COMPLEMENTARY PROTECTION IN AUSTRALIA

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

2019 onwards

Last updated 31 March 2020

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

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

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

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

FEDERAL COURT OF AUSTRALIA

Case	Decision date	Relevant paragraphs	Comments
Hernandez v Minister for Home Affairs [2020] FCA 415 (Charlesworth J) (Successful)	31 March 2020	14-68	The court quashed the Minister's decision, finding that an appellant from El Salvador established jurisdictional error as the Minister consider non-refoulement. "Had the Minister determined that Australia owed non-refoulement obligations to Mr Hernandez, that would be a factor capable of weighing in favour of revocation of the cancellation decision in the exercise of the discretionary power conferred by s 501CA(4). The existence of the obligation is clearly capable of furnishing "another reason" why the cancellation decision should be revoked. At the very least, it would be open to the Minister to conclude that Australia's reputational interests may be adversely affected by a decision resulting in the deportation of a person in contravention of Australia's obligations under international law. Accordingly, meaningful consideration of the issue may have made a difference to the ultimate outcome." (Para 63) "In my view, the error I have identified above is material, whether or not the Minister was conscious of the consequences of not deciding for himself the non-refoulement issue. If the Minister did correctly appreciate the consequence, it would be irrational to point to the protection visa application process as a reason not to decide the question, and ground 2 would be upheld. If the Minister did not appreciate the consequence, that may support a conclusion that the

			contentions underpinning ground 1 should be upheld, but I do not consider it necessary to go so far. It is sufficient to conclude that the decision was affected by jurisdictional error because of a material failure to consider the non-refoulement issue. The application for judicial review should be allowed on that additional basis." (Para 68)
DCC18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 395 (Wheelahan J) (Successful)	26 March 2020	34-40	The court quashed the Minister's decision, finding that a Sudanese appellant established jurisdictional error as the Minister concluded that it was unnecessary to determine whether non-refoulement obligations were owed in respect of the applicant, and did not give any consideration to the harm that the applicant claimed he might suffer. "I have set out the two material sections of the Minister's statement of reasons at [19] and [21] above. At [19] to [21] of the statement, the Minister concluded that it was unnecessary to determine whether non-refoulement obligations were owed in respect of the applicant, and did not give any consideration to the harm that the applicant claimed he might suffer. There was no discussion of the type of risks that the applicant had advanced, and which the Asylum Seeker Resource Centre had supported with the citation of several reports. Whatever relevance the applicant's representations had to the issue of non-refoulement, the representations also amounted to a straight-forward argument that the applicant would be harmed, and possibly be killed, if he were returned to South Sudan:

			Ezegbe v Minister for Immigration and Border Protection [2019] FCA 216; 164 ALD 139 at [36] (Perram J).” (Para 38) “As to [30] to [33] of the Minister’s statement, while the Minister referred at [32] to the applicant’s representation that his life would be in danger, and that he would be killed due to the ongoing civil war, and that he would face starvation and poverty, there is no consideration of these claims. The Minister did not make any findings of fact, including as to whether the feared harm was likely to eventuate. Indeed, in the following paragraph, [33], there appears to be no reference to these representations at all, still less evidence of any active intellectual process of engagement with them. The failure to consider significant matters raised by the appellant’s representations was a failure to carry out the relevant function according to law: *Viane v Minister for Immigration and Border Protection* [2018] FCAFC 116; 263 FCR 531 at [75] (Colvin J), cited in *Omar* at [45].” (Para 39)
AJB18 v Minister for Home Affairs [2020] FCA 381 (Banks-Smith J) (Successful)	24 March 2020	55-79	The court allowed the appeal of a child applicant, born in Australia to Nepalese parents. In doing do, the court considered serious harm and significant harm, and the role of parents including in relation to mitigating harm. “Having carefully considered the reasons of the Tribunal and in particular what is said at [40], I consider that the Tribunal fell into error in the manner in which it carried out its statutory task. The

			identification of the period of the 'reasonably foreseeable future' was a matter for the Tribunal, having regard to the claims and the evidence. However, the Tribunal should have considered the particular fears as articulated on behalf of the child, assessed whether there was evidence to support them, considered the individual circumstances of the child and considered the circumstances of the country to which he would return. The generalised reference to the risk of not receiving or accessing 'a number of government services', or not having the same 'opportunities and rights', combined with the generalised reference to the child's 'basic needs' being met by his parents does not reveal a sufficient engagement with the claims or the task required." (Para 68) "The appellants appeared to accept through counsel that as part of the task of having regard to the particular circumstances of the child, the role of the parents may be relevant depending on the nature of the harm being considered. The real complaint, then, appears to be that the Tribunal referred to the role of the parents in a global sense, suggesting their support could meet or 'set off' the harm that might otherwise flow from denial of access to government services and other rights, even where such denied or diminished services or rights extend to matters such as access to education and the ability to travel overseas. The appellants submit that in order to properly undertake its task, the Tribunal needed to consider the discrete aspects of the claim and, had it done so, it would have found that the fears referred to in [40] could not be met by financial support of the child's

			parents, even assuming such support was to continue indefinitely. I accept that whilst financial support may well be relevant, it is not on its face an answer to the claims as a whole. Nor is it appropriate, practically speaking, to require parents to mitigate the risk of persecution where mere financial support cannot meet or mitigate the identified feared harm. It remained necessary for the Tribunal to consider and expose which of the claims it considered would be met by the parents' support as part of meeting the child's 'basic needs'." (Para 77)
EVK18 v Minister for Home Affairs [2020] FCAFC 49 (Flick, Griffiths and Moshinsky JJ) Unsuccessful)	24 March 2020	10-15	The court dismissed the appeal of a Jordanian appellant who claimed the Minister failed to resolve claims made, including in relation to fear or harm or grave danger and/or the impact upon mental health. In doing so, the Court discussed the relevance that a representation as to harm may assume. "But one particular aspect of this generally expressed principle is the necessity for the Minister (or an Assistant Minister) to give consideration to a "*representation*" which has been made as to the "*harm*" a visa holder may face if returned to a country of origin. One difficulty which was initially encountered in previous cases that have come before this Court arose because a representation as to "*harm*" may assume relevance to both a claim that that "*harm*" may provide "*another reason*" why a decision should be revoked (s 501CA(4)(b)(ii)), as well as giving rise to a consideration as to whether Australia owes non-refoulement obligations to the visa holder when

			considering a protection visa application. There is, however, a distinction between the two decision-making processes: *DOB18 v Minister for Home Affairs* [2019] FCAFC 63. Robertson J (with whom Logan J agreed) there identified that distinction as follows:" (Para 11)
FMN17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 326 (Steward J) (Successful)	16 March 2020	40-52	In allowing the appeal of a child applicant born to Pakistani parents, the court found that the Tribunal erred in failing to consider whether or not there was a "real risk" that the appellant would suffer "significant harm" from forcible marriage. "Here, the Tribunal did not make an attempt to determine what was likely to occur in the future as a result of its finding that there was a substantial risk that the appellant would be forcibly married. It did not appear to have considered the possibility that, for example, there was an equally substantial risk that if the appellant were to be forcibly married it might take place in a way that involved the imposition of extreme humiliation; that it might involve "threatening behaviour, abduction, imprisonment, physical violence, rape and in some cases murder", to use the language of the UK 2000 Home Office Working Group." (Para 48) "In that respect, the Tribunal was not required to make a positive finding, one way or the other, that the appellant would, if returned to Pakistan, be forcibly married in a way that would constitute one of the heads of "significant harm". Rather, the Tribunal was required to consider whether there was a "real risk" that the

			appellant would suffer "significant harm". The absence of specific evidence about the nature of such a forced marriage was no necessary barrier to a positive finding about the presence of that risk. The application of s. 36(2)(aa) of the *Act* mandates the making of a prediction about the future. The prediction made here by the Tribunal was that there was a substantial risk of the appellant being forcibly married. In other words, there was a substantial risk that the appellant would face in Pakistan an "appalling evil", to use the language of Lord Brown of Eaton-Under-Heywood J.S.C. Such a finding required the Tribunal to consequently make a prediction about whether or not there was a "real risk" that the appellant would thereby suffer "significant harm". With great respect, it did not do this." (Para 50)
XFKR v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 323 (Wheelahan J) (Unsuccessful)	13 March 2020	80-102	The court dismissed the appeal of an applicant from Myanmar, but in doing so considered the hierarchy between "primary" and "secondary" considerations, and the legal consequences of a decision including conclusions in relation to *non-refoulement* obligations.
FQD18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 313 (Katzmann J) (Unsuccessful)	12 March 2020	58-103	The court dismissed the appeal of Sri Lankan appellants, but in doing so considered sexual assault claims and significant risk of harm in the context of complementary protection obligations.
GBV18 v Minister for Home Affairs [2020] FCAFC 17 (Flick, Griffiths	25 February 2020	3, 9, 26-48	The court allowed the appeal of a South Sudanese applicant and in doing so discussed the consistency with

and Moshinsky JJ) (Successful)			the approach taken by the Full Court in *Minister for Home Affairs v Omar*. "For reasons which will shortly emerge, it is unnecessary to determine grounds 1, 2 and 4 because the appeal should be allowed on the basis of ground 3. In broad terms, this is consistent with the approach taken recently by the Full Court in *Minister for Home Affairs v Omar* [2019] FCAFC 188; 373 ALR 569. It should be emphasised that the primary judge here did not have the benefit of the Full Court's reasons for judgment in *Omar* when his Honour delivered his reasons for judgment in this matter on 29 July 2019." (Para 3) "The resolution of ground 3 turns in large measure on the extent to which the appellant raised his risk of harm if he were returned to South Sudan, independently of any *non-refoulement* obligations, as being "another reason" for revoking the visa cancellation decision and whether the AAT adequately addressed the issue in the relevant legal sense. The following matters relating to the material submitted by the appellant, or on his behalf, are relevant to assessing that issue (while acknowledging that a range of other matters were also raised by or on behalf of the appellant in support of his revocation request):" (Para 9) "The key relevant principles with reference to ground 3 may be summarised as follows: …" (Para 31)

			"*Omar* also provides helpful guidance on what is meant by the obligation of a decision-maker to "consider" a matter in the context of a judicial review (see at [35]-[37]). The reasons for judgment in the present case should be read as though those paragraphs were incorporated here. For convenience, the key relevant points may be summarised as follows." (Para 32)
ADH17 v Minister for Immigration and Border Protection [2020] FCA 53 (O'Bryan J)(Unsuccessful)	7 February 2020	35-49	In dismissing the appeal of a Chadian appellant the court discussed principles governing the application of s 36(2B)(c) of the Act. "The above cases illustrate that the proper construction and application of s 36(2B)(c) in various circumstances may not be straightforward. The exception juxtaposes the concept of a risk faced by the population of a country generally with a risk faced by the non-citizen personally. Each of *SZSPT* and *BBK15* support the conclusion that the phrase "faced by the population of the country generally" does not mean that the risk must be faced by everyone in the country. The question of when a risk is "general" and not "personal" for the purposes of s 36(2B)(c) may be difficult to determine, particularly if the risk is geographically located, as in *BCX16*. While *BCX16* concerned a risk in the capital city of a country (Kabul), questions might arise whether a risk is personal and not general for the purposes of s 36(2B)(c) if it exists in a wider geographic area, for example the northern half of a country compared with the southern half." (Para 42)

YNQY v Minister for Home Affairs [2020] FCA 56 (6 February 2020) (Moshinsky J) (Successful)	6 February 2020	44-54	The court allowed the appeal of a South Sudanese appellant who claimed that the Tribunal failed to consider whether the applicant would face certain forms of harm in South Sudan (independently of whether the risk of harm was of such a kind that Australia owed non-refoulement obligations with respect to the applicant). "At [165]-[167] and [172]-[176], the Tribunal considered the applicant's claims only through the lens of Australia's non-refoulement obligations, as implemented by the *Migration Act*. That the Tribunal considered the claims in this way is apparent from the emphasised portions of [165]-[167] and [172]-[176] (as set out earlier in these reasons) including, for example, the reference to "serious or significant Convention-related harm" in the last sentence of [165], and the references to "complementary protection" and "serious or significant harm within the meaning of the Act" in the last sentence of [167]. In these passages, the Tribunal did not, therefore, consider the applicant's claims *irrespective* of whether they engaged Australia's non-refoulement obligations (as implemented by the *Migration Act*). It is, however, clear that the applicant's claims were put on this (wider) basis. This was emphasised in the applicant's statement of issues, facts and contentions, in particular at [68] and [99]. In those paragraphs, the applicant explicitly acknowledged that some of the harms he would face could not solely be characterised as "serious" or "significant" harm, and submitted that the Tribunal was required to consider all

			of the levels and types of harm he would face." (Para 49) "It follows from the preceding paragraphs that the Tribunal did not deal with the applicant's claims set out in [47] above other than through the lens of Australia's non-refoulement obligations (as implemented by the *Migration Act*). The error in the present case is similar to that discussed by Perram J in *Ezegbe* at [27]-[28]. The claims referred to in [47] above were significant and clearly expressed representations. There is no issue between the parties that the Tribunal was required to consider all of the integers of the claims put by the applicant. For the reasons set out above, the Tribunal failed to do so. Had the Tribunal considered these claims, it may have affected its conclusion. Had the Tribunal considered, for example, the representation regarding "destitution and famine", it may have concluded that this was a factor weighing in favour of revocation. This could have affected its ultimate conclusion. The failure to deal with the applicant's claims constituted a jurisdictional error. It follows that the decision of the Tribunal should be set aside and the matter remitted to the Tribunal for determination according to law." (Para 53)
GLD18 v Minister for Home Affairs [2020] FCAFC 2 (Allsop CJ, Mortimer and Snaden JJ) (Unsuccessful)	5 February 2020	1-2, 31-58, 103	The court dismissed the appeals of two applicants, one from Nigeria and one from the United Kingdom, but in doing so discussed the meaning of "significant harm". "These two appeals, which were heard together, raise the same question about the nature and scope of the complementary protection criterion in s 36(2)(aa) of the

			Migration Act 1958 (Cth). The question is: can a person satisfy the criterion in s 36(2)(aa) if the harm she or he identifies arises because of separation from her or his family members, who – for one reason or another – will not in fact return with that person to her or his country of nationality?" (Para 1) "In our opinion, that question should be answered in the negative. In each case, the Federal Circuit Court was correct to reject the appellants' arguments on this matter. In each case, the Federal Circuit Court applied the decision of Mansfield J in *SZRSN v Minister for Immigration and Citizenship* [2013] FCA 751. The appellants in these appeals also sought to challenge the correctness of that decision. That challenge should fail." (Para 2) "The immediate observation to make, and the proposition with which the appellants' arguments failed to grapple in a satisfactory way, is that each category of harm looks to the conduct of an actor or perpetrator, and identifies the visa applicant as the subject of the conduct of that actor or perpetrator." (Para 31) "There are at least two separate issues arising from the appellants' contentions on grounds one and two: (a) the proper construction of the criterion in s 36(2)(aa), in terms of the circumstances in which the risk of significant harm must arise; and (b) whether physical or mental harm arising by reason

			of the separation of a family (relevantly, but perhaps not exclusively, of a parent from her or his children) and consequent upon the visa applicant's removal from Australia, can constitute "significant harm" for the purposes of the criterion in s 36(2)(aa), read with the definitions of significant harm in s 36(2A) and s 5(1)." (Para 33) … Judgement of Snaden J "With respect to those who think otherwise, I would be slow to conclude that "significant harm" extends no further, conceptually, than to harm that a visa applicant might endure at the hands of others. It might well be that an applicant could, for want of adequate mental health, subject him or herself to the sort of harm upon which complementary protection is premised. If, for example, there was a basis for thinking that a visa applicant, upon (and because of) his or her removal from Australia, would be inclined to self-harm, and that that inclination might extend to or beyond the standard of "cruel or inhuman treatment or punishment" (perhaps because it involved the intentional self-infliction of severe pain), there is no obvious reason why that might not qualify as a risk of the kind to which s 36(2)(aa) of the Act is directed." (Para 103)
ZYVZ v Minister for Immigration, Citizenship, Migrant Services and	24 January 2020	31-85	In dismissing the application of a Sri Lankan appellant the court considered s 36(2C) and in particular the non-political crimes of gang rape and abduction and "serious reasons for considering".

