COMPLEMENTARY PROTECTION IN AUSTRALIA

ADMINISTRATIVE APPEALS TRIBUNAL

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On 1 July 2015, the Refugee Review Tribunal (RRT) was merged with the Administrative Appeals Tribunal (AAT). Previous RRT decisions can be found in the separate RRT table (archived on the Kaldor Centre website). Pre-1 July 2015 AAT decisions (also archived on the Kaldor Centre website) relate to cases where a visa was cancelled or refused on character grounds (including exclusion cases). Tribunal cases from 2015-2016, 2017 and 2018 are in separate Tribunal tables archived on the Kaldor Centre website).

Case	Decision date	Relevant paras	Comments
HPZB and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2019] AATA 5402	13 December 2019	113-116, 133	with the direction that a temporary protection visa not be refused, including because the applicant is owed *non-refoulement* obligations.
_____ _____ _____	3 December 2019	52-55, 64	The tribunal set aside a decision not to revoke the protection visa, including because he is owed *non-refoulement* obligations. He had made anti-Iran statements and a summons had been issued in his name.
CQBW and Minister for Home Affairs (Migration) [2019] AATA 5177 (Unsuccessful)	28 November 2019	190-224	The Tribunal affirmed a decision to refuse a bridging visa to a Vietnamese applicant, but in doing so discusses the states of law on consideration of non-refoulment obligations.
KYMM and Minister for Home Affairs (Migration) [2019] AATA 5174 (Unsuccessful)	28 November 2019	114-160	The Tribunal affirmed a decision not to revoke the ugee and humanitarian visa. While *non-refoulement* obligations weighed in favour of revocation, it was open to the applicant to apply for a protection visa.
QDWQ and Minister for Home Affairs (Migration) [2019] AATA 4622 (Unsuccessful)	12 November 2019	84-103, 127-131	The Tribunal affirmed a decision not to revoke the mandatory cancellation of an Afghan, Shia applicant of *non-refoulement* obligations were engaged, they did not outweigh primary considerations.
WKMZ and Minister for Home Affairs (Migration) [2019] AATA 4381	14 October 2019	160-274	The Tribunal affirmed a decision not to revoke the mandatory c visa under s.501(3A), notwithstanding finding that it is

refer at [30] [32]. Psychological harm which is a

definition requires that the act or omission take place in the future. In our view the words in s.36(2A), as

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whether 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. While her Honour concludes that this would engage s.36(2A) and therefore s.36(2)(aa), we prefer the authority of Mansfield J in SZSRN where his Honour made an important distinction between an act and the consequence of an act: at [47]. We also note that when s.36(2A) is read with s.5(1) the clear meaning is that the non-citizen will be subjected to an act where suffering is intentionally inflicted. This is inconsistent with suffering harm from a previous

Project Blue Sky would be authority for such a broad

			view, ss.36(2A) and 5(1) are clear in their terms. To engage s.36(2)(aa) an applicant must satisfy the Tribunal that there is a real risk he or she will suffer significant harm in the receiving country and this means an act or omission taking place in the receiving country. This cannot be constituted by an act in the past or the future consequence of an act in the past. Psychological illness which is manifest, in this case, by reason of a a 111) years ago is a continuing act which, in effect, will come to fruition when the applicant returns to the place of the original trauma, is novel. The act must be the physical act, in this case being the threat made 17 years ago. In our view, the mental health issues that arise from the threat are a consequence of the act. Any harm arising in Fiji is a consequence of the trauma from the act. A psychological response to being returned to the location where the traumatic event occurred is not an act in itself. As stated by Reeves J in CHB16 (agreeing with Collier J in CSV15 v Minister for Immigration and Border Protection [2018] FCA 699) at [65] to [68], the we reject the submission that the psychological harm, which we accept may be suffered by the applicant because of his subjective fear of 113)

1619551 (Refugee) [2019] AATA 5306 (Successful)	5 September 2019	59-62	The Tribunal remitted a Pakistani, homosexual that the applicant satisfies both the refugee and complementary protection criteria.
DARYAB (Migration) [2019] AATA 4492 (Unsuccessful)	4 September 2019	56-60	The Tribunal affirmed a decision to cancel a Hazara visa, while recognizing that Australia may owe protection obligations towards the applicant and that ccept, for the purpose of this review only, that it would be difficult for the applicant to live on her own in Pakistan without much family support. The Tribunal accepts that the situation in Pakistan may be unsafe and that the applicant would be recognised as a Hazara and a single woman. Although the Tribunal is mindful that the applicant is eligible to seek a protection visa in the future, for the purpose of this review, the Tribunal accepts that Australia may owe protection obligations towards the applic
1516248 (Refugee) [2019] AATA 4304 (Unsuccessful)	9 August 2019	103-164, 166	The Tribunal affirmed a decision not to grant a Lebanese applicant a protection visa and in doing so considered the meaning of intention in the context of s.5(1). representative to the effect that Lebanon lacks suitable qualified mental health specialists; that specialised

