# COMPLEMENTARY PROTECTION IN AUSTRALIA

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

2019 onwards

Last updated 30 June 2022

This is a list of decisions of the Federal Court of Australia and the Federal Circuit Court of Australia that are relevant to complementary protection. Key High Court decisions are also listed. The decisions are organised by court, in reverse chronological order, from 2019 onwards. Decisions from 2012 (when the complementary protection regime commenced in Australia) to 2014, 2015–2016, 2017 and 2018 are archived on the Kaldor Centre website.

The list does not include all cases in which the complementary protection provisions have been considered. Rather, it focuses on cases that clarify

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| | | | an interview in the circumstances of this case, wher applicant was persistently seeking to be interviewed and an interview in some form could readily be given was not efficient and plainly unjust. Her Honour concluded that no decision-maker, acting reasonably, could ha exercised the power under s 473DC(3) in this way having regard to the statutory context and the attendant factual circumstances. Notwithstanding s 473DB(1) should have been apparent to the Authority, actin reasonably, that in this particular case an interview with the appellant was necessary to ensure that his claim for protection was efficiently determined consistently with Division 3 of Part 7AA, as required by s 473FA(1). Her Honour emphasised that this particular case tu almost entirely on its own facts, and that analog reasoning by references to other cases would unhelpful. |
| ABB19 v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2022] FCA 715 (Successful) | 22 June 2022 | 46–67 | Chief Justice Allsop allowed an appeal from a decis of the Federal Circuit Court that had dismissed appellant's application for review of a decision of AAT. The AAT had affirmed a decision of a delegate of the Minister refusing to grant the appellant a protection visa. The relevant question for determination whether the Tribunal had erred in failing to consider the 0.02 Tw 12 014 |

[redacted]
Multicultural Affairs [2022] FCA 716 (Unsuccessful)

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admission and sojourn in the Republic’. The dispute was whether, in engaging in its statutory task under s 36(3), the Tribunal should have appreciated the qualifie defeasible nature of the appellant’s permanent residency status, despite the fragility or defeasibility of permanent residence status having never been articulated or raised by the appellant as a ‘claim’ before Tribunal. Chief Justice Allsop observed that determination of this question required careful attention to the Tribunal’s statutory task on review of th delegate’s decision referable to s 36(3). U consideration of the provision and relevant case law, his Honour concluded that (at [67]):

> Where a ‘right’ to enter and reside depends on a visa or permit which is before the Tribunal, the Tribu necessarily must consider any factors apparent o face of that visa or permit which speak to its defeasance or defeasability. With proper regard to Note (v), it was legally unreasonable for the Tribunal to make a finding that the appellant’s permanent residence permit would or could not be revoked if he attempted to return to RSA. …

Chief Justice Allsop dismissed an appeal against o made by the Federal Circuit Court dismissing application for a constitutional writ in respect of decision of the AAT. The AAT had affirmed a decision of a delegate of the Minister to refuse the applicant’s formula under s

consequence of the non-revocation of the mandator cancellation of his visa was that he would be deported to Burundi. The applicant's evidence in chief in t proceeding in the Tribunal had disclosed that he may be a citizen of Tanzania. However, the Tribunal refused to take this information into account by reference s 500(6H) of the Migration Act. Justice Logan fou that the Tribunal, like the delegate, failed to appreciate that an integer of the applicant's representation was that he did not know what his country of citizenship was but was acting on an assumption that he would be se Burundi. The Tribunal both misunderstood t representation he had made and, in so doing, did not give the identification of the applicant's 'home country' (as required by the Ministerial Direction) anything mo than cursory and dismissive attention. Justice Lc observed that the resultant error could be characterised in a number of ways, including as a failure to afford the applicant natural justice or (as the applicant had chosen to characterize it) as a failure by the Tribunal to exercise the jurisdiction consigned to it. His Honour went on to find that the Tribunal's failure was material and therefore jurisdictional

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| | | | reasons with respect to the application of cl 9.1 of the Ministerial Direction (non-refoulement obligations) Burley J observed that the applicant's claims before the Tribunal had not suggested that he was seeking to make any non-refoulement claim. Justice Burley further considered a new claim by the applicant that he would face harm of the kind covered by the ICCPR. His Honour rejected the applicant's claims, observing that cl 9.1 of the Direction requires decision-makers to 'follow the tests enunciated in the Act'. His Honour observed that in the context of s 36(2A) of the Act and protection vis refusals, the definitions of 'cruel or inhuman treatm or punishment' and 'degrading treatment or punishment' incorporate the element of actual, subjective intent (citing SZTAL v Minister for Immigration and Bord Protection (2017) 262 CLR 362). A general lack o healthcare services in a country to which an applicant is to be returned does not amount to intentional infliction of harm, as required for 'cruel, inhuman or degradin treatment or punishment'. Similarly, removal to country with inadequate medical treatments and prospect of dying of a health condition was not, without more, something that would 'arbitrarily deprive [t applicant] of life' as in Article 6 of the ICCPR. |
| AGE18 v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2022] FCA 668 (Successful) | 10 June 2022 | 20, 33, 36–38 | Justice Middleton allowed an appeal from a decisio the Federal Circuit Court which had rejected applicant's application for judicial review of a decision of the IAA affirming a decision of a delegate of t Minister to refuse to grant the appellant a protection visa. Each of the delegate and IAA had found that although the appellant would face a real chance of persecuti |

significant harm if he returned to his home district Khoshi, he could reasonably relocate within the country. The delegate found that the appellant could reasonably relocate to Kabul, a finding partially based on delegate’s understanding that the appellant had sisters in Kabul. However, during the IAA’s review of th decision, the appellant provided new information to the Authority that his sisters had left Kabul. The IA declined to consider this new information un s 473DD of the Act on the basis that the information was irrelevant because it had reached the view that relocation to Mazar-e-Sharif as opposed to Kabul would reasonable. Justice Middleton found that the IAA and the primary judge fell into error by failing to consider relevant material matter that had clearly emerged from the review material, name

