COMPLEMENTARY PROTECTION IN AUSTRALIA

DECISIONS OF THE HIGH COURT, FEDERAL COURT & FEDERAL

2018

Last updated 25 January 2019

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

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

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

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

FEDERAL COURT OF AUSTRALIA

Case	Decision date

Afghanistan; (2) the applicant and his brother received a threatening letter from the Taliban shortly after the father-in-law's death, stating the Taliban had killed him because he was betraying the country, that the brothers were suspected of being American spies, and that they too would suffer the consequences of cooperation with foreign forces; and (3) that the applicant and his brother left Afghanistan and went to Pakistan on the same day that they received the letter "to protect [themselves] from the imminent risk of harm directed at [them] by the Taliban".' (Para 7).

'Further, and relevantly for the present application, under the heading "complementary protection" the Tribunal set out terms of s 36(2B)(c) of the 1958 (Cth), which is in the following terms:

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
...
(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.' (Para 14).

'The Tribunal then referred, at [79] of its reasons, to the test set out in v Minister for Immigration and

to s 36(2B)(c) of the Migration Act did not warrant the grant of relief because "[n]o different result would or could have been reached by the Tribunal had it applied [the correct test in] SZSPT." (Para 31).

'Proposed ground 1(a) arose from the primary judge's discussion of s 36(2B)(c) of the Migration Act. In particular, her Honour stated, at [26]-[27] of her reasons, that:

…

[27] In SZSPT v Minister for Immigration and Border Protection [2014] FCA 1245 ('SZSPT') the Court held that s 36(2B)(c) is engaged by a risk of harm (even amounting to torture) if the general population of which an applicant is a member was exposed to that risk. The widespread nature of the risk, whatever the specific gravity of it for an individual in the individual's circumstances was enough to engage the exclusionary provision. In the Tribunal hearing, the Tribunal applied a more favourable test to the Applicant deriving from a decision in

In substance, the Tribunal found that the appellant d
not face a particular, personal risk of harm in the Sadda
area, if returned to Pakistan, and that any risk of harm
he did face was one which arose from sectarian or
generalised violence in Pakistan. In reaching those
conclusions, the Tribunal explicitly rejected the
appellant's claims that he would be targeted by the
Taliban or was of interest to the Taliban. The Tribunal

sectarian violence was concerned, that the appellant did
[redacted]hat
would make him a target for sectarian or ethnic or

violations is a relevant consideration inttha assessment.' (Para 42).

'The fact that the test applied, incorrectly, by the Tribunal was more favourable to the applicant than the test that ought to have been applied by it provides a basis for saying that the Tribunal would have reached the same resultl even if it had applied the correct test. More importantly, however, the fact that the Tribunal considered both the risk of harm faced by the population in Afghanistan generally and the risk to which the applicant was exposed, including in his particularcircumstances if he returned to his home region, confirms that the Tribunal would have reached the same decision had it applied the correct test. The Tribunal's consideration of both the risk of harm in Afghanistan generally and the risk to the applicant i returned to his home region is apparent in the Tribunal's reasons at [80]-[85], which are set out below

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

			Sri Lanka were generally poor. The appellant submitted, however, that the Tribunal needed to consider whether the conditions involved "significant harm" if he were to be remanded for up to several days and that this required the Tribunal to engage in an "active intellectual process", which it failed to do. Mr Wood, who appeared pro bono for the appellant, drew attention to the Minister's submission to the Full Court in SZTAL v Minister for Immigration and Border Protection[2016] FCAFC 69243 FCR 556 ( ) at [32] and [34] in support of his contention that, as a matter of principle, the issue whether exposure to poor prison conditions in Sri Lanka constituted significant harm within the meaning of s 36(2A) of the Act required an analysis of the specific circumstances in a particular case.' (Para 16). 'At [71], the Tribunal repeated its finding about the real risk the appellant might be held on remand: For the reasons set out above, the Tribunal has accepted that the applicant will be questioned at the airport upon his return to Sri Lanka, that he will likely be charged with departing Sri Lanka illegally and that he could be held on remand for a brief period usually being less than 24 hours but possibly as long as several days while awaiting a bail hearing.' (Para 62). 'It then rejected the appellant's evidence that he faced a real risk of torture either during questioning or on remand, and made the following finding:

The Tribunal has considered the independent source cited in the applicant's representative's submissions and accepts that prison conditions in Sri Lanka are generally poor and overcrowded. However the Tribunal does not accept on the evidence before it that there is a real risk the applicant would be subjected to treatment constituting significant harm as that term is exhaustively defined in section 36(2A), either during

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

appellant will be exposed to poor prison conditions during a short period on remand in Sri Lanka is necessarily incapable of constituting a breach of Art 7, and thus necessarily falls outside the definition of [cruel or inhuman treatment or punishment] in s 5 of the [Migration] Act irrespective of the meaning of the phrase “intentionally inflicted”. That follows because it is possible as a matter of law that, had the Tribunal made findings about exactly where the appellant would be detained and the conditions he would have experienced then, depending on the content of those findings, Art 7 might have been engaged.