			mental care. When he arrived in Australia his condition escalated and he became violent with his parents. Australian medical intervention has been of great help and he is obtaining continuous medical and social support which could never be found in Mauritius. ii. If he returns to Mauritius the change in environment and degrading treatment will cause a great impact on his life. He did not want to be locked up in a small room in a mental hospital. Mental illness is treated poorly by the medical system in Mauritius and his uncle experienced this, as he was locked up on and off since he was [age] years old. His uncle lost his life in 2013. Going back may cause another serious episode of his illness which might damage his brain. iii. Mentally ill people were not welcomed in society in Mauritius. He will suffer harm because of lack of community support and poor The Tribunal has also considered the claims of the applicant under the complementary protection provisions of the Act. The definition in s.36(2A) is framed in terms of harm suffered because of the acts of other persons. As discussed above, the Tribunal accepts that the mental health care available in Mauritius is not the same standard as in Australia, but finds that care is available via the public system and privately. Additionally, the Tribunal is satisfied that the applicant

will not be without a means of support as he can return to the family home, will be supported by his family and

representative that the applicant has had a difficult journey with his mental health. It is not accepted that societal discrimination in Mauritius will impact upon the applicant seeking treatment if he was to return or that for this reason the applicant will be subject to significant harm. It is also not accepted that the government of Mauritius is culpable if the applicant could not obtain appropriate treatment. There is nothing

			(Para 43). considered the submission that it will be Australia who will be intending to inflicting cruel or inhuman treatment or punishment or degrading treatment or punishment, if the application is refused and he is required to return to Mauritius. In *SZRSN v MIAC*, where it was claimed significant harm would arise from separating the applicant from his Australian children, the Federal Court found that harm arising from the act of removal itself will not meet the definitions of [20] to afford protection referred to in s.36(2)(aa) arise from the harm faced by a non-citizen in the receiving country, rather than the country in which protection is sought.[21] As the harm under s.36(2)(aa) must arise as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, s.36(2)(aa) will not be engaged by harm inflicted by the it, therefore, that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Mauritius, there is a real risk that he will suffer significant harm, as defined, as a result of his
1515288 (Refugee) [2019] AATA 4066 (Successful)	9 June 2019	107-129, 131	The Tribunal remitted the matter with the direction that the applicant, a Nepali, divorced single female with a child satisfied the complementary protection. The

divorced single female with a child and that there is some stigma associated with this. It is when considering

vulnerabilities that the Tribunal cannot discount that the applicant may face a small but real risk of degrading treatment in Nepa
(Para 114)

discrimination in employment against women, but that

			reasonable and not covered by the lawful sanctions exception. The Tribunal is thus satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Nepal, there is a real risk that

Applicant was not sufficientl

AATA 3430 (Successful)			direction that he satisfies s.36(2)(aa) as he faces a real risk of significant harm in Mongolia for reasons of his homosexuality. evidence to both the delegate and in the Tribunal hearing in relation to claims of harm in Mongolia. Notwithstanding the fact of the applicant providing fraudulent documents to support his claims, based on that there have been at least some occasions on which the applicant has been harassed and physically assaulted in Mongolia based on his sexuality. The Tribunal is also satisfied that vindictive individuals utilised information which they posted on social media to embarrass the applicant. The Tribunal also accepts that there were instances where police acted in an unhelpful and intimidating way t (Para 33). attacks and physical harm against the applicant as he has detailed in his written claims and indicated in supporting documents, the Tribunal accepts that there have been at least some instances of intimidation and physical harm suffered by the applicant as a result of his (Para 34). intimidation and physical harm from society in general

is not inconsistent with independent information as to the treatment of homosexuals in Mongolia, albeit that there have been some steps by the government to

negative attitudes towards homosexuality in Mongolia, the Tribunal is satisfied that the applicant faces a real chance of both serious and significant harm, as defined in the Act. Harm would include the real chance of physical harm, as the Tribunal accepts that he

criterion, the Tribunal notes s.5J(2) of the Act indicating that a person does not have a well-founded fear of persecution if effective protection measures are available to the person in the relevant country. Section

The Tribunal notes that the independent information contained in this decision could suggest that the legal

			protection measures, police need to provide, not perfect 40) outcome in this matter because, in any event, the applicant would satisfy the complementary protection different and stricter test applies in relation to effective protection as set out in s.36(2B)(b) of the Act. Under that section, protection must reduce the risk of harm to less than a real risk for the purpose of the complementary protection criterion. This is a more attitudes towards homosexuality in Mongolia, consistent Tribunal, that the legal framework and police protection would reduce the risk of significant harm to the applicant based on his sexuality to less than a real risk. This is because there is the potential for the applicant to face physical harm before the involvement of police, who would be likely involved after the harm has occurred, or due to the operation of the legal system, which would not operate until after the harm had occurred. The Tribunal finds that the applicant would face a real risk of degrading treatment or punishment as well as cruel or inhuman treatment or punishment can

			(Para 51). or terrorism throughout Pakistan due to the general security situation. The country information discussed above generally acknowledges that such attacks can and do happen without warning throughout Pakistan, targeting various groups or persons in authority, despite some reduction in the number of attacks over recent years. There is some risk therefore, that the the applicant may fall victim to a random attack as an innocent bystander, wherever he is in Pakistan. However, I consider that any such risk is not one faced by the applicant personally but is one faced by the population of the country generally. Applying s.36(2B)(c), there is therefore taken not to be a real risk that the applicant will suffer significant harm from (Para 52). efore me did not raise any other grounds for believing that the applicant would suffer harm (significant or otherwise) as a necessary and foreseeable consequence of his returning to Pakistan. After weighing my findings, I conclude that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Pakistan, there is a real risk (Para 53).