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| | | | ability to support family, housing, education a healthcare in the ‘safe’ area may also be relevant to an assessment of the reasonableness of the app relocating. In this case, the IAA had not considered the ability of the applicant to provide for his family upon relocation to Mazar-e-Sharif. The IAA had addressed the applicant’s employment, but only as a single pers Further, the IAA had not considered how or whether the applicant’s wife or children could safely travel from Iran to Mazar-e-Sharif. Justice Middleton observed that these are the types of factors (among others) that requ proper thought and consideration by the IAA in relation to the applicant. |
| XTLP v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2022] FCA 646 (Successful) | 2 June 2022 | 55–59 | Justice Stewart quashed a decision of the AAT affirm the decision of a delegate of the Minister to refus grant the applicant a protection visa and ordered that a writ of mandamus issue, directing the AAT to review the decision of the delegate according to law. The sole ground of review was that the Tribunal had erred failing to consider relevant evidence when it affirmed the decision of the delegate. In affirming the decision under review, the Tribunal had referred to evidence of an AVO having been taking out in 2016 for the protection of the applicant’s wife in finding that the applicant’s history of family violence weighed heavily in favour of exercising the discretion to refuse his visa, and that the applicant’s risk of reoffending was ‘moderate’.[1] The Tribunal had |

reasons, Stewart J concluded that the substant evidence in the supplementary statements was considered by the Tribunal. The representations in supplementary statements were highly relevant, particular to primary considerations A and B that th Tribunal was required to consider pursuant to Direction 90. The Tribunal was therefore required to engage with the representations and had failed to do so. It ignored, overlooked or misunderstood relevant facts or materials in relation to a substantial and clearly articulated argument (citing Plaintiff M1/ 2021 v Minister for Home Affairs [2022] HCA 17). His Honour was satisfied that these errors were material to the outcome of Tribunal's decision – if the evidence had been properly

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|  |  |  | because of the impact on his family, but submitted th claim to that effect arose squarely on the material before the authority and in the context of the express findings otherwise made by the IAA.<br>In considering the statutory framework and princip her Honour observed (at [33]-[34]):<br>33. An applicant for a protection visa will not satisfy the complementary protection criterion if, relevantly, would be reasonable for that person to relocate to an area within their country of origin where they would not face a real risk of significant harm: s 36(2B)(a). This enquiry involves a two-step test DFE16 v Minister for Immigration and Border Protection [2018] FCAFC 177; (2018) 265 FCR 57 at 62 [27] (Reeves, Rangia and Colvin JJ). First, it must be determined whether there is a location within the country of reference where applicant will not face a real risk of significant har Second, if there is no real risk, it must be determi whether it would be reasonable for that applican relocate to the proposed site of relocation.<br>34. The first step and the second step involve sep inquiries. ‘Reasonableness’ is not confined by the s factors which govern whether there is a real risk significant harm. Even if a decision-maker finds that a risk of harm at a site of prospective relocation is no sufficient to give rise to a real risk of significant harm in the sense required by s 36(2A) of the Act, the Authority may still be required to consider whether that risk means that it would be unreasonable for an applicant to relocate to that place MZACX v Minister for Immigration an Border Protection [2016] FCA 1212 at [48] – [49] |

> (Kenny J). This means that potential risks which do rise to the level of a “real” risk, or potential harms which do not rise to the level of potential “significant” har may nonetheless inform the decision-maker’s task in determining whether relocation would be “reasonable” in all the circumstances.

In this case, the IAA found that the appellant (a member of the Pashtun ethnic group and the Yousufzay) c from a Hazara dominated area in Quetta, Pakq>BDC q 449.88 7 (m)-6.1 (

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| | | | discrimination and violence', as referred to in a DF Report that was considered by the Tribunal. This was a matter that was capable of having a real and prac impact on whether it was reasonable for the appellant to relocate to Karachi or Islamabad. Her Honour observed that this was particularly so in circumstances where the Authority's assessment of the reasonableness o appellant relocating proceeded upon the basis tha family would likely accompany him and there w nothing to preclude them from joining him. |
| BDF21 v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2022] FCA 547 (Unsuccessful) | 13 May 2022 | 10, 20–21 | Justice Abraham dismissed an appeal from a decisi the Federal Circuit Court dismissing an application for |

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| BIM16 v Minister for Immigration, Citizenship, Migrant Services an Multicultural Affairs [2022] FCA 453 (Unsuccessful) | 29 April 2022 | 18, 51, 57–58, | Justice Anastassiou dismissed an appeal from a de of the Federal Circuit Court that dismissed an application for judicial review of a decision of the AAT. The AAT had affirmed a decision of a delegate of the Minister to refuse to grant the appellants protection visas. The appellants submitted that the Tribunal failed to |

EVB17 v Minister for Immigration, Citizenship Migrant Services an Multicultural

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| | | | it was not “required to further assess the applica claims in a cumulative way” (at [26]): “[h]aving accepted the claim about the applicant’s earlier sexu mistreatment, the Authority was not, as a matter inexorable logic, required to further cumulative examine that issue” (at [27]). Accordingly, the second ground of appeal also failed. |
| COY19 v Minister for Immigration, Citizenship Migrant Services and Multicultural Affairs [2022] FCA 352<br>(Successful) | 6 April 2022 | 4, 5, 52, 53, 55–61, 63, 67, 69–71, 74–76. | Justice Greenwood set aside orders of the FCCA and issued a writ of mandamus to the AAT to determine the protection visas sought according to the law. appellants were a daughter (first appellant) and mother (second appellant) from Pakistan. The father and husband of the appellants respectively (the “father”) had died in 2004 and their brother and son (the “brother”) no longer lived in Pakistan. They claimed that Austra owed them international protection obligations based on the father, son, daughter’s uncle, and daughter’s political activity in Pakistan and the risks that the appellants faced as single women living alone in Karachi faced. supporting these arguments, the appellants referred to the fact that the premises of their business had b destroyed since they left Pakistan and fear of serious psychological and physical harm from people seeking to extort money from them and making threats aga them. These risks arose after the father’s death and the son’s departure from Pakistan, and that women are not adequately protected there.<br><br>Justice Greenwood held that the Tribunal’s finding that the “earlier elimination and destruction of the business and its principle assets” was not a sound basis on which to make a finding that, if the appellants were to start |