It follows that the Minister does not submit that, even if the appellant’s arguments are accepted, the appeal should nevertheless be dismissed on the basis that it would be futile to remit the matter to the Tribunal by reason of paragraph (c) of the definition of [cruel or inhuman treatment or punishment] (or paragraph (a) of the definition of “degrading treatment or punishment”)8(t)-2 (1he)4 (6 ( )]T

individualised analysis that it is possible to assess whether poor prison conditions cause individualised harm of sufficient severity to engage Art 7.' (Para 70).

'These approaches, read with the High Court's decision in SZTAL, frame the statutory task to be undertaken by the Tribunal, in order to determine on review whether a person satisfies the criteria for complementary protection, and specifically, whether the person faces a risk of "significant harm", as that phrase is to be understood in the light of s 36(2A).' (Para 71).

'The task is unlikely to be performed according to law by a summary and formulaic finding such as that made by the Tribunal in its reasons and which we have extracted at [63]-[64] above. The Tribunal was not only required to determine the appellant's contentions about a risk of torture. The Tribunal was required to decide whether it was satisfied there was a real risk the appellant would suffer "degrading treatment", and to undertake that task it needed to understand what degrading treatment was in the statutory context, and then by reference to the evidence and material before it, explain why it did or did not consider that that was the kind of treatment the appellan

‘The Tribunal faced a similar task to determine whether it was satisfied that there was a real risk the appellant would suffer “cruel or inhuman treatment”.’ (Para 73).

‘The appellant had presented ample evidence and argument on these matters. The Tribunal did not grapple with them sufficiently as required by law, and had we not upheld Ground 1, we may well have been persuaded that its failure to do so revealed a

a Departmental officer at the appellant's interview ar
this material was highly relevant to the question
whether the appellant had given inconsistent evidence
in support of his case.' (Para 26).

'Secondly, the term "inconsistency" should be used
with appropriate caution and an appreciation of the
danger of using labels or formulae which m4 (n a32 (c)4 (iJ, t)-2 (he)-6 (n

seekers in giving accounts of why they fear persecut
including that they may have to give multiple accounts,
using interpreters, and that they may reasonably expect
an interview or a review process will provide an
opportunity for them to elaborate on, or explain, the
narratives they have previously given. Consideration
should also be given to whether there is an acceptable
explanation for the person having given inconsistent
evidence such that the fact of the inconsistency should

information to the Department in support of his case (Para 29).

‘Relevant legal principles guiding judicial review of adverse credibility findings and whether or not the failure to take into account rele(Para 29).

(d) Even if an aspect of reasoning, or a particular finding of fact, is shown to be irrational or illogical, jurisdictional error will generally not be established if that reasoning or finding of fact was immaterial, or not critical to, the ultimate conclusion or end result (such as, for example, where it is but one of several findings that independently may have led to the ultimate decision).

(e) Merely because there is no reference in the decision-maker's reasons for decision to particular material does not necessarily give rise to an inference that the material was not considered. Nonetheless, in the case of the Tribunal, which is required by s 430 of the Act to make a written statement setting out its reason for decision and its findings on material questions of fact and to refer to the evidence on which such findings were based, a failure to refer to evidence that on its face bears on a finding may indicate that that evidence has not in fact been considered and, in some cases at least, disclose jurisdictional error in the decision-making (see Minister for Immigration and Multicultural Affairs v Yusuf

and Border Protection (Migration) [2018] AATA 1078 at [25].' (Para 9).

'In the circumstances of the present case, it is concluded that the primary Judge was correct to conclude that the Tribunal had implicitly taken into account the Guidelines and thereby complied" with the Direction: [2017] FCCA 1976 at [52], (2016) 323 FLR at 208. A "fair reading" of the Tribunal's reasons for decision, the primary Judge correctly concluded, led to the conclusion that the argument then advanced should fail: [2017] FCCA 1976 at [55], (2016) 323 FLR at 209.' (Para 16).

