCA 760. The medical evidence before the Tribunal indicates that the applicant suffers from serious mental health problems, has done so for many years, and his mental health has deteriorated. Given this evidence the Tribunal is of the view that the applicant's mental health is unlikely to change in the foreseeable future and the Tribunal is not satisfied the applicant currently has the competence to give evidence and present arguments relating to the issues arising in relation to the decision under review.' (Para 27). 'In the current case the applicant's representative provided a new submission prior to the Tribunal hearing. It claimed that the applicant was owed protection for the following 'refugee' grounds: ○ Ethnicity, as a member of the Tamil ethnic group

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			○ Political opinion, as a person with an actual/imputed pro-LTTE political opinion ○ Membership of a particular group, being: ▪ Failed asylum seeker/returnee from a Western country whose details have been released to the Sri Lankan Authorities; ▪ People imputed with a pro-LTTE political opinion in Sri Lanka; ▪ Male Tamils from the north of Sri Lanka that left directly after the war ended; and/or ▪ Family member of a public LTTE supporter. a. He is a Tamil male born in Jaffna, North Western Province, to Tamil parents, based on a copy of his passport provided to the Department. b. He entered Australia without a visa and by boat and therefore would be returning to Sri Lanka as a failed (Tamil) asylum seeker. c.He departed Sri Lanka illegally by boat. d. He has serious and deteriorating mental health problems.' (Para 35).

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			‘The representative submits, among other things, that the applicant’s severe mental health issues would result in him being subject to significant harm in the form of cruel or inhuman treatment or punishment, or degrading treatment or punishment if returned to Sri Lanka; that he suffers from [details deleted] for which he requires ongoing treatment; and his mental health would rapidly deteriorate if returned to Sri Lanka and he would not be able to access medical treatment. Country information is referenced about the poor treatment of mental health in Sri Lanka, as well as the stigma and discrimination attached which acts as a barrier to treatment.’ (Para 36). ‘As well, the representative refers to a case in the European court of Human Rights that found the removal of a severely ill person, in circumstances where they are reliant on medical treatment, can amount to inhuman or degrading treatment of punishment where removal would expose him or her to serious and distressing consequences. It is submitted that this is a case where removal of the applicant to Sri Lanka would have such serious and distressing consequences for his mental and physical health that it would amount to significant harm in the form of cruel or inhuman treatment or punishment, or degrading treatment or punishment, occasioned in many ways, including by the Sri Lankan authorities in questioning and detaining him for any amount of time in inadequate prison facilities.’ (Para 37).

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			‘Based on what is accepted of the applicant’s mental health status and circumstances, the Tribunal considers there to be a real risk that, on the applicant being processed in the manner described above on his return to Sri Lanka, and being charged for breaching Sri Lanka’s departure laws, the applicant may act in a way that draws adverse attention to himself from the authorities: either through being non-verbal as evidenced at the Tribunal hearing in March 2017, and/or becoming agitated and possibly aggressive, as indicated in the medical evidence provided. The medical evidence before the Tribunal confirms the applicant has experienced such symptoms and responses in different settings on numerous occasions in the past in Australia and that stress is often a precursor. The Tribunal notes the applicant’s treating psychiatrist in his most recent report provided observes the applicant’s increasing inability to regulate his emotions, noting that he quickly comes to a stance of paranoia and perceived persecution; his cognitions are distorted; he becomes demonstrative with his emotions and distress; he sometimes raises his voices and screams; [details deleted].’ (Para 44). ‘Further, the Tribunal notes that whilst it has not made a finding as to the applicant’s claims of past experience of significant harm in Sri Lanka against himself, including allegations of being tortured, these past experiences of persecution are a dominant and recurring theme throughout the applicant’s psychiatric history as

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			indicated in the medical evidence submitted, and in his refusal to cooperate with people trying to assist him in Australia, whom he sometimes alleges are interrogating him. This indicates to the Tribunal that the applicant himself believes he has been persecuted in the past. Given these constant ruminations, combined with the fact that the applicant suffers from serious mental illnesses which impact on his judgement and behaviour, the Tribunal considers it is not out of the question that he may criticise the government on return and do so in a demonstrative and possibly aggressive manner. The Tribunal accepts the applicant does not have the judgement to know when he can express certain views or an appreciation of the impact of what he is saying.' (Para 45). 'In these circumstances it is not a remote or farfetched possibility that the applicant would suffer significant harm if he was to make comments that were perceived to be anti-government/pro-LTTE on return to Sri Lanka, either during the processing at the airport, or on remand regarding charges under the *I&E Act* for his illegal departure.' (Para 46). 'Given these considerations and having regard to the country information set out above, the Tribunal is of the view that the applicant will be questioned by the authorities on return to Sri Lanka as a failed asylum seeker and is likely to be charged under the *I&E Act* because of his illegal departure years before. The

