COMPLEMENTARY PROTECTION IN AUSTRALIA

DECISIONS OF THE FEDERAL COURT, FEDERAL CIRCUIT COURT & ADMINISTRATIVE APPEALS TRIBUNAL

ARCHIVE 2012–14

This is a list of decisions of the Federal Court of Australia, the Federal Circuit Court of Australia (previously, the Federal Magistrates Court) and the Administrative Appeals Tribunal that are relevant to complementary protection. Decisions are organised by court/tribunal, in reverse chronological order, for the period 2012–14. More recent decisions are available in separate tables 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 also includes 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 includes 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 below 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
MZZGB v Minister for Immigration and Border Protection [2014] FCA 1052 White J (Unsuccessful)	1 October 2014	3, 7, 18, 28, 29 and 31	This case relates to: • the failure to apply the complementary protection criteria to the applicant's claim The appellant was an Iranian citizen (para 3) and claimed to fear harm from the Basij in Iran (para 7). The applicant also claimed that since arriving in Australia he had developed an interest in Christianity and intended to be baptised as a Christian (para 7). The appellant claimed that the change in his religion would put him at risk of serious harm, were he to return to Iran (para 7). The appellant pursued three grounds of appeal. Relevantly, the first ground was that the Federal Circuit Court failed to consider 'two integers' of the appellant's claim with respect to significant harm (para 18) The first integer was said to be that the Independent Merits Reviewer (IMR) did not to consider whether two incidents (Incidents One and Two), which involved sporadic harm from Basji members, amounted to "significant harm" (para 18). The Court concluded that the IMR 'having found that the appellant did not have a well-founded fear of serious harm amounting to persecution for a

			Convention reason, the IMR then considered the claim for complementary protection . It is unsurprising that in doing so, the IMR did not think it necessary to repeat her summary of, or conclusions with respect to, the evidence considered in relation to the claim for protection under s 36(2)(a). It is also unrealistic to suppose that the absence of repetition is an indication that the IMR, when considering the claim for complementary protection, did not have regard to the same matters about which she had already made findings' (para 28). The second integer was said to be that the 'IMR took as her framework for consideration of the claim of complementary protection' the written submissions made in support of that claim, which did not make reference to Incidents One and Two (para 29). The Court concluded that 'the IMR's multiple references to her earlier findings and conclusion are to be noted. It is evident therefore that the IMR did, by cross reference, incorporate her consideration of Incidents One and Two into her assessment of whether the applicant satisfied the criterion in the complementary protection provision' (para 31).
SZSPE v Minister for Immigration and Border Protection [2014] FCA 267 (Yates J)	27 March 2014	31–45	This case relates to: • whether the complementary protection provisions in the Migration Act create a regime that is distinct from the international instruments upon which the provisions are based.

			The appellant was a national of Turkey. He had left Turkey because he feared he would be forced to join the military. He feared he would be detained or imprisoned for desertion and later forced to join the military (para 4). The Tribunal rejected the applicant's claim (see summary of decision at paras 11–21). In his appeal to the Federal Court, the applicant argued that: 1. the primary judge erred in failing to find that the Tribunal had committed jurisdictional error by misconstruing provisions of the Act relating to complementary protection (para 31). 2. the Tribunal denied him procedural fairness and natural justice by failing to have regard to 'relevant materials and considerations' (para 31), which he later explained by saying that the Tribunal acted on 'flimsy evidence that steps were being taken by the Turkish government to prevent torture and mistreatment in prisons' (para 36). The Court found that the primary judge did not err in finding that the Tribunal properly construed the provisions relating to complementary protection (para 40). The appellant had argued that the requirement of intention in the definitions of 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' should be given the same construction as had been given to similar expressions used in relevant international treaties. The Tribunal rejected this approach, stating that there was a distinction to be

			drawn between the international jurisprudence and the definitions in question, and relying in this regard on the Full Federal Court's judgment in *Minister for Immigration and Citizenship v MZYYL*. In that case, the Full Court had found that the complementary protection regime in the Act was 'a code in the sense that the relevant criteria and obligations are defined in it and it contains its own definitions'. In the present case, the Court found the Tribunal was correct in following *MZYYL* (para 41). With respect to the second ground, the Court stated (para 39): 'I am unable to see how the information that the Turkish government had started to crack down on cases of torture and ill-treatment – especially when contained in a report relied on by the appellant in his own submissions to the Tribunal – was an irrelevant consideration when dealing with his claim that, as a necessary and foreseeable consequence of being removed from Australia to Turkey, there was a real risk that he would be subjected to torture. I therefore reject that contention.' The Court dismissed the appeal.
SZSHJ v Minister for Immigration and Border Protection [2014] FCA 268 (Yates J)	27 March 2014	35–60	The case relates to: • the application of s 91R(3) to complementary protection. (Section 91R(3) provides that, in determining whether a person has a well-founded fear of persecution for a Convention reason, conduct engaged in by the applicant in Australia is to be disregarded unless the applicant