'The implication that the Tribunal had taken into account the Guidelines follows primarily from its reasoning at para [69]. Contrary to the submission of Counsel for the Appellant, it is concluded that:

para [69] is not merely an elaboration of the statutory requirements imposed by ss 5(1) and 36

provisions but rather language drawn from the Guidelines.

The balance of the Tribunal's reasoning process, moreover, exposes a consideration of:

> the claims made by the Appellant and, in particular, his reliance upon a newspaper article published on 8 December 2012. So much necessarily follows from the express reference to that article in the footnote to para [58] of the Tribunal's reasons for decision." (at 17)

> 'Considerable disquiet may nevertheless be expressed at the fact that compliance with the Ministerial Direction, being a direction with which the Tribunal "must comply", was ultimately left to a process of implication. In

			lawfully given by a Minister. Without insisting upon unnecessary formality, properly drafted reasons should disclose a consciousness of those matters set forth in any applicable Ministerial direction. Mere adherence to the statutory scheme does not, of itself, establish that there has been compliance with a Ministerial direction. A Ministerial direction ensures, in a very real sense, an additional safeguard or protection to those claiming protection – one level of protection is the necessity for a decision-maker to comply with the statutory scheme; the second level of protection is the necessity for a decision-maker to separately consider whether a decision reached "complies" with the relevant Ministerial directions.' (Para 19).
[redacted]	18	18-19, 62, 68-72, 79-88, 99-101, 102-105, 107	The Court considered whether the Tribunal took into account the possibility of torture in their assessment of

for a few days before appearing before a magistrate being bailed pending the imposition of a fine. But the Tribunal found that the Sri Lankan laws in relation to illegal departure were laws of general application that were applied in a non-discriminatory manner, and which served a legitimate purpose of dealing with people who had departed Sri Lanka unlawfully.' (Para 18).

'In relation to the appellant's complementary protection claim, the Tribunal considered whether there was a real risk that the appellant would face significant harm whilst being detained pending an appearance before a magistrate. The Tribunal accepted that there were concerns about overcrowding, poor sanitary facilities, limited access to food, the absence of basic assistance mechanisms, a lack of reform initiatives and instances of torture, maltreatment and violence in prisons in Sri Lanka. But the Tribunal found that the appellant would likely be remanded for only a short period, up to several nights. The Tribunal did not accept that a relatively short period of remand amounted to the intentional infliction of significant harm. Moreover, the Tribunal did not accept that there was an intention by the Sri

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asked itself the wrong question or applied the wrong test. This ground relates to the Tribunal's consideration of the complementary protection claim(s). It is said that the Tribunal erred by treating the length of imprisonment as determinative of the question of whether imprisonment amounted to significant harm. The appellant particularised this ground in the following fashion:

(a) It is said that the Tribunal found that on the appellant's return to Sri Lanka he would be remanded

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

‘There is no requirement of any act or omission in or of an “official capacity” in paras 36(2A)(c) to (e)…’ (Para 71).

‘Specifically, there is no requirement in para 36(2A)(c) or indeed in the definition of “torture” in subs 5(1) that the torture be committed by a person who is a public official or acting in an official c6 (l nu(no)-10 ((ia)6 (l c)6 (6 (l nu(no)-10

Parties to adopt national legislation that contains

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

and implied obligations on a State not to return a pe
to a place where he or she will face a real risk of a
significant breach of his or her rights (Minister for
Immigration and Citizenship v MZYYL

distinguish between acts or omissions of State and r
State actors. Accordingly, if the act or omission is
sufficient to amount to one of the defined harms, that is
sufficient under the legislative scheme for the harm to
amount to “significant harm” including “torture”, even
if carried out by a non-State actor.’ (Para 88).

‘The Tribunal accepted that within Sri Lanka prisons
there were “concerns about ... instances of torture,
maltreatment and vio

application, then it will not amount to significant harm for the purpose of the Act.' (Para 100).

'In this case, so the Minister contends, having regard to the Tribunal's conclusion that the appellant's treatment would be in accordance with a non-discriminatory law of general application, any risk of torture, maltreatment or violence by a non-State actor could only be incidental to the lawful sanction being applied under the relevant Sri Lankan law. Accordingly, so the Minister contends, it follows that the Tribunal was not obliged to consider whether there was a real risk that the appellant would suffer "torture, maltreatment and violence" whilst on remand because even if he 4 (s)-5 (e)-10 (ev)-4 (en)0

or its imposition amounted to the relevant act or omission.' (Para 104).