1820814 (Refugee) [2019] AATA 1632 (Unsuccessful)	29 January 2019	10, 14, 57-58,	The Tribunal considered the claims of a Pakistani man

			in Golarchi, water rights to one property they were farming had been impeded, causing them hardship. The applicant gave evidence that when that happened, he was helped by members of his community to resolve the I refer to my findings above in considering the real chance test. I am not satisfied that the applicant has established that there is a real risk that he will arbitrarily deprived of his life as a necessary and foreseeable consequence of him being returned to Pakistan. I have found that the applicant has established that he has experienced and would continue to face some entrenched discrimination, harassment and societal vilification if he was to return to Pakistan. However, as noted above, in the particular circumstances of this Golarchi, I consider that the level of discrimination, harassment and vilification he has faced and would be likely to face if he returns to his home is moderate, in the form of some social discrimination, harassment and vilification and sporadic incidents of hate speech and abusive writing on external walls of his home. I have and I do not consider that the level of discrimination, harassment and vilification which he will encounter in the future is properly considered as causing and suffering, whether physical or mental, that will be intentionally inflicted on the applicant, or that they are at a level such that they cause him extreme humiliation. I acknowledge that the experiences of discrimination,

			vilification and harassment have caused and will cause the applicant some mental and physical distress and humiliation. I consider that the moderate discrimination, harassment and vilification faced by the applicant if he is returned to Pakistan would be at a level which he has faced throughout his life, and despite which he has prospered. Bearing in mind his own evidence, and taking into account his physical location in Pakistan, his established standing within his community and his lifetime experience, I am not satisfied that the level of pain or suffering the applicant will face (as he has in the past) is at a level which could be regarded as cruel or inhuman in nature, or as cruel or inhuman or degrading treatment or punishment causing or intended to cause severe pain or suffering or extreme humiliation, even ubstantial grounds for believing that there is a real risk that the applicant will suffer significant harm (including being arbitrarily deprived of his life or subjected to cruel or inhuman or degrading treatment or punishment), as a necessary and foreseeable consequence of him being returned to
1712068 (Refugee) [2019] AATA 223 (Unsuccessful)	25 January 2019	21, 86, 140-143, 173, 175	In this case the Tribunal considered the claims of an Iranian man who, inter alia, feared being punished for transgressions of the dress code. The Tribunal found that he was at risk of reprimands, fines and warnings and that this did not amount to significant harm. *Summary of claims:* The applicant claims that he and

faces can be summarised as arising from being a Mousavi supporter in the past with Western habits including dressing in Western clothes, drinking alcohol and singing and dancing to Western music, opposing the regime in the future at moments of widespread general uprisings, being a failed asylum seeker, showing public affection to his girlfriend and having nominally converted to Christianity while in Australia but remaining a non-practising Muslim as described above along with other particular circumstances as noted under

applicant has PTSD and would have some access to

			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 while awaiting a bail hearing. The Tribunal does not accept that the applicant is of ongoing adverse interest to the this matter, it does not accept on the information before it there to be a real risk that the applicant will face torture, or other types of significant harm as set out in s.36(2A) of the Act, either during his questioning at the airport or during any period he spends on remand. The Tribunal considers, if convicted of charges under Sri *I&E Act*, he will likely face a fine and if a family member is required to act as a guarantor, accepts on his evidence that his wife will be able to help him out in this regard. The Tribunal does not accept on the evidence before it that there is a real risk the applicant would be subjected to treatment constituting significant harm as that term is exhaustively defined in section 36(2A), either during his questioning at the airport or during the short period that he may spend on remand awaiting a bail hearing, or when he returns to his home are on the information cited above, the Tribunal does not accept that this will manifest itself in the mandatory imposition of a term of imprisonment or that the applicant would not be able to pay any fine that may be imposed on him as he would have the assistance of his

wife who is financially supported by her wealthy brother
(Para 98).

Lanka are generally poor and do not meet international

			questioning, a fine and detention and poor prison conditions, would not amount to significant harm as this would apply to every person in Sri Lanka who breached the illegal departure law. As this is a real risk faced by the population generally and not the applicant personally, under s.36(2B)(c) there is taken not to be a (Para 101). and cumulatively, for these reasons the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the a real risk that he will suffer significant harm. Therefore the applicant does not satisfy the criterion set out in