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			country information set out above indicates that for most returnees charged under the *I&E Act* they are fined then free to go (if they plead guilty) or immediately granted bail on the basis of personal surety or through a family member acting as guarantor. However in the applicant's case the Tribunal considers it plausible that he may be held for a longer period than others given his serious mental health problems. It is also unclear to the Tribunal whether or not he has the support of his family members in Sri Lank who could act as guarantor if needed or help him pay the fine. In these circumstances there is a real chance the applicant will not be released immediately and is likely to be kept in remand for longer than usual. In such a context the Tribunal considers there is more than a remote chance the applicant will face harassment and possibly significant harm from the authorities given his profile as a Tamil, failed asylum seeker, and serious mental health problems whilst in remand. The Tribunal notes in this regard country information which indicates that that the security forces continue to detain individuals they suspect of having LTTE connections. If detained by security forces, there remains a real risk of ill treatment or harm requiring international protection.' (Para 47). 'For these reasons, and when considering all aspects of the applicant's case, including as someone with serious mental health issues, the Tribunal is satisfied that as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a

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			real risk the applicant would suffer significant harm by the authorities on account of his imputed political opinion when detained in the form of assault and/or torture. The Tribunal is satisfied that the harm involves severe physical or mental pain or suffering or both, which is intentionally inflicted on the applicant. The Tribunal is satisfied that the harm also involves an act that causes, and is intended to cause, extreme humiliation which is unreasonable. The Complementary Protection Guidelines refer to consideration of factors such as the circumstances and particular characteristics of the victim (such as sex, age, state of health) when determining whether physical or mental pain or suffering amounts to cruel or inhuman treatment or punishment. This is particularly relevant in the applicant's case given his serious mental illnesses as discussed above. The Tribunal is therefore satisfied that the treatment that the applicant will be subjected to amounts to cruel or inhuman treatment or punishment or degrading treatment or punishment, as defined in s.5(1) of the Act.' (Para 48). 'For the reasons given above, the Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations. Therefore he satisfies the criterion set out in s.36(2)(aa).' (Para 55).
1511084 (Refugee) [2018] AATA 882 (Unsuccessful)	6 March 2018	1, 6, 108, 110-120, 123-126	This case concerned the application of the complementary protection definitions of 'cruel, inhuman treatment or punishment' or 'degrading

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			treatment or punishment' to applicants who feared stigma and social discrimination as a result of their HIV positive status. The Tribunal considered the interaction of international and regional case-law with the Australian statutory regime and drew on this jurisprudence to aid interpretation. However, the Tribunal also referred to dictionary meanings of key terms. 'The applicants are a husband and wife from Malawi, and their two children.' (Para 1). 'In summary the first and second-named applicants claim that they will suffer serious harm or significant harm based on their membership of social groups of people living with HIV, and that their children will suffer persecution as children affected by HIV, or as orphans. They also claim to fear persecution for political reasons, exacerbated by their Yao ethnicity, and as victims of crime and poverty.' (Para 6). 'The Tribunal is satisfied that the applicants may suffer some societal ostracism and discrimination, given that country sources referred to earlier in this decision indicate that notwithstanding government efforts to combat stigma, it still does exist among parts of the community.' (Para 108). 'The Tribunal has considered carefully whether suffering some social ostracism and discrimination

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			would amount to cruel or inhuman treatment or punishment or degrading treatment or punishment.' (Para 110). 'Cruel or inhuman treatment or punishment is exhaustively defined to mean an act or omission by which severe pain or suffering, whether physical or mental, is inflicted on a person, or pain or suffering, whether physical or mental, is inflicted on a person, so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature. The pain or suffering must be intentionally inflicted. The type of social ostracism which the applicants may suffer in Malawi, according to sources and the applicants themselves, is insults, being excluded from social gatherings and similar behaviour. The question is whether such behaviour would result in 'severe' mental pain or suffering, or whether the pain or suffering could be regarded as cruel or inhuman in nature.' (Para 111). 'While the complementary protection criterion draw in part on the language of the International Covenant on Civil and Political Rights (ICCPR), the Second Optional Protocol and the Convention Against Torture (CAT) and on international jurisprudence applying those instruments, it does not purport to incorporate the non-refoulement obligations arising under those interests or replicate the tests in those instruments. Australia became a party to the ICCPR in 1980, to its