Multicultural Affairs [2020] FCA 28 (Colvin J) (Unsuccesful)			
CXO16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 17 (Wheelahan J) (Successful)	16 January 2020	29-52	The court allowed the appeal of an Afghan Shia Muslim appellant as the IAA did not examine the security situation in Kabul for the purposes of considering reasonableness of relocation. "The Authority's failure in the course of its review function under s 473CC of the *Migration Act* to consider the general security situation in Kabul for the purposes of evaluating the reasonableness of relocation was a failure to consider a significant objection to relocation which the appellant had squarely raised by the submissions made on his behalf to the delegate and to the Authority: see *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* [2004] FCAFC 263; (2004) 144 FCR 1 at [58], [60]-[61]. Those submissions were part of the framework set up by the objections of the appellant to relocation to Kabul: see, *SZMCD v Minister for Immigration* at [124] (Tracey and Foster JJ), citing *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* [1994] FCA 1253; (1994) 52 FCR 437 at 443 (Black CJ, Whitlam J agreeing). Another conclusion is that in assessing the appellant's objections to relocation to Kabul on the basis of the general security situation in Kabul, the Authority confined its consideration to only one limb of s 36(2B)(a) of the *Migration Act*, and thereby proceeded upon a legally erroneous

			appreciation of the dual criteria in s 36(2B)(a)." (Para 51) "Had the Authority considered the question of reasonableness of the appellant relocating to Kabul having regard to the general security situation there, there was a realistic possibility of a different outcome on review, and therefore the error was material and was jurisdictional: *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3; 363 ALR 599 at [45]." (Para 52)
CCR18 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCA 9 (Jackson J)(Successful)	13 January 2020	26-49	The court allowed the appeal of an Afghan appellant noting that "… I do not consider that the scheme of s 473DC and s 473DD dictates that the Authority must follow any such elaborate course. What the scheme does require is that in the appropriate circumstances, the Authority must decide whether to get new information. That will be confined by the requirements of s 473DC(1)(a) and s 473DC(1)(b). But it must not be confined by any view that, because the absence of 'exceptional circumstances' within the meaning of s 473DD(a) rules out any consideration of the new information, there is no need to determine whether to get the information." (Para 48)
AIJ19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2019] FCA 2205 (Perry J) (Successful)	24 December 2019	54-75	The court allowed the application of Sudanese applicant finding that the Assistant Minister did not give meaningful consideration to the applicant's claims to fear harm where he had previously been tortured and caused extreme suffering. In doing so the court discussed *Omar (FCAFC)* and the duty to consider the

			merits of a case and to give meaningful consideration to a clearly articulated and substantial or significant representation on risk of harm independently of a claim concerning Australia's *non-refoulement* obligations. "As earlier explained, ground 1(c) relies upon the decision in *Omar (FCAFC)*. That decision turned upon the question of whether the Assistant Minister had made a jurisdictional error by failing to consider the matters (including factual matters) raised by the respondent in his representations made under s 501CA(3) as reasons for revoking the visa cancellation decision, irrespective of whether these matters engaged any of Australia's *non-refoulement* obligations. In *Omar (FCAFC)*, the representations by the respondent, Mr Omar, included a representation that even if the Minister considered that it was unnecessary to consider *non-refoulement* obligations, the cogent evidence of Mr Omar's fragile mental state remained apposite (*Omar (FCAFC)* at [9])." (Para 54) "However, while the Assistant Minister accepted that the applicant "*would face* ***hardship*** *arising from the conflict in his home country*", that finding falls well short of a finding as to whether or not he may suffer torture or extreme suffering or be exposed to highly dangerous conditions (Assistant Minister's reasons at [33]; emphasis added). Yet the Assistant Minister accepted that Sudan was (still) a "*conflict-affected third world country*" (at [23]; see also at [33]) and that the applicant "*has* ***previously*** *experienced torture and extreme suffering*" in his home country (at [33];

			emphasis added) because of the conflict – a finding which it can reasonably be inferred was based at least in part upon the fact of the earlier grant of the humanitarian visa to the applicant. Despite those findings, there is no consideration by the Assistant Minister of whether the situation in Sudan had changed such that, notwithstanding the ongoing conflict, the applicant was no longer at risk of suffering to the same extreme level as the Assistant Minister accepted he had been subjected to in the past." (Para 67) "It also follows that while the applicant's submissions about the harm which he says that he would face if returned are brief as the Minister submits, that brevity must be understood in a context where the Department has already accepted that the applicant would be subjected to discrimination amounting to a gross violation of human rights in Sudan." (Para 68)
BAL19 v Minister for Home Affairs [2019] FCA 2189 (Rares J) (Successful)	24 December 2019	30-55	A Sri Lankan citizen of Tamil ethnicity who was found to be a refugee and to whom Australia owed non-refoulement obligations established jurisdictional error in the personal decision of the Minister to refuse to grant a protection visa. 'The Minister committed a material jurisdictional error. What the Minister said in [94]-[97] of his reasons demonstrated that he did not approach the exercise of the discretion under s 501(1) on the basis that a refusal would have the legal or practical consequence of refoulement (as the direct and immediate result) that ss 197C and 198 mandated, in spite of this country's non-

			refoulement obligations owed to the applicant. He acted unreasonably (*Minister for Immigration and Citizenship v Li* [2014] FCAFC 1; (2013) 249 CLR 332 at 362-363 [63]) and did not address the correct question, namely what would happen to the applicant (*i.e.* the legal or practical consequence) if the visa were not granted because of the "unacceptable" risk that the Minister found **and**, as must then happen, he were returned to Sri Lanka where, the Minister also found, there is a real chance that the applicant would be persecuted as a person who had been involved with the LTTE for 10 years.' (Para 54)
XMBQ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2019] FCA 2134 (Davies J) (Successful)	19 December 2019	3-12	A Somali applicant' established error in the Tribunal's decision not to revoke the mandatory cancellation of his refugee visa for failure to engage meaningfully with claims relating to the risks of harm if returned to Somalia, including about the nature and probability of the risk of harm.
EZC18 v Minister for Home Affairs [2019] FCA 2143 (Besanko J) (Successful)	19 December 2019	30-47	In dismissing a British applicant's appeal of a decision to refuse a protection visa, the court considered whether suicide falls within the terms of ss 36(2A)(a) and 36(2)(aa) and whether it amounts to an arbitrary deprivation of life. The court discussed the issue by reference to the receiving country's response to the risk of suicide and deprivation of life by the applicant's own hand.
CTB19 v Minister for Immigration, Citizenship, Migrant Services and	18 December 2019	29-49	An Iraqi, Assyrian Christian established jurisdictional error in the failure of the Tribunal to adequately consider the applicant's fear or harm if returned to Iraq (an how this relates to *non-refoulement* obligations) in a

Multicultural Affairs [2019] FCA 2128 (Stewart J) (Successful)			decision not to revoke the mandatory cancellation of a humanitarian visa.
DKT16 v Minister for Immigration and Border Protection [2019] FCAFC 208 (Davies, Moshinsky and Snaden JJ) (Unsuccessful)	2 December 2019	11-49	In dismissing a Nepalese, HIV-positive widow's appeal of a refusal to grant a protection visa, the Court discussed significant harm, degrading treatment or publishment and cumulative risks. 'We do not accept that the Tribunal should be understood to have overlooked the subjective impacts upon the appellant of the relevant discriminatory or adverse treatment. As the analysis above demonstrates, it is plain that the Tribunal was conscious of the different species of treatment to which the appellant claimed that she would be subjected upon her return to Nepal, and of her contention that they would visit extreme humiliation specifically upon her. The Tribunal concluded that the appellant had embellished some of those claims, and that the adverse or discriminatory treatment to which *she* had been subjected in Nepal was of a moderate level only. There is no warrant to infer, in those circumstances, that the Tribunal did not consider the subjective impact that the treatment would have on the appellant. There is nothing about the Tribunal's approach in this case to the question of whether or not the appellant might be subjected to "extreme humiliation" that bespeaks jurisdictional error.' (Para 45) 'Likewise, that the Tribunal's analysis focused upon physical and discriminatory mistreatment was neither misplaced nor surprising. It reflected the bases upon

			which the appellant claimed that she satisfied the complementary protection criterion upon which the determination of her Visa Application partly rested. The appellant claimed that she had been and/or would be subjected to torture and discriminatory treatment in Nepal on account of her status as an HIV-positive widow. Those were the circumstances that the Tribunal was required to consider and it did so. It did not thereby import requirements of physical or discriminatory mistreatment into the statutory concepts with which it had to grapple (namely, "significant harm", "degrading treatment or punishment" and "extreme [and unreasonable] humiliation"); it simply considered whether the instances that the appellant advanced were sufficient to engage those concepts in a manner favourable to her Visa Application. Its conclusion that they were not was not one affected by jurisdictional error.' (Para 46) 'In our view, that is not a hurdle that the appellant in this case can clear. The adverse and discriminatory treatment to which the appellant is at risk of being subjected upon returning to Nepal was found to be of a "moderate level". Given the Tribunal's conclusions about the appellant's credibility, there is no prospect that it might have decided the Review Application in the appellant's favour but for any statutory misconstruction on this front (if there was one).' (Para 48)
AWU15 v Minister for Immigration and Border	2 December 2019	47-69	A Pakistani applicant, a member of the Yousafzai Pashtun tribe, and a Sunni Muslim established

Protection [2019] FCA 2008 (Kerr J) (Successful) (See also AWU15 v Minister for Immigration and Border Protection (No 2) [2019] FCA 2132 relating to suppression or redaction of reasons)			jurisdictional error in the failure to consider claims advanced relating to pre-trial detention in circumstances that would be different to those facing ordinary citizens.
CPE16 v Minister for Immigration and Border Protection [2019] FCA 2007 (Jagot J) (Succecssful)	29 November 2019	7-18	An Afghan, Hazara, Shia Muslim established jurisdictional error in the refusal to grant a protection visa due to the manner in which the reasonableness of relocation was considered on the facts in a context where the applicant would be required to travel between Kabul and Herat for his petrol selling business.
DYY18 v Minister for Home Affairs [2019] FCA 1901 (Steward J) (Successful)	18 November 2019	28-51	The South Sudanese appellant established jurisdictional error in the manner in which *non-refoulement* obligations were considered in a decision to not revoke the mandatory cancellation of a visa.
FBW18 v Minister for Home Affairs [2019] FCA 1878 (Yates J) (Unsuccessful)	15 November 2019	26-90	In dismissing a Sudanese applicant's application for judicial review of a decision not to revoke the cancellation of a visa, the Court discusses jurisprudence on the manner in which *non-refoulement* obligations should be considered.
DGI19 v Minister for Home Affairs [2019] FCA 1867 (Moshinsky J) (Successful)	14 November 2009	45-98	A Sierra Leone appellant established jurisdictional error, including in relation to the manner in which *non-refoulement* obligations were considered in the context of a decision not to revoke the cancellation of his visa. The court discusses jurisprudence and the role *non-refoulement* obligations play in the exercise of a

			discretionary power and in the context of an application for a protection visa. ‘In my view, on the basis of the reasons of the majority in *BCR16* at [48]-[49], as applied in *Omar (first instance),* the applicant’s ground is made out. For the reasons given by the majority in *BCR16*, there is a qualitative difference in the role that non-refoulement obligations may play in the context of the exercise of the discretionary power in s 501CA and in the context of an application for a protection visa under s 65. It follows that, if and to the extent that the Minister proceeded on the basis that non-refoulement obligations would be considered in the same way, he proceeded on the basis of a misunderstanding as to the operation of the *Migration Act*. In my view, in the present case, the Minister did proceed on the basis of such a misunderstanding. It is implicit in his reasons for not considering non-refoulement obligations (see [30] above) that he understood that such obligations would be considered in the same way in the context of an application for a protection visa. In this respect the Minister’s statement of reasons is materially the same as the statement of reasons in *Omar (first instance)*.’ (Para 66)
ZMBZ v Minister for Home Affairs [2019] FCAFC 195 (Perram, Stewart and Abraham JJ) (Successful)	11 November 2019	15-49	The Court allowed the appeal of a Rohingya, Sunni Muslim with HIV from Myanmar, who had been refused a protection visa. The court discussed whether the appellant’s ethnicity and religion had been considered in the context of *non-refoulement* obligations owed to the appellant.

EKC19 v Minister for Home Affairs [2019] FCA 1823 (Davies J) (Successful)	8 November 2019	19-30	The Court set aside a decision of the Minister to cancel a Nuer, Christian, South Sudanese applicant's visa finding that the Minister did not give genuine consideration to the applicant's representations as to prospects of harm on return to South Sudan and the Minister erred in reasoning that non-refoulement obligations would be considered in processing a protection visa application. 'The obligation on the Minister or his delegate to give meaningful consideration to a representation on harm independently of a claim concerning Australia's non-refoulement obligations was very recently affirmed by the Full Court in *Minister for Home Affairs v Omar* [2019] FCAFC 188 at [34(i)], [39] and [40]. That obligation requires "an active intellectual engagement with the matters raised ... relating to the risk of harm" and the failure to consider may constitute a failure to carry out the statutory task and give rise to jurisdictional error: *Omar* at [41].' (Para 22) 'Although the Minister stated that he took into account the situation in South Sudan in forming the conclusion that the applicant will face hardship if returned there, merely taking account of the fact of civil war did not engage with the representations made on behalf of the applicant, which were before the Minister, namely that country information indicated that there was targeted violence against the Nuer ethnic community of which the applicant is a member, including killings, abductions, unlawful detentions, deprivation of liberty, rape and sexual violence. The Minister did not engage,

			in any meaningful way, with the nature and gravity of the possibility that the applicant would be killed because of his ethnic group and the reasons simply do not disclose a genuine consideration of all the claimed consequences of the decision (including death). The "obligation of real consideration" required the Minister to give proper and adequate consideration to all the claims made by the applicant and the failure to do so constituted jurisdictional error as there is plainly a realistic possibility that the Minister's decision could have been different if he had given proper and meaningful consideration to all the applicant's claims: *Minister for Immigration and Border Protection v SZMTA* (2019) 93 ALJR 252; [2019] HCA 3 ("***SZMTA***") at [45] (Bell, Gageler and Keane JJ).' (Para 24) 'The Full Court in *Ibrahim* held at [112] that the like reasoning in that case involved a misapprehension that Australia's non-refoulement obligations under international law would be considered in an application for a protection visa, whereas non-refoulement obligations under international law were not co-extensive with the protection visa criteria. Relevantly, the internal relocation principle in relation to the existence or otherwise of non-refoulement obligations no longer forms part of the consideration of an application for a protection visa under s 36(2)(a) of the Act. The Minister accepted that as this Court is bound by *Ibrahim* in this proceeding, there was legal error in the Minister's reasons by the conflation of the criteria for the grant of a protection visa under s 36 of the Act

			with Australia's non-refoulement obligations under international law.' (Para 28) 'It was argued for the applicant that the legal error constituted jurisdictional error because the error was material in the sense that there is clearly a "realistic possibility" that, if the Minister had not made the same misunderstanding of the Act in the present case as the Assistant Minister did in *Ibrahim*, he might have made a different decision: cf *SZMTA* at [45] (Bell, Gageler and Keane JJ). It was argued that had the Minister correctly understood that non-refoulement obligations would not be considered, and that the protection visa criteria do not reflect Australia's non-refoulement obligations, he may well have decided to consider whether Australia owes non-refoulement obligations to the applicant. Thus, it was said, it is clearly possible that the Minister would have been persuaded that non-refoulement obligations were owed and that this was a reason not to cancel the applicant's visa.' (Para 29) 'The Minister argued to the contrary that the error was not shown to be material, and the reasons demonstrate that the Minister accepted the underlying claim that the Applicant would face hardship "arising from famine and civil war" were he to return to South Sudan. Thus, it was said, the possibility of internal relocation was not raised by the Minister as a reason to reject the claim to fear harm on the applicant's return, so that the difference between international law and statutory criteria could not affect the findings actually made: cf *Hossain* at [35] (Kiefel CJ, Gageler and Keane JJ).

			However, it was also conceded for the Minister that if the Court found for the applicant on ground 3, it could not be said that there was no realistic possibility that the Minister might have made a different decision had the Minister not made the same misunderstanding of the Act as the Assistant Minister did in *Ibrahim*. In view of my conclusion on ground 3, the applicant also succeeds on ground 2(c)(iii).' (Para 30)
CWGF v Minister for Home Affairs [2019] FCA 1802 (Gleeson J) (Successful)	7 November 2019	20, 33-43	The Court found jurisdictional error in a Tribunal decision affirming the mandatory cancellation of an Iranian applicant's protection visa, due to the Tribunal's failure to give proper, genuine and realistic consideration to the real possibility that, as a consequence of the Tribunal's refusal to exercise its discretion in the applicant's favour, the applicant faced refoulement to Iran. 'In considering whether to revoke the cancellation of the applicant's visa, the Tribunal had an obligation to take into account the legal consequences of its decision by reason of its knowledge that Australia had currently existing non-refoulement obligations in respect of the applicant: cf. *FRH18 v Minister for Home Affairs* [2018] FCA 1769 at [44].' (Para 33) 'However, the Tribunal did not squarely identify the legal consequence of its decision that the applicant would be required to be removed "as soon as reasonably practicable". Instead, the Tribunal found that the applicant would *only* be removed "if it is reasonably practical to do so". The Tribunal's reasons do not

			address the implications of this finding in relation to Australia's non-refoulement obligations; they do not address the meaning of the phrase "as soon as reasonably practicable" or what practical considerations might affect whether or not it would become "reasonably practicable" to remove the applicant. In particular, the Tribunal's reasons do not address the applicant's submission, recorded at [95] of its decision record, that the Minister's plans for compliance with the duty to remove were unclear.' (Para 37) 'Although the Tribunal refers (at [97]) to the aim of effecting removals "in a timely manner", the decision record does not reveal how this aim affected its consideration of the legal consequence of its decision.' (Para 38) 'Although the Tribunal implicitly contemplates at [100] and [102] that the applicant might be returned to Iran in breach of Australia's non-refoulement obligations as a consequence of its decision, its decision record does not directly refer to that potential breach or consider its significance (generally or in relation to the applicant specifically), referring only to the "existence of the non-refoulement obligation" and to the fact that the applicant is a person "to whom Australia has non-refoulement obligations".' (Para 39) 'Further, the decision record does not record any consideration of the likely significant harms that were conceded to follow from the applicant's removal to Iran, as opposed to the fact of the Minister's

			concession. The Tribunal's finding at [102], balancing only the applicant's expressed concerns against the risk posed by the applicant to the Australian community, strongly suggests that the Tribunal did not give active consideration to the likely significant harms. That suggestion is reinforced by the absence of reference to those harms in considering the extent of impediments that the applicant may face if removed to Iran.' (Para 40)
AJI16 v Minister for Immigration and Border Protection [2019] FCA 1769 (Perram J) (Unsuccessful)	31 October 2019	24-34	The Court dismissed a Bangladeshi applicants appeal from a decision refusing to grant a protection visa, but in doing so discussed difficulties the applicant would face in terms of access to medicine if retuned to Bangladesh, complementary protection, the ICCPR and Human Rights Committee decisions.
Minister for Home Affairs v Omar [2019] FCAFC 188 (Allsop CJ, Bromberg, Robertson, Griffiths and Perry JJ) (Unsuccessful)	29 October 2019	3-5, 26-46	The Court dismissed the Minister's appeal from orders made that gave effect to the primary judge's reasons for judgment (published as *Omar v Minister for Home Affairs* [2019] FCA 279.) which set aside a decision by the Assistant Minister under s 501CA(4) in which he declined to revoke the mandatory cancellation of a Somali respondent's partner visa. The Court examined the duties to consider non-refoulement obligations and to consider matters (including factual matters) raised by the respondent in his representations made under s 501CA(3) as being a reason for revoking the visa cancellation decision, irrespective of whether these matters engaged any of Australia's non-refoulement obligations.