			satisfies the Minister that he or she engaged in the conduct otherwise than for the purpose of strengthening his or her claim to be a refugee.) The appellant was from the People's Republic of China and claimed to fear harm as a result of being a practising Christian. The appellant argued that: 1. with respect to the Tribunal's application of s 36(2)(aa) of the Act, the primary judge erred in considering that the appellant's motives in attending a church in Australia and in being baptised 'went to the question of what might happen in the future' (para 36). 2. the primary judge treated certain evidence (of Minister Park and Session Clerk Choi), and the evidence of the appellant's baptism, in isolation and not with other evidence supporting the appellant's claim to be a Christian. The appellant contended that 'if all aspects of the appellant's conduct had been considered as a whole, the only finding that would have been available was that he was a genuine Christian'. Accordingly, the appellant contended that the primary judge's reasoning was illogical and irrational (para 37). The essence of the first ground was that, for the purposes of s 36(2)(aa), regard could not be had to the appellant's motives for attending a church in Ausrtalia and for being baptised (para 38). He argued: 'the effect

			of s 36(2)(aa) is that even where the real risk of significant harm exists only because a person has deliberately engaged in conduct in Australia for the purpose of strengthening a claim for protection, the applicant will not be precluded from meeting the criterion for a protection visa in s 36(2) if he or she satisfies the test in s 36(2)(aa) and other relevant requirements' (para 39). This was because the injunction in s 91R(3) of the Act did not apply to complementary protection. The Court did not accept these submissions (para 41). The Court stated: 'I agree that this injunction [in s 91R(3)] does not apply to the complementary protection criterion in s 36(2)(aa). It follows that, when considering that criterion, conduct in Australia engaged in by a person seeking to strengthen his or her claims for protection can be taken into account. When considering that conduct, however, there is no statutory basis for excluding the person's motive or motives for engaging in that conduct. A person's motives constitute an element of the relevant conduct and, plainly, may be relevant to assessing whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of that person being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm.' With respect to the second ground, the Court found that the primary judge had appropriately disposed of the matter, and no error in his reasoning or conclusion

			could be demonstrated (para 51). The primary judge found that the Tribunal had had proper regard to the evidence of Minister Park and the Sessional Clerk (para 50). The Court further found that although the ground had been 'couched in terms of irrational or illogical decision-making', the appellant's submissions really sought to 'cavil with the Tribunal's findings of fact' (para 60). The Court rejected the appeal.
Plaintiff M46 of 2013 v Minister for Immigration and Border Protection [2014] FCA 90 (Tracey J) (includes Corrigendum dated 24 February 2014)	21 February 2014	77–84	This case relates to: • the obligation of *non-refoulement* following a exercise by the Minister of his discretion to not grant a protection visa. The applicant was a Sri Lankan national of Tamil ethnicity. He had found to be a refugee by the UNHCR and the delegate of the Minister, but the Minister refused to grant the applicant a protection visa, finding that the applicant represented a danger to the Australian community (based on an adverse security assessment provided by the ASIO) (paras 1–2). On this basis, the Minister was not satisfied that the applicant passed the character test prescribed by s 501(6) of the Act (para 1). The Court accepted the Minister did not have to disclose the "final appreciation" prepared by ASIO which recorded the Director-General's reasons for making the adverse security assessment relating to the applicant, upholding the Minister's claim of public interest immunity (paras 13, 39).

			The Minister's reasons for coming to his decision were otherwise brief (para 40). The Minister stated that the decision to refuse to grant a protection visa was not in itself a decision to remove the applicant from Australia [40]. Therefore, it was not incompatible with Australia's *non-refoulement* obligations. It was common ground the applicant could not be returned to Sri Lanka because of Australia's *non-refoulement* obligations (para 81). The Court accepted it was unlikely the applicant could be resettled in a third country. If a protection visa was not granted, it was likely the applicant would remain in immigration detention at the Melbourne Immigration Transit Accommodation (para 15) until a third country expressed a willingness to accept the applicant (para 82). The applicant sought judicial review of the Minister's decision, asserting four grounds (para 54): • the Minister erred by basing his decision on the adverse security assessment provided by the ASIO; • he misconstrued s 198 (requiring the removal of a non-citizen) of the Act; • the decision was illogical and/or irrational; and • he had provided inadequate reasons for his decision. Only the second ground related to Australia's *non-refoulement* obligations. The applicant contended that, once the Minister had decided to refuse to grant a visa

			to him, his removal from Australia to somewhere other than Sri Lanka was required by s 198 (para 81). The Court found that the obligation imposed by s 198 did not arise until removal was "reasonably practicable". Removal to another country could not occur unless and until another country was willing to accept the applicant (para 82). At para 83, the Court adopted Murphy J's views in *MZYYO v Minister for Immigration and Citizenship* (2013) 214 FCR 68: 'Even if the decision to refuse the applicant a protection visa did amount to a decision to remove him from Australia (which it did not), such a decision would not necessarily offend the non-refoulement obligation. The obligation requires that the applicant not be removed to any country where he has a well-founded fear of persecution for a Convention ground. He may, of course, be removed to a 'safe' country - that is, a country where he has no well-founded fear of such persecution. The Minister was correct in stating in the Reasons that his decision to refuse a protection visa is not 'of itself' incompatible with Australia's non-refoulement obligation.'"
SZSHK v Minister for Immigration and Border Protection [2013] FCAFC 125 (Robertson, Griffiths and Perry JJ) Full Federal Court	13 November 2013	31–39	This case relates to: • claims arising 'squarely' on the material In assessing whether a claim can be said to arise 'squarely' on the material, such that a decision-maker is obliged to consider it, the Full Federal Court held: 'We do not suggest there is a formula to assess whether