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			Second Optional Protocol in 1990 and CAT in 1989. The Act reflects Australia's international non-refoulement obligations by providing criteria to assist decision-makers. In *MIAC v MZYYL* [2012] FCAFC 147; (2012) 207 FCR 211 the Full Federal Court emphasised that while international interpretation of non-refoulement obligations arising from those instruments may be relevant and informative to the extent that those instruments contain similar terms to those in s.36 of the Act, it is not necessary or useful to assess how those instruments would apply to the circumstances of a case and reference must be made to the terms of s.36 itself. The Tribunal must also take into account, where relevant, the Department of Immigration's PAM3: Refugee and Humanitarian - Complementary Protection Guidelines (Complementary Protection Guidelines), in accordance with Ministerial Direction No.56. The Guidelines state that decision-makers should interpret this part of the definition by reference to international jurisprudence on the meaning of cruel or inhuman treatment or punishment in the context of Article 7 of the ICCPR: no-one shall be subjected to torture or to cruel or inhuman or degrading treatment or punishment.' (Para 112). 'In light of this, the Tribunal has referred to relevant international jurisprudence while relying on the terms of s.36 itself. In the *Greek case* (1969) 12 Yearbook 1, 186 the European Commission established that the notion of 'inhuman treatment' covers '*at least such*

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			treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable..' It was found that there was inhuman treatment contrary to Article 3 where the Turkish authorities had dealt poorly with a man whose sons had disappeared, because of the anguish he suffered. Some examples of what has amounted to cruel or other inhuman or degrading treatment under Article 7, have been conditions of detention (*Vuolanne v Finland* (265/87)) and forced sexual reorientation treatment for transsexual women in Ecuador ((2009) UN doc CCPR/C/RWA/CO/3, at [14]). Treatment has been found to be inhuman where it was premeditated, applied for hours at a time, and caused actual bodily injury or intensive physical and mental suffering.[41] It has been held that harmful techniques used on prisoners amounted to inhuman treatment.[42]The European Court of Human Rights has held that threats of torture could amount to inhuman treatment.[43] Abuses in custody have also been found to be inhuman or degrading treatment[44] as has exposure to mob violence and blood feuds[45], and children who witnessed their mother arbitrarily arrested and beaten[46].' (Para 113). 'The applicant referred the Tribunal to the European Court of Human Rights decision of *Ndangoya v Sweden*[47]. In this case the court examined Article 2 and 3 of the European Convention on Human Rights. Article 3 refers to '*inhuman or degrading treatment or punishment*'. The applicant there complained that his

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			expulsion to Tanzania, due to the difficulty of obtaining medical treatment would accelerate his HIV and reduce his life expectancy. Similarly to facts in this matter, the court found that although HIV is a serious condition, there was no indication that the applicant in that case had reached the stage of AIDS, or that he suffered from any HIV related illness. The Court found that treatment was available in Tanzania, as is the case in the matter before this Tribunal. That case (and, arguably, this matter before the Tribunal) was distinguishable from *D v The United Kingdom*,[48] where the applicant was in an advanced stage of a terminal and incurable illness, and treatment would be unavailable, or that in *SJ v Belgium*.[49] In *D v United Kingdom*[50], a man from St Kitts was in the advanced stages of an incurable illness and it was found that withdrawal of medical services in the UK would amount to inhuman or degrading conduct. In *N v United Kingdom*[51], the court said that there would be a breach of the provisions only in exceptional circumstances, which in *D v United Kingdom*,[52] were that he was close to death and had not care or support.' (Para 114). 'The Court noted in *Ndangoya*, that the applicant had siblings in the country and could live in Arusha, where treatment would be available. The Court said that the fact that his circumstances in Tanzania would be less favourable could not be regarded as decisive. Therefore there was no contravention of Articles 2 or 3. Similarly, in this case treatment is available and the applicants

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			have family support and could live in urban areas, where they have lived previously.' (Para 115). 'The Tribunal notes the decision of *MIAC v MZYYL* [2012] FCAFC 147; (2012) 207 FCR 211 where the court held that reference must be made to the terms of the Australian legislation. The question for the Tribunal is, firstly, whether social ostracism of the type which the applicants may experience, would result in 'severe' mental pain or suffering, as set out in s.36 of the Act, on the basis of the ordinary meaning of the term 'severe'. 'Severe' is defined in the Macquarie English Dictionary, as (in relation to 'criticism' or 'laws') as 'harsh, harshly extreme'.[53] The Oxford English Dictionary definition (in relation to 'something bad or undesirable') is 'very great, intense'.[54] It appears from the choice of the word 'severe' that legislators intended a high level of harm take place. The Explanatory Memorandum states that the first type of cruel or inhuman treatment or punishment, an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, refers to an act or omission which would normally constitute torture, but which is not inflicted for one of the purposes or reasons under the definition of 'torture'.[55]Consistent with this, the standard approach internationally is to regard torture and cruel, inhuman or degrading treatment or punishment as harm falling on a continuum, or hierarchy, of ill-treatment, with torture the most severe manifestation.[56] Female genital