			'The key issues which potentially arise may be summarised as follows: (a) Did the primary judge err in finding that the Assistant Minister fell into jurisdictional error in making his decision under s 501CA(4) by deferring consideration of any *non-refoulement* obligations to a future protection visa application by the respondent? (b) Are *non-refoulement* obligations mandatory relevant considerations under s 501CA? (c) Is the decision of the Full Court in ***Ibrahim*** *v Minister for Home Affairs* [2019] FCAFC 89 at [106]-[116] plainly wrong, as contended by the Minister? In light of this contention, the Chief Justice directed that the appeal be heard by five Judges. (d) Does Direction No 75 reverse the effect of ***BCR16*** *v Minister for Immigration and Border Protection* [2017] FCAFC 96; 248 FCR 456? (e) Did the primary judge err, as contended by the respondent, in not holding that the Assistant Minister had made a jurisdictional error by failing to consider the matters (including factual matters) raised by the respondent in his representations made under s 501CA(3) as being a reason for revoking the visa cancellation decision, irrespective of whether these matters engaged any of Australia's *non-refoulement* obligations.' (Para 3)

			'In oral address, the Assistant Minister accepted that if issue (e) was determined in the respondent's favour, the other issues did not arise for determination.' (Para 4) 'As will shortly emerge, we consider that issue (e) should be determined in the respondent's favour, consequently the other issues need not be determined, including the challenge to the correctness of *Ibrahim*. Also, although issue (a) need not be determined separately from issue (e), there is some overlap between the two issues inasmuch as there are some factual matters which underpin both issues.' (Para 5) 'The failure to consider, in the relevant legal sense, a substantial or significant and clearly articulated claim raised by the representations actually made and the acceptance of which could, in the present statutory context, constitute "another reason" for revoking the visa cancellation, may constitute a failure to carry out the statutory task and give rise to jurisdictional error (see *Viane* at [28]-[30] per Rangiah J and at [67] per Colvin J and *Ezegbe* at [37] per Perram J).' (Para 41) 'Applying those principles to the particular circumstances here, we shall now explain why we respectfully consider that the primary judge was wrong to find at [64] and [65] that the Assistant Minister: (a) "did examine risks of harm to the applicant if he had to return to Somalia"; and

			(b) that he "accepted there would be harm, but found that in the exercise of the revocation discretion, other factors outweighed whatever harm the applicant might suffer in Somalia"; and (c) that he "appeared to accept at a factual level, and certainly did not reject, all the substantial factual contentions put on behalf of the applicant in submissions about the significant difficulties and the likely harm he would experience in trying to exist in Somalia".' (Para 42) 'We are left with the abiding impression that part, possibly a large part, of the reason why the Assistant Minister failed to engage fully and meaningfully with the respondent's representations on this topic was because of the Assistant Minister's belief that they could be deferred and dealt with at a later stage of the decision-making process, whether in the context of a protection visa application or the Minister's consideration of the exercise of his various non-compellable powers under the *Act*. But to proceed in that fashion is to fail to recognise and give effect to the distinction identified by Robertson J in *DOB18* at [185] (with whom Logan J agreed) (see [34(f)] above.' (Para 44) 'Consistently with Colvin J's judgment in *Viane* at [75], we consider that the Assistant Minister's failure to consider in the relevant legal sense significant matters raised clearly by the respondent in the representations is a failure to conform with the *Act* or, to put it another

			way, to carry out the relevant statutory function according to law. As Colvin J stated at [75]: ... The statutory requirement for the Minister to invite representations must lead to the conclusion that if representations are made as to significant matters then the Minister must consider whether to revoke the original cancellation and do so by considering the representations as to those matters. Jurisdictional error, in the sense relevant in the present case, consists of such a material breach of an express or implied condition of the valid exercise of a decision making power conferred by the *Migration Act*: *Wei v Minister for Immigration and Border Protection* [2015] HCA 51; 257 CLR 22 at [23]- [26].' (Para 45) 'The Assistant Minister's error is material and gives rise to jurisdictional error because there is a possibility that if the Assistant Minister had truly engaged in an active intellectual process with the significant matters put forward by the respondent on the likelihood of harm, he may have come to a different conclusion on the issue of revocation.' (Para 46)
RZSN v Minister for Home Affairs [2019] FCA 1731 (Anderson J) (Unsuccessful)	24 October 2019	72-103	The court dismissed an Iraqi applicant's appeal of a Tribunal decision not to revoke the mandatory cancellation of the applicant's Class BA Subclass 202 (Global Special Humanitarian) visa. In doing so, the Court discussed the assessment of Australia's non-refoulement obligations as the applicant contended that the Tribunal erred in various ways in the manner in

			which it addressed (or failed to adequately address) any international non-refoulement obligations.
CLM18 v Minister for Home Affairs [2019] FCAFC 170 (Perram, Robertson and Abraham JJ) (and CLM18 v Minister for Home Affairs (No 2) [2019] FCAFC 194) RZSN v Minister for Home Affairs [2019] FCA 1731	8 October 2019 (and 7 November 2019)	10-64	This case is relevant to procedure for considering non-refoulement obligations. It concerned a Sri Lankan Tamil applicant who had arrived in Australia by boat in October 2012, but was not permitted to make an application for protection until mid-2016. People who fell into this so-called 'legacy caseload' were given a deadline to apply for protection by 1 October 2017. The applicant made a late application, which was rejected by the Department. The question was whether the Minister's exercise of his power under s 46A(2C) to revoke his determination to allow certain persons (including the applicant) to lodge an application for a protection visa was subject to a requirement of procedural fairness, and if so, whether the appellant was afforded procedural fairness. 'In my opinion, a sufficient interest is established. The consequence of the Minister having made a personal procedural decision and of the Appellant having a sufficient interest to attract the rules of procedural fairness is that, because he was not shown the adverse country information, he was denied procedural fairness. As noted above at [28], the Minister did not dispute that if an obligation of procedural fairness was owed, it was breached in the Appellant's case. I would therefore uphold grounds 3 and 4. The appeal should be allowed and the parties given an opportunity to frame the

			appropriate form of the relief.' (Para 64)
BDQ19 v Minister for Home Affairs [2019] FCA 1630 (Kerr J) (Successful)	4 October 2019	97-105	The Court found jurisdictional error in the Tribunal's decision to affirm the mandatory cancellation of an Afghan applicant's Permanent Resolution of Status Visa as the Tribunal failed to consider risk of harm to the applicant if returned by virtue of risk to civilians. An ITOA assessment had found that the applicant was owed non-refoulement obligations both under the 1951 Refugee Convention and the complementary protection provisions. 'The nub of this issue is whether, as Mr Brown submits, the first limb of Ground 2, which relates to collateral consequences of returning to Afghanistan as a civilian, was picked up in, and subsumed by, the Tribunal's finding that there had indeed been a decision made by the ITOA assessor that the applicant was owed *non-refoulement* obligations.'(Para 96) 'However, when the reasoning and conclusions of the ITOA are closely examined the first of Mr Brown's propositions appears to be unsound. The ITOA does refer to a significant body of country information which might be relevant to the collateral risk that BDQ19 might face if he were to return to Afghanistan as a civilian. However, that material is drawn on only in respect of the ITOA's ultimate conclusion that BDQ19 had a reasonable fear that he would be killed by the Taliban. That conclusion was the exclusive basis for the ITOA's assessment that BDQ19 was owed *non-refoulement* obligations both under the *Refugee*

			Convention and the complementary protection provisions of the *Convention Against Torture* and the *International Covenant on Civil and Political Rights* as have been codified by ss 36(2)(aa) and 36(2A) of the Migration Act.'(Para 98) 'For that reason, I do not accept Mr Brown's submission that the further risks which BDQ19 might face as a civilian must be understood as having been subsumed within the Tribunal's acceptance of the conclusions of the ITOA.' (Para 99) 'Mr Brown does not submit that BDQ19 did not advance a substantial contention before the Tribunal that this was another reason why the earlier revocation of his visa should be revoked.' (Para 100) 'Nor, in my view, is it plausible to suggest that BDQ19's submission in this regard was in respect of a matter capable of being validly dismissed without the Tribunal referring to it.' (Para 101) 'The collateral risk of harm that BDQ19 might face simply by being present in a place riven by violent extremism was a factor that the Tribunal was required to consider. It potentially added to the risks BDQ19 would face as a person specifically targeted by the Taliban if he were to return to Afghanistan. It was a matter the Tribunal was bound to take into account (if it accepted the truth of the proposition) pursuant to cl 14(1)(e) of Ministerial Direction No 65.' (Para 102)

			'I decline to accept that the Tribunal's failure to consider that claim was immaterial. The weighing of all relevant considerations, guided by Ministerial Direction No 65, is for the Tribunal, not the Court. It is not open to this Court to reason that had that additional factor been placed in the balance in BDQ19's favour, the Tribunal necessarily would have made the same decision.' (Para 103)
CAR15 v Minister for Immigration and Border Protection [2019] FCAFC 155 (Allsop CJ, Kenny and Snaden JJ) (Successful)	9 September 2019	17-18, 20	The court allowed the appeal of a Nigerian applicant, born in Australia in 2013, who was found to be at risk of significant harm in the form of female genital mutilation, if retuned to Nigeria. The court found jurisdictional error as the Tribunal misunderstood the state of satisfaction that it was to form under s 36(2B)(a) and, consequently, directed itself to the wrong question: namely, whether it was reasonable for the appellant's parents to relocate to Lagos with her and her sister. It proceeded to determine whether the appellant was at risk of "significant harm" for the purposes of s 36(2)(aa), without properly understanding in what circumstances s 36(2B)(a) of the Act recognised that she might not be.
Minister for Immigration and Border Protection v CTW17 [2019] FCAFC 156 (Robertson, Farrell and Wigney JJ) (Successful)	5 September 2019	20-41	The court allowed the Minister's appeal and found that the FCCA had erred in holding that three separate protection visa applications sent to the department in 2017 on behalf of three respondents were valid. An application for a protection visa had been made on behalf of the respondents in 2010 and had been refused and the question was whether s.48A(1AA) prevented a further application for a protection visa which relied on

			complementary protection criteria in s.36(2)(aa).
CHJK v Minister for Home Affairs [2019] FCA 1330 (Flick J) Successful)	23 August 2019	12-27, 29	A South Sudanese applicant's appeal of a decision not to revoke the mandatory cancellation of his protection visa was allowed. The Tribunal was found to have fallen into jurisdictional error for not having considered an international treaties obligations assessment relating to *non-refoulement* obligations.
AXT19 v Minister for Home Affairs [2019] FCA 1423 (Logan J) Unsuccessful)	23 August 2019	14-27	This case concerned an application for an extension of time and for judicial review of a decision of the AAT not to revoke the mandatory cancellation of a visa pursuant to s 501CA(4) in which the applicant possessed a refugee visa. The FCA discussed practice and judicial authority concerning the requirement, if any, to consider *non-refoulement* obligations and the possibility to make a future application for a protection visa where the claims could be assessed.
FQM18 v Minister for Home Affairs [2019] FCA 1263 (Davies J) Successful)	14 August 2019	3-15	A material error was found where an applicant for a mandatory cancellation of visa under s 501(3A) argued that the Minister erred by conflating protection obligations under s 36 with international *non-refoulement* obligations.
GBV18 v Minister for Home Affairs [2019] FCA 1132 (Anderson J) Unsuccessful)	29 July 2019	Extensive	The FCA dismissed a South Sudanese applicant's appeal from an AAT decision not to revoke cancellation of a Global Special Humanitarian visa, on the basis that the decision did not disclose jurisdictional error. Nonetheless, this case is flagged here as it contains an extensive discussion of whether and how, decision

			makers should consider *non-refoulement* obligations in the context of visa cancellation. 'The grounds of review advanced in this Court by the applicant primarily centered on the extent to which, and the manner in which, a decision-maker under s 501CA(4) is to consider whether or not Australia's owes non-refoulement obligations to the person whose visa was cancelled. Debate persists as to the correct approach. This is largely due to the feature of the legislative framework that it customarily remains open for that person to separately make an application for a protection visa, which would ordinarily invite consideration of those obligations as effected under the Act. These reasons consider this debate and how it applied to the Tribunal's decision.' (Para 2) 'In this case, the Tribunal was not required to consider Australia's non-refoulement obligations as expressed under the Act, but nonetheless proceeded to do so. In doing so, the Tribunal was required to give active intellectual consideration to the applicant's non-refoulement claims while maintaining due appreciation that these matters were but one consideration influencing the Tribunal's balancing exercise under s 501CA(4)(b)(ii).' (Para 3)
FER17 v Minister for Immigration, Citizenship and Multicultural Affairs [2019] FCAFC 106 (Kerr,	24 June 2019	5, 11-13, 15-16, 39-41, 56, 61-66, 71-73, 75, 77-79	The relevant issue in this case – to both refugee and complementary protection under s 36 of the Act – arose out of a cross-appeal by the Minister and concerned the

White and Charlesworth JJ) (Successful)			meaning of the term “a national” within the definition of “receiving country” in s 5 of the Act. ‘The Appellant arrived in Australia by boat in 2013. His SHEV application was advanced on the basis that his mother and father had fled Sri Lanka during the civil war to live in India. He had been born in India in 1998, had never resided in Sri Lanka, and did not have Sri Lankan citizenship. His account referred to his upbringing in India where, as a Tamil, he had suffered racial discrimination and had feared to leave his home other than to attend school.’ (Para 5). ‘Section 5 of the Act defines “receiving country” to mean: (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or (b) if the non-citizen has no country of nationality – a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.’ (Para 11). ‘The IAA concluded that “Sri Lanka is the receiving country for the purpose of this assessment”.’ (Para 12). ‘The IAA assessed the Appellant’s claims for protection exclusively on the premise that he was a national of Sri Lanka. It dismissed FER17’s claims for refugee status

			and complementary protection and affirmed the delegate's decision.' (Para 13). 'The primary judge accepted that contention. His Honour held that: (1) the IAA had misconstrued the relevant law when it had concluded that FER17 was a national of Sri Lanka and that Sri Lanka was his receiving country for the purpose of its review; and (2) the IAA's error was material to the conclusions reached with respect to the Appellant's protection claims. Consequently, the IAA had fallen into jurisdictional error; but (3) relief nonetheless was to be refused on discretionary grounds.' (Para 15). 'The first two of those findings are the subject of the cross-appeal in this proceeding. The third finding is the subject of the appeal.' (Para 16). 'Mr O'Leary submitted that the term "a national" as appears in that definition, properly construed, is to be understood as a reference not only to a person possessing an existing status consistent with that description (whatever bundle of rights may be attached to that status) but also to a person possessing a present capacity to acquire that status.' (Para 39).

			‘The Minister’s submissions were that, in applying the concept of “a national”, properly construed, it had not been open to the primary judge to have concluded that the IAA had erred in law in finding that FER17 was “a national” of Sri Lanka.’ (Para 40). ‘That is so, counsel submitted, because if FER17 has a present capacity to acquire Sri Lankan citizenship, he is, for the purposes of the definition of a “receiving country”, a “national” of Sri Lanka.’ (Para 41). ‘Mr McDonald [for the applicant] submitted that, whatever minimum bundle of rights would be sufficient for a person actually possessed of such rights to fall within the description of “a national”, there was nothing in the Act to suggest that the terms “a national” or “nationality” were open to be understood as applying to anything other than an existing status as recognised by the law of another country.’ (Para 56). 61. ‘The Macquarie Dictionary defines the word “national”, used as a noun, as “a citizen or subject of a particular nation, entitled to its protection”. It defines nationality as “the quality of membership in a particular nation (original or acquired)”: see *Macquarie Dictionary* (5th ed, Macquarie Dictionary Publishers Pty Ltd, 2009).’ (Para 61). 62. Those definitions refer to a status actually and presently held by a person.’ (Para 62).