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|  |  |  | as it could have resulted in a different outcome for appellant. |
| APD21 v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2022] FedCFamC2G 18 (Unsuccessful) | 23 March 2022 | 53, 57, 61–67. | Judge Kendall affirmed a decision of the AAT not grant a protection visa under s 36(2)(aa) of the Act.<br>The AAT had found that the applicant had atten rallies and meetings in Australia in support of a gr targeted in his home country by government authorities. It had also found that, if the Vietnamese governm knew of this involvement, he would be at real risk upon return. However, the applicant had not provi evidence that the government did in fact know of this involvement. It accepted that the Vietnam government did monitor the activities of opponents and maintained a substantial security apparatus, but was not convinced this would extend to recording every attendee at opposition protests abroad.<br>The applicant had claimed that the AAT misconstrued or misapplied s 36(2)(aa) of the Act, arguing that question for the AAT was whether there was a real risk that the Vietnamese government was aware of th applicant's activities.<br>The Court relied on DQU16 v Minister for Home Affairs [2021] HCA 10 (at [53]), noting the differe requirements of s 36(2)(a) and s 36 (2)(aa), being that the former assesses whether a person will be granted refuge, while the latter assesses whether removal to a specifi state is permitted by reference to the consequenc that removal. DQU16 also noted that the focus must be on construction of s 36(2)(aa), not obligations under |

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| | | | complementary protection due to s 36(2B) of the The appellant had argued that relocation was possible, due to pervading conditions in Kabul, including in relation to accommodation, work and access to basic necessities of life (at [13]). At the FCA, it was found that the IAA's finding that the appellant would ha adequate access to water and sanitation, and thus was not entitled to complementary protection, were open and did not give rise to jurisdictional error (at [16]).<br><br>The FCA considered that it was reasonable for the IAA to find that the appellant would have access to water and sanitation if he were to relocate to Kabul alone. However it held that the IAA had not adequately conside whether the appellant would be able to support his wife and children, including ensuring that they too wo have access to adequate water and sanitation (at There was also no explicit consideration of the hardship that might arise if the appellant were to relocate to Kabul but his wife and children were to remain long te behind in their home town. Writs of certiorari a mandamus were accordingly granted, with the ma being remitted to the IAA to be made in accordance with the law. |
| [DGA17 v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2022] FedCFamC2G 12](#)<br>(Successful) | 2 March 2022 | 16, 19–21, 36, 39, 42 | Judge Riley set aside the IAA's earlier decision a remitted the appellant's protection claim to the IAA. There were three grounds of appeal, including that "[t]he IAA failed to consider the applicant's claim or an integer of his claim to satisfy s 36(2)(a) or (aa) of the Act being that he would face mistreatment in prison because he was Tamil" (at [5]), that the IAA's conclusion "was irrational and illogical or affected by irrational and illogical |

analysed the IAA’s process of reasoning when dea

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Minister for Immigration and Border Protection [2018] FCA 594 and the way in which the weighing proc should be undertaken when it comes to ot considerations being given greater weight than on more primary considerations (at [34], Derringtor agreeing):

> 34 The point made in Suleiman was that the othe considerations referred to in the direction were not inherently secondary and were not secondary in all circumstar Generally, the primary considerations were such that they were to be given greater weight. However, particular circumstances may pertain that may justify greater weight being given to one or more of the other considerations than one or more of the primary considerations. It may be noted that the refere in Suleiman to an inquiry as to whether the case is outside the circumstances that generally apply should not be rea

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| | | | harm for the purpose of the complementary protec criterion. The appellant submitted that the Authority had failed to consider a distinct claim of being at risk significant harm because his province was a Taliban-controlled area where they operated parallel political and justice structures involving human rights abuses. appellant submitted that this was distinct from a claim that the Authority had considered about a risk generalized conflict-related violence. Justice Bromwich observed that had this been a merits review process, the arguments advanced by the appellant may well have had considerable heft. However, the appellant's argum fell short of meeting the high bar of jurisdictional error. His Honour held that the Authority was entitled to regard the claims made as giving rise to an issue of generalised violence rather than depart from the way it was presented and treat it as a separate and distinct claim (in the way now contended for by the appellant). |
| DQI17 v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2022] FCA 106 (Unsuccessful) | | | |

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| | | | specifically mentioned in the IAA's reasons, on a reading of the IAA's decision this information had been considered by the the IAA.  In this regard his Hon referred to the Authority's consideration of 'reports of failed asylum seekers or Tamils returning to Sri Lanka being detained on arrival at the airport or after returning to their villages, and then being mistreated and subjected to torture particularly if they are detained for prolonged periods'. Justice Middleton concluded: 'The Authority is not obliged to comment on every item of material before it or to explain why it rejected a particular item, attributed less weight to it than to another item. It was open for the Authority to rely, as it did, on the DFAT Report in makings its findings about the risk of harm the Appellant would face on return as a person who departed Sri Lanka illegally' ([75]). |
| DIE20 v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2022] FCA 102 (Successful) | 15 February 2022 | 31–33 | Justice SC Derrington allowed an appeal from a deci of the Federal Circuit Court. The South Korean appellant had sought review of a decision of the AAT affirming the decision of a delegate of the Minister to refuse to grant him a protection visa. At first instance, a judge of th Federal Circuit Court dismissed the application judicial review. The appellant's central contention was that the primary judge ought to have found that Tribunal failed to consider the application, or otherwise, of the Military Criminal Act of South Korea to the appellant, an issue that was said to arise from the material before it.<br><br>Justice SC Derrington observed that the Tribunal had had before it country information prepared by the Department of State which referred to a numbe |

matters regarding the treatment of LGBTI individuals
the South Korean military, including the criminalization

provisions of the Military Criminal Act

Citizenship, Migrant Services and Multicultur Affairs [2021] FedCFamC2G 10. At the core of t primary judge’s reasoning was his Honour’s conclusion that the country Afghanistan, as it existed when the IAA made its decision, no longer existed. His Hon concluded that the fact that Afghanistan no lon existed had the consequence that the IAA’s decis made over four years earlier, was ‘accordingly so illogical and irrational and wanting in evide justification as to amount to legal unreasonableness in the exercise of the review power conferred under Part 7AA’.