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			mutilation and honour killings were referred to in the Explanatory Memorandum as grounds for complementary protection.' (Para 116). 'The Tribunal is not satisfied that social ostracism, such as insults or exclusion from social gatherings, would amount to 'severe' pain or suffering, taking into account the wording of the complementary protection provisions, the Explanatory Memorandum and Second Reading Speech and relevant international jurisprudence.' (Para 117). 'There is no doubt that insults and exclusion would be very unpleasant for the applicants, and that this could affect their psychological well-being and health, as suggested by their doctor. However the question is whether they would experience 'severe' pain or suffering. The Tribunal has considered these definitions cumulatively along with the expectation that the act would normally constitute torture, as set out in the Explanatory Memorandum.[58]The Tribunal is not satisfied that the harm they would experience would reach the level of 'severe', as that term was intended to apply by the legislators.' (Para 118). 'The Complementary Protection Guidelines suggest that assessment of whether particular conduct or conditions amounts to cruel or inhuman treatment or punishment is subjective, in that it depends on the characteristics of the victim (such as sex, age, state of health). For

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			example, the exploitation of phobias or particular cultural taboos could conceivably amount to degrading treatment or punishment for one person where it may not for another person. It may also be appropriate to take into account the societal context within which the harm is occurring.[59] The Tribunal has taken into account the fact that the applicants are educated and have family support, indicated by the fact that the applicant's [sibling] has already been locating relevant information for them. The first-named applicant once worked for a [non-government organisation], and has also worked in government organisations. While these factors would not fully protect them from social ostracism, the Tribunal is satisfied that education, family support and networking in the community would provide some level of buffer against social comments and exclusion. Furthermore, the sources indicate that there is a high level of commitment in Malawi to overcoming social stigma, which may mean that they will be able to combat ostracism, and find support in some quarters. For all these reasons, considered cumulatively, the Tribunal is not satisfied that the harm they would experience would amount to 'severe' pain and suffering.' (para 119). 'For the same reasons, the Tribunal is also not satisfied that social ostracism or discrimination would amount to an act which would cause these applicants pain and suffering, and could reasonably be regarded as cruel or inhuman in nature. The Tribunal notes that the

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			legislators intended that there be a high level of harm in order that there be 'cruel or inhuman treatment or punishment'. This is evidenced by the fact that the legislators used the words 'real risk of significant harm', and 'cruel' and 'inhuman'. 'Cruel' is defined in the Macquarie Dictionary as 'disposed to inflict suffering; indifferent to, or taking pleasure in, the pain or distress of another; hard-hearted; pitiless', or 'causing, or marked by, great pain or distress'.[60] The Oxford Dictionary definition is 'wilfully causing pain or suffering to others', or 'feeling no concern about it, or causing pain or suffering'.[61] The Macquarie Dictionary definition of 'inhuman' is 'lacking natural human feeling or sympathy for others; brutal', or 'not human'. The Oxford Dictionary defines 'inhuman' as 'lacking human qualities of compassion and mercy; cruel and barbaric', or 'not human in nature or character'.[62] The Tribunal is not satisfied that the conduct the applicants may experience would amount to conduct which could reasonably be regarded as cruel or inhuman in nature, given the definitions (words such as hard-hearted, pitiless and brutal).' (Para 120). 'The final type of significant harm listed in s.36(2A) of the Act is degrading treatment or punishment: s.36(2A)(e). Degrading treatment or punishment is exhaustively defined in s.5(1) of the Act to mean an act or omission which causes, and is intended to cause, extreme humiliation which is unreasonable. While social ostracism such as insults and exclusion is

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			unpleasant the Tribunal is not satisfied that it is intended to cause extreme humiliation, as that term is envisaged by the legislators. The word 'extreme' is defined as, relevantly, 'the utmost or highest degree', or 'utmost or exceedingly great in degree' [65] and 'reaching a high or the highest degree, very great'.' (Para 123). 'In the *East Africans case* (1973) EHRR 76 (189), it was found that 'degrading treatment' was more than treatment that lowers a person in 'rank, position, reputation or character whether in his own eyes or in the eyes of other people'. The Court said the act must 'grossly humiliate the person before others or drive him to act against his or her will or conscience'. In *Pretty v UK* [2002] ECHR 427; (2002) 35 EHRR 1, the Court stated that degrading treatment occurs where 'treatment humiliates or debases an individual, showing a lack of respect for , or diminishing his or her own human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance'. Examples of 'degrading' treatment found in international jurisprudence include punishment by birching,[67] and numerous cases of poor detention conditions.[68] The Complementary Protection Guidelines refer to cases where the UNHRC has held that certain practices exercised for the purpose of humiliating prisoners and making them feel insecure constituted degrading treatment. These included

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			repeated solitary confinement, subjection to cold, and persistent relocation to a different cell.' (Para 124). 'Cases where there was held to be no degrading punishment included where a successful litigant claimed that he suffered humiliation for the non-enforcement of a civil judgment,[69] and where two members of the armed forces who were homosexual were asked about their sex lives, preferences and habits during interview.' (Para 125). 'The Tribunal is not satisfied, given the words used in the Act, the definitions and international jurisprudence referred to above that there is a real risk of an act or omission which causes and is intended to cause 'extreme' humiliation, such that is it humiliation of the utmost or highest degree or exceedingly great in degree.' (Para 126).