'Third, and consistently with what I have just said, when it was looking at the question of subjective intention, it was only considering the "intention by the Sri Lankan authorities" (see at [118]). It was not considering the intention of non-State actors engaging in torture in prisons. This confirms the second point I have just made, namely, that the Tribunal did not consider the combination of a short period of detention and torture together.' (Para 105).

'Fifth, the Minister has put a persuasive argument referring to the carve out to the definition of, inter alia, "torture", which "does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant". The Minister may well be correct as to this argument, but it seems to me that this is a matter for the Tribunal to consider and determine. I cannot say /Artifact BMC 1 g 45

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

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

appellant claims she will suffer from depression if she

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

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

someone else who was organising the boats.
(4) In his statutory declaration, the appellant stated that he continued to drive his neighbour for a week after he

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

Tribunal itself characterised the inconsistencies as minor or trivial. In any event, even if the inconsistencies had touched on matters more germane

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

decision of the Full Court of this Court in BCR16 v Minister for Immigration and Border Protection [2017] FCAFC 96 (2017) 248 FCR 456 ("BCR16"). An

decision-maker must refuse to grant the visa.' (Para 18).

'In expanding upon the first Ground, the written submissions filed on Mr Ali's behalf summarised the conclusions reached by the Full Court in BCR16 which were said to apply in this case as follows (without alteration):

16.1. First, that the Assistant Minister's decision

Minister to consider those matters led to jurisdictional error (at 70 – 72) (the Private Harm).' (Para 19).

Notwithstanding the considerable care with which Counsel on behalf of Mr Ali developed these written submissions, it is concluded that there has been no error of the kind identified in BCR16 committed by the Assistant Minister in the present proceeding.' (Para 20).

'On the facts of the present case, the Assistant Minister was making a decision pursuant to s 501CA(4) confined to a decision not to revoke the cancellation of a visa. In exercising that statutory power, the Assistant Minister did not:

- misunderstand the nature and extent of the power being exercised and, more particularly, did not misunderstand the "likely course of decision-making" or any necessity to consider non-refoulement obligation if a Protection visa application were to be made; or

- fail to consider the submissions made as to why an adverse decision should not be made pursuant to s 501CA(4).

The latter issue falls fotogation if a Protecu 12 455.51o 0.216 0 Torotecn2d

'The Assistant Minister's reasons in respect to the first Ground were as follows:

International non-refoulement obligations

19. Mr ALI's migration agent, Dr Daawar, submits that 'Australia has protection, non-refoulement and humanitarian obligations to Mr ALI as his father was killed by the Taliban, he himself was almost killed at the same time and his family was warned to leave the country. His family members echo these concerns.

20. I am aware that my Department's practice in processing Protection visa application is to consider the application of the protection-specific criteria before proceeding with any consideration of other criteria, including character-related criteria. To reinforce this practice, I have given a direction under s. 499 of the Act (Direction 75) requiring that decision-makers who are considering an application for a Protection visa must first assess whether the refugee and complementary protection criteria are met before considering ineligibility criteria, or referral of the application for consideration under s. 501.

21.Accordingly, I consider that it is unnecessary to determine whether non-refoulement obligations are owed in respect of Mr ALI for the purposes of the present decision as he is able to make a valid application for a Protection visa, in which case the existence or otherwise of non-refoulement obligations

would be considered in the course of processing tha application.' (Para 22).

'Paragraph [20] of these reasons is unquestionably an attempt on the part of the Assistant Minister to address the concerns expressed by the Full Court in BCF16 The Assistant Minister was obviously fully aware of Direction No75.' (Para 23).

'Read literally, para [20] is an express finding as to the Departmental practices to be followed in processing Protection visa aact BMC 1 g 453.6 6teses.t76 6te002 (c)4 (t)T4.u 4 39

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

> country of origin because of Australia's non refoulement obligations under international law, could be exposed to indefinite detention.

There is a certain initial attraction in the case advanced on behalf of the Applicant.' (Para 26).

'But the case for the Applicant is to be rejected.' (Para 27).

'At the end of the day, the decision sought to be reviewed in the present proceeding is the decision made on 25 October 2017 to not exercise the power conferred by s 501CA(4) to revoke the original decision. That decision-making process relevantly required a state of satisfaction to be formed – not as to whether a person satisfied the criteria prescribed by s 36(2) – but a state of satisfaction as to whether "there is another reason why the original decision should be revoked" for the purposes of s 501CA(4)(b)(ii).' (Para 28).