The Full Court upheld the Minister’s appeal. Relevantly, their Honours observed ‘the task on judicial review may be simply stated. It is to determine, on the grounds of judicial review advanced, whether the judicial revi

> 29 The situation in Afghanistan, or whether Afghanis
> existed in some and if so what form, at the time of the court's hearing was irrelevant to the question before the primary judge as to whether the IAA had erred in a way going to jurisdiction. It follows that the primary judge erred in concluding that the article had any relevance, within the meaning of s 55 of the *Evidence Act*, to any issue which the primary judge had to determine.

The Full Court further observed ([31]-[33]):

> 31 As noted earlier, the primary judge concluded that power vested in the IAA was "conditioned upon the existence of the country and the receiving country of which the applicant is found to be a national" and that the existence or otherwise of the country and receiving country was a jurisdictional fact. These conclusions are incorrect. Part 7AA of the *Migration Act* is engaged where a decision has been made to refuse to
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Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 181 at [8]-[13] (Rangiah, SC Derrington an Abraham JJ). The Migration Act has a binary structure in this respect; if a non-citizen can make a valid application for a visa, Relevantly, by ground 4, the applicant alleged that Minister had erred in his assessment of whether refusing to grant the applicant a visa was in the ‘national interest’ by failing to consider Australia’s non-refoulement obligations. In this regard the applicant relied on the decision in

CCU21 v Minister for Home Affairs [2022] FCA r 790.227 of the *Migration Regulations*) that granting the visa was in the national interest. Where that criterion was not met, the Minister was obliged to refuse the visa. In contrast with the position under s 501(3), there was no discretion.

49 Secondly, in contrast with the legislative context in ENT19, there was no immediate requirement to remove the applicant from Australia once the Cancellation Decision was made. That was because of the statutory provisions relating to the question whether that decision should be revoked. This different decision-making process suggests that the issue of non-refoulement need not be considered as part of the national interest assessment under s 501(3).

50 Thirdly, and perhaps most importantly, unlike the position in ENT19, the Minister did consider Australia's non-refoulement obligations in making the Cancellation Decision. That consideration occurred in respect of the Minister's assessment of how the re 0 12 476.28MC ET /8-3 (h)-238[.78 0 Td-4 (f)-1 ([(n)-1 .33

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| | | | indirectly a risk to security within the meaning of 4 of the ASIO Act, upon which the Minister relied, there was no realistic possibility that consideration of Australia's non-refoulement obligations under the rubric of the "national interest" (as opposed to as part of the Minister's residual discretion) could have led to a different outcome. This case is factually far removed from the circumstances in either ENT19 or, indeed, CWY20 |
| BJT21 v Minister for Home Affairs (No 2) [2022] FCA 24 (Unsuccessful) | 25 January 2022 | 108–113, 115–120 | Justice Rangiah dismissed an application for judicia review of the AAT's decision to affirm a decision of a |

the applicant. Justice Rangiah also rejected this gro of that finding, the applicant was found to be ineligible for a protection visa on refugee grounds under that

that the Authority made a jurisdictional error by failing to adequately consider whether the Appellant met the complementary protection criterion in s 36(2)(aa) of the Act. In particular, the Appellant alleged that the Authority failed to consider the claim that the Appellant

### (1) The Tribunal

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| | | | (ii) the Tribunal erred by failing to consider, or to give real and genuine consideration and intellectual attention to, the impact of the Appellant's claims on Australia's international non-refoulement obligations and/or the implications of the Tribunal's finding that there was a possibility that removal of the Appellant could result in Australia breaching its international non-refoulement obligations.<br>Three of these grounds had been raised for the first time on appeal (grounds 1, 4, 5(ii)) and two of these grounds had been reformulated and expanded upon from grounds of review advanced at first instance. In the event, however, the Full Court rejected all of the above grounds of review. |
| DQD16 v Minister for Immigration and Borde Protection [2A,481 re f | | | |

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| | | | However, Mortimer J held that the Tribunal had considered DFAT information that demonstrated that the appellants would suffer similar persecution in Nepal that it had been found that they would suffer in Ind Additionally, the report detailed the impacts of the 2015 earthquake in Nepal on access to the “basic necessities of life” (at [76]). This report was accordingly central to the protection claim and should have been considere |
| LGLH v Minister for Immigration Citizenship Migrant Services an Multicultural Affairs [2021] FCA 1529 (Successful) | 7 December 2021 | 75–107 (ground 6(a))<br>108–117 (ground 6(b))<br>118–125 (ground 6(c))<br>126 (summary) | Justice O’Bryan allowed an application for judic review of an AAT decision affirming a decision of delegate of the Minister not to revoke the manda cancellation of the South Sudanese applicant’s Gl Special Humanitarian visa. Relevantly, by his sixth ground of appeal, the applicant asserted that the AAT fell into jurisdictional error in three respects ([75]):<br>(a) by failing to consider clearly articulated claims of the applicant to be owed international non-refoulement obligations including, for example, to be owed such obligations by virtue of a real chance that he would suffer harm on return to South Sudan as a result of his race (on account of his Dinka ethnicity); and/or<br>(b) by failing to consider whether returning the applicant to South Sudan would breach Australia’s international non-refoulement obligations and, if so, the consequences of that breach; and/or<br>(c) by misunderstanding this aspect of the statutory task as permitting less weight to be given to international non-refoulement obligations on the basis that they could be “properly considered” in an application for a protection visa. |

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| | | | Justice O'Bryan summarised his conclusions on each of these grounds, and the appeal more broadly, as follows ([126]):<br>In conclusion, I uphold ground 6(a) advanced by the applicant. If it had been necessary to determine ground 6(b), or in the alternative, 6(c), I would have accepted those grounds |
| [FDT20 v Minister for Home Affairs [2021] FCA 1484](#)<br>(Unsuccessful) | 29 November 202 | 36–46 | Justice Griffiths dismissed an appeal against a dec of the FCCA below, which had dismissed an application for (a) a declaration that the Iranian appella immigration detention was unlawful, (b) a writ of habeas corpus, and (c) a writ of mandamus compelling the appellant's removal to a regional processing country. On appeal before the present Court, the appellant s leave to amend his notice of appeal so as to press only a single ground of appeal alleging that ([27]; emphasis in original)<br>[t]he Circuit Court erred in refusing habeas corpus because it incorrectly considered [the appellant] to be in Immigration Detention under s.196 and hence incorrectly applied the authority of *Commonwealth of Australia v AJL20* [2021] HCA 21, and failed to find that he was in Incidental Detention under s.198AD(3) of the Migration Act 1958, from the time the Respondents started to take steps to take him to Nauru, without the conduct of a non-*refoulement* assessment in determining the reasonable practicability to take him there. |