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1609041 (Refugee) [2018] AATA 576 (Unsuccessful)	14 February 2018	10, 24-26, 30-31	In this case the Tribunal found that while threats of harm in the context of a history of family violence could cause emotional or psychological harm in the future, the emotional toll did not reach the level of 'significant harm', for either adult or child applicants. 'The primary applicant is afraid to return to Malaysia because she fears that she will be attacked or killed by her ex-husband. She claims to have suffered serious domestic violence during the marriage and had her life threatened many times. After she separated he took custody of their son while she had their daughter. She claimed that he threatened to kidnap their daughter. She fled Malaysia because the authorities cannot protect them from domestic violence and relocation is not an option because her ex-husband has many friends in the police. The second and third named applicants' fears arise from the circumstances of the first named applicant.' (para 10). 'The issue in this case is whether the first named applicant's claims of an ex-husband who was violent towards her and had made threats against her are credible and that they would continue such that his actions would reach the threshold of there being a real chance of serious harm or a real risk of significant harm. If so the second line of consideration is whether the ex-husband has the ability to overcome any protection made available by the state or find the applicants if they were to relocate.' (para 24).

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			‘The applicant has detailed the violence she encountered while married in great depth and with consistency. Without a reason to dispute this I accept that she did go through these experiences. I will now consider the evidence provided of the events subsequent to their break–up.’ (para 25). ‘I also note that since the separation the primary applicant was not physically harmed. Instead she received threats which exacted an emotional toll and caused her to fear for her life. In considering whether there is a real chance of serious harm or a real risk of significant harm emanating from the ex-husband’s possible actions I first consider the circumstances surrounding the June 2014 threat which is the most recent and most escalated incident. It is the claim upon which they attempted to report him to the police and subsequently triggered their departure from Malaysia to Australia.’ (para 26). ‘Considering that the first and second named applicants’ actions following the June 2014 threats are not consistent with what they described to be a real and present danger to them, which they claimed led them to flee Malaysia and take the serious step of leaving their daughter in the care of another person alongside my doubts over the ability of [Ms B] to obtain a passport for the child without any parent present leads me to question the entire narrative. That the first named applicant remained in her home town for two months

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			after the threat despite having recourse to support from her new partner on the other side of the country and the actions of the partner who only remained with her for three days leads me to conclude that the threat was made and received as an idle threat. This conclusion is supported by the fact that the first named applicant was not harmed by the ex-husband for a period of three years after their separation despite on numerous occasions appearing at the doorstep of his then mother-in-law's house demanding that they continue their relationship. For these reasons I accept that there was and will be a real chance in the reasonably foreseeable future of emotional and psychological harm to the first and second named applicants, but I do not accept that it amounts to serious or significant harm to either. I find that the ex-husband will not take any physical action against the applicants. As I have found the emotional and psychological harm they will face will not amount to serious or significant harm and the likelihood of physical harm not being a real chance or a real risk I do not accept that the first and second named applicants will face a real chance of serious harm or a real risk of significant harm in the reasonably foreseeable future.' (para 30). 'I have also considered the circumstances of the third named applicant. As I have found that the ex-husband will not undertake actions to physically harm the first and second named applicants I also find that the third named applicant does not face a real chance or a real

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			risk of being kidnapped or cared for by the ex-husband such that she would face serious or significant harm. I note the UNHCR guidelines on child asylum claims referenced by the representative in their submission dated [in] December 2015 and I acknowledge in line with the Migration and Refugee Guidelines on Vulnerable Persons that children experience harm differently. I have considered the evidence through the light of these resources and find that the emotional and psychological harm the first and second named applicants may bear will not impact upon the child in such a way that it would lead to serious or significant harm nor would the actions of the ex-husband reach the child in such a way as to amount to serious or significant harm. As such I find that the third named applicant does not face a real chance of serious harm or a real risk of significant harm.' (para 31).