			‘All of the statutory provisions set out above, relating to the assessment of a protection claim, refer in the present tense to the possession of such a status: Section 5 refers to a country of which the non-citizen “is a national”; Section 5H refers to the case where a person “has a nationality”; Section 36(3) refers to “countries of which the non-citizen is a national”; Section 91M uses the phrase “because of nationality”; and Section 91N refers to a circumstance where at a particular time, “the non-citizen is a national of 2 or more countries”.’ (Para 63) ‘As a matter of textual analysis, applying the ordinary and natural grammatical meaning of their words, we are satisfied that there is no basis on which to construe those provisions as extending to any status that a person does not presently possess. Instead, on their ordinary and natural meaning, the words “national” and “nationality” refer to a status presently possessed. They do not encompass a status capable of being sought and acquired, but which is not presently held.’ (Para 64). ‘As *SZTAL* posits, considerations of context and purpose recognise that in an enactment’s statutory,

			historical or other context, some other meaning of a word may be suggested, and that meaning may prevail over its ordinary meaning.' (Para 65). 'However, the Court discerns nothing in the history of the usage of the words "national" and "nationality" (whether at common law or in international law) as would provide a plausible basis for the contention that the Parliament should be understood to have intended those words to apply other than in their ordinary and natural sense. There is nothing to suggest those words might have a different technical legal meaning, which the Parliament might be thought to have adopted, as would apply to a status capable of being, but not as yet, acquired.' (Para 66). 'The Court is satisfied that the meaning submitted for by the Minister finds no footing in the text of the statute. As Mr McDonald submits, if nationality is not established then the definition of "receiving country" in s 5 of the Act provides a fall-back alternative: "habitual residence". We accept that submission. Given that Parliament has expressly provided for that specific eventuality, there is no reason inherent in the text to find that pragmatic considerations require this Court to construe the words "a national" and "nationality" in the relevant provisions other than in their ordinary and natural sense.' (Para 71). 'Moreover, other textual considerations point to contrary. The provisions of s 36(3)-(7) and s 91N(2) provide specific exceptions to Australia's protection

			obligations if, in the circumstances they refer to, a person has a lesser right than nationality as would enable them to safely enter and reside in a third country.' (Para 72). 'Section 91N(2) does not operate to deem a person falling within its terms (a person having the right to re-enter and reside in another country) to be a national of that country. It provides only that s 91N "also applies" to such a person. Moreover, s 91N(2)(a)(ii) expressly dis-applies the provision in so far as it might have application to a country of which a non-citizen is a national. To the extent that a different conclusion might be faintly arguable in the face of those obstacles (which we would reject), the operation of s 91N is confined by s 91N(7).' (Para 73). 'Without a foundation in the text or in any explanatory materials, there is no reason to construe the text other than consistently with its ordinary and natural meaning. It is not necessary to add any gloss to the language of the relevant provisions of the Act. The words used are plain and simple English.' (Para 75). 'Having regard to the narrow point that was argued before this Court it is both unnecessary and undesirable for us to venture any concluded view as to the correctness or otherwise of the Minister's submission that for the relevant purposes of the Act, "nationality" must have a wider meaning than citizenship. It is sufficient to note that the correctness of that proposition is not self-evident, having regard to the observations of

			Finkelstein J in *Lay Kon Tji* and of Weinberg J in *VSAB* in the passages cited above. The resolution of that point should await decision in a case that requires it to be addressed.' (Para 77). 'Once it is accepted that the meaning of "a national" and "nationality" for the relevant purposes of the Act, properly construed, does not extend to a person who is not presently a national of another country (understood in its ordinary sense) but who might have, or has, the capacity to acquire that other country's citizenship, it is clear that the Minister's cross-appeal cannot succeed.' (Para 78). 'The primary judge was correct to have held that the IAA had fallen into legal error by applying a wrong test in concluding that FER17 was a national of Sri Lanka.' (Para 79).
AEG16 v Minister for Immigration and Border Protection [2019] FCA 585 (Bromberg J) (Unsuccessful)	29 April 2019	4, 9, 12, 17-20, 29-30	The applicant argued that he had made an unarticulated claim to complementary protection that the Tribunal should have considered because of the type of harm he feared (being forced to kneel by authorities for extended periods of time). His argument was unsuccessful, but the Court accepted in principle that such a claim could be made, for example, if an applicant feared torture, or some other form of harm that clearly fell within the definition of 'significant harm'. 'Those grounds are as follows:

			1.The Federal Circuit Court erred in failing to find that the Tribunal failed to consider whether the treatment of the appellant constituted significant harm in the form of degrading treatment or punishment in accordance with s 36(2A)(e) of the *Migration Act*. Particulars a. The Tribunal accepted at [32] that the appellant had on multiple occasions been punished for forgetting his fishing pass by being made to kneel for around an hour. b. The Tribunal concluded that the punishment did not constitute serious harm for the purposes of the assessment of whether the applicant was a refugee. c. The Tribunal failed to consider whether the punishment constituted significant harm for the purposes of complementary protection, specifically degrading treatment or punishment in accordance with s 36(2A)(e)of the *Migration Act*, and if so, whether there was a real risk that the appellant would suffer such harm upon return to Sri Lanka.' (Para 4). 'The appellant contended that, prima facie, for a person to be forced by military personnel at a check point to kneel for an hour at a time, on multiple occasions, as punishment for forgetting a fishing pass, met the definition of either or both "cruel or inhuman treatment

			or punishment", or "degrading treatment or punishment".' (Para 9). '12. The appellant contended that the Tribunal's task required it to assess his claims against both the Refugee Criteria and the Complementary Protection Criteria and that, because the Tribunal failed to consider whether the punishment inflicted upon the appellant constituted "significant harm" for the purposes of the Complementary Protection Criteria, the Tribunal had constructively failed to exercise its jurisdiction. Specifically, the appellant contended that the Tribunal failed to consider whether being made to kneel in the circumstances experienced by the appellant was a form of "significant harm" for the purposes of the Complementary Protection Criteria in that it constituted "cruel or inhuman treatment or punishment", or "degrading treatment or punishment".' (Para 12). 'I accept the appellant's contention that an applicant for a visa need not expressly refer to the terms of the Complementary Protection Criteria to make an articulated claim which engages that criteria. Much depends on what is said, and the extent of any necessary implication to be made from that which is expressly articulated. For instance, a claim by an applicant that she was tortured and fears exposure to further torture should she be returned to her home country would, without more, sufficiently engage the Complementary Protection Criteria for that claim to be regarded as an articulated claim for complementary protection of the kind provided by s 36(2)(aa). That would be so

			particularly because the use of the term "torture" engages directly with the definition of "significant harm".' (Para 17). 'The position may be different where a category of harm referred to in the definition of "significant harm" is not mentioned, but instead, the claim that is articulated merely refers to the treatment claimed to have been inflicted upon the applicant, in circumstances where the treatment is capable of falling within the definition of "significant harm".' (Para 18). 'That is the position contended for by the appellant here. He contends that the punishment was capable of meeting the definition of "significant harm" and, accordingly, the claim he made should be regarded as an articulated or express claim for complementary protection.' (Para 19). 'In my view, the punishment inflicted on the appellant does not so obviously fall within the definition of "significant harm" as to effectively make express that which may merely be implicit. The extent of implication or inference required from what was expressly articulated by the appellant, deprives what was said by the appellant the character of being a "claim expressly made": ***SZSHK*** *v Minister for Immigration and Border Protection* [2013] FCAFC 125 at [36]. Of course, where the making of a claim is reliant on some implication or inference being drawn, the claim may nevertheless be characterised as a claim which clearly arises on the material before the Tribunal.

			I turn then to consider whether that was here the case.' (Para 20). 'Taking into account the subject matter being addressed when the evidence was given; the framing of the appellant's case made by the RAILS submission and, in particular, that whilst that submission made claims engaging the Complementary Protection Criteria, no claim was made based on the punishment; the fact that no supplementary submission was made after the Tribunal's hearing adverting to such a claim; the fact that the appellant was not unrepresented; and that the nature of the punishment was not a reasonably clear or obvious instance of "significant harm"; I do not consider that a claim relying on the Complementary Protection Criteria and based on the punishment, clearly emerges from or was raised by the material before the Tribunal.' (Para 29). 'For those reasons, ground 1 must be rejected.' (Para 30).
BCX16 v Minister for Immigration and Border Protection [2019] FCA 465 (Charlesworth J) (Successful)	5 April 2019	1, 13-14, 30-41	In this case the Court considered the interpretation of section 36(2B)(c), the exclusionary provision which states that a real risk is taken not to be a real risk when it is 'faced by the population of the country generally and is not faced by the non-citizen personally. The Court found that the Tribunal had erred by finding that a person would not be exposed to a risk personally if the risk was one which other persons in Kabul faced. Charlesworth J held at [37] that '[a] risk to which a person is exposed because of the circumstance that he

| | | | or she resides in a specific area of the country is, in my view, a risk that is faced by the person personally, notwithstanding that other persons residing in the same area are exposed to the same risk.'

'The appellant is a citizen of Afghanistan and a former resident of Kabul. On 13 November 2012 he applied for a Protection (Class XA) visa under the *Migration **Act** 1958* (Cth). A delegate of the Minister for Immigration and Border Protection refused to grant the appellant the visa. The delegate's decision was affirmed on review by the Administrative Appeals Tribunal. The Federal Circuit Court of Australia (FCC) dismissed an application for judicial review of the Tribunal's decision: *BCX16 v Minister for Immigration & Anor* [2018] FCCA 364. This is an appeal from that judgment.' (Para 1).

'In respect of the Complementary Protection Criterion, the appellant relied on the same factual circumstances supporting his claim to be a refugee. In addition, the appellant claimed that there was a real risk that he would suffer significant harm if returned to Kabul, being the city in which he resided, because of the deteriorating security situation there. It is the latter additional claim that forms the subject of the first ground of appeal.' (Para 13).

1. 'The first ground of appeal is that:

The Federal Circuit Court erred by finding that s 36(2B)(c) of the *Migration Act 1958* (Cth) (**the Act**) |

			applied to preclude a finding of a real risk of significant harm. Particulars In circumstances where the Tribunal did not make any finding about the risk in Kabul compared to Afghanistan generally, there was no basis to conclude that the risk in Kabul was 'one faced by the population of the country generally and is not faced by the non-citizen personally'.' (Para 14). 'In the proceedings before the primary judge, as on this appeal, the appellant argued that the test in s 36(2B)(c) had been misconstrued or misapplied by the Tribunal. The appellant submitted that the Tribunal had failed to make any assessment of the degree of harm faced by him in light of all of his personal circumstances and particularly having regard to his status as a resident of Kabul. Relatedly, it was submitted, the Tribunal had failed to make an assessment of whether the risks faced by residents of Kabul were the same risks faced by members of the population of the whole of Afghanistan more generally. Accordingly, it was submitted, the Tribunal had not performed the comparative task prescribed by s 36(2B)(c) of the Act because it had not asked whether the risk faced by the appellant personally (that is, having regard to his personal circumstance as a resident of Kabul) was the same as that faced by the broader population of the whole of the country. Instead, it was submitted, the Tribunal had erroneously compared the

			risk faced by the appellant with the risk faced by the population of the city of Kabul. That was not the test established by s 36(2B)(c), it was submitted.' (Para 19). 'At [110] of its reasons, the Tribunal expressed the view that the risk of the appellant being harmed in a terrorist attack in Kabul was a risk "faced by the population generally, not by the applicant personally *in this generalised violence context in that city*" (my emphasis). The emphasised words are to be given some meaning. In my view, the words indicate that the Tribunal's reference to the population generally in this passage is a reference to the population of Kabul and not the general population of the whole of Afghanistan. Accordingly, the Tribunal should be understood as finding that the risk faced by the appellant was no greater than the risk faced by any other citizen of Kabul and, for that reason, was not a risk faced by him personally within the meaning of s 36(2B)(c).' (Para 30). 'In the following paragraph, the Tribunal states that it does not accept that the level of generalised violence *in Afghanistan* is so elevated that the appellant would face a real risk of significant harm. The Tribunal in that passage implicitly assesses the risk of harm faced by the appellant by reference to his status as a citizen of the country, without reference to the circumstance that he resided in the city of Kabul.' (Para 31). 'The parties described s 36(2B) as a "carve out" or "exclusionary" provision. That is an appropriate

			description. It is clear from the opening words of s 36(2B)(c) that the provision is to have application where the non-citizen faces what would be a real risk but for the deeming effect of the provision. The same may be said of s 36(2B)(a). If the degree of risk to which a non-citizen is exposed does not constitute a real risk, within the meaning of s 36(2)(aa), then there is no occasion to consider the exclusionary effect of s 36(2B) at all.' (Para 32). 'Section 36(2B)(a) presupposes that persons residing in one part of a country may be exposed to a real risk of harm to which persons in another part of the country are not exposed. I will return to this provision in due course.' (Para 33). 'The Tribunal did make an assessment of the likelihood that the appellant would be personally targeted in the generalised violence in Kabul, and concluded that he would not be. But that finding was not determinative of the whole of the appellant's claim. It was necessary to consider whether the appellant's residency in Kabul was, of itself, a circumstance that exposed him to a real risk of significant harm as a *non-targeted* citizen who may be caught up in the attacks. If the answer to that question was "no" then there would, as I have said, be no reason to consider the application of s 36(2B)(c) at all. If the answer was "yes", then it was the risk *so identified* that fell to be considered under s 36(2B)(c).' (Para 34).

			‘I respectfully conclude that the primary judge erred in finding that the Tribunal made a finding that there was no real risk that the appellant would face significant harm quite apart from the operation of s 36(2B)(c)of the Act. The application of s 36(2B)(c) is front and centre in the Tribunal’s reasoning in respect of the Complementary Protection Criterion. There is nothing to suggest that the Tribunal was applying the exclusionary provision as an alternative path in reasoning to its conclusion.’ (Para 35). ‘For reasons given below, the Tribunal misapplied the exclusionary provision.’ (Para 36). ‘As has been observed, s 36(2B)(a) contemplates a circumstance in which a person may be exposed to a real risk of harm by reason of the location of a person in an area of a country and yet is able to relocate so as not to be exposed to that risk. Section 36(2B)(c) should be construed harmoniously with s 36(2B)(c). Read in the context of s 36(2B)(a), the concept in s 36(2B)(c) of a risk being faced by a non-citizen *personally* in my view may include a risk faced by a person because of the circumstance that he or she resides in an area of a country. A risk to which a person is exposed because of the circumstance that he or she resides in a specific area of the country is, in my view, a risk that is faced by the person personally, notwithstanding that other persons residing in the same area are exposed to the same risk. In such cases, s 36(2B)(a) operates so that in cases where it would be reasonable for such a person to relocate to an area of the country where there would not

| | | | be a real risk that he or she would suffer significant harm, then the risk in fact faced by the person must be taken not to be a real risk.' (Para 37).

'Returning to the present case, the Tribunal concluded that the risk to which the appellant was exposed was the same as that faced by other residents *of Kabul* and so was not, the Tribunal said, a risk faced by the appellant personally. In this aspect of its reasons, the Tribunal asked the wrong question. The Tribunal construed s 36(2B)(c) on the erroneous basis that a person would not be exposed to a risk personally if the risk was one to which other persons in the same area of a country were exposed to the same degree. In my view, on the proper construction of the Act, if there was a real risk of harm faced by all citizens of Kabul *by virtue of their residency there*, then it was a risk faced by each of them personally.' (Para 38).

'Where, however, the risk faced by a person is the same risk that is faced by the general population of the whole of the country, then it cannot be said that the person is exposed to the risk *because of* his or her personal circumstance of residency in any one particular area of it. No question of relocation could arise because the real risk would be one to which the person would be exposed throughout the country. Understood in this way, it can be seen that the text in s 36(2B)(c) is a composite phrase. Underlying the phrase is an assumption that a risk faced by the population of the |

			country generally is, by its nature, a risk that is not faced personally by any one of its citizens.' (Para 39). 'I accept the submission that the Tribunal did not make an assessment of whether the appellant faced a real risk of significant harm in light of his status as a resident of Kabul so as to enable that risk to be the subject matter of its consideration under s 36(2B)(c). As a consequence of that error, the Tribunal could not and did not perform the comparative task required by s 36(2B)(c). Instead, the Tribunal compared the risk faced by the appellant with the risk faced with other citizens of Kabul and erroneously concluded that any risk of serious harm was not faced by the appellant personally because it was one faced by other people residing there. That was not the comparison which s 36(2B)(c) called for.' (Para 40). 'I have not overlooked the Tribunal's finding that the general population of Afghanistan did not face a real risk of harm by virtue of sectarian violence. That finding may be critical in an assessment of whether the appellant might reasonably be asked to relocate to another part of the country and so affect any assessment that may be made under s 36(2B)(a) but that does not affect my conclusion that the Tribunal committed jurisdictional error in its application of s 36(2B)(c).' (Para 41).
SZDCD v Minister for Immigration and Border	13 March 2019	3, 15, 20-23, 34-36, 38, 40-41, 48	In this case the court considered whether a lack of adequate access to medical treatment constituted 'significant harm' and was 'arbitrary' and whether a

Protection [2019] FCA 326 (Gleeson J) (Unsuccessful)			subjective intent to arbitrarily deprive someone of life is required by s 36(2A)(a) of the Act. 'The Tribunal accepted that the appellant has glaucoma and heart problems on the basis of evidence provided to the Tribunal. The evidence included a letter from a general practitioner which stated relevantly that the appellant had a "significant life-threatening condition". The general practitioner stated that the appellant was under the care of cardiologists and that certain treatment had been recommended "because of the known risk of sudden death associated with [the appellant's] cardiac condition". The general practitioner added: The cardiologists have stated that it is unlikely medical care in Bangladesh is suitable to meet [the appellant's] critical needs.' (Para 3) 'The appellant's notice of appeal contains the following four grounds of appeal: (1) The FCCA judge erred (at [60] of her Honour's reasons) by construing s 36(2)(aa) as requiring the appellant to establish that he would be arbitrarily deprived of medical treatment if he returned to Bangladesh rather than considering whether he would be arbitrarily deprived of his life as a necessary and foreseeable consequence of being removed from Australia to Bangladesh. (2) The FCCA judge erred (at [62] of her Honour's reasons) by finding that the requirement to identify an

			actual subjective intention to cause harm extended to the question of "arbitrary deprivation of life" for the purposes of ss 36(2)(aa) and (2A)(a) of the Act…' (Para 15). 'The appellant argued, based on [59] and [60] of her Honour's reasons, that the FCCA judge considered that the appellant was required to demonstrate that he would be offered only limited medical treatment by the Bangladeshi government or denied medical treatment in Bangladesh on an arbitrary basis.' (Para 20). 'The appellant contended that this approach had the effect of "superimposing an additional requirement beyond the terms of s 36(2)(aa)" and also requiring an analysis of the intentions behind the health policies of Bangladesh as the receiving country rather than an analysis of whether the act of removal from Australia would have the necessary and foreseeable consequence (not intention) of arbitrarily depriving the appellant of his life.' (Para 21). 'The appellant noted that, in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 91 ALJR 936 ("*SZTAL*") at [26], the requirement of actual subjective intent in ss 36(2A)(c) to (e) arose from the definitions of "torture", "cruel or inhuman treatment or punishment" and "degrading treatment or punishment" in s 5 of the Act, each of which contained a reference to intention. He argued that, in contrast, there is no definition by which a requirement of intention is imported into s 36(2A)(a),

			which is concerned with a consequence rather than intention.' (Para 22). 'The appellant argued that the ordinary meaning of the word "arbitrarily" clearly embraces situations that are random.' (Para 23). 'The language of arbitrary deprivation of life reflects the terms of Art 6(1) of the ICCPR, which provides: "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life".' (Para 34). 'In relation to Art 6(1), Joseph and Castan writing in *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3rd ed, Oxford University Press, 2013) state at [8.04], relevantly: "[A]rbitrary" is a broader concept than "unlawful". That is, a killing may breach article 6 even though it is authorised by domestic law. The prohibition on the "arbitrary" deprivation of life signifies that life must not be taken in unreasonable or disproportionate circumstances. Some indicators of the arbitrariness of a homicidal act are the intention behind and the necessity for that action.' (Para 35). 'At [8.75], Joseph and Castan address the environmental and socio-economic aspects of Art 6 and state that the Human Rights Committee has confirmed

			that Art 6 has a socio-economic aspect by reference to the following comment: Moreover, the Committee has noted that the right to life has been too often narrowly interpreted. The expression 'inherent right to life' cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics. The reference to 'desirability' may indicate that States have a moral 'soft law' obligation, rather than a legal 'hard law' duty, to tackle problems such as high infant mortality and low life expectancy.' (Para 36). 'The language of s 36(2)(aa) required the Minister to consider the necessary and foreseeable consequences of the appellant being removed from Australia to Bangladesh. The phrase "being removed" is certainly wide enough to comprehend the consequences of the events that comprise the removal of a non-citizen from Australia to a receiving country and, to that extent, may cover events that occur prior to the arrival of a non-citizen in a receiving country such as the loss of access to medical treatment.' (Para 38).