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| | | | refoulement obligations were also intrinsically and inherently relevant, for the reasons identified by Allsop CJ in CWY20, including because a breach of international legal obligations is a legal consequence of the decision. So, too, was the prospect of indefinite detention for, unless the detention were for a lawful purpose, detaining the appellant indefinitely could put Australia in breach of its obligations under the ICCPR.<br>The Minister's failure to take into account the legal and practical consequences of refusing to grant the appellant a protection visa was also material because '[a]ssuming the Minister was acting fairly and reasonably, wit mind open to persuasion, giving active and genu consideration to all relevant matters, including matters he erroneously omitted to consider, … there was a realistic possibility that his decision could have been different' ([112]). |
| Davis v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2021] FCAFC 213 (Unsuccessful) | 23 November 2021 | 3 (Kenny J), 55 (Besanko J), 96 (Griffiths J), 118 (Mortimer J), 360–364 (Charlesworth J) | (This case appears to be an appeal from, or a later of the proceedings in, one or more cases summa previously in these tables.) This appeal concerned tw proceedings. In the first, the Full Court dismissed appeal against a decision of a single justice of the Court affirming an AAT decision that, in turn, had affirmed a decision of a delegate of the Minister to refuse to grant the British appellant a partner visa. In the second, the Full Court likewise dismissed an appeal against a decision of a single justice of the Court affirming a decision of the former Migration and Refugee Tribunal that, in turn, had affirmed a decision of a delegate of the Minister to refuse to grant the Fijian appellant a protection visa. Relevantly, in the second matter, the second ground of ap asserted ([360]): |

The [DoHA Secretary] misconstrued the [relevant Guidelines issued by the Minister concerning section 351 of the Migration Act] in dealing with the Sexual Assault Claim [namely, that if the appellant returned to Fiji as a single woman of Indian descent with no family or friends, no place of residence, and no employment, she would be more vulnerable than ever before to violent abuse, including sexual assault]. For example, on the proper construction of sections 4 and 10 of the Guidelines, a request that ‘raises claims only with

revoke the mandatory cancellation of the Zimbabw appellant’s protection visa. Before the Full Court, appellant sought leave to raise three grounds of ap that had not been raised before the primary judge

> It seems to us that the appellant invited the Court to rea the Tribunal's reasons with an eye attuned to error, and that this would be to make a fundamental error. This is not a case like Omar where the Tribunal failed actively to engage with an evidently significant and substantial representation, and to make findings relevant to such a representation. On a fair reading of the whole of the Tribunal's reasons, it does not appear to us that the Tribunal failed to give anything other than careful consideration to any significant or substantial representation made by CVRZ concerning the risk of harm to him if returned to Zimbabwe. Having regard to the way in which this and the non-refoulement claims were made by CVRZ and considered by the Tribunal, the Tribunal did not offend any aspect of Omar, the effect of which the Tribunal clearly recognised. That is, the Tribunal properly considered the evidentiary material relevant to the different claims, concluding first that the factual basis of the human consequences claim was not made out, and secondly, by reference to additional material, that Australia did not owe any non-refoulement obligation with respect to CVRZ.

In determining that the second proposed ground had no merit, the Full Court rejected the appellant's asse reading of the relevant passage of the Tribunal's reasons and, additionally, explained ([53]):

> … the appellant's further submission was that, even if we interpreted the last sentence of [324] in this way, there remained the difficulty that there was no evidence that the appellant would have access to economic support "at the same level as other citizens of Zimbabwe". As already noted, counsel for the appellant sought to sow the seeds of doubt about this latte

basis that the AAT’s decision had been affected jurisdictional error. The contended jurisdictional er was that the AAT had failed to consider the “executive

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| | | | engagement with matters advanced by the Applicar regarding the likelihood of harm should he be returned to Iraq.<br>In disposing of this ground, Justice Anastass concluded ([67]):<br>I reject Ground One on the basis that, in my view, the Tribunal did engage in a genuine evaluation and active intellectual consideration of the risks faced by the Applicant if he were returned to Iraq. Those considerations were in turn weighed in the balance by the Tribunal in discharging its statutory function under s 501CA(4) of the Migration Act. |
| BFMV v Minister for Immigration, Citizenship Migrant Services an | | | |

At the hearing of the present appeal, the appellant so
leave to raise the following ground of review, which was not opposed by the Minister and which was granted ([3]; emphasis in original):

> The Court below erred in not finding that the decision of the [Tribunal] was affected by jurisdictional error. The [Tribunal] failed to consider a representation of the appellant. The [Tribunal] failed to carry out [its] statutory function according to law by failing to consider, in the relevant legal sense, representations made by the appellant under s 501CA(4) of the Migration Act 1958 (Cth), in support of his request for revocation of the mandatory cancellation of his visa.
>
> Particulars
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> I. The [Tribunal] failed, or did not attempt to evaluate the likelihood of the appellant being returned to Iraq despite the submission made by the appellant.
> II. The [Tribunal] failed, or did not attempt to evaluate the likelihood of the appellant being refused a protection visa on character grounds.
> III. The [Tribunal] failed or did not attempt to consider, the submission made by the appellant that he risked being indefinitely detained if the cancellation of his visa was not revoked.

The Court concluded ([19]–[20]):

> 19 The Tribunal conducted a review which complied with what the Act required. The Tribunal considered the appellant's submission that he might be refouled to Iraq or be indef

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| | | | protection visa would be refused. There was n jurisdictional error in determining the review on the basis that refoulement or indefinite detention were possibilities, but not inevitabilities. That conclusion was open.<br>20 The Tribunal took into account the representations which the appellant had made when reviewing the decision under s 501CA(4)(b)(ii) not to revoke the cancellation for “another reason” in each of the three ways identified in the particulars to the amended notice of appeal. It follows that the ground of appeal is not made out. |

Acting Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs v

the Acting Minister acted unreasonably by deferring his consideration of Australia’s non-refoulement obligations to the exercise of the discretion in s 501A(2) of the Act (Ground 2B).