			the case put has sufficiently raised the relevant issue but relevant matters to be taken into account are whether or not the claim for complementary protection clearly arises from the materials and, where the claimant is represented by professional advisers, whether the advisers have articulated the case which is later said not to have been dealt with by the tribunal of fact. We do not accept the appellant's submission that merely because material is put as giving rise to a claim on Refugees Convention grounds it automatically follows that that claim is required to be considered as a claim for complementary protection.' (para 37) See also *SZRUA v Minister for Immigration and Border Protection* [2014] FCA 621 (26 May 2014), where the applicant unsuccessfully claimed that a claim that arose squarely on the material had not been considered by the decision maker.
Minister for Immigration and Citizenship v SZRNY [2013] FCAFC 104 (Buchanan, Griffiths and Mortimer JJ) Full Federal Court	11 September 2013	84–107	This case relates to: • the point at which a visa application is 'finally determined' This was an appeal against the decision of the Federal Circuit Court in *SZRNY v Minister for Immigration & Citizenship* [2013] FCCA 197 (see summary of this decision, below, for relevant background). The Minister submitted that the primary judge had erred in concluding that the RRT's review of the decision to refuse SZRNY's visa application had not been 'finally determined' as at 24 March 2012 (para 50). The Full Federal Court (Griffiths and Mortimer JJ, Buchanan J

			dissenting) dismissed the appeal. Relevantly, item 35 of Schedule 1 to the *Migration Amendment (Complementary Protection) Act 2011* (Cth) provides that the complementary protection provisions apply, inter alia, to 'an application for a protection visa … that is not finally determined (within the meaning of subsection 5(9) of [the Act] before [24 March 2012]'. Whether or not SZRNY's application had been finally determined before 24 March 2012 was hence relevant to whether the RRT was obliged to consider the applicant's claims against the complementary protection provisions. On this question of statutory construction, Griffiths and Mortimer JJ held: 'We consider that the delegate's decision on SZRNY's visa application was not finally determined by the Tribunal under Part 7 of the Act until such time as the Tribunal had notified both the applicant and the Secretary as ss 430A(1) and (2) require. Notification in this context means notification in accordance with the Act; namely ss 441A and 441B and not actual notification. Only when those requirements were fulfilled was the visa application "finally determined" within the meaning of s 5(9)(a) of the Act.' (para 84) In reaching this conclusion, the Full Federal Court, like the primary judge, considered the decision in *Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 131 to be relevant:

			‘Although the question of the proper construction of s 5(9) of the Act did not arise in that [*SZQOY*] (rather, it focused on the related question of when the Tribunal becomes *functus officio*), the … observations of both Logan J and Barker J [extracted at paras 89–90] are especially apposite in highlighting the significance of the notification requirements to the Tribunal’s “core function” of review.’ (para 88) On the basis of this construction of s 5(9) of the Act, Griffiths and Mortimer JJ held that the RRT was obliged to consider whether SZRNY was owed protection obligations under the complementary protection provisions (para 106). Accordingly, their Honours dismissed the Minister’s appeal. Buchanan J, dissenting, upheld the appeal. His Honour held: ‘In my opinion, once the decision of the RRT was despatched to the Secretary and (albeit incorrectly addressed) to the first respondent, the decision of the delegate was no longer subject to any form of review by the RRT. The position does not change because despatch to the first respondent was ineffective or because it did not conform to the direction in s 430A(1)(b) (i.e. to use a method in s 441A) or to the related direction in s 441A to post the decision to the last notified address. Although it remained necessary to comply with s 430A(1) using one of the methods specified in s 441A (by post or otherwise) that did not

			mean, in my view, that the decision of the delegate remained under any form of review until that was done. My view about that is strengthened by the operation of s 430A(3) and the fact that the decision itself (on 12 March 2012) must be taken to be valid.' (para 40) 'If a valid and final decision affirming the decision of the delegate was made on 12 March 2012, it cannot in my respectful view be successfully maintained that the decision of the delegate remained nevertheless under some form of review. In my view, that position does not change even if the applicant was not effectively notified until 28 May 2012. It does not change even if it be correct to say that the review is not complete so far as it concerns the obligations of the member of the RRT.' (para 41)
WZARI v Minister for Immigration, Multicultural Affairs and Citizenship [2013] FCA 788 (Siopis J)	9 August 2013	26–33	This case relates to: • the meaning of 'significant harm' The appellant claimed that the primary judge had erred, inter alia, in not finding that the RRT had committed jurisdictional error by concluding that the harm that the appellant would suffer as a result of being separated from his family (who were in Australia) was not 'serious harm' or 'significant harm' (paras 27–8). The Court rejected the appellant's argument: 'The fear of "serious harm" which is referred to in s 91R(1) of the *Migration Act* describes the kind of harm which is capable of sustaining a claim to hold a well-founded fear of persecution if the visa applicant was