			‘The *Macquarie Dictionary* (Online) defines “arbitrary” as follows: *adjective* 1. subject to individual will or judgement; discretionary. **2.** not attributable to any rule or law; accidental: **the only significance her smile could have had was that of an arbitrary, not to say perverse, decoration*. –PATRICK WHITE, 1976. **3.** capricious; uncertain; unreasonable: **The next thing to provoke him was the arbitrary way in which she disposed of his personal liberty*. –HENRY HANDEL RICHARDSON, 1925. **4.** uncontrolled by law; using or abusing unlimited power; despotic; tyrannical: **In fact Aboriginal society has been kept in continual tension by what appeared to Aborigines arbitrary and pointless interference with their lives* –CD ROWLEY, 1970. **5.** selected at random or by convention: an arbitrary constant.’ (Para 40). ‘The same Dictionary defines the verb “deprive” to mean: **1.** to divest of something possessed or enjoyed; dispossess; strip; bereave. **2.** to keep (a person, etc.) from possessing or enjoying

			something withheld. **3.** to remove (an ecclesiastic) from a benefice; to remove from office.' (Para 41). 'Dealing with the appellant's other submissions set out above: (1) The observation, at [59] of her Honour's reasons, that the prospect of dying of a health condition was not, without more, a subject matter that enlivened the application of the criterion for complementary protection under the Act, must be correct. The words "arbitrarily deprived" imply conduct which is responsible for the deprivation of a person's life. Further, they do not cover such a deprivation of life unless it may be characterised as "arbitrary". Dying of a health condition may be expected or unexpected but the requirement of arbitrariness operates to characterise the conduct by which a person is deprived of his or her life. (2) Accordingly, I do not accept that the decisions in *MZAAJ* place any gloss on the language of s 36(2)(aa). (3) In considering the circumstances in which the appellant would not receive adequate medical treatment in Bangladesh, the FCCA judge was not imposing an additional requirement. Rather, her Honour was effectively addressing the problem that the appellant had not identified a risk of "arbitrary" deprivation of

			life. (4) The word "arbitrarily" in s 36(2A)(a) may address situations that are "random" but it is necessary to consider whether the random nature of a situation is one that involves a risk of being "arbitrarily deprived" of life. (5) While the appellant may suffer the loss of his life as a result of losing access to medical treatment currently available to him in Australia, those facts are insufficient to support a conclusion that there is a risk to him that he will be "arbitrarily deprived of his life" as a consequence of his removal to Bangladesh because they do not involve an arbitrary conduct. (6) On the facts, the Australian government's removal of the appellant will not arbitrarily deprive him of his life. That act would be deliberate; it can be presumed that it will be effected lawfully, and it has no quality of randomness. Further, it will not deprive the appellant of his life, although it may not be protective of his life. Rather, it will deprive the appellant of his present access to medical treatment.' (Para 48).
AJL16 v Minister for Immigration and Border Protection [2019] FCA 255 (Mortimer J) (Unsuccessful)	5 March 2019	3, 28, 39-41, 60-61,	The issue in this case was whether the applicant had made a claim that he feared sexual violence on return in circumstances where sexual violence was only mentioned in submissions in the form of COI. The court indicated that the matter was to be considered in relation to the complementary protection criteria because unlike in refugee claims, there is no

			requirement to show a subjective fear. However, the court said that 'it is still necessary for a visa applicant to identify what it is about her or his particular circumstances which is said to give rise to "substantial grounds" for the belief' that he will experience significant harm. 'The appellant is a national of Sri Lanka, of Tamil ethnicity and a Roman Catholic. He arrived on Cocos Island by boat on 10 August 2012 and was first interviewed by an officer of the Department of Immigration and Border Protection on 13 August 2012. He was released into the community on a bridging visa on 8 November 2012.' (Para 3). 'The appellant contends a range of country information was put to the Tribunal on his behalf which indicated that sexual violence is widespread in Sri Lanka's detention facilities, and that Tamil men are at particular risk of such violence. In a context where the Tribunal found that there was a real risk that the appellant would be detained in Sri Lanka for up to several days, the appellant contends the Tribunal did not consider whether there was a real risk that the appellant would experience "degrading treatment or punishment" or "cruel or inhuman treatment or punishment" in the form of sexual violence while in detention, or whether the risk of suffering sexual violence in detention is a real risk faced by the population of Sri Lanka generally for the purposes of s 36(2B)(c) of the Act. On this basis, the appellant contends the Tribunal failed to perform its

			statutory review function, and failed to consider a claim he had made.' (Para 28). 'The appellant does not contend he directly raised the claim that there was a real chance he might be exposed to sexual violence during any period of incarceration on return to Sri Lanka. That is, it is not contended he gave any evidence either in his statutory declaration, or in the interview before the delegate, or the Tribunal, about this fear or risk specifically. In his statutory declaration, he did, however, express his fears of harm in a way which might be said to not exclude sexual violence: I fear harm including arrest, detention, physical assault and death at the hands of the Sri Lankan Army and other government authorities on account of my Tamil ethnicity and having made a complaint against the Government's attempt to confiscate our land. I face an increased risk of this harm as I am a young male Tamil and because I left Sri Lanka illegally. I have already experienced beatings, harassment and persecution by people I believe are associated with the army. I cannot reasonably relocate anywhere else in Sri Lanka to avoid the threat of harm. I believe that I will be killed if I return.' (Para 39). 'In this context, counsel for the appellant accepted the chance of being subjected to sexual violence in prison could not be described as a subjective fear expressed to be held by the appellant, and it may be more difficult to fit this claim within the confines of Art 1A of the

			Convention (*Convention Relating to the Status of Refugees*, done at Geneva on 28 July 1951 as amended by the *Protocol Relating to the Status of Refugees*, done at New York on 31 January 1967). He accepted the error identified was one which went principally to the Tribunal's assessment of whether the appellant satisfied the complementary protection criteria. Counsel correctly emphasised the different formulation of the criteria for a protection visa in ss 36(2)(a) and in 36(2)(aa) of the Act…' (Para 40). 'Thus, the agreed factual situation is that the appellant himself did not identify any such risk of harm, for either his claims under s 36(2)(a) or under s 36(2)(aa), but his representatives did put forward a reasonable amount of country information on the topic of risks of harm by way of sexual violence. They put forward some information to the delegate, but put more before the Tribunal. The country information contained references to the existence of such risks, and reports of Tamil returnees being harmed by the infliction of sexual violence.' (Para 41). 'Although in hindsight it may be easier to describe the Tribunal as having "missed" the aspect of the country information dealing with sexual violence, I do not consider that is what occurred. The appellant simply did not indicate he feared any such harm, inside or outside prison. He made no mention of sexual violence whatsoever. The RILC submissions drew attention to this specific risk as one of the many kinds of harm which it submitted could befall a person in the

			appellant's position. For the Tribunal to have dealt expressly with it would have required an exercise akin to attempting to "discover" any potential claims lying somewhere in the country information.' (Para 60). 'I do not accept that it is appropriate to describe this aspect of what was presented by RILC as a "claim" made by or on behalf of the appellant. While I accept the point made by the appellant about the difference between the assessment under s 36(2)(aa) and the assessment under s 36(2)(a), it is still necessary for a visa applicant to identify what it is about her or his particular circumstances which is said to give rise to "substantial grounds" for the belief that she or he may suffer significant harm on return to her or his country of nationality. That is not to insist such identification occur through evidence directly from a visa applicant, although of course that is one obvious and regular way in which a claim may be made. It may be inferred from the existing evidence, or it may be part of the instructions provided to a representative and communicated in such a way. In some circumstances, a representative may formulate a "claim" on behalf of a visa applicant, but whether or not that is the correct characterisation for what has occurred will be a matter of fact in each particular case.' (Para 61). 'I do not accept that the appellant, whether by himself or through his representatives, had sought to invoke Australia's protection obligations on the basis that if he were incarcerated, there was a real chance or a real risk that he might be subjected to sexual violence by State or

			non-State actors during that incarceration. He had sought protection on the basis he might be harmed – and the kinds of harm were developed in some detail by his representatives through the use of country information. One kind of harm identified was sexual violence. This did not mean that in considering and assessing this aspect of his "claim", the Tribunal needed expressly in its reasons to deal with every kind of harm the country material suggested a person in the appellant's position could conceivably face. The Tribunal was entitled to focus on what the appellant himself identified and what could reasonably be drawn from the RILC submissions. Although sexual violence was clearly mentioned as a possible form of harm, I do not consider it figured so prominently that it could properly be described as a separate "claim" made by the appellant, or a "claim" linked to another claim made by the appellant.' (Para 65).
DED16 v Minister for Home Affairs [2019] FCAFC 18 (Bromberg, Kerr and Charlesworth JJ)(Unsuccessful)	7 February 2019	4-16	In dismissing the appeal of a Nepalese applicant relating to a refusal to grant a protection visa, the Court considers whether the applicant had taken all possible steps to avail himself of a right to enter and reside in India within the meaning of s 36(3) of the *Migration Act 1958* (Cth).

FEDERAL CIRCUIT COURT OF AUSTRALIA

Case	Decision date	Relevant paragraphs	Comments
BZA17 v Minister for Immigration & Anor [2020] FCCA 375 (Judge Manousaridis) (Unsuccessful)	28 February 2020	36-58	In finding no jurisdictional error on the part of the IAA, the court discussed considered the manner in which the Authority purported to undertake a cumulative assessment of risk of harm relating to an applicant from Afghanistan.
GCLV v Minister for Immigration & Anor [2020] FCCA 270 (Judge Manousaridis) (Successful)	14 February 2020	22-35	The court granted an extension of time to an applicant from El Salvador and quashed the Tribunal's decision on the basis of jurisdictional error, noting that "the Tribunal proceeded on the basis that the notion of "*arbitrary deprivation of life*" referred to in s.36(2A)(a) of the Act required an intention to inflict harm and, in proceeding in this way, the Tribunal misunderstood the tasks it was required to undertake when reviewing the delegate's decision. The Tribunal, therefore, made a jurisdictional error, and its decision is liable to be quashed." (Para 35)
AEJ17 v Minister for Immigration & Anor [2020] FCCA 261 (Judge McNab) (Successful)	13 February 2020	22-44	The court allowed the application of a Sunni Muslim, Afghan applicant of Pashtun ethnicity and found "a failure on the part of the Authority to engage in a detailed consideration of the applicant's circumstances so as to consider in real terms whether a relocation to Kabul is reasonably practicable for the applicant." (Para 38)
ADL17 v Minister for Immigration & Anor [2020] FCCA 148 (Judge A Kelly)	2 February 2020	2, 85-105	In dismissing the application of an Iranian applicant, the court also considered whether "*Appellant S395* principles" should have been applied.

(Unsuccessful)			"In summary, I am not satisfied that the Authority erred in its consideration of whether the applicant satisfied the criteria for refugee status and in particular what may happen if the applicant returned to Iran or whether he could then take reasonable steps to modify his behaviour. Nor am I persuaded on the very limited submissions made before me that the principles in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*[1] should be applied to complementary protection under s 36(2)(aa) of the Act. Finally, I do not accept that there was error by the Authority in the asserted failure to consider properly what was described as the applicant's 'nuanced' claim to protection based upon the further pursuit of some level of interest in Christianity." (Para 2)
CMB18 v Minister for Home Affairs & Anor [2020] FCCA 110 (Judge Neville) (Unsuccessful)	29 January 2020	35-47	In dismissing the application of an applicant from Afghanistan, whose grounds for review included the alleged misapplication of ss.36(2)(aa) and 36(2B)(a), the court discussed the relocation criteria.
EBV17 v Minister for Immigration & Anor [2019] FCCA 1216 (Judge Driver) (Unsuccessful)	5 December 2019	24-59	In dismissing the application of a Shia Hazara from Quetta, Balochistan province in Pakistan, the court discussed the reasonableness of relocation in a context where the applicant's extended family lived in Quetta and the applicant's need to travel by road from Lahore to Quetta.
BXU17 v Minister for Immigration & Anor [2019] FCCA 3326 (Judge A Kelly) (Successful)	16 November 2019	35-73	A Sunni Muslim applicant of Baloch ethnicity established failure to accord procedural fairness and jurisdictional error in the failure of the Tribunal to deal with the generalized risk to persons of Baloch ethnicity. This was an issue which "clearly arose on the country

			information" before the Tribunal and "sufficiently established a risk of significant harm to persons of Baloch ethnicity as a fact or matter that warranted consideration." (para 71 and 72, respectively)
BLH15 v Minister for Immigration & Anor [2019] FCCA 3379 (Judge Barnes) (Unsuccessful)	22 November 2019	63-67	In dismissing a Tongan applicant's application, the court discussed the real chance test as it relates to family violence, including the degree of protection afforded by family relationships.
CAC19 v Minister for Home Affairs & Anor [2019] FCCA 3336 (Judge Burchardt) (Unsuccessful)	22 November 2019	20-29, 31	In dismissing a Nigerian applicant's application, the court discussed jurisprudence on whether the act of removal itself could constitute the significant harm.
WZAUK v Minister for Immigration & Anor [2019] FCCA 3246 (Judge Kendall) (Successful)	13 November 2019	76-100	A Kenyan applicant established jurisdiction error due to a failure to engage in an active intellectual manner with the evidence of a critical witness on a matter central to the applicant's claim for protection (i.e., his homosexuality).
BXN16 v Minister for Immigration & Anor [2019] FCCA 2820 (Judge Kelly) (Successful)	24 October 2019	2, 39-76	A Pakistani applicant established jurisdictional error as the Tribunal failed to correctly apply the test for reasonableness of internal relocation. "For the reasons which follow I have concluded that the application should be allowed. In summary, I have concluded that the decision was affected by jurisdictional error by reason that, although the Tribunal correctly identified the test for internal relocation, it did not apply that test. The Tribunal did not adopt a forward looking approach in evaluating whether the applicant

			could reasonably expect to face harm in the future, nor did it take into account information that was before it in undertaking that assessment. The other grounds of review have been rejected and leave to further amend the application refused." (Para 2)
FSR18 v Minister For Home Affairs & Anor [2019] FCCA 2295 (Judge Driver) (Successful)	17 October 2019	78-88	The Court found jurisdictional error in the IAA's consideration of the reasonableness of relocation for a Pakistani applicant because the IAA failed to consider the impact on the applicant of his family relocating with him. "I accept the Minister's submissions set out above that the Authority gave adequate consideration to the reasonableness of relocation in considering the applicant's mental health problems, his lack of family support in Islamabad, his former occupation as a driver and the general security situation in Islamabad. Further, I do not accept the applicant's complaints in relation to the Authority's general consideration about the cost of living in Islamabad and the applicant's employment prospects." (Para 85) "I am, however, persuaded that the Authority did err in failing to consider the impact on the applicant of his family relocating to Islamabad with him. While the Authority at [50] stated that the applicant could draw on his extended family for assistance for his wife and child to "come to Islamabad" should they wish to do so, it appears to me that the Authority was envisaging a visit rather than a permanent relocation. The wording of this statement suggests that the applicant could call on

			family assistance to get his wife and children to Islamabad, which says nothing about the cost and difficulty of maintaining their residence there. In the rest of that paragraph, the Authority reasoned by reference to the fact that the applicant would be living independently from his wife and family. As the applicant's submissions demonstrate, the relocation of his wife and children to the place he would be living in Pakistan was an issue of fundamental importance to him and was raised specifically both before the delegate and the Authority. The Authority needed to give consideration to the impact on the applicant's need for employment, housing and the other essentials of life if he had his wife and children living with him. By failing to consider the impact of the permanent relocation of the applicant's wife and children with him in Islamabad, the Authority fell into error." (Para 86)
AMG18 & Ors v Minister for Immigration & Anor [2019] FCCA 2466 (Judge Driver) (Successful)	16 October 2019	26-30	Vietnamese applicants established jurisdictional error on the part of the IAA because it rejected a submission (or misconstrued arguments) as new information. "The first ground addresses the vexed issue of the Authority having to grapple with the distinction between argument and information and claims and argument. It is now tolerably clear that there is no material distinction between claims and information. There is, however, a difference between argument and information. In the very recent decision of the Full Federal Court in *DNA17 v Minister for Immigration*[30]

			the Full Federal Court considered a circumstance not dissimilar to the present at [38]-[45].” (Para 26) “In my view, as in *DPH17*, the present case is an example of the circumstances set out at (b) above. In other words, the applicant was seeking to engage with the delegate’s decision by drawing on information that was before the delegate in the form of a responsive but new argument. The applicant was not seeking to introduce any new information in order to support the argument. It was already known that the family had travelled together and that the applicant father had arranged it.” (Para 29) “I conclude that the Authority was wrong to regard the submission as new information. As in *DPH17*, the argument might not have been a strong one, but it could have made a difference to the outcome and the Authority should have considered it. By failing to do so, the Authority fell into error.” (Para 30)
CMV18 v Minister for Immigration & Anor [2019] FCCA 2522 (Judge Driver) (Successful)	4 October 2019	48-61	An Afghan applicant established jurisdictional error on the part of the IAA for failing to engage with part of the applicant’s submission on the reasonableness of relocation to Mazar-e-Sharif. “In my view, it was insufficient for the Authority to deal with the applicant’s submission at such a high level of abstraction. The assumptions made by the Authority were both bold and broad. In my view, the Authority needed to consider what level of scarcity and meagreness was practicable and what level of scarcity

			and meagreness was reasonable for the applicant to accept in his struggle for existence. Some things should no doubt be assessed against basic standards, such as access to potable water, food, clothing and shelter. Other things might be assessed on a more relativistic basis, because if a person is returning to a third world country, they must expect third world conditions. These may be issues of some subtlety of analysis which was absent from the Authority's reasoning." (Para 59)
DPH17 v Minister for Immigration & Anor [2019] FCCA 2258 (Judge Driver) (Successful)	3 October 2019	39-52	The Court found that a Sri Lankan applicant established jurisdictional error by the IAA, which had characterized an argument as new information. "In my view, the applicant's argument was a new argument but was based on information that was before the delegate. It fell within the class described at [46(b)] above. It may not have been a strong argument, but the Authority was wrong to characterise the new argument as new information." (Para 51) "Having erred in its characterisation of the argument as new information for the purposes of s.473DC and s.473DD, the Authority fell into error which artificially constrained the review, thus going to jurisdiction. The applicant should receive the relief he seeks." (Para 52)
ALI18 v Minister for Immigration & Anor [2019] FCCA 2257 (Judge Driver) (Successful)	2 October 2019	36-40	The Court found jurisdictional error in the IAA decision not to grant a protection visa to an Afghan citizen. The Court explained that the "psychological impact of isolation on the applicant needed to be taken into account in considering the reasonableness of relocation.