'To the extent that the Applicant raised claims for consideration in the submission made on 31 October

The difficulties confronting the Minister would then be considerable. One possibility to be raised only to be rejected would be the prospect that the Applicant would be returned to Afghanistan in breach of Australia's international obligations. That, at least to the knowledge of Senior Counsel for the Respondent Minister, has never happened in the past. Nor would such a possibility be lightly entertained. But the difficulty then confronting the Minister could be compounded by the fact that a person who is not lawfully entitled to remain in Australia is to be removed as soon as practicable.

purposes of s 501CA(4)(b)(i), the power exercised on that da

‘The appellant is a Sri Lankan national of Tamil

that the applicant “could well be” held on remand on return to Sri Lanka was not a finding that detention was “likely”.

2. The Court also concluded the use of the words “could well be” and “possibly” indicated that the Tribunal had considered that the conditions the applicant faced on remand were not necessarily cramped and uncomfortable. The judge should have concluded that these words, if

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

definitions. This caused the Tribunal to overlook a substantial and clearly articulated argument. Secondly, to the extent that the Tribunal did consider the

particular torture, cruel or inhuman treatment or

‘It is possiblebut unlikely that the Tribunal was not cognisant of the definition of “significant harm” in

not dealing with the complementary protection criteri and therefore had no cause to consider the definitions of "significant harm". It is difficult to see how the primary judge could be satisfied that the Tribunal had considered the elements of the statutory test for significant harm, including the requirement for intention. "Serious harm" under s 91R may amount to "significant harm" under s 36(2A)

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

Committee, owing to lack of space some detainees h
to sit on excrement. The Dominican detainee was
deprived of food and water until the day after his arrest.
The Committee apparently found that his treatment was
both inhuman and degrading. In another case, the
Committee apparently found that the treatment of a
Zairean detainee who was deprived of food and drink
for four days after his arrest and later “interned under
unacceptable sanitary conditions” was inhuman.’ (para

‘The primary judge considered that the Tribunal did not refer to international jurisprudence including the cases cited in the appellant’s March 2013 submission because it did not consider it was relevant in the particular circumstances of this case. Her Honour held that this was not indicative of jurisdictional error for two reasons. The first reason she gave was that the Tribunal did not accept that there was a real chance that the appellant would be imprisoned after conviction and the international jurisprudence concerned poor prison conditions for people who had been convicted. The second reason she gave was that the Tribunal did not base its decision on the aspects of the definitions in s 5, particularly the exceptions that refer to the ICCPR. In support of this latter reason her Honour relied on the joint judgment of Kenny and Nicholas JJ in the Full Court in SZTAL at [65].’ (para 107).

			'Indeed, in SZTAL (HC), their Honours acknowledged at [18] that "words taken from an international treaty may have another, different, meaning in international law". The adoption of those words may in some cases be suggestive of a legislative intention to import that meaning. The focus of that case, however, was on the concept of intention in the definitions contained in s 5(1), which does not appear as an element of "cruel, inhuman or degrading treatment or punishment" in the ICCPR. Further, their Honours observed that the concept of intention does not have a settled meaning in international law and therefore international jurisprudence on that question would be of little utility. See also Minister for Immigration and Border Protection v BBS15 [2017] FCAFC 176 at [42].' (para 109). 'I respectfully disagree with the primary judge's explanation for the Tribunal's failure to refer to the international jurisprudence in this case. First, as I have already observed, the material upon which the appellant relied showed that there was no material difference between the conditions in which remand and convicted prisoners were held. Secondly, the two cases I have referred to above involving the Dominican and the Zairean detainees dealt with detention for similar periods of time. On the face of things, the facts of those cases as outlined in the appellant's March 2013 submission were not so very different from the conditions described in the Doherty article and in the other reports referred to in that submission. Thirdly, her Honour's interpretation of the joint judgment

in SZTAL(FC) was too narrow. More likely than not t
international jurisprudence was not mentioned because
the Tribunal did not give due consideration to the
appellant's submission.' (para 110).

'That said, the real question is whether the Tribunal was
re

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

‘It was submitted on behalf of the applicant that this Court should find that the applicant’s ‘own country’ within the meaning of art 12(4) is Australia, notwithstanding his lack of citizenship. The Court was urged to have regard to the applicant’s longstanding residence in this country, his close and enduring ties with Australia, and his lack of ties with any other country. It was emphasised that these factors are not contentious and were accepted by the Tribunal at [53], where it reproduced the statement by the applicant set out at [14] above as to his upbringing and substantial family connections in Australia and his lack of any family, friends or other connection with New Zealand.’ (para 40).