			returned to the receiving country in question. However, in order to invoke Australia's protection obligations, the feared harm must be harm which the visa applicant fears will be visited upon him or her by the government authorities of the receiving country for a Convention reason, or by reason of the government authorities failing to protect that person from others inflicting that harm on him or her for a Convention reason. The same reasoning applies in relation to the risk of suffering the "significant harm" referred to in s 36(2)(aa) of the *Migration Act*.' (para 31) 'In this case, the separation anxiety and distress which the appellant fears he and his family will suffer if he is returned to Fiji, is not a fear attributable to the conduct of the Fijian government or its agencies, or their failure to provide protection from others inflicting such harm on the appellant. The fear, therefore, falls outside the ambit of s 36(2)(a) and s 36(2)(aa) of the *Migration Act*.' (para 32)
SZSGA v Minister for Immigration, Multicultural Affairs and Citizenship [2013] FCA 774 (Robertson J)	6 August 2013	33–58	This case relates to: • claims arising 'squarely' on the material This was an appeal from the decision of the Federal Magistrates Court in *SZSGA v Minister for Immigration & Citizenship* [2013] FMCA 162. The Federal Court dismissed the appeal. One of the issues considered by the Court was whether a claim (that the appellant 'would be tortured and seriously harmed by the Nigerian authorities because they used specific incidents of crime and the high level

			of crime in general to arrest and detain people randomly and demand money for their release') 'squarely' arose on the material (para 2). In assessing this question, the Court considered a number of authorities: • 'In [*Htun v Minister for Immigration* (2001) 194 ALR 244], Allsop J, with whom Spender J agreed, said that there had been a failure to deal with one part of the claim for asylum on the basis of the applicant's imputed political opinion. It was true, Allsop J said, that when called on at the hearing to articulate his fears the applicant did not expressly identify his friendships as a Karen with people in organisations such as the KNLA, as distinct from his activities in Australia. However, Allsop J said, given the clarity of the expression of this fear in his application for review and the existence of objective material put forward by him to support it, this basis of the claim had not been abandoned. Conceptually, and in a commonsense way, Allsop J said, that claim was quite distinct from his claim based on his participation in the Karen community and the political groups.' (para 46) • In *Dranichnikov v Minister for Immigration* (2003) 197 ALR 389 (*Dranichnikov*), 'the majority held [that] the Tribunal failed to respond to a substantial, clearly articulated argument relying upon established facts, being that the Tribunal did not deal with his claim to be a member of the social group consisting of entrepreneurs and/or businessmen who publicly criticised law enforcement authorities for failing to take action

			against crime or criminals.' (para 47) • In *M61/2010E v Commonwealth of Australia* (2010) 243 CLR 319, 'the Court said, with reference to *Dranichnikov* ... that failing to address one of the claimed bases for the plaintiff's fear of persecution was a denial of procedural fairness.' (para 48) • In *NABE v Minister of the Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 (*NABE*), '[the Court] discussed … the proposition that the Tribunal was not to limit its determination to the "case" articulated by an applicant if evidence and material which it accepts raised a case not articulated. The Court said that a claim not expressly advanced would attract the review obligation of the Tribunal when it was apparent on the face of the material before the Tribunal. Such claim will not depend for its exposure on constructive or creative activity by the Tribunal … the Court discounted as a general rule that the Tribunal could disregard a claim which arose clearly from the materials before it.' (para 49) • In *NABE*, the Court approved of the following statement by Selway J in *SGBB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 199 ALR 364: 'The question, ultimately, is whether the case put by the appellant before the tribunal has sufficiently raised the relevant issue that the tribunal should have dealt with it.' (para 49). • In *NABE*, the Court also approved of the following statement by Gleeson CJ in *S395 v Minister for*

			Immigration and Multicultural Affairs (2003) 216 CLR 473: 'Proceedings before the tribunal are not adversarial; and the issues are not defined by pleadings, or any analogous process. Even so, this court has insisted that, on judicial review, a decision of the tribunal must be considered in the light of the basis upon which the application was made, not upon an entirely different basis which may occur to an applicant, or an applicant's lawyers, at some later stage in the process.' (para 50) • In *NABE*, the Court held that every case must be considered according to its own circumstances (para 50). The Court held: 'Applying these principles, the Court in *NABE* said that although the claim might have been seeing as arising on the material before the Tribunal it did not represent, in any way, "a substantial clearly articulated argument relying upon established facts" in the sense in which that term was used in *Dranichnikov*. A judgment that the Tribunal failed to consider a claim which is not expressly advanced is not lightly to be made. The claim must emerge clearly from the materials before the Tribunal.' (para 51) '[I]n my opinion, the current claim was not apparent on the face of the material before the Tribunal or squarely or sufficiently raised by the material. The claim as now put is taken out of its original context both in the submission of the appellant's representative and the