80 In Ground 3 which is related to Grounds 1 and 2A, the Acting Minister alleges that the primary judge erred in fact or law in treating the accepted position that any breach of Australia’s non-refoulement obligations may affect Australia’s international reputation and standing as if it was a fact that it would do so in this particular case, such as to render the Minister’s consideration of the “national interest” unreasonable.

81 CWY20 has filed a Notice of contention in the appeal in which he alleges that the decision at first

Minister did not proceed in this way and, in those circumstances, the Acting Minister has proceeded to exercise the power based on a material misconstruction or misunderstanding of s 501A(2) and his purported decision is affected by jurisdictional error.

82 In the application, the grounds which are to be heard and determined before the other grounds are Grounds 5 and 5A. Ground 5 is to the effect that the Minister asked himself the wrong question because the structure of s 501A(2) was to the effect that th

decision which is the subject of the appeal. Those findings include a finding by the Minister that Australia owed non-refoulement obligations to the applicant and that refusing him a visa would put Australia in breach of those obligations. The Minister's decision to cancel the applicant's visa meant that he would be refouled in breach of Australia's obligations under international law. The one difference between the application and the appeal (p)1.Ta1.1(ap)2 uldi.d(ap)2 u(e ap)2.1 pulpcaion26 ( t)8.3 (h)2 e M
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| | | | Kerr J agreed with the entirety of Allsop CJ's additio reasons and agreed with Besanko J's judgment save for one (non-material) qualification ([176]–[180]).<br>Charlesworth J simply expressed agreement with judgment of Besanko J and the additional reason Allsop CJ ([181]). |
| [CAI18 v Minister for Immigration, Citizenship Migrant Services and Multicultural Affairs [2021] FCA 1310]() (Unsuccessful) | 28 October 2021 | 3, 25–36, 38–39, 40–73 | Justice Derrington dismissed an application to raise grounds of appeal against the decision of the FC below. The FCCA had dismissed an application judicial review of a decision of the IAA that, in turn, had affirmed a decision of a delegate of the Minister to refuse to grant the Afghani appellant a Safe Haven Enterprise visa. Derrington J observed that the two new grounds of appeal essentially amounted to 'a single allegation that the Authority constructively failed to undertake its task of reviewing the delegate's decision because it neglected the obligation in s 36(2B)(a) to consider a claim raised by the applicant that it would not be reasonable for him to relocate to Kabul due to it not being safe there as a result of the existence of a lesser risk of harm' ([38]). His Honour discussed in detail, and with reference relevant authorities, a set of general principles relating to the application of the complementary protection criterion in section 36(2)(aa) of the Migration Act and the relocation exception in section 36(2B)(a) ([25]–[36]). Ultimately, his Honour concluded that, even if lea were granted to raise the new grounds of appeal, would not succeed because '[lvB3 (t)-2 (a )-2 (s |

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| | | | Kabul for the purposes of s 36(2B)(a) of the Migration Act 1958 (Cth) (the Act)'. |
| CRH16 v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2021] FCA 1239 (Successful) | 12 October 2021 | 4, 37–39, 41–42 | Justice Beach allowed an appeal from a decision of Federal Circuit Court dismissing the appellants' application for judicial review of a determination made by the AAT which affirmed a decision of the delegate of the Minister not to grant the appellants protection visas.<br>The sole ground of appeal concerned the AAT's failure to take into account two corroborative witness statements that the first appellant had put to the AAT concerning threats that had been made against her by her father. The parties accepted that this evidence only went directly to the complementary protection criterion.<br>Justice Beach found that by reason of the Tribunal failing to consider the two corroborative statements, the first appellant was denied a realistic possibility of a successful outcome based upon satisfying the complementary protection criterion. |
| ESA19 v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2021] FCA 1230 (Unsuccessful) | 1 October 2021 | 29–30, 32–37 | Justice Rares dismissed an appeal from a decision Federal Circuit Court rejecting the appellant's application for judicial review of a decision of the IAA affirming a decision of a delegate of the Minister not to grant the appellant a protection visa.<br>The appellant had made a number of claims to the |

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| | | | converted to Christianity in Australia and become an evangelising Christian, so that if he returned to Iran, his life would be in danger.<br>Relevantly, by his first ground of appeal, the appellant argued that the primary judge ought to have found that the IAA had erred in addressing the appellant's claims based on his pet ownership in the context of whether he met the refugee criterion, but not at that point dealing with any claim for complementary protection. The appellant contended that when dealing with his claim for complementary protection, the IAA merely transposed its consideration that the appellant could not establish that he had a well-founded fear of persecution were he to be returned to Iran now or in the foreseeable future for reasons of race, religion, nationality, membership of a particular social group or political opinion, to the criterion of the complementary protection, which did not limit consideration to those criteria. He submitted that the potential for him to be treated adversely for pet ownership required the authority to engage in a more detailed consideration, particularly having regard to the definitions in s 5(1) of the Act of cruel or inhuman, and degrading, treatment or punishment for the purposes of s 36(2A)(d) and (e). Justice Rares rejected this ground, finding that the worst consequences that could befall the appellant could not conceivably, objectively, fall within the definition of significant harm in s 36(2A) of the Act. |
| AFD21 v Minister for Home Affairs [2021] FCAFC 167 (Successful) | 15 September 202 | 28–29, 55–59 (whether representations t | The Full Court (Kenny, Kerr and Wheelahan JJ) allowed an appeal from a single judge of the Court dismissing the appellant's application for judicial |

Minister raised non-refoulement obligations)