			It was not and the omission goes to jurisdiction." (Para 39)
WZAUB v Minister for Immigration & Anor [2019] FCCA 2749 (Judge Lucev) (Successful)	27 September 2019	19-88	The court found jurisdictional error due to interpretation given which was affected by a number of errors and non-interpretation errors, many of which were significant and material such that the applicant was not afforded a fair hearing.
DPV18 v Minister For Home Affairs & Anor [2019] FCCA 2762 (Judge Riethmuller) Succesful)	26 September 2019	14-40	The court allowed the application of a Shia Hazara from Afghanistan who claimed that the IAA denied procedural fairness by failing to put before the applicant material, or its substance, that the IAA knew of and considered may bear upon whether to accept the Applicant's claims. "In these circumstances it is difficult to avoid the conclusion that it was legally unreasonable not to have also sought information from the applicant with respect to this new information, particularly given that the discretion under section 473DC is not even so constrained as to require 'exceptional circumstances'." (Para 39)
DZQ16 v Minister for Immigration & Anor [2019] FCCA 2609 (Judge Manousaridis) Successful)	20 September 2019	3, 4, 25-44	The court quashed the decision of the IAA affirming a decision of a delegate of the Minister who refused to grant the applicant, a Sri Lankan Tamil from Jaffna, a Safe Haven Enterprise visa. The applicant was of interest to the Sri Lankan authorities and had been questioned, interrogated and mistreated including in connection to his activities with an uncle who assisted the LTTE and his suspected links to the organization.

			The court found jurisdictional error due to the IAA's failure to consider evidence relevant to the claim. In light of the findings that the IAA had made, the Court stated that consideration of the relevant evidence could have resulted in the IAA making a different decision.
BTP18 v Minister For Home Affairs & Anor [2019] FCCA 2608 (Judge Neville) Unsuccessful)	20 September 2019	46-61	The court dismissed the appeal of a Hazara Shia from Surkh-e Parsa district in the Parwan Province of Afghanistan, who claimed he was a target of the Taliban because of his employment profile as a self-employed mechanic whose customers included local government workers. In doing so the court discussed the relocation and real chance tests under the refugee definition.
FKZ17 v Minister for Immigration & Anor [2019] FCCA 2521 (Judge Neville) (Successful)	20 September 2019	69-79	The court allowed the appeal of an Afghan national of Hazara ethnicity and Shia religion whose application for a Safe Haven Enterprise visa had been refused by a delegate of the Minister, based on relocation, and affirmed by the IAA for different reasons. The applicant claimed he feared harm from the Taliban due to his religion and his ethnicity, as a returnee, and as a failed asylum seeker from a western country. He also claimed he feared harm because of his previous "adverse profile" as a long-haul truck driver who had regularly encountered, and been stopped and searched by, the Taliban when delivering goods. The Court held that the IAA failed in its statutory task as it failed to consider independent country information, which directly contradicted the country information that the IAA relied on to form an adverse finding.

			‘…My particular concerns, which cumulatively lead to the conclusion that the statutory task of the IAA under s.473CC has relevantly failed, are as follows: (a) In my view, there is a fundamental procedural issue where, as here, the Delegate determined the Applicant’s case in one way, but the IAA determined it on a totally different basis, albeit that the end result of a denial of a protection visa was the same. Before the Delegate, the case was conducted and determined on the bases of (i) “internal relocation”, (ii) it was unsafe for the Applicant to return to his original Jaghori province, and (iii) the Applicant could and should relocate to Kabul. Before the IAA, while the reasons of the Delegate and the submissions related to “internal relocation”, the decision of the IAA was contrary to that of the Delegate. The IAA held that there was no need for the Applicant to relocate to Kabul because he would be living in Jaghori, an area that was considered to be “relatively secure” (reasons par.24); (b) The general assessment by the IAA of the relative safety of Hazaras in Jaghori province relied upon a Thematic Assessment by DFAT dated 5th September 2016. This particular assessment (and others) was specifically criticised in the detailed reports (dated November and December 2016) provided by the Applicant from Professor Maley. But the IAA had rejected these Reports on the basis that the requirements of s.473DD(b) had not been met (par.5). So, on the one hand, the IAA had available to it expert information that critiqued (and strongly criticised) Thematic

			Assessments provided by DFAT, but on the other hand, it had formally rejected this later, expert evidence; (c) I accept that Bromwich J has recently held that there is no obligation upon the IAA to provide reasons in relation to the exercise of its discretion under s. 473DD. However, in the current instance, deciding not to consider the Reports of Professor Maley deprived the IAA of information that was relevant because it was directly at odds with country information provided by DFAT, and which also provided a detailed critique of that information. The country information from DFAT was ultimately relied upon by the IAA, adversely to the Applicant; (d) Moreover, in providing no reasons for rejecting the expert Maley Reports (accepting – again – that there was no legal requirement to do so), the IAA provided no assistance let alone insight to the parties (or ultimately to this Court) to comprehend why later, expert Reports, did not come within the broader, and therefore outside of the unduly narrow, interpretation of the term “exceptional circumstances” as discussed by White J in BVZ16 v Minister for Immigration and Border Protection. This expansive approach has since been approved in two recent Full Court decisions, BBS16 and CHF16; (e) Further, a detailed critique and adverse assessment by a recognised expert (Professor Maley) of material provided by DFAT, which material was ultimately relied upon by the IAA in making a decision that was

			adverse to the Applicant, in my view, must be viewed as constituting "exceptional circumstances". "Exceptional circumstances" for the purposes of s. 473DD has been interpreted and applied in an ever-growing number of cases as including "circumstances that are unusual and out of the ordinary course." One would hope (and expect) that a strong critique of Departmental advice by an independent expert would readily come within such a definition, particularly where, as here (at par.7) the IAA itself confirmed that there was "limited analysis" of the security situation for Shias before the Delegate; …' (Para 69(a)-(e))
DEA18 v Minister for Home Affairs & Anor [2019] FCCA 2550 (Judge Kendall) (Successful)	13 September 2019	45-55, 60-91	The court found jurisdictional error in the decision of the IAA, which affirmed a decision not to grant a Safe Haven Enterprise visa to a Shia Muslim Afghan citizen of Hazara ethnicity and a former resident of Kabul. The court held that the IAA erred in failing to assess and undertake a comparison between the real risk of harm faced by residents of Kabul with the risk of generalized violence faced by the Afghan population. The court discussed the exercise, in light of refugee and complementary protection provisions. The court also considered whether the claim arose clearly on the material. 'In assessing the Tribunal's decision, Justice Charlesworth found that the claims or facts that the applicant in BCX16 alleged did not "wholly coincide" – that is, they were not the same for both the refugee and complementary protection provisions: BCX16 at [24]. The applicant did not rely on his status as a resident of

			the city of Kabul in his claims to fear persecution. The applicant did, however, "rely on his place of residency as a personal circumstance that caused him to face a real risk of significant harm that was not the same as that faced by the population of Afghanistan generally": BCX16 at [24].' (Para 50) 'In explaining how s.36(2B)(c) of the Act should be construed and applied, the following is of note in relation to her Honour's findings in *BCX16*: a. read in the context of s.36(2B)(a), a risk being faced by a non-citizen personally as described in s.36(2B)(c) may include a risk faced by a person because of the circumstance that he or she resides in an area of a country. A risk a person is exposed to because of their residence in a specific area of the country is a risk that is faced by the person personally, notwithstanding that other persons residing in the same area are exposed to the same risk: *BCX16* at [37]; b. it is erroneous to construe s.36(2B)(c) on the basis that a person would not be exposed to a risk personally if the risk was one that other persons in the same area of a country were exposed to the same degree: *BCX16* at [38]; c. where the risk faced by a person is the same as is faced by the general population of the *whole* of the country, the personal circumstance of residency in any one particular area of the

			exposure to risk is not because of the particular residency: *BCX16* at [39]; d. section 36(2B)(c) is a composite phrase founded upon an assumption that a risk faced by the population of the country *generally* is a risk that is not faced *personally* by any one of its citizens: *BCX16* at [39]; and what is required is an assessment of whether an individual faced a real risk of significant harm in light of their status as a resident of a particular area or city. It is that risk (in the particular city) that must be the subject matter of consideration under s.36(2B)(c) against the population generally: *BCX16* at [40].' (Para 54)
DFL18 v Minister for Immigration & Anor [2019] FCCA 2356 (Judge Kendall) (Successful)	27 August 2019	41-58	The court allowed the appeal of a Shia Muslim from Iraq, whose appeal from a refusal to grant a Safe Haven Enterprise visa by a delegate of the Minister was affirmed by the IAA. The applicant had become involved in serious criminal activities and while incarcerated been the victim of a serious sexual assault. The court found jurisdictional error by the IAA for failing to properly assess the applicant's claim he would face harm as a victim of same-sex assault.
FUI18 v Minister For Home Affairs & Anor [2019] FCCA 1682 (Judge Driver) (Successful)	15 August 2019	15-38	The court allowed the appeal of a citizen of Mali, who had resided in Bamako before fleeing to Australia and whose application for a protection visa was refused by the delegate of the Minister and affirmed by the IAA. The court found jurisdictional error on the part of the

			IAA for failing to consider a key piece of country of origin information relating to Bamako.
[CDG16 v Minister for Immigration & Anor [2019] FCCA 1749](#) (Judge Barnes)(Successful)	28 June 2019	63-76	The court upheld an appeal from a Shia Muslim Iraqi citizen of Bidoon ethnicity, born in Kuwait who was refused a Temporary Protection visa. The court found jurisdictional error on the part of the IAA for failing to consider an integer of the Applicant's claim that arose squarely on the material before it. 'The IAA did not reject the factual premise of the claim to fear harm consisting of future detention and mistreatment in making the finding that the Applicant's release by the criminal court indicated he was no longer suspected by the authorities of involvement with the 2009 or 2012 bombings. This finding did not dispose of the need to consider the real risk of significant harm to the Applicant following any future bombing or terrorist act, having regard to the fact he had twice been detained in such circumstances and only released after a court determined that the charges should be dismissed.' (Para 73).
[BRE15 v Minister for Immigration & Anor [2019] FCCA 1680](#) (Judge Lucev) (Successful)	20 June 2019	64-94	The court quashed a Tribunal decision and required the Tribunal to re-hear the application for review made by a Vietnamese applicant as a number of paragraphs constituting the majority of its consideration on complementary protection was copied from another Tribunal decision. "The Court is conscious of the fact that the Tribunal has given detailed consideration to its factual findings in

			relation to the refugee criterion, but notwithstanding that, the Court is left with the overall impression that there was not a fresh and independent consideration of the complementary protection findings and reasons by the Tribunal in the BRE15 – Tribunal Decision." (Para 93) "It follows from the above that the Tribunal did not therefore discharge its statutory task or function in relation to making its findings and reasons on complementary protection, and that there is therefore a jurisdictional error in that regard by the Tribunal. It follows that ground 5 is made out." (Para 94)
ECE17 v Minister for Immigration & Anor [2019] FCCA 1223 (Judge Driver) (Unsuccessful)	12 June 2019	4, 14, 29-35, 37-38	The case concerned whether there had been a sufficiently prospective assessment of the applicant's complementary protection claim. 'In support of his application for the SHEV, the applicant raised the following matters: a. he is a Hazara and Shia Muslim. He was born in Iran, as his father had fled Afghanistan due to persecution he suffered as a Hazara; b. in May 2012, the applicant was involved in a traffic incident with Pashtuns. They fired a shot at him, which grazed his skin and caused bleeding;

			c. a few days before the applicant fled to Australia, a friend of his was killed by the Taliban; and d. he fears harm from the Taliban or Pashtuns, because of his Hazara ethnicity, Shia religion, being a failed asylum seeker from the west, and for being an Afghan returnee from Iran.' (Para 4, footnotes omitted). 'These proceedings began with a show cause application filed on 13 September 2017. The applicant now relies upon an amended application filed on 5 October 2017. At the trial of this matter on 9 May 2019, I granted leave for the applicant to further amend the single ground in it to broaden its scope somewhat. In its final form, that ground is: *1. In holding that the applicant did not face a real chance of serious harm from* [insurgent groups] *on account of his ethnicity or religion (imputed or actual), the Immigration Assessment Authority (IAA) erred in failing to consider the risk faced by the applicant in the reasonably foreseeable future.* *Particulars* *a. The IAA accepted that the applicant was a Hazara Shia: IAA Decision [18].* *b. The IAA accepted that the Taliban were active and "have the capability to orchestrate serious attacks in Kabul", but found that the Taliban were not targeting*

			Shia Hazaras for reasons of their ethnicity or religion within Kabul: IAA Decision [43]. *c. The IAA accepted that "the security situation in Afghanistan is serious and there has been a deterioration in the security situation through the country, including Kabul": IAA Decision [78].* *d. There was information before the IAA that indicated that, in the past, the Taliban had targeted Hazaras: see, eg, material referred to at p 4 of the decision of the Minister's delegate.* *e. In assessing whether the applicant faced a real chance of serious harm from the Taliban on account of his ethnicity or religion (imputed or actual), the IAA did not once refer to the issue of whether the applicant might face such a risk in the reasonably foreseeable future.*' (Para 14). 'The Authority in this matter clearly understood the test it was to apply. At [15]-[16][52] of its reasons, it correctly summarised the definition of refugee in s.5H(1) of the Migration Act, as well as observing that there must be a "well-founded fear of persecution", which required, among other things, that there is a "real chance that the person would be persecuted". While it is correct that the Authority did not use the phrase "reasonably foreseeable future", it was plainly not required to do so[53] and the phrase is not, in any event, used in ss.5H or 5J of the Migration Act. The fact that the Authority does not use that phrase does not, of

			itself, show a misunderstanding or misapplication of the relevant test. The Authority's reasons should not be read with an eye finely attuned for error.' (Para 29). 'The ground of review and the applicant's submissions allege that the Authority failed to "have regard to the reasonably foreseeable future" in considering whether the applicant faced a real chance of harm from the Taliban, IS or other insurgent groups. The applicant focuses on [37]-[43] of the Authority's reasons. However, the reasons must be read as a whole,[55] and the discussion at [37]-[43] forms part of the Authority's assessment, at [35]-[56],[56] of the "risks to the applicant on the basis of his ethnicity, his religion...", both in Kabul and Afghanistan more generally.' (Para 30). 'It is apparent that the Authority did, at [35]-[56] of its reasons, engage in a prospective assessment of the applicant's risk of harm on account of his ethnicity (Hazara) or religion (Shia) if he were to return to Afghanistan, as it was required to do.' (Para 31). 'As noted above, the Authority correctly understood the test it was to apply, and it expressed its conclusion at [47],[57] in terms of the applicable statutory test, namely, that the applicant did not have "a well-founded fear of persecution" on account of his ethnicity or religion.' (Para 32). 'Further, in its consideration of the complementary protection criteria, the Authority expressly stated that it was assessing whether there were "substantial grounds

			for believing that, as a *necessary and foreseeable consequence* of the person being removed from Australia to [Afghanistan], there is a real risk that the person will suffer significant harm" (emphasis added).[58] This also plainly suggests that the Authority was engaging in a prospective assessment, as required. Also, at [85],[59] the Authority, in considering harm under the complementary protection criterion in relation to the applicant's religion and ethnicity was, in reliance on its earlier findings, "satisfied there is not a real risk that he would suffer significant harm for any of the reasons claimed if he returns to Afghanistan, and lives in Kabul...". This, too, suggests that the Authority had undertaken a prospective assessment, focussing on what would occur if the applicant returned to Afghanistan.' (Para 33). 'Contrary to the applicant's submissions, the language, expressions and findings used and made by the Authority make it plain that it did engage in a *prospective assessment* of what the applicant would do and the risk of harm he would face if he returned to Afghanistan.[60] For example: a. the Authority found that if the applicant went back to Afghanistan, he would return to Kabul and would seek to re-establish himself there, and had "assessed him on that basis";[61] b. the Authority considered at [36][62] the applicant's religious practices and made

			findings as to how the applicant "would live in the community", how the Authority "expected" he would practise his faith, and concluded that he "would not be" harmed if he returned; c. in relation to harm suffered by Shia Hazaras from the Taliban and other anti-government elements, the Authority considered the country information before it as to the risk of harm faced by Shia Hazaras in Kabul; ie. the applicant's circumstance if he returned. That indicated that "ordinary Shia Hazaras" were not being targeted. The country information also indicated that persons with certain profiles were at risk, but the Authority found that the applicant did not have such a profile and *would not* if he returned to Afghanistan.[63] The Authority also considered country information put forward by the applicant relating to recent attacks in 2016 and 2017 against Shia Hazaras. The Authority was not, on the basis of this country information, satisfied that the applicant would be at risk of harm if he returned;[64] d. in relation to IS, the Authority considered relevant country information about their actions, including recent