			relevant paragraph, [190], of the Tribunal's decision.' (para 52)
SZRSN v Minister for Immigration and Citizenship [2013] FCA 751 (Mansfield J)	6 August 2013	43–9	This case relates to: • the meaning of 'significant harm' This was an appeal against the decision of the Federal Magistrates Court in *SZRSN v Minister for Immigration and Citizenship* [2013] FMCA 78 (see summary of this case, below, for relevant background). The Federal Court dismissed the appeal. On the question of whether the appellant's separation from his children in Australia could amount to 'significant harm', the Court held: 'An interpretation of the legislation that incorporates removal from one's family by the Australian government as "significant harm" would be an extremely strained reading, and one not in accordance with the clear intention of Parliament in enacting the complementary protection criterion. That intention was to honour Australia's non-refoulement obligation. In short, the appellant has failed to identify or demonstrate any error in the application of the term "significant harm" by the Federal Magistrate.' (para 49) In January 2014, the claimant sought re-examination of his application, and the delegate of the Minister found that it was not valid as it had been dealt with already. The claimant sought review of the delegate's decision in *SZRSN v Minister for Immigration* [2014] FCCA 557

			(18 March 2014), in which case he was unsuccessful. He further appealed that decision unsuccessfully in *SZRSN v Minister for Immigration and Border Protection* [2014] FCA 527 (5 May 2014).
SZGIZ v Minister for Immigration and Citizenship [2013] FCAFC 71 (Allsop CJ, Buchanan and Griffiths JJ) Full Federal Court	3 July 2013	1–75	This case relates to: • proper construction of section 48A of the Act • relevance of Australia's international obligations to construction of the Act The appellant was from Bangladesh. He applied for a protection visa on 11 March 2005, claiming to be a refugee. This application was rejected, primarily on the ground that section 91R(3) of the Act required the appellant's conversion in Christianity in Australia to be disregarded for the purpose of determining his claim to be a refugee. On 24 March 2012, the *Migration Amendment (Complementary Protection) Act 2011* (Cth) took effect. On 10 October 2012, the appellant lodged an application for a protection visa based on complementary protection grounds. Section 48A of the Act prohibits an application for a protection visa by a non-citizen in the migration zone where an earlier application for such a visa has been made while in the migration zone and refused. The issue in this case was whether section 48A operated to invalidate the appellant's second application for a protection visa. The Full Court held that the proper construction of section 48A was that its operation was confined to the making of a further application for a protection visa

			which duplicated an earlier unsuccessful application, in the sense that both applications raised the same essential criterion for the grant of a protection visa. Hence, the application lodged by the appellant on 10 October 2012 was not invalid (para 32). The Full Court reached this conclusion in reliance on textual (paras 35–7, 63–73) and contextual (paras 38–55) considerations. The Full Court also held that this construction of section 48A was supported by the fact that this construction was consistent with Australia's international obligations (paras 56–62). On the basis of the Explanatory Memorandum and Second Reading Speech to the Bill which became the *Migration Amendment (Complementary Protection) Act 2011* (Cth), the Full Court held that the purpose of this amendment was to give effect to Australia's non-refoulement obligations under international law (paras 57–8). The Full Court held: '59. It is now well settled that if the language of legislation is susceptible of a construction which is consistent with the terms of an international instrument and the obligations it imposes on Australia, that construction should prevail (see *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J). The relevant principles were described by Kiefel J in *Plaintiff M70/2001 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [247] as follows (omitting footnotes): In *Polites v Commonwealth* it was

			accepted that a statute is to be interpreted and applied, so far as its language permits, so that it is in conformity, and not in conflict, with established rules of international law. In *Minister for Immigration and Ethnic Affairs v Teoh*, Mason CJ and Deane J took the proposition to apply to favour the construction of a statute which is in conformity, and not in conflict, with Australia's international obligations, at least so far as the language of the legislation permits. The ambiguity, to which such a construction was relevant, should not be viewed narrowly, in their Honours' view. Their Honours went on to say: So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations. The rule of construction stated in Teoh has been applied in *Kartinyeri v The Commonwealth*, *Plaintiff S157/2002 v The Commonwealth*, and *Coleman v Power*. However, if it is not possible to construe a statute conformably with international law rules, the provisions of

			the statute must be enforced even if they amount to a contravention of accepted principles of international law. Such a position is not reached after construing s 198A(3)(a). 60. Here, to deny a person a statutory entitlement to seek protection from, for example, torture, because the Minister had previously not been satisfied of a claim of a well-founded fear of persecution under the Refugees Convention would not only conflict with Australia's international obligations, but also would be arbitrary. 61. Nothing in the above approach denies the central task with which the Court is concerned: the construction of a law of the Parliament: cf *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54; 231 CLR 52.'
MZYXS v Minister for Immigration and Citizenship [2013] FCA 614 (Marshall J)	21 June 2013	32–40	This case relates to: • relocation (reasonableness) The appellant claimed that the Refugee Review Tribunal had erred, inter alia, by failing to distinguish between the statutory test in section 36(2B)(a) and the case law concerning relocation in the refugee context (para 33). However, Marshall J rejected this claim: '37. … The issues which arise when considering the reasonableness of relocation in the refugee context are the same which arise in the complementary protection context. Read fairly, the reasons of the Tribunal show that it understood this. The Tribunal did not fail to