‘There are obvious similarities between the present case

‘Clause 14 of Direction 65 states as follows:
14. Other considerations – revocation requests
(1) In deciding whether to revoke the mandatory cancellation of a visa, other considerations must be taken into account where relevant. These considerations include (but are not limited to):
a) International non-refoulement obligations;
b) Strength, nature and duration of ties;

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

CDY15 v Minister for Immigration and Border Protection [2018] FCA 175 (Unsuccessful)	28 February 2018	5, 6, 22-24, 27, 37-39	This case discussed the significance of the motivation behind inflicting harm on an applicant under a section 36(2)(aa) inquiry. 'In general terms, the first appellant claims that, in Malaysia, two of his brothers, who were members of a political party, were attacked by members of a gang as they were returning from a party meeting. It is said that the attack was politically motivated. One of the first appellant's brothers killed the alleged leader of the gang. That brother was tried, convicted and has been sentenced to death. The other brother involved in the attack was later killed in a car accident, which the appellants allege was suspicious and supposedly caused by the gang members. The first appellant claims that, subsequently, he has been threatened, attacked and harassed by the gangsters seeking retribution for the death of their leader. It is for that reason that he seeks a protection visa. The same grounds are relied upon for

(a)

cannot agree with those views as expressed by the learned judge.' (para 22).

'The question to be determined under the s.36(2)(aa) is whether, as a necessary and foreseeable consequence of the applicant for a visa being removed to a receiving country, there is a "real risk" that he or she will suffer significant harm. That involves an evaluation of the harm which the applicant might suffer in the future and that assessment requires past facts and events to be evaluated for the purposes of ascertaining whether a propensity exists for the applicant to encounter harm in the future. Highly relevant to that inquiry is whether the applicant has suffered any previous infliction of harm and the circumstances in which it occurred. If it were the case that third parties inflicted harm to the applicant and had reasons and motivation for doing so and those reasons and motivations remained extant at the time when the decision is made, the decision maker might rightly assume that there exists a propensity for harm to be suffered by the applicant at the hands of those third

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

were to the effect that the appellants' explanations fo
the attacks on the first appellant were untrue and not
accepted. This had the result that there was no evidence
as to why the appellant was attacked on the two
previous occasions. That had the dual effect of denying
the possible existence of a Convention ground and
removing the existence of any real risk of significant
harm being suffered in the future.' (para 27).

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

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

four grounds of appeal and advancing, in their place new grounds 5, 6 and 7, as follows

…Ground 7: Misapplication of the test for complementary protection

…

d. The Tribunal then found ‘that the risk of harm from any insecurity or generalised violence in

the general state of insecurity in Afghanistan places anybody living or returning to Afghanistan at risk of relevant harm. By reference to BOS15 v Minister for Immigration [2017] FCCA 745, referred to in [24] of the appellant's submissions which are reproduced at [42] above and also by reference to what was said in SZSFF v Minister for Immigration & Anor [2013] FCCA 1884 and reproduced at [30] of the appellant's written submissions and reproduced at [43] above, the appellant submits, for example, by reference to a country such as Syria at present, that where serious human rights violations in a particular country are so widespread and so severe that almost anyone would

which was not done and which should have been done by reference to the DFAT report.' (para 70).

'Accepting generally that there may be circumstances, in which for Australia to return a person to their country of origin may be to expose them to a sufficiently real and personal risk of harm without them being targeted

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

in the Tribunal. Instead, his substantive claim was pı
on the basis that he would be targeted because he would
be seen as an apostate in a predominantly Islamic
country.' (para 73).

'On that basis, I do not consider that ground 6 can
succeed. There was no obligation to consider the DFAT

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

Parliament had declined to give any approval which might be necessary for implementation of the death penalty. It does not say that. The better reading is that the President sought to reintroduce it and at the time of the DFAT report it was unknown whether or not he would have parliamentary support to do so.' (para 27).

'It is not a reasonable conclusion against this background that there is no real risk the appellant would be subject to the death penalty. The President has indicated he intends to reintroduce it and the position of Parliament is unknown. These events have taken place at a point in time after the Amnesty International report and in apparent response to public concerns and media reports of violent crime. The information as to the number of people on death row whose death sentences had not been executed and that Sri Lanka was effectively abolitionist in practice logically had to give way to the most recent fact – the President announcing that he intended to reintroduce the death penalty. The fact that this had not occurred as at the time of the DFAT report fell well short of a reasonable basis on which to conclude there was no real risk that the appellant might be exposed to a death sentence.' (para 28).