			attacks in 2016 and 2017.[65] The Authority noted that casualties caused by IS were decreasing,[66] and that IS was focusing on high profile government, military and coalition targets, ie. not the applicant;[67] e. relying on country information, the Authority did not accept that anti-government elements were targeting Shia Harazas in Kabul on the basis of their ethnicity and/or religion;[68] and f. other parts of the Authority's decision also plainly show that it undertook a prospective assessment of the risk of harm facing the applicant on return to Afghanistan.' (Para 34). 'The applicant's submission to the Authority refers to country information indicating that the security situation in Afghanistan was deteriorating, which, it is submitted, meant that it was "important" for the Authority to consider the "reasonably foreseeable future". No error is revealed by this submission. The Authority acknowledged that "there has been a deterioration in the security situation in the country overall...".[70] That does not, however, mean that the applicant would face a real chance of harm on return to Afghanistan. Having acknowledged this country information, the Authority also considered country information as to the particular risk of harm relevant to

			the applicant in the areas to which he was returning, and was not satisfied that the applicant would face a real chance of harm there.[71] In doing so, the Authority considered country information (put forward by the applicant) as to recent circumstances and attacks in those areas.[72] No failure to engage in a prospective assessment of the applicant's risk of harm on return to Kabul has been shown.' (Para 35). 'I am satisfied that the Authority did make a forward looking assessment concerning the risks faced by the applicant from insurgents. The applicant has not challenged the Authority's assessment of the risk he faces from generalised violence in Kabul or Afghanistan more generally. That may have been a generous concession, having regard to the fact that the Authority accepted the applicant had been shot during his brief period in Kabul, which might indicate a real risk of significant harm from generalised violence for the purposes of the complementary protection assessment. In a country where firearms are ubiquitous and are openly carried on the street, and in circumstances where the applicant was shot in a random incident of violence because of a traffic incident, the conclusion that he does not face a real risk of significant harm as a result of generalised violence is, to my mind, a somewhat brave one.' (Para 37). 'This is a matter which the Minister might consider pursuant to s.417 of the Migration Act. Further, there are humanitarian considerations in this case. The applicant was born in Iran as a refugee and spent most

			of his life there. More recently, he has spent some years in Australia. He has only spent a short time in Afghanistan, in Kabul, where he was shot. Plainly, being compelled to return there is a very unhappy prospect for him.' (Para 38).
BGE17 v Minister for Immigration & Anor [2019] FCCA 1291 (Judge Nicholls) (Unsuccessful)	16 May 2019	5-6, 64, 67-69, 72-74, 77-78, 94-97	This case was concerned with the proper way to approach the statutory definition of 'significant harm'. The FCCA confirmed that a decision-maker does not have to consider all possible forms of statutorily defined harm in each case, but rather only those which are raised by the particular case. 'The applicant is a citizen of Afghanistan who arrived in Australia on 27 August 2012. He subsequently made an application for a SHEV which was received by the Department on 8 December 2015 (CB 97– CB 146). The applicant was assisted by a migration agent in making the application.' (Para 5). 'The applicant claimed to fear harm if he were to return to Afghanistan from the Taliban, other (Sunni Islam) extremist groups, and the Pashtun population generally due to his being of Hazara ethnicity, of Shia Islamic religion, that he would be imputed with an anti–Taliban political opinion, and would return as a failed asylum seeker.' (Para 6). 'Ground two takes issue with the IAA's consideration of the question of the reasonableness of relocation to Mazar–e–Sharif.' (Para 64).

			'In any event, the assertion of legal error was said to be, simply, as follows. In the context of its consideration of relocation, the IAA did consider all of the forms of significant harm in relation to social discrimination, and nepotism ([40] at CB 322–CB 323). Further, that the IAA did make conclusions regarding the reasonableness of relocation at [43] and [50] of its decision record.' (Para 67). 'However, the applicant submitted, the IAA made "generic conclusions" which he "would have to go behind...to contend that there was no consideration in relation to the other forms of significant harm".' (Para 68). 'The complaint as expressed in the applicant's written submissions is as follows: (at [23]) *"...The IAA expressly considered whether the applicant had the "capacity to subsist" in Mazar-e-Sharif at [46] and [47] of its decision. However, the IAA erred by failing to consider the risk to the applicant of other possible forms of statutorily-defined forms of significant harm when assessing the reasonableness of him relocating to Mazer-e-Sharif."*' (Para 69). 'Implicit, if not explicit, in the applicant's argument is that in all cases where a decision maker gives consideration to the matter of "significant harm" under the Act, the decision maker is compelled to consider each and every one of the items set out at s.36(2A). In

			the current case the applicant argues the IAA did not do this.' (Para 72). 'There are two immediate answers to the general proposition postulated by the applicant.' (Para 73). 'One, s.36(2A) is not a "shopping list" that requires some formulaic "ticking – off" of each item set out there. Rather, the decision maker's task is to consider the circumstances presented, and attendant upon, claims expressly made or clearly arising from the material before it (*NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* [2004] FCAFC 263, and *"WAEE"*).' (Para 74). 'Two, in that light regard must also be had to the entirety of the IAA's consideration. For example, as set out above findings of fact made by the IAA under different headings in its decision record are available and may be "imported" into the consideration under the heading of "Real risk of significant harm" (CB 322.3).' (Para 77). 'As the respondent's counsel submitted in the current case there is no suggestion that the IAA was unaware of the "various means" by which a person may suffer significant harm (see the IAA's references in [35], and see also [37]).' (Para 78). 'Two things may be said about the applicant's submission before the Court concerning the matter of the capacity to subsist. One, it was not unreasonable for

			the IAA to focus on this given the applicant's claims and arguments about relocation to Mazar–e–Sharif. Two, as the Minister submits this was not the only element in the IAA's relevant consideration.' (Para 94). 'For example, the IAA considered the applicant's circumstances in light of his claimed personal circumstances, his concerns about the economic well-being of his family, his capacity to re-establish himself in Mazar–e–Sharif, employment concerns and relevant familial and social networks. In addition the IAA addressed the matters raised as being "Accommodation and Family support".' (Para 95). 'Contrary to the applicant's submissions now, this went beyond a simple consideration of the applicant's capacity to subsist but, properly, considered the reasonableness, and practicability of relocation in the context of the applicant's own circumstances, and his objections to relocation.' (Para 96). 'In all therefore, the IAA understood the question posed by s.36(2)(aa) and s.36(2A), and its application of s.36(2B) does not reveal jurisdictional error. Ground two is not made out.' (Para 97).
EZC18 v Minister For Home Affairs & Anor [2019] FCCA 464 (Judge Brown) (Unsuccessful)	1 March 2019	1-4, 23, 31-35, 37-38, 41, 46-47, 49-51, 67, 69-71, 74-76, 79, 81, 83-84, 90-93	The court discussed the meaning of 'arbitrary deprivation of life' and whether there was a requirement of intention attached in relation to an applicant who was at risk of committing suicide on return to the UK. Not only does the court indicate that there must be a subjective intention, it appears to require that the state

			condone the actions of a non-state party which would deprive someone of life. 'The applicant is a British citizen. He was born in Cumnock, Scotland on 24 January 1932. He migrated to Australia, with his now deceased spouse and three children, in June 1964. He has never applied nor been granted Australian citizenship. He remained living in Australia, pursuant to a permanent resident visa, issued under the provisions of the *Migration Act 1958*.' (Para 1). 'On 10 March 2016, the applicant was convicted of two counts of sexual exploitation of a minor, in the District Court of South Australia, and sentenced to four years imprisonment, with a non-parole period of one year. The victims of the crimes were two of his granddaughters, who were each under fourteen years of age at the time of offending.' (Para 2). 'The applicant is in poor health. He suffers from atrial fibrillation; type 2 diabetes; hypertension; hypercholesterolaemia; hypothyroidism; congestive cardiac failure; cardiovascular disease; and various lung diseases. In the past he has suffered from bowel cancer. He has hearing loss; blindness in one eye; suffers from arthritis; and has mobility issues. He has also been diagnosed with some form of dementia.' (Para 3). 'On 22 August 2016, a delegate of the Minister for Immigration & Border Protection cancelled the applicant's permanent resident visa pursuant to the

			provisions of section 501(3A) of the Act. This requires that any migration visa held by a person is to be cancelled if that person does not pass a *character test* because he/she has been convicted of a sexually based offence, involving a child, and has been sentenced to a term of full-time imprisonment.' (Para 4). 'In this particular case, the applicant does not contend that he is a refugee for the purposes of section 5H.The grounds for his application turn on the complimentary protection provisions. It is his position that as there is evidence, in the form of the assessment of Dr Begg, that he will commit suicide, if returned to the United Kingdom. As a consequence it is contended, on his behalf that there is a *real chance* that he will suffer significant harm through the *arbitrary deprivation* of his life within the terms envisaged by section 36(2A).' (Para 23). 'In these circumstances, his counsel, Mr Finlayson submits that AAT erroneously interpreted the expression and concept of a person who is *arbitrarily deprived* of life, as contained in section 36(2A) of the Act. In his contention, a person can be *arbitrarily deprived* of life, if the action is occasioned by his/her own hand, if a state based authority fails to take adequate precautions or put in place sufficient measure to prevent the suicide in question occurring. The emphasis, in his submission, being on the meaning

			of *arbitrarily* in the context of the complementary protection provisions.' (Para 31). 'In this context, the AAT had available to it a paper prepared by Aida Ziganshina entitled *Independent Research on Arbitrary Deprivation of Life.*[12] Essentially, in Ms Ziganshina's thesis, an action result in a person being deprived of life can be authorised by domestic law and still remain arbitrary. The expression is to be interpreted broadly, whilst bearing in mind it will have a variety of meanings depending on context.' (Para 32). 'By way of example, it is submitted that the suicide of a person in lawful custody may be characterised as arbitrary, if the state authority concerned has acted negligently through failing to provide adequate safeguards to prevent the self-harm in question. Such state authorities are accountable to a higher standard as a consequence of their deprivation of the liberty of the person who is subject to their control.' (Para 33). 'Ms Ziganshina cited a United Nations Special Rapporteur, Manfred Nowak, who defined arbitrariness as difficult to define in abstract, but in the context of deprivation of life it is a concept linked to ideals of justice and covered both intentional and unintentional acts and one which contained elements of unlawfulness, injustice, capriciousness and unreasonableness.' (Para 34).

			'In this context, it is contended, on behalf of the applicant, given the fact that the AAT accepted he is at significant risk of suicide because of his idiosyncratic circumstances on return to the UK, it is axiomatic that Australia owes him complementary protection obligations and it is immaterial that his death may be self-initiated.' (Para 35). 'The AAT considered Ms Ziganshina's thesis to be a helpful insight into international jurisprudence but found it was not bound to consider any possible breaches, by Australia, of the *International Covenant On Civil and Political Rights* when considering the complementary protection criterion under the Act.' (Para 37). 'The AAT noted that the expression *arbitrarily deprived of life* was an expression not defined within the applicable legislation. In these circumstances, the adverb *arbitrarily* should be given it ordinary meaning, which it found to be concerned with *"capriciousness, unpredictability, injustice and unreasonableness"* in the sense of *"not being proportionate to the legitimate aim sought"*. Finally, the AAT found that the natural reading of section 36(2A) required the harm arbitrarily inflicted on the person concerned to emanate from a third party.' (Para 38). 'The difficulty arising in this case is that the expression *arbitrarily deprived of life* is not defined within the Act. Other aspects of *significant harm,* listed in section 36(2A) such as *torture; cruel or inhuman*

			treatment or punishment; and *degrading treatment or punishment* are defined. Necessarily, in my view, these definitions provide context to assist the court, in determining the issues arising in this case, as will the overall legislative intent underpinning the provision.' (Para 41). 'Mr Bowen indicated that the purpose of the bill was to honour Australia's *non-refoulement* obligations arising under its ratification of the *International Covenant on Civil and Political Rights*[18] and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*[19]Particularly relevant were Articles 6 & 7 of the *ICCPR.*' (Para 46). 'Accordingly, in my view, it is appropriate, for this court, in its interpretation of section 36, to look to both the *ICCPR* and the *CAT* to determine the meaning of *significant harm* in the context of the person concerned being *arbitrarily deprived of life.*' (Para 47). 'The predominant focus of Article 6 is on state sanctioned executions and genocides, which are by their nature intended to occur. In each case, either a state based authority (in the case of an execution) or a ruling clique has determined on the killing of a particular ethnic or religious group (in the case of genocide). Judicially authorised executions are recognised but only in closely prescribed circumstances.' (Para 49). 'In the case of the applicant in the present case, neither the UK nor Australian authorities actively *intend* his

			death, in the sense that either state actively seeks it or has put in place formative steps to ensure that it will definitely occur at some specific time, as with an execution. Accordingly, in the current case, the authorities do not *mean* the applicant's death to occur, but they can foresee its possibility, given the applicant's idiosyncratic circumstances, particularly his psychiatric prognosis.' (Para 50). 'Necessarily given the applicant's accepted state of psychological infirmity, his death at his own hand, is a foreseeable consequence of his forced removal from Australia, which is known to the relevant authorities in this country. The question for the court, which arises, is whether this situation is equivalent to an *arbitrary* action, of the state, likely to lead to the deprivation of life. As will be seen, in *SZTAL,* Edelman J referred to this concept as *oblique intention.*' (Para 51). '*MZAAJ v Minister for Immigration & Border Protection* [23] Judge Riley was dealing with a judicial review matter, in respect of a complementary protection claim, concerning a Sri Lankan Tamil, who suffered significant diabetes and kidney disease requiring regular dialysis. Again, given it developmental status, Sri Lanka could only provide limited dialysis, which had the potential to have life threatening consequences for the applicant, if returned there.' (Para 67).

			‘On appeal, Pagone J again dealt with the issue in brief terms. He said as follows: *“The words “arbitrarily deprived” are to be given their ordinary meaning. In this case the Tribunal found that any lack of adequate medical treatment would not result from the first appellant’s ethnicity or particular circumstances but from the general circumstances faced by all Sri Lankans. The Tribunal did not expressly mention s 36(2B)(c) in its reasons but did find, for the purposes of that provision, that the risk of harm from inadequate medical treatment was a risk faced by all Sri Lankans when concluding that the first appellant would be excluded from the operation of the complementary protection regime.’”* (Para 69). ‘In this context, counsel for the Minister, Mr d’Assumpcao submits as follows: *“...the ordinary meaning of the words ‘arbitrarily deprived’ read in the context of the Act and the policy underlying their introduction, mean that the harm is concerned with matters such as extrajudicial killing and the like.’”* (Para 70). ‘I agree with this submission. The risk of significant harm facing the applicant in this case is not one which emanates specifically from any state based authority or

			its agents or proxies. The applicant faces the risk of death, at his own hand, because of the travails of loneliness; social isolation; compounded by old age and poor health. These are risks likely to be faced by many individuals, in both this country and the UK.' (Para 71). 'The same dictionary defines verb *deprive* as *"strip, dispossess, debar from enjoying"*. It is a transitive verb which necessitates in its usage that it has a direct object. Accordingly, for the applicant to suffer significant harm, pursuant to this criterion, a decision maker must be satisfied that another actor is intent on dispossessing another person of his/her life in a despotic or tyrannical fashion or otherwise subject to whim or caprice.' (Para 74). 'Despotism and tyranny are attributes of some form of malign authority, inimical with any consideration of internationally sanctioned standards of human rights. In my view there is a consistency between the various forms of significant harm delineated in section 36(2A) in that each requires an intended consequence. This follows from the specific use of the word intend and in the context of *deprivation of life* the use of a transitive verb.' (Para 75). 'It is also clear that section 36(2A) was created to give substance to Australia's non-refoulement obligations at an International level. Section 36(2B) limits these obligations by the principle of internal relocation and in cases where the harm faced is generic in nature. In my view, the harm concerned, given the tenor of the second

			reading speech, must also have a causal connection to one of Australia's obligations under either *ICCPR* or *CAT*.' (Para 76). 'As such, the applicant was not likely to be subject to any direct form of discrimination or harm emanating from the UK authorities or subject to the infliction of any sort of harm by others, whom the government was either unable or unwilling to restrain. The direct harm, in this case, would come from the applicant himself by dint of his circumstances.' (Para 79). 'In these circumstances, the situation facing the applicant may be regarded as one characterised by the relevant authorities having a callous disregard for his safety and well-being but not, in my view, one characterised by those authorities having a tyrannical or capricious intent to end his life. The distinction is a fine one but is significant given the context and intent of the relevant legislation.' (Para 81). 'The example given of the honour killing is apposite to the current matter. The victim of an honour killing will have been axiomatically arbitrarily deprived of life in an unrestrained and tyrannous manner. The death will involve the actions of others and be meant, by them, to occur. If it occurs with the passive disregard of the relevant authorities, it will be tantamount to the commission of significant harm, which the government condones. It will be antipathetic to the principles of human rights to which Australia adheres. As such, in

			my view, it will not be analogous to the situation confronting the applicant.' (Para 83). 'In the current matter, neither the Australian nor the UK governments condone the applicant engaging in self-harm. Any potential self-harm is unlikely to have the involvement of another individual actor and, if it does, it will arise with the acquiescence of the applicant. As such, there is no suggestion of any direct act or omission attributable to any government agency.' (Para 84). 'What is fundamentally different between this case and other cases involving honour killings; exposure to violence because of sexual preference; or the return of a person to an environment in which family violence is prevalent and condoned; is that each of these exemplars of harm involves the actions of others; whilst in the applicant's case, his harm is potentially self-actioned and self-directed.' (Para 90). 'Section 36 is directed towards ensuring Australia meets it international human rights obligations as entailed in its ratification of the Refugees Convention; the *ICCPR;* and the *CAT.* Each of these, in my view, is directed to provide protection, for individuals, from the despotic actions of states and any actors within states, whose tyrannical activities are not subject to the control of state based authorities, who have passively provided its imprimatur to such activities.' (Para 91).