			apply the correct test in considering s 36B(2B)(a). …' '39. It is accepted that s 36(2)(aa) and s 36(2B)(a) must be considered together and as a whole; see *MZYYL*. That is what the Tribunal did in this case. The Tribunal considered whether relocation was reasonable and practicable in the particular circumstances of the applicant and the impact upon him of relocation within his country in reliance in *SZATV v Minister for Immigration and Citizenship and Anor* (2007) 233 CLR 18 and *SZFDV v Minister for Immigration and Citizenship and Anor* (2007) 233 CLR 51. Although those cases do not deal with the complementary protection regime, they deal with the question of the reasonableness of internal relocation, being a matter directly addressed by s 36(2B)(a) of the Act. It was appropriate for the Tribunal to draw guidance from these decisions.'
Minister for Immigration and Citizenship v SZQRB [2013] FCAFC 33 (Lander, Besanko, Gordon, Flick and Jagot JJ) Full Federal Court	20 March 2013	70–2, 96–100, 200, 238–47, 310–13	This case relates to: • 'Standard of proof' (or threshold) for complementary protection • Relevance of international jurisprudence on the CAT and ICCPR to Australian jurisprudence on complementary protection 'Standard of proof' (or threshold) for complementary protection The analysis below is based on the reasons of Lander and Gordon JJ, with whom Besanko and Jagot JJ (para 297) and Flick J (para 342) concur on this issue.

			The pertinent ground of appeal advanced by SZQRB was that the Minister had erred in making a decision not to consider, or not to further consider, the exercise of any of his personal non-compellable public interest powers under the Migration Act with respect to SZQRB (paras 44, 53). The Minister's decision had been made 'on the basis of' the 'International Treaties Obligations Assessment' (ITOA), the purpose of which was to determine whether SZQRB was a person to whom Australia had protection obligations by reason of being party to the CAT and ICCPR (para 238). Specifically, the ITOA noted that article 3 of CAT required Australia not to 'expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture' (para 238). The ITOA also noted ICCPR article 6 ('no-one shall be arbitrarily deprived of his life') and article 7 ('no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment') of the ICCPR (para 238). The Court noted that Australia's international obligations under the CAT and ICCPR were reflected in the complementary protection provisions of the Migration Act (paras 70, 98–100, 239). Specifically, ss 36(2)(aa) and 36(2A) of the Act provide for the grant of a protection visa where there is a 'real risk' that a non-citizen will suffer 'significant harm'. 'Significant harm' is defined to include arbitrary deprivation of life, torture, cruel or inhuman treatment or punishment, and degrading treatment or punishment.

			Relying on Immigration Department policy, the ITOA said that 'real risk' must be interpreted 'as meaning that the necessary chance of the harm occurring is balance of probabilities, but that this should not be construed too narrowly in cases which are very close to that threshold. That is, the possibility must be more likely than not, which is a higher threshold than the real chance test used in the Refugees Convention under Australian law.' (para 241) The Court found that this test was incorrect. It held that the correct standard of proof for assessing whether a non-citizen was entitled to complementary protection under s 36(2)(aa) was the same as that applicable to a refugee claim under s 36(2)(a) – namely, whether there was a 'real chance' that the applicant would suffer significant harm (para 246; see also para 242, citing *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 as the relevant authority for the 'real chance' test). In reaching this conclusion, the Court (para 243) also noted the Minister's acceptance that this was the relevant standard in *Minister for Immigration and Citizenship v MZYYL* [20120 FCAFC 147 at para 31; and (at para 244) a similar concession in *Santhirarajah v Attorney-General for the Commonwealth of Australia*. Accordingly, the ITOA applied the wrong test in considering SZQRB's entitlement for Australia's protection obligations under the CAT and ICCPR as defined in s 36(2)(aa) and s 36(2A) (para 247). On this basis, the ITOA was not carried out according to law