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|  |  |  | The Court observed that the Minister’s own statement of reasons treated the appellant’s representations as to “the harm [faced by him] if he was returned to Burundi due to the ongoing conflict in that country” and on account of “Tutsi and/or Hutu elements on the basis of his mixed Tutsi/Hutu heritage” as presenting the issue of international non-refoulement obligations. The Minister’s submissions in the Full Court to the effect that the appellant’s representations did not raise the issue of Australia’s international non-refoulement obligations were directly inconsistent with the view apparently taken by the Minister at the time he purported to consider the appellant’s representations.<br>The Full Court concluded, contrary to the finding of the primary judge, that a claim that Australia’s international non-refoulement obligations were engaged squarely arose from the material before the Minister at the time he made his decision. |
| ALK17 v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2021] FCA 1106 (Unsuccessful) | 13 September 202 | 23–27 | Justice O’Callaghan dismissed an appeal from a decision of the Federal Circuit Court refusing judicial review of a decision of the IAA affirming the decision of a delegate of the Minister not to grant the appellant a protection visa.<br>Relevantly, by his first ground of appeal, the appellant claimed (as he had in the FCC) that the IAA had only considered his application by reference to s 36(2)(a) and did not consider whether he separately satisfied s 36(2)(aa). The primary judge had rejected that ground. |

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| | | | Justice O'Callaghan rejected appeal ground one, fin that the IAA, in considering whether the appellant faced a real risk of significant harm in returning to Iraq, had assessed this risk by reference to both the criteria set out in ss 36(2)(a) and 36(2)(aa). His Honour cited with approval the observation of the primary judge that "[t]here is no jurisdictional error in a decision maker relying upon earlier findings of fact. Whilst there are differences between Convention claims and [complementary] protection claims, the most significant being the need for a convention reason in convention claims, both rely upon a finding of a risk of harm". It was not necessary for the IAA, having considered in detail each of the reasons advanced by the appellant as to why he would face a risk of harm as assessed against the s 36(2)(a) criterion, to then repeat the fact-finding exercise again through the "lens" of the s 36(2)(aa) criterion. |
| BCW16 v Minister for Immigration and Borde Protection [2021] FCA 1086 (Unsuccessful) | 10 September 202 | 34 | |

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| | | | Justice Moshinsky considered that the proposed ap ground had insufficient merit to justify an extension of time being granted. His Honour found that the ITOA did consider the applicant’s claim in the context of complementary protection criterion. While it was tr that the claim was not considered in detail in the section dealing with complementary protection, a compara claim was considered in detail in respect of the refugee criterion, and the findings in that regard were adopted in the section dealing with complementary protection. the circumstances of this case, where the factual basis of the claims was essentially the same, it was open to the assessor to rely on her earlier findings in connection with the refugee criterion. |
| CKL21 v Minister for Home Affairs [2021] FCA | | | |

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| | | | In dismissing the appeals, Kerr and Mortimer JJ (Allsop CJ agreeing at [1]) affirmed the correctness of the line of previous Full Court authority established by Ali v Minister for Home Affairs [2020] FCAFC 109; 278 FCR 627, Ibrahim v Minister for Home Affairs [2019] FCAFC 89; 270 FCR 12 and BCR16 v Minister for Immigration and Border Protection [2017] FCAFC 96; 248 FCR 456. Allsop CJ additionally provided general comments about the Full Court's practice of reconsidering, and departing from, previous Full Court authority. |
| [CGS19 v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2021] FCA 968](#) (Unsuccessful) | 17 August 2021 | 21–22 (grounds of appeal), 23–31 (disposition of ground 1), 32–46 (disposition of ground 2), 47–56 (disposition of ground 3) | Rangiah J dismissed an appeal against a decision FCCA dismissing an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to grant the appellant a protection visa. On appeal to the Federal Court, the appellant advanced three grounds of appeal. The first ground alleged that the AAT failed to understand and examine the persecution of the appellant based on his membership of an e group by conflating and failing to differentiate h membership of an ethnic group with membership of a criminal group, giving rise to jurisdictional error. Th second ground alleged that the AAT misapplied relevant principles when making an adverse credibility finding. The third ground alleged that the AAT conflated the findings under the refugee criterion with t complementary criterion. The appellant submitted these three errors involved misapplication of the relevant principles, failure to give genuine, proper or realis consideration to the appellant's claims, or an absence of logic and an insufficient evidentiary basis for the mak |

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| | | | of the AAT's findings. Rangiah J rejected all thr grounds and dismissed the appeal. |
| Ratu v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2021] FCAFC 141<br>(Unsuccessful) | 12 August 2021 | 3, 30, 38–48 (consideration of *Teoh*); 54–66 (Ground 1); 72–74 (Ground 2) | The Full Court (Farrell, Rangiah and Anderson JJ) dismissed an appeal from the judgment of a single judge of the Court dismissing the appellant's application for judicial review of a decision of the Minister not to revoke the mandatory cancellation of the appellant's visa.<br><br>The appellant's arguments in the appeal focused upon Art 12(4) of the ICCPR which provides that no one shall be arbitrarily deprived of the right to enter their own country. By his first ground, the appellant submitted that the Minister's failure to put the appellant on notice that a decision may be made contrary to Australia's obligation under Art 12(4) was a denial of procedural fairness. In this regard the appellant submitted that the ratio decidendi of *Teoh* (visa holder had a legitimate expectation that the Minister would comply with Art 3(1) of the CROC) extends to relevant provisions of other international treaties, including Art 12(4) of the ICCPR.<br><br>In respect of this ground, the Court considered the application of *Teoh* in more recent cases (noting that the doctrine of legitimate expectations has since been rejected by obiter dicta statements of the High Court in a number of cases). The Court noted that the High Court did not directly refer to the ICCPR in *Teoh* and concluded that *Teoh* does not establish that a legitimate expectation arises that Art 12(4) of the ICCPR will be observed, nor that procedural fairness requires that |

affected person be given an opportunity to make

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| 3), 62 (disposition o<br>ground 4) | IAA constructively failed to exercise jurisdiction in th it failed to review the decision of the delegate. T particular failure alleged was that the IAA failed review the claim by the appellants that they w stateless Muslims from Myanmar of unknown ethnicity. An aspect of this error was said to be that the IAA treated its finding that the appellants were not of Rohing ethnicity as effectively determinative.2 44o |

were stateless persons of unknown ethnicity. The fc ground alleged that the FCCA misunderstood the second ground of judicial review before it and, as a result, analysis of the ground was flawed.