'Particularly in circumstances where the consequences of a conclusion are so serious, there is a paucity of information leading to that serious conclusion. The

Kirby J made the following remarks, with which there could be little dispute, in *Applicant NABD of 2002 v Minister for Immigration and Multicultural and*

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

b. The applicant also claimed to be entitled to

from recurring violence for the Convention reasons relied upon by the applicant' (Para 47).

'Counsel for the Applicant submitted that in circumstances where the country information cited by the Tribunal suggested there was a significant risk of generalised violence in the Applicant's home region (that is, violence that was not targeted at any person for

address the complementary protection claim based on generalised violence that was not for a Convention reason or for reason of a personal attribute of the Applicant giving rise to an attendant Convention reason. The express limitation to a consideration of harm for 'the Convention reasons relied upon by the applicant' is not consistent with the interpretation contended for by the First Respondent. Insofar as "for these reasons" is may be a broader concept, seen in this context it must be a reference to the reasons (that is, the attributes of the Applicant and Convention reasons) expressly addressed in paragraph 90.' (Para 77).

'In paragraph 96 the Tribunal made a general conclusion considering the Applicant's attributes and the "attendant" Refugees Convention grounds. It addressed those claims "

generalised (that is, not targeted) violence in his home area.' (Para 82).

'Nor is this a case in which paragraphs 91 to 95 can be

been no cause for it to refer to

the issue of s.36(2B)(c) did not properly arise in this case.' (Para 104).

'In SZSPT Rares J expressed the view (at [11]) that:

> In my opinion, the natural and ordinary meaning of the exception in s.36(2B)(c) is that, if the Minister, or decision-maker, was satisfied that , as opposed to the individual claiming complementary protection based on his or her individual exposure to that risk, the provisions of s 36(2)(aa) were deemed not to be engaged.

(emphasis added in Applicant's submissions)' (Para 107).

> 'In BBK15, Buchanan J rejected a contention that for s.36(2B)(c) to apply the Tribunal had to be satisfied that the real risk of harm in question was "faced by the population of the country

then s 36(2)(aa) would not be engaged at all. There would be no need to refer to s 36(2B)(c).

30. In my view, s 36(2B)(c) draws attention to a

			risk that a non-citizen will suffer significant harm in a country".' (Para 109). 'However in this case the Tribunal considered s.36(2B)(c) of the Act. In so doing it incorrectly confined the provision to risks in the Applicant's home region. As the First Respondent conceded in submissions, the Tribunal misconstrued s.36(2B)(c) of the Act. Reading paragraphs 100 and 101 of the Tribunal reasons together, it is clear that the Tribunal incorrectly understood that s.36(2B)(c) would apply to risks that existed in the Applicant's home region (which it had found at paragraph 61 was the Kurram Agency), instead of risks faced by the population of Pakistan generally in the sense explained by Buchanan J in BBA15 at [30] and [32]. This was an error of law.'
CKX16 v Minister for Immigration & Anor (No.2) [2018] FCCA 2894 (Successful)	12 October 2018	4, 11, 23-24, 26-27, 32-33, 43-44	The Court considered whether the Tribunal was obliged to consider 'significant harm' that might occur in the future where the act causing it had occurred in the past. 'The applicant summarised the background to this

provided that the harm itself occurred in the future.' (Para 25).

'Paragraph 36(2)(aa) of the Act requires that, relevantly:

- ... as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm'... (Para 26).

'That provision obviously requires the harm (the severe mental pain or suffering) to occur in the future but says nothing about when the action causing the harm (the threat) must occur.' (Para 27).

'It seems to me that a person will be subjected to an act in the future if the person suffers the consequences of the act in the future, even if the act itself is in the past. For example, a person going to Chernobyl next week will be subjected to an act (consisting of a nuclear meltdown that occurred over three decades ago) by which pain or suffering (in the form of high levels of radiation) is inflicted on the person next week.' (Para 32).

'Even if I am wrong about that, it seems to me, applying the Project Blue Sky[2] principles, that the Parliament must have intended to give complementary protection for future harm suffered in consequence of past actions. There is no conceivable

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

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

return to Afghanistan. While the Authority's consideration of such information is, like its consideration of any other material, governed by the same principles of logic and reason as discussed immediately above, the identification of relevant information and the weight to be attributed to it is entirely a matter for the Authority: NAHI v Minister for Immigration & Multicultural & Indigenous Affairs

[39] That contention should also be rejected. Implicitly, it proceeds from the false premise that a claim for complementary protection is in the nature of an adversarial proceeding in which the burden of proof is on the applicant and, therefore, that, in the event of the applicant failing to discharge the burden of proof, the claim for complementary protection must fail. To the contrary, however, as appears from BL v Australia, before a decision maker may properly reject a claim for complementary protection on the basis of the availability of reasonable internal relocation, the decision maker needs reliable information as to the safety and suitability of the place of relocation. Moreover, as Gummow, Hayne and Crennan JJ observed in SZATV v Minister for Immigration and Citizenshipin relation to a claim for refugee protection:

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

“reliable” information in the sense that the informatio

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

applicant claimed that he had to leave Taiwan to “survive” (CB 36 to CB 38).’ (Para 5).