			(para 247). Relevance of international jurisprudence Contrary to the comments in *Minister for Immigration and Citizenship v MZYYL* [2012] FCAFC 147, it is apparent from the judgment that international jurisprudence on the CAT and ICCPR are relevant to interpretation of the domestic complementary protection provisions. This is because the Court characterises s 36(2)(aa) as a 'recognition' of Australia's international obligations to afford protection to those entitled to protection under the CAT or ICCPR (paras 70, 98–100, 200 (21.3), 310–13).
DZAAD v Minister of Immigration and Citizenship [2013] FCA 204 (Foster J)	6 March 2013	38–49	This case relates to: • commencement of complementary protection provisions The Court considered whether the Minister was required to consider the applicant's claims against the complementary protection provisions, by reason of item 35 of Schedule 1 to the *Migration Amendment (Complementary Protection) Act 2011* (Cth). On this question, the Court held: 'Theoretically, after 24 March 2012, the applicant might have requested the Minister to consider his claims against the requirements of s 36(2)(aa). But this was never done. In this case, the only grounds ever advanced by the applicant as justifying the exercise of

			any discretion in his favour by the Minister were his need for protection based upon imputed political opinion and his Tamil ethnicity. Complementary protection was never relied upon by the applicant. That ground was introduced into the case for the first time when the applicant filed his affidavit sworn on 14 February 2013. In my judgment, the applicant cannot rely upon this ground (see *SZRPA v Minister for Immigration and Citizenship* [2012] FCA 962 at [37]–[38]).' (para 46) 'As I have already mentioned, the applicant did not make an application for a protection visa before 24 March 2012. Because of his immigration status, he could not have done so in any event. He did not make nor was he able to make a valid application for a protection visa at any time after 24 March 2012. At all relevant times, the applicant has been an offshore entry person in Australia and an unlawful non-citizen within the meaning of s 46A of the Act. In those circumstances, he has been unable to make a valid application for a protection visa. For those reasons, Item 35 of Sch 1 to the Amendment Act does not apply to the applicant.' (para 47)
Honourable Brendan O'Connor v Adamas [2013] FCAFC 14 (Lander, McKerracher and Barker JJ) Full Federal Court	15 February 2013	454–79	This was an extradition case in which it was argued by the first respondent that Australia's *non-refoulement* obligations under the ICCPR extended to prohibiting the extradition of a person whose right to a fair trial under ICCPR Art 14 has been or would be breached in the requesting state (para 454). The Court rejected this argument:

			‘476. I am satisfied that the submissions made on behalf of the Minister concerning Australia’s *non-refoulement* obligations under the ICCPR are well based and that no different position should be adopted by reason of decisions such as *Soering* made by the European Court of Human Rights.’ ‘477. I accept in particular that there is, at this point in time, at best disputed opinion as to whether Australia has any *non-refoulement* obligations with respect to the rights under Art 14 of the ICCPR, for the reasons advanced on behalf of the Minister.’ The Minister advanced a number of reasons for rejecting the first respondent’s contentions. In particular: ‘463. The Minister says the basic principle accepted by Australia is that the obligations in the ICCPR are primarily territorial. States are required to guarantee ICCPR rights to persons within their territory and subject to their jurisdiction, but are not required to ensure compliance by other States and other jurisdictions. Exceptionally, in the context of Art 6 and Art 7, Art 2 has been read to incorporate a *non-refoulement* obligation in circumstances where a State proposes to remove a person from its jurisdiction and there is a real risk that his or her rights under those Articles will be violated in the receiving jurisdiction. This constitutes a limited and extraordinary exception to the general jurisdictional position under Art 2.’

			‘464. The Minister notes there are State Parties to the ICCPR, notably the United States of America, which do not accept the existence of *non-refoulement* obligations at all, even in relation to those fundamental rights. While Australia has accepted a *non-refoulement* obligation in relation to Art 6 and Art 7, it has repeatedly asserted that such an obligation does not extend to Art 14, for example in *A.R.J. v Australia* Communication No 692/1996 HRC (28 July 1997) (*A.R.J. v Australia*), [4.12] and *C v Australia*, Communication No 900/1999 HRC (28 October 2002) [4.11]. The Minister submits the Committee has consistently declined to rule on the question when raised by applicants in individual communications, as for example in *A.R.J. v Australia*; *Kwok v Australia* [9.8]; *Judge v Canada*, Communication No 829/1998 HRC (5 August 2002) (*Judge v Canada*); *Alzery v Sweden*, Communication No 1416/2005 HCR (25 October 2006) [11.9].’ ‘465. The Minister submits there are cogent reasons for maintaining the current scope of the *non-refoulement* obligation. The fact that human rights might not be as well respected in another State, as in Australia, should not of itself give rise to a *non-refoulement* obligation. This would deprive the primarily territorial scope of Art 2 of real meaning by effectively requiring Australia to ensure that the full extent of rights in the ICCPR is guaranteed to persons within another jurisdiction. See also the comments *Judge v Canada*, Individual Opinion

			(Chanet).' '466. The Minister says that the first respondent asks the Court to find that a *non-refoulement* obligation arises in relation to Art 14 on the basis that the Committee has not ruled it out and that this is wholly the wrong approach, the definitive point being that the Committee has never stated that such an obligation exists. The Minister says this is critical because the implied nature of the obligation means that its scope should not be readily extended, so rather a domestic court should look to the practice of the Committee and State Parties to the ICCPR and refrain from interpretation which would create new obligations to which the parties have not consented.' Editorial note: In the case of *Othman v United Kingdom* App No 8139/09 (17 January 2012), the European Court of Human Rights found that article 6 of the ECHR (right to a fair trial) would be violated if the applicant were removed to Jordan, because there was a real risk that evidence obtained by torture would be admitted in his retrial in Jordan. The court said that the use of evidence obtained by torture during a criminal trial would amount to a flagrant denial of justice. This was the first time that the court had found that an expulsion would violate article 6 of the ECHR (although it had previously accepted this in principle).
MZYYO v Minister for Immigration and Citizenship [2013] FCA 49	5 February 2013	68–9	This case relates to: • whether protection visa refusal on character grounds is incompatible with *non-refoulement* obligation under Refugee Convention