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1515754 (Refugee) [2018] AATA 466 (Successful)	14 February 2018	5-6, 77-82	This case concerns the application of s 36(2B)(c) which states that there is no real risk that an applicant will suffer significant harm in a country if 'the real risk is one faced by the population generally and is not faced by the applicant personally'. Here, the applicant's gender and past experiences were distinguishing characteristics. 'The applicant is [an age] woman born in Myagdi Nepal. She states her marital status as 'married' and 'separated'. She indicates she speaks, reads and writes Nepali. She is the holder of a Nepali passport valid until [month] 2018. She arrived in Australia [in] November 2008 as the holder of a [temporary] visa valid until [date] March 2011. She provides two residential addresses in Nepal in the period from birth to her departure in November 2008, in [addresses], Nepal. She has completed [number] years of education, to the age of [age].' (para 5). 'She refers to a statement of claims attached with the application. She came to Australia to 'have her freedom' and 'to save her life'. She cannot return to Nepal because the Maoists will abduct her. She also fears her brutal husband will kill her. She is a single woman and will be discriminated by society. She claims she was raped by [number] men and also her husband and the same will be repeated. She fears harm from the conservative and male dominant society and the Maoists who mistreated her in the past. She claims the

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			police and authorities only give protection to high profile leaders and she will get no protection from them.' (para 6). 'The Tribunal accepts that the harm the applicant has suffered in the past, including physical mistreatment and rape comes within the meaning of significant harm. It is not satisfied that there is a real risk that she will face such harm from Maoists, her former husband or past assailants in the future, for the same reasons referred to above. Given the changed political climate, and lack of recent contact from her former husband or any contact from her past rape assailants, the Tribunal does not accept there is any basis to find the applicant will face significant harm from Maoists or her former husband or past assailants upon return. It does not accept poor treatment by the community or her own psychological anguish constitutes 'significant harm' for the purposes of this criteria and therefore it is not satisfied there are substantial grounds for believing that there is a real risk she will suffer significant harm (within the specific meaning of that term) for any of these reasons, if she is returned to Nepal.' (para 77). 'However, the Tribunal has considered whether there are substantial reasons for believing there is a real risk the applicant will suffer significant harm more generally in the form of gender based violence. Having regard to the country information referred to and discussed above, including the most recent US

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			Department of State and Freedom in the World and DFAT reports, the Tribunal considers that the country information before it supports a conclusion that the chance of the applicant being a victim of rape or other serious sexual assault, domestic violence, or being vulnerable to another forced marriage or being trafficked in future, having regard to her particular circumstances as a single, separated woman who has already suffered gender based violence in the past, is a real chance and not one that is far-fetched or remote, and therefore constitutes a real risk.' (para 78). 'The Tribunal has considered s.36(2B), which provides that there is taken not to be a real risk of significant harm if the non-citizen 'could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm': s.36(2B)(b). In *MIAC v MZYYL* the Full Federal Court held that, to satisfy s.36(2B)(b), the level of protection offered by the receiving country must reduce the risk of significant harm to something less than a real one.[34] In considering this applicable standard the Tribunal takes into account that all of the recent reports from the US Department of State, Freedom House and DFAT considered by the Tribunal were consistent in their conclusions that rape, domestic violence and violence against women continued to be significant problems in Nepal and the limitations on the effectiveness of police. Therefore, in consideration of the evidence before it the Tribunal cannot be satisfied

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			that the Nepali law or authorities offer a level of protection that would reduce the risk of violence against the applicant such that there would not be a real risk of the applicant facing significant harm.' (para 79). 'The Tribunal has further considered s.36(2B) which provides that there is taken not to be a real risk that an applicant will suffer significant harm in a country if 'the real risk is one faced by the population generally and is not faced by the applicant personally': s.36(2B)(c). The Federal Court has held that the natural and ordinary meaning of s.36(2B)(c) requires determination of whether the risk is faced by the population of a country generally as opposed to the individual claiming complementary protection based on his or her individual exposure to that risk.[35] In *SZSPT v MIBP*, the Court's reasoning suggests that the 'faced personally' element of this qualification requires the individual to face a risk of differential treatment, or because of characteristics that distinguish them from the general populace.[36] In the present case the Tribunal takes into consideration the following in respect of the applicant's particular circumstances: her gender, her past experiences as a victim of a child marriage and past sexual assaults at the hands of her husband and other men, and previous failure of her father to adequately protect her. The Tribunal finds that these characteristics distinguish the applicant from the general populace in Nepal and it accepts that the real risk of harm in the present case is one that is faced by the applicant