			‘I appreciate that Article 2 of the *ICCPR* places emphasis on every human being’s *inherent right to life.* This statement prefaces sub-articles dealing with the imposition of the death penalty; genocide; the right to seek commutation or pardon in respect of a penalty of death; and negates it imposition for youths and pregnant women.’ (Para 92). ‘It is in the context of such matters – all involving state actions – that the phrase *arbitrarily deprived of life* appear. In this context, I agree with the submissions of counsel for the Minister, Mr d’Assumpcao that the Article is concerned with the concept of extra-judicial killings, which are state initiated. In my view, the Article does not create any obligations upon contracting states, in respect of ensuring the sanctity of life, in a more generic sense.’ (Para 93).
AOS18 v Minister for Immigration & Anor [2019] FCCA 327 (Judge Kendall) (Unsuccessful)	15 February 2019	4, 36-37, 42, 57-58, 61-62, 66-73	The issue in this case was whether the Tribunal had sufficiently examined the applicant’s complementary protection obligations where the Tribunal had not made findings separate to its Refugee Convention findings. The court applied the Federal Court’s decision in *CDY15 v Minister for Immigration and Border Protection* [2018] FCA 175 (28 February 2018) in finding that the Tribunal had not erred. ‘The Applicant provided a statutory declaration with his SHEV application in which he claimed that that he feared harm by the Bangladeshi police. The Applicant claimed that his parents and siblings were supporters of the Bangladesh Nationalist Party (“BNP”) and that his

			father was a member of the BNP. The Applicant also indicated that he had endured physical and emotional harm at the hands of members of a rival political party, the Awami League ("AL") and that he also fears harm as a Sunni Muslim.' (Para 4). 'As noted above, in his Application for judicial review, the Applicant relies on one ground of review, as follows: 1. *The Assessor failed to properly consider all of my claims. The Immigration Assessment Authority (IAA) erred by:* a. *failing to consider an integer of the Applicant's claims for protection by not considering whether the physical harm, threats and extortion suffered by the applicant in Bangladesh for a non-Convention reasons gave rise to complementary protection obligations under s.36(2)(aa) of the Migration Act 1958 (Cth) (Act); and / or in the alternative* b. *requiring the Applicant to show a Convention-nexus to the risk of significant harm he faced in order to fall within complementary protection*

			criteria under s.36(2)(aa) of the Act.' (Para 36). 'It is evident from the very useful oral submissions presented by Mr Saul-Jahnke for the Applicant that at the core of the Applicant's ground of review is the contention that, given the IAA's findings in relation to the evidence of physical harm inflicted on the Applicant in Bangladesh (on three occasions), the IAA failed to comply with its obligations under the Act because it did not specifically address these acts of violence in determining whether the Applicant risked future harm as per the requirements of s.36(2)(aa) of the Act.' (Para 37). 'In assessing whether or not an error has occurred here in relation to the IAA's obligations when assessing any Complementary claims, the Court is guided by the overview provided by Derrington J in *CDY15*. Relevantly, His Honour wrote that the question to be determined in assessing whether an Applicant is entitled to any Complementary protections is: *23. ...whether, as a necessary and foreseeable consequence of the applicant for a visa being removed to a receiving country, there is a "real risk" that he or she will suffer significant harm. That involves an evaluation of the harm which the applicant might suffer in the future and that assessment requires past facts and events to be evaluated for the purposes of ascertaining whether a propensity exists for the applicant to*

			encounter harm in the future. Highly relevant to that inquiry is whether the applicant has suffered any previous infliction of harm and the circumstances in which it occurred. If it were the case that third parties inflicted harm on the applicant and had reasons and motivation for doing so and those reasons and motivations remained extant at the time when the decision is made, the decision maker might rightly assume that there exists a propensity for harm to be suffered by the applicant at the hands of those third parties in the future. Conversely, if the motivation or reasons behind the infliction of the initial harm have expired or lapsed, a decision maker might rightly consider that the prospect of the applicant suffering harm in the future from the identified third parties does not exist. *24. That is not to say that the identification of motivation for the infliction of past harm is a necessary requirement. It is possible to contemplate circumstances where the motivation for prior incidents is not known but the frequency of the infliction of harm or the circumstances are such that it is possible to reach the conclusion that there exists a real risk of the applicant suffering significant harm in the future. That said, such circumstances (outside of war zones and the like) will be unusual and it is likely that they will only occur where they generate an assumed or implicit motivation for*

			the infliction of past harm which can be seen to continue at the time of the making of the decision. Nevertheless, in general, as a matter of logic it is the motivation behind past inflictions of harm on an applicant which make that factor relevant to a consideration of whether similar harm is likely to be inflicted in the future. In circumstances where the reason or motivation for the past infliction of harm is not known, the fact that the applicant has sustained that harm, of itself, must necessarily be of little significance in deciding whether, in the future the applicant might be at risk of similar harm. Put another way, it must be that, in all but the most exceptional cases, the existence of prior acts of harm for which no reason or motivation is known cannot lead to the conclusion that the victim of those acts of violence faces any risk of similar harm in the future.' (Para 42). 'Applying *CDY15* to the specific facts of this case, it is clear here that the Applicant made a Complementary claim to fear harm on the basis of the attacks he referenced. That much is clear from the Applicant's SHEV application, where he states that he had been assaulted in the past and was worried that he would be attacked again.' (Para 57). 'It is worth stressing here that this particular Complementary claim does not exist in a vacuum and cannot simply be segregated from the Applicant's Convention claims. Rather, the claim to fear harm arises

			within the context of a series of quite violent attacks that, on the Applicants own evidence, occurred at the hand of the AL in Bangladesh because of his *political affiliations* (as either a member of supporter of the BNP). The Applicant here, on the evidence, does not assert that he was attacked for any reason other than his political affiliations. This is crucial to any s.36(2)(aa) analysis.' (Para 58). 'Here, it is clear that the IAA accepted that the Applicant was attacked. However, the IAA rejected the Applicant's claims as to *the motivations* for the attacks and his evidence surrounding the attacks and *why they occurred* – evidence which, the IAA found, suggested no political motivation for the attacks.' (Para 61). 'The question that follows is whether the IAA was then required to specifically address these attacks under its assessment of s.36(2)(aa).' (Para 62). 'To paraphrase Derrington J, the difficulty the Applicant faces here is that the facts and evidence that underpin his claim about a risk of significant harm if he is returned to Bangladesh are clearly linked to his own evidence and concerns about the harm that might arise because of his political leanings. The allegations and concerns raised in relation to his Complementary claims are the same as those which ground his Convention claims.' (Para 66). 'Here, once the IAA had determined that any harms that arose in the past were not, in any way, politically

			motivated – but rather, random in nature – the foundation of the Applicant's claims as a whole necessarily fell away.' (Para 67). 'In these circumstances, there is no jurisdictional error in the IAA applying its earlier Convention findings (being the rejection of the Applicant's evidence as to why he was assaulted) for the purposes of determining whether or not he would face a real risk of harm if returned to Bangladesh for the purposes of s 36(2)(aa) of the Act.' (Para 68). 'Here, as in *CDY15*, the rejection of the Applicant's evidence as to the motivations for the violence he experienced (which he says suggested a political motivation for the attacks), had the effect that the fact of the attacks having occurred carried with it no suggestion, on the evidence before the IAA, that similar harm would be suffered in the future.' (Para 69). 'Here, the IAA relied on its findings made pursuant to 36(2)(aa) of the Act when it wrote: *I have otherwise found that the applicant does not face a real chance of any harm on return to Bangladesh due to his former political involvement, his previous or future support of the BNP, his father's BNP support, as a Sunni Muslim or due to his illegal departure.*' (Para 70).

			‘This is sufficient. The Applicant’s claims about the acts of violence inflicted on him all relate to his specific claims and his own evidence about his political affiliations. Here, the IAA determined that the violence in question was not politically motivated. It references that conclusion in its 36(2)(aa) analysis. The fact that the IAA does not specifically reference the attacks in question does not, in the circumstances of this case, point to jurisdictional error.’ (Para 71). ‘Although the Complementary analysis provided by the Tribunal in *CDY15* is more substantive and detailed, the Court does not accept that the IAA is *required* to specifically reference each factual finding made in its analysis of an Applicant’s Convention claims. To oblige the IAA to do so risks requiring the IAA to undertake separate determinations of fact in relation to each ground as advanced. To again reference Derrington J in *CDY15* (at [42]): *The Tribunal is entitled to make factual findings on the basis of the evidence provided to it by the applicant and what other evidence is available. If such findings of fact are relevant to the application of two or more statutory tests, the Tribunal is entitled to rely upon the finding in relation to each. To require the Tribunal or other decision maker to undertake a wholly nugatory task of considering the material a second time would be irrational. ... [I]t 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 72). 'Here, the factual basis for the Applicant's Convention and Complementary claims is the same. All the evidence points to harm on the basis of a political affiliation. In circumstances where that occurs, the basis of the IAA's rejection of the Convention claims (i.e. that no *political* violence was evident) can be relied on for the rejection of the Applicant's claim for Complementary protection. The IAA makes specific reference here to its Convention findings, noting that it found no political motive for any harm infected in the past. That finding clearly captures any Complementary claims that rely, as they do here, on the same factual context for proof of harm in the future.' (Para 73).
ANL15 v Minister for Immigration & Anor [2019] FCCA 238 (Unsuccessful) For similar discussion on the Ministerial Direction, see also BNF15 v Minister for Immigration & Anor [2019] FCCA 236 (8 February 2019)	8 February 2019	3, 5, 10, 14, 16-18, 25-29	The FCCA considered whether there had been a failure to comply with Ministerial Direction No 56 in circumstances where the Tribunal had mentioned the Guidelines in the 'Relevant Law' section but not in the substantive section where it set out its findings on complementary protection obligations. 'The background to this matter is as follows: a. the applicant is a citizen of Sri Lanka and arrived at Cocos Island on 12 August 2012 as an illegal maritime arrival: CB 95-96; b. on 6 September 2012 an entry interview was conducted: CB 1-14, and on 20 November 2012

			the Minister lifted the bar under s.46A of the *Migration Act* to allow the applicant to lodge a Protection Visa application: CB 96; c. the applicant lodged the Protection Visa application on 13 December 2012, in which he claimed to fear harm on the basis of his actual or imputed political opinion and his unlawful departure from Sri Lanka: CB 15-45; …' (Para 3). 'The applicant submitted as follows: a. the ground of review could also be described as a failure to take into account a relevant consideration, namely the PAM 3 Refugee and Humanitarian Complementary Protection Guidelines ("Guidelines"); b. the Tribunal was obliged under s.499(2A) of the *Migration Act* to comply with any Ministerial direction made pursuant to s.499(1) of the *Migration Act*. In this instance, the Ministerial Direction as set out at [4(d)(iii)] above had been made, which required the Tribunal to take into account the Guidelines to the extent they are relevant; c. the Tribunal dealt with the Ministerial Direction in the Tribunal Decision at CB 164 at [69];

			d. the Tribunal Decision at CB 171-172 at [107]-[109] rendered the Guidelines relevant, and by reason of s.499(2A) of the *Migration Act*, the Guidelines were a mandatory consideration; e. the Guidelines provide examples of poor prison conditions which can amount to cruel or inhuman or degrading treatment or punishment: CB 171-172 at [107], including, amongst other things, overcrowding, unsanitary conditions, exposure to cold, inadequate ventilation or lighting, inadequate bedding, inadequate clothing, inadequate nutrition and clean drinking water, lack of opportunity for adequate exercise, and denial of medical treatment: Guidelines, pp.27-29; f. despite that finding at CB 171-172 at [107], the Tribunal does not then consider whether the overcrowding, poor sanitary facilities, limited access to food, absence of basic assistance mechanisms, lack of reform initiatives and instances of torture, maltreatment and violence would, when regard is had to the Guidelines and the international jurisprudence referred to therein, mean there is a risk of significant harm to the applicant; g. the Ministerial Direction requires the Tribunal to take into account the Guidelines to the extent

			they are relevant to the decision under review; …' (Para 5). 'What is required to be undertaken is a consideration of the reasoning in the Tribunal Decision as a whole, and an evaluation as to whether the omission of any further specific reference to the Guidelines can be understood, or rationalised, as being because the Tribunal did deal with the matters the subject of the Guidelines, albeit without specifically referring to the Guidelines, or because the matters or evidence which were required to be considered were not material to the Tribunal's reasons: *Minister for Immigration & Border Protection v SZSRS* [2014] FCAFC 16; (2014) 309 ALR 67 ("*SZSRS*") at [33]-[34] per Katzmann, Griffiths and Wigney JJ; *Minister for Immigration & Citizenship v MZYZA* [2013] FCA 572 at [48] per Tracey J.' (Para 10). 'The Tribunal specifically dealt with whether the applicant would experience significant harm for reasons of returning as a failed asylum seeker or an illegal departee: CB 169-171 at [94]-[101], and in particular observed that the applicant would be detained for a short period if charged with an offence under the *I & E Act*, would be fined, and bailed, and that if he could not afford to pay the fine could make arrangements to pay the fine by instalments: CB 169-170 at [94]-[97]. The Tribunal then dealt specifically with prison conditions…' (Para 14).

			‘The Tribunal further dealt with: o the question of prison conditions in assessing the complementary protection claims of the applicant at CB 171-172 at [107]-[109] set out at [4(v)] above; o the process by which the applicant was likely to be charged with an offence under the *I & E Act*, bailed and fined in its complementary protection assessment: CB 171 at [104]-[105]; and c. the question of the applicant’s employment upon his return to Sri Lanka in its complementary protection assessment: CB 172 at [110].’ (Para 16). ‘It is evident from the foregoing that the Tribunal engaged at an appropriate intellectual level with the claims made by the applicant, both in the context of the refugee and complementary protection assessments: *Lafu*at [47]-[54] per Lindgren, Rares and Foster JJ.’ (Para 17). ‘It is possible to infer that the Tribunal has failed to consider particular evidence or information where it does not mention it in its reasons: *Yusuf* at [69] per McHugh, Gummow and Hayne JJ. The fact that evidence or information is not expressly referred to in the Tribunal Decision does not, however, mean the Tribunal did not consider the evidence or information at

			all, or failed to actively engage in a consideration of the evidence or information: *Yusuf* at [69] per McHugh, Gummow and Hayne JJ; *SZSRS* at [34] per Katzmann, Griffiths and Wigney JJ. Where a Tribunal makes findings on a particular matter, the omission of other matters can be reasonably understood or inferred to be on the basis of irrelevance or immateriality to the Tribunal's reasoning, however, "[i]n some cases, having regard to the nature of the applicant's claims and the findings and reasons set out in the [Tribunal's] reasons, it may be readily inferred that if the matter or evidence had been considered at all, it would have been referred to in the [Tribunal's] reasons, even if it were then rejected or given little or no weight": *SZSRS* at [34] per Katzmann, Griffiths and Wigney JJ.' (Para 18). 'In *ADO15* this Court observed as follows at [52]-[54] per Judge Smith: *52. The first point to note is that cl.2 of the Direction only requires the Tribunal to "take account of" the relevant guideline. It does not require the Tribunal to follow the guideline slavishly as though it were a statement of law. In this case, the Tribunal stated, at [6] that it was required to take the guideline into account. In light of that, it is clear that the Tribunal was at least cognisant of its obligation under s.499 of the Act. Thus, in my view, in order to succeed the applicant must show from the balance of the Tribunal's reasons that, in spite of this cognizance, the Tribunal failed to have any regard to the guidelines.*

			53. The second point to note is that the particular paragraph in the guidelines relied upon by the applicant (the second paragraph quoted at [51] above) is very general in nature and application. The Direction does not say when it would be appropriate to make certain inferences, or when certain inferences must be drawn. Indeed, if it did it would probably be beyond the power in s.499(1) of the Act…' (Para 24). 'As in *ADO15* the reference to the Guidelines at CB 164 at [69] indicates that the Tribunal was well aware of the requirement to take the Guidelines into account. That is reinforced in this case by the placement of the reference to the requirement to take the Guidelines into account in the paragraph immediately preceding the Tribunal's consideration of the applicant's claims and the evidence: CB 164 at [69]. For the reasons which follow immediately hereunder it cannot be said in this case that in spite of its cognisance of the Guidelines the Tribunal failed to have regard to them.' (Para 25). 'In the Court's view it can plainly be inferred from the Tribunal Decision that the Tribunal read, understood and took into account the Guidelines, particularly insofar as it focussed upon the likely short period of detention: CB 172 at [108]. The Tribunal expressly set out and engaged with the definition of "significant harm" as it related to the applicant's circumstances in this case, and in particular the applicant's return to Sri Lanka as a failed asylum seeker or an illegal departee: CB 163-164 at [66]-[68], 171 at [102] and [104], and 171-172 at [107]-[109]. The focus on the short period of

			detention allows an inference that the Tribunal was applying duration-based reasoning as a centrally important factor in assessing prison conditions against Article 7 of the *ICCPR* as indicated in the Guidelines. The necessary implication to be drawn from this inference is that having found the applicant would be detained for only a short period, the Tribunal did not consider the other parts of the Guidelines relevant, as opposed to failing to consider them: *SZTMD* at [15] per Perram J. Moreover, the Tribunal otherwise specifically considered country information concerning prison conditions, in the context of a short period of confinement, as it was required to do by the Guidelines: *AJW15-FCCA* at [3] per Judge Street. *SZUQZ* and *ARS15* are therefore distinguishable in these circumstances, the Court being of the view that in this case the Tribunal's reasons indicate that it read, understood and took into account the Guidelines.' (Para 26). 'For all of the above reasons, the Court is bound to follow the Federal Court's judgment in *SZTMD*, *AAH15* and *AWJ15-Federal Court*, and applying those judgments, and the rationale in *ADO15*, the Court is of the view that the Tribunal was aware of the requirement to, and, as a matter of substance and not mere form, did take into account, the Guidelines.' (Para 27). 'Finally, it is pertinent to observe that even if there was an error with respect to the treatment of the Guidelines by the Tribunal in the Tribunal Decision, the finding by

			the Tribunal at CB 172 at [108] that the mere act of imprisonment in the applicant's circumstances does not have a requisite intention to cause significant harm means that any error with respect to the Guidelines would be irrelevant: see *SZTAL* (and now see *SZTAL v Minister for Immigration & Border Protection* [2017] HCA 34; (2017) 91 ALJR 936; (2017) 347 ALR 405 at [4] per Kiefel CJ, Nettle and Gordon JJ, and [74] per Edelman J).' (Para 28). 'With respect to the applicant's sole ground of review the Court does not find any jurisdictional error in the Tribunal's consideration of the Guidelines in the applicant's case and, in particular, finds that there was no failure to relevantly take account of the Guidelines.' (Para 29).