Besanko J upheld ground 3 of the appeal and appeared to uphold ground 1, although his Hor considered that the jurisdictional error alleged by ground

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| | | | impressionistic level and the considerable delay pursuing the application for the extension of time, application must be refused. |
| BWY17 v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2021] FCA 860 | | | |

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| | | | Snaden J rejected all three grounds of review dismissed the appeal. |
| PKZM v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2021] FCA 845 (Successful) | 27 July 2021 | 2–3 (grounds of review) 26–68 (disposition of ground 1), 72–88 | |

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| | | | real risk he would suffer significant harm if he return to Afghanistan and, thus, was not a person to w Australia had non-refoulement obligations. The assessor's lack of satisfaction was based in par country information taken from the sources referenced at footnotes 80–89 and 97 of the ITOA report. The sole ground of review advanced in the Federal Court was that the FCCA erred in finding that there was no denia procedural fairness in failing to put country information to the appellant for comment during an ITOA interview under the non-statutory processing regime. The appellant also sought leave to adduce fresh evidence, comprising the documents referred to in footnotes 80–89 and 97 of the ITOA report and an email exchange betw Professor William Maley and the appellant's solicitor on 24–25 September 2020, forwarding an email fr Qayoom Suroush to Timor Sharan dated 5 May 2 Davies J refused leave to adduce the fresh evidence and dismissed the appeal. |
| CZT16 v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2021] FCA 819 (Successful) | 21 July 2021 | 36–37 (ground of review), 45–73 (disposition) | Halley J allowed an appeal against a decision of FCCA dismissing an application for judicial review of a decision of the AAT affirming a decision of a delegate of the Minister not to grant the appellants protection visas. On appeal to the Federal Court, the appellants advanced a single ground of review, namely that the FCCA erred |

failed to consider and determine an integer of appellant's claim, including by (a) erroneously holding that the integer in question was predicated on him being able to access adequate medical care for his mental illness, (b) erroneously holding tha

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| | | | amount to significant harm for the purposes of section 36(2)(aa) of the Migration Act. Snaden J rejected bo grounds of review and dismissed the appeal. |
| ALO19 v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2021] FCA 760 (Unsuccessful) | 8 July 2021 | 3 (grounds of review) 15–22 (disposition of first pressed ground review) | Anderson J dismissed an appeal against a decision FCCA dismissing an ga di teve4 (l)-2 ( a)4 (ga)4 (i)-2 63 ()(a)-9 (a)1[k4 Tr |

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

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| FPK18 v Minister for Immigration, Citizenship Migrant Services an Multicultural Affairs [2021] FCA 723 (Unsuccessful) | 30 June 2021 | 10 (proposed ground review), 59–67 (relevant legal principles), 68–75 (disposition) | Banks-Smith J dismissed an application for an exten |

alleged further, and alternatively, that the IAA erred misapplying the ‘real chance’ test.

Grounds 2 and 3 were not raised in the FCCA. Kenny J considered that these grounds lacked merit and Honour refused leave to raise them on appeal. Kenny J also rejected grounds 1 and 4.

CDS16 and CDT16 also sought to raise another ground of review, alleging that the FCCA erred by not finding that the IAA’s decision was affected by jurisdictio error in that the IAA failed to carry out its jurisdiction by failing to consider significant evidence and/or a clai raised on the materials. Specifically, they alleged that the claim/evidence not considered was that the child would chi9 (h)-4 (at)-6.

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| | | | ENC18's sole ground of appeal was that the FCCA into error by failing to find that the AAT failed to have regard to important evidence in respect of her claims for protection and/or acted unreasonably in finding that she had a 'private' nature. Middleton J rejected this ground, concluding that the analysis taken by the FCCA correct and the AAT had enough probative evidence to find, as it did, that ENC18 did not have the relevant fear of serious harm amounting to persecution or significant harm.<br>END18 advanced two grounds of appeal. The ground alleged that the FCCA fell into error by failing to find that the AAT failed to have regard to importa evidence in respect of END18's claims for protect and/or acted unreasonably in finding that she had a 'private' nature. In this respect, END18 (like ENC1 also claimed to have lived discreetly in Malays including because of her fears of the religious police. The second ground alleged that the FCCA fell into error by failing to find that the AAT had failed to have regard to an integer of END18's claims arising from her fear of harm as a woman who 'dressed like a man'. Middleton J was not persuaded that the AAT had commi jurisdictional error and rejected both of these ground |
| GOS18 v Minister for Immigration Citizenship Migrant Services an Multicultural Affairs [20OB] FCA 662 (Successful) | 21 June 2021 | 2 (grounds of appeal) 26–39 (disposition of ground 1A), 40–51 (disposition of grounds 1B, 1C, and 2) | Jagot J allowed an appeal against orders of the F dismissing the appellant's application for judicial review of a decision of the IAA that had affirmed the decision of a delegate of the Minister refusing to grant appellant a temporary protection visa. On appeal to the Federal Court, the appellant contended that the pri |

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

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|  |  |  | reformulated ground of appeal that Beach J permitte be put, that there was a constructive failure to exercise jurisdiction by the IAA in that it failed to consider and determine the reasonableness and practicability o appellant relocating to Kabul. This issue arose under the complementary protection criterion invoking ss 36(2)(aa) and (2B) of the Migration Act 1958 (Cth). Beach J concluded that the new ground of appeal was not made out and dismissed the appeal. |
| EXT20 v Minister for Home Affairs [2021] FCA 629 (Unsuccessful) | 11 June 2021 | 37 (grounds of review) 38–72 (disposition) | O'Bryan J dismissed an application for judicial review a decision made personally by the Minister under section 501CA(4) of the Migration Act not to revoke the cancellation of the applicant's partner visa. The applicant made three core complaints about the Minist decision. The first complaint (reflected in ground 1) was that the Minister failed to resolve a substantial clearly articulated claim that the applicant faced a real risk of harm if returned to the Democratic Republic the Congo (DRC). The second complaint (reflected ground 4) was related to the first complaint. It alleged that the Minister failed to consider the applicant's claims to fear harm upon any return to the DRC outside of the non-refoulement con11 (ea/]13 (t)-2 ( )-10 (a (eomo2 455.04 26 [c 455.0n |

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

ground was that the AAT failed to give consideratio the potential damage to Australia’s internatio reputation in the event that the applicant was deported in breach of Australia’s non

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

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

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

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