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			personally on account of her particular circumstances.' (para 80). 'For these reasons the Tribunal is satisfied, on the evidence before it, that there are substantial grounds to believe that the applicant faces a real risk of rape or other gender based violence amounting to significant harm in the future. The Tribunal finds that the risk of being a victim of gender based violence in future is one faced by the applicant personally and not by the population of the country generally, and on this basis the Tribunal finds that it is not excluded from finding that there is taken to be a real risk: s.36(2B) of the Act.' (para 81). 'For the above reasons, the Tribunal is satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).' (para 82).
BHKM and Minister for Immigration and Border Protection (Migration) [2018] AATA 3 (Successful)	8 January 2018	1-2, 47-49, 52-55, 65-68, 70-71	This case relates to *non-refoulement* obligations in light of requirements on decision-makers in refusal decisions and the interaction with s 197C of the Migration Act which sets out that Australia's *non-refoulement* obligations are irrelevant to removal of unlawful non-citizens under section 198. It considers the validity of sections of Direction 65, the appropriateness of executive actors having discretion whether to breach Australia's treaty obligations and the weight to be given to *non-refoulement* obligations in light of Federal Court decisions such as *DMH16* (see the Kaldor Centre table

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			of court cases) which have intervened since Direction 65 was issued in 2014. 'This case concerns a young man who has had an unfortunate history since he arrived here from the Philippines at the age of six. He arrived with his mother, brother and two sisters. His father had already left his mother in the Philippines and married another woman. His mother had a new partner, who later began to abuse his mother both verbally and physically and then to beat the applicant himself until he was 11 or 12. By the age of 13 he began to experiment with drugs. He had difficulties at school, and by the age of 17, he was addicted to ice, as methamphetamine is known. That addiction is one factor which led him into a life of petty crime, associated with a degree of violence. That crime has mainly consisted of matters like driving offences, robbing a fellow train passenger of $50 or $60, and, at a younger age, joining in a street fight to help his younger brother, and activities at the home of his former girlfriend in breach of an apprehended violence order. He has spent the last five years in gaol and in immigration detention, and since 2014, he has been on the methadone program, which has stopped his ice addiction. He has never worked, and obtained his year 10 school qualification at TAFE. He now wishes to obtain employment, and put his troubled past behind him. His mother and sisters gave evidence of the

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			positive changes they have seen in him since he has been on the methadone program.' (para 1). 'The young man (who is identified by a pseudonym) applied for a protection visa in December 2016. He apprehends that if he is sent back to the Philippines he will be liable to extra-judicial killing at the hands of the Duterte regime. The purpose of trying to obtain a protection visa is to enable him not only to avoid being forcibly returned to the Philippines, but also to be released back into the community so he can get on with his life. One important issue in this case relates to Australia's obligations under treaties, not to forcibly return a person who is a refugee to their native country where they have a well-founded fear that their life or liberty will be threatened.' (para 2). '*DMH16 v Minister for Immigration and Border Protection* [2017] FCA 448 ('*DMH16')* concerned a refusal by the Minister personally to grant a protection visa notwithstanding that it had been concluded that the applicant was a person in respect of whom protection obligations were owed by Australia. It was held by North ACJ that the Minister misunderstood s.197C of the Act, he was persuaded by the same view which is stated in the clause 12.1 (6) of the Direction, namely, that the applicant "may face the prospect of indefinite immigration detention because of the operation of s189 and s196 of the Migration Act." North ACJ accepted that the true position was that as things then

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			stood, there was no evidence that it was not reasonably practicable to remove the applicant to Syria. The effect of the Minister's refusal of the visa was that the applicant would be forthwith removed to Syria, and was not that he would face the prospect of indefinite immigration detention. He also held that if the Minister decided to consider granting a visa under s.195A of the Act then the non-citizen could be detained for so long as was necessary for him to complete that consideration, and if he decided to refuse to do so, or to refuse to grant a visa under s.195A, then the effect of s.197C was that there would the arise a duty to remove the applicant forthwith to Syria.' (para 47). 'This Tribunal is, of course, bound by the decision of North ACJ. It is bound to find that the operation of sections 189 and 196 of the Act does not mean that if the protection visa is refused, the applicant would face the prospect of indefinite immigration detention. Rather, and in the absence of the Minister choosing to exercise his power under s.195A, there would be a duty arising under s.197C immediately to deport the present applicant to the Philippines, at any rate as soon as such removal is reasonably practicable. To that extent, at least, the Direction is inconsistent with the Migration Act and not binding under s.499 of the Act.' (para 48). 'Other questions were debated before me about whether other aspects of clause 12 ought to be taken to be amended in consequence. Trying to work out the

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			intention of the document in that way seems to me to be very difficult and risks a decision-maker mistaking the task involved. The Direction is, under s.499 of the Act, binding except to the extent to which it is inconsistent with the Act. I am not satisfied that any part of the Direction is inconsistent with the Act other than the words at the end of clause 12.1 (6) which read "the operation of sections 189 and 196 of the Act means that, if the person's Protection visa application were refused, they would face the prospect of indefinite immigration detention".' (para 49). 'During the hearing of this matter, I enquired of the respondent whether it remained government policy that Australia will not forcibly remove a non-citizen to his or her country of origin if such removal would involve a breach of Australia's international *non-refoulement* obligations. I was informed by Ms Watson, who took instructions from the Department, that government policy was still to that effect, and I act on that basis.' (para 52). 'One reason for my enquiry was that Ms Bampton, on behalf of the applicant, queried whether government policy was still to the effect stated in the previous paragraph, and announced to members of parliament by the then Minister in 2014. That is because it is difficult to understand why, in the light of the policy, the respondent opposes this application. The simplest way to give effect to the policy would have been for the