‘The Tribunal noted that when the applicant arrived in Australia on 10 November 2012, he was arrested at the

convicted of in Australia. The Tribunal found that this would not breach Article 14(7) of the International Covenant on Civil and Political Rights ("ICCPR") and further, the prison conditions in Taiwan would not be intentionally inflicted such that they come within the definition of "cruel or inhuman treatment or punishment" ([56] at CB 97 to [74] at CB 100).' (Para 19).

'Both definitions explicitly do not include "an act or omission" which, amongst other things, is not inconsistent with Article 7 of the ICCPR (see also the definition of "covenant" also in s.5(1) of the Act).' (Para 52).

'In this light, and in the circumstances, it was appropriate and necessary for the Tribunal to have regard to Article 7 of the ICCPR. The Tribunal properly identified the remaining issue (in light of its factual findings) as whether the relevant sanctions in Taiwan were inconsistent with the articles of the ICCPR ([64] at CB 98).' (Para 53).

			69; (2016) 243 FCR 556 and SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; (2017) 91 ALJR 936). The Tribunal's conclusion in this regard, and the findings that informed it, were reasonably open on what was before it. No legal error is revealed in this regard.' (Para 58).
SZDCD v Minister for Immigration & Anor [2018] FCCA 1029 (Unsuccessful)	18 April 2018	15, 34, 36, 49, 56, 63	This case concerned an applicant from B2ink <</MC

treatment or punishment in s.5(1) there is no evidence that the Applicant would be intentionally subjected to these sorts of harm if he was returned to Bangladesh.' (Para 60).

'Given that lack of evidence I have referred to, it was open to the Tribunal to find that the evidence did not disclose any intention to inflict pain or suffering, or

			result when they have the result in question as their purpose.' (Para 62). 'I find that the Tribunal approached the claim of the Applicant as to his health concerns correctly, and applied the correct test. Ground 2 otherwise seeks a merit review. That is not a review available in this Court on this application for judicial review.' (para 63).
BHQ15 v Minister for Immigration & Anor [2018] FCCA 181 (Successful)	26 February 2018	4, 5, 36-41	In this case the Tribunal was found to have erred by failing to properly apply the real risk test in circumstances where it used the word 'likely' in its

or had been baptised or attended church, and was therefore not satisfied that there were substantial grounds for believing that there was a real risk that the applicant will suffer significant harm on his return to

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

Church on religious holidays to ensure no Muslim is present.

CB 210 at [53].' (para 38).

'Although the Tribunal did not accept that the applicant would seek to practise Christianity in Iran or that anyone was "likely" to become aware that he was interested in Christianity or had been baptised or attended church in Australia, the use of "likely" in that context leaves open the real possibility that his activities in Australia might come to the attention of the Iranian authorities, particularly in circumstances where it is possible that he would be monitored by the Iranian authorities or be informed upon by informants and be exposed to "the penalties for apostasy" in Iran: CB 210-211 at [55], which, according to country information which was available to the Tribunal, included the death penalty: see CB 119 (Freedom House report); CB 123 (The Guardian) and CB 127 (Amnesty International). That possibility is exposed in a pass patss pat ea0.2 g 12 (pos)-1 (sMC

which was not considered by the Tribunal because it not properly apply the real risk test.' (para 39).

'The Court further notes that a finding that the applicant is not a Christian does not suffice to exclude the possibility that the activities of baptism and church attendance in Australia might be matters brought to the attention of the Iranian authorities, and which would not preclude the applicant having a well-founded fear of persecution on the basis that he had engaged in those activities in Australia, even if, as found by the Tribunal he is not a Christian or will not or does not intend to practise Christianity if returned to Iran.' (para 40).

'In all of the above circumstances, the Court has concluded that the Tribunal did not apply the real risk test to the applicant for the purposes of assessing the applicant's complementary protection claim in relation to whether anyone in Iran might become aware that the applicant had any interest in Christianity, or had been baptised or attended church whilst in Australia, and whether that gave rise to a well-founded fear of persecution upon the part of the applicant. That suffices