(Murphy J)			This was an application to review the decision of the Minister to refuse to grant a protection visa to the applicant on character grounds. The applicant, from Iran, had been found to be a person to whom Australia had obligations under the Refugee Convention (para 1). In rejecting the applicant's argument that the Minister's decision was incompatible with Australia's *non-refoulement* obligation under Art 33 of the Refugee Convention, the Court held: 'The Minister was correct in stating in the Reasons that the decision to refuse the applicant a protection visa on character grounds was not "in itself" a decision to remove him from Australia. This is so because (at any time prior to removal) it was open to the Minister to exercise his power under s 195A of the Act to grant the applicant a visa of a particular class, if satisfied that it was in the public interest to do so. It therefore cannot be said that a necessary consequence of the decision to refuse the protection visa was that the applicant would be removed to any country, let alone *refouled* to a country where he faced persecution. The facts of the present case illustrate this as the Minister granted a Bridging Visa to the applicant, which had the effect that he was released from detention and the statutory obligation to remove him from Australia was lifted.' (para 68) 'Even if the decision to refuse the applicant a protection visa did amount to a decision to remove him from

			Australia (which it did not), such a decision would not necessarily offend the *non-refoulement* obligation. The obligation requires that the applicant not be removed to any country where he has a well-founded fear of persecution for a Convention ground. He may, of course, be removed to a "safe" country - that is, a country where he has no well founded fear of such persecution. The Minister was correct in stating in the Reasons that his decision to refuse a protection visa is not "of itself" incompatible with Australia's *non-refoulement* obligation.' (para 69)
SZRLY v Minister for Immigration and Citizenship [2012] FCA 1459 (Griffiths J)	21 December 2012	27–32, 41–3	This case relates to: • best interests of the child The appellant claimed, inter alia, that the Federal Magistrates Court had erred in failing to find that the RRT denied the appellant procedural fairness by its failure to consider the best interests of the appellant's son as a primary consideration in its decision not to grant her a protection visa (paras 27, 33, 34). The Court rejected the appellant's submissions, for three reasons: 'First, it is to be noted that the appellant's son was not born until after the decisions of both the delegate and the RRT. The springboard for each of the three fresh grounds of appeal is the obligation imposed by Article 3 of the United Nations Convention on the Rights of the Child (the Convention) to the effect that, in all actions concerning children, "the best interests of the child shall be a primary consideration". "Child" is defined in

			Article 1 of the Convention as meaning "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier". It is also to be noted that the Preamble to the Convention contains the following statement: Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth" I am not aware of any judicial authority supporting the proposition that Article 3 the Convention applies to unborn children.' (para 28) 'Secondly, as the Minister pointed out, there is a long line of authority to the effect that the principle in *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 291 per Mason CJ and Deane J (to the effect that there is a legitimate expectation that administrative decision-makers will act in conformity with the Convention), has no application to a decision whether or not to grant a protection visa, because such a decision is not discretionary (see, for example, *SZBPQ v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 568 at [17]-[19] per Hely J (an application for special leave to appeal was refused: *SZBPQ by his next friend v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA Trans 249); *Minister for Immigration and Multicultural Affairs v*

			Anthonypillai (2001) 106 FCR 426 at [36] and *M38/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 146 at [53] per Goldberg, Weinberg and Kenny JJ).' (para 29) 'Thirdly, I also note that in *Teoh*, Gaudron J held at p 304 that the obligation of administrative decision-makers to treat the best interests of a child as a primary consideration stemmed not only from Article 3 of the Convention and the ratification by Australia, but also from the proposition that any reasonable person "would assume or expect that the interests of the child would be taken into account in that way as a matter of course and without any need for the issue to be raised with the decision-maker". Her Honour explained that such an assumption would be made "because of the special vulnerability of children, particularly where the break-up of the family unit is, or may be, involved, and because of their expectation that a civilised society would be alert to its responsibilities to children who are, or may be, in need of protection". I do not read her Honour's statements as applying to administrative decisions not involving any discretion. Indeed, it is significant that her Honour expressed those views at p 304 by explicit reference to "all discretionary decisions by governments and government agencies which directly affect that child's individual welfare..." (emphasis added).' (para 30)
Minister for Immigration and Citizenship v Anochie [2012] FCA 1440 (Perram	18 December 2012	71–83	This was an appeal from the decision of the AAT in *Anochie v Minister for Immigration and Citizenship* [2012] AATA 234. The Minister wanted to cancel the

J)			applicant's visa because he was sentenced to 8.5 years' imprisonment for importing cocaine