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			respondent to consent to the setting aside of the reviewable decision so as to open the way for the applicant to be granted the protection visa.' (para 53). 'The government policy in question is restated twice within clause 12.1 of the Direction: See clauses 12.1(2) and 12.1(6). Those statements operate at least as a reminder to decision-makers of the policy when they come to exercise discretions under the clause. Their presence in the Direction, which is made binding by s.499, could possibly be thought to operate as making the government policy binding on decision-makers. That would mean that in an appropriate case, a decision-maker must not refuse to grant a protection visa. That possible view is very hard to justify, when the other provisions of Direction 65 are borne in mind. That is because clause 12.1 states only one consideration which is mandatory to take into account, and there are others, which the direction always requires to be taken into account, where relevant. Since the Direction is binding, the question of its wisdom does not arise for a decision-maker. Leaving it to a member of the executive government to decide whether or not Australia should, or should not, go into breach of an international treaty is curious in the extreme, but that seems to be the effect of Direction 65.' (para 54). 'The default method by which the clause states that the policy will be given effect to (namely indefinite detention) turns out, in the light of s.197C, as construed

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			in *DMH16*, to be incorrect. Another view of the clause, either as a matter of construction, or as a matter of the proper exercise of discretion in a particular case, is that in considering whether to refuse to grant a protection visa, the government policy will predispose a decision-maker not to do so. That is, short of binding a decision-maker to take into account the consequences of a breach of a treaty, the decision-maker will be entitled to treat the consideration as a powerful reason not to refuse the grant of a protection visa. Although not necessarily conceding that the proposition is correct as a matter of the proper construction of clause 12, the Minister concedes that it is open to this Tribunal (and, it must follow, to delegates as decision-makers) to give great weight to the *non-refoulement* consideration.' (para 55). 'The respondent drew attention to the possibility that the Minister may exercise his personal, non-compellable power under s.195A of the Act to grant some kind of visa to the applicant, which might (depending on its terms, which are at large) avoid or defer the consequence of putting Australia in breach of its treaty obligations. This possibility is remote in my opinion. It was described as "a matter of speculation" by the Full Federal Court in *NBMZ v Minister for Immigration and Border Protection* [2014] FCAFC 38; (2014) 220 FCR 1, a case, like the present, where there was not even an indication that the Minister might consider exercising his personal, non-compellable power to act under s.195A. If any such visa was

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			intended to be granted by the Minister, it would have been simple for evidence to that effect to be led before me from an officer of the Department, and none was led.' (para 65). 'The current guidelines published by the Minister for the exercise of his powers under s.195A would probably not lead to the present application being referred to him by the Department for consideration.' (para 66). 'The protection visa is the means specifically designated in s.36 of the Act for the purpose of enabling Australia to give effect to its protection obligations. If it is refused, then the applicant is unable to apply for any other visa, except one that would not prevent his removal from Australia. For a decision-maker to rely on the mere possibility that a Minister might in the future take action which there is no obligation on him to take, when exercising a discretion to grant or refuse a protection visa may well amount to a legally unreasonable failure to exercise discretion if, on that account, the decision-maker put the *non-refoulement* obligations aside.' (para 67). 'To sum up in relation to the *non-refoulement* consideration, it is in my opinion there is a very powerful discretionary reason why the reviewable decision should be set aside. A breach of a treaty to which this country is a party is not in the best interests

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			of Australia, it is not consistent with the dictates of good government. The government policy to which I have referred in paragraph 52 above is one entirely consistent with the best interests of the country and with the dictates of good government, and, in the proper exercise of discretion, it, also, ought to be taken into account by decision-makers acting under Direction 65 and s 501(1).' (para 68). 'Drawing together the various mandatory considerations already discussed, the only consideration which supports the reviewable decision is the first, that of protection of the Australian community. All of the others, including some primary considerations, favour the setting aside of the reviewable decision. The *non-refoulement* consideration in particular strongly favours setting aside the delegate's decision. In my opinion the correct and preferable decision is to set the reviewable decision aside.' (para 70). 'The decision to refuse the application will be set aside and remitted for reconsideration with the direction that notwithstanding that the applicant does not pass the character test in s.501 of the Act, the discretion in s.501(1) should be exercised in favour of granting his application for a protection visa. That will enable consideration of any other matters arising under the application for a visa.' (para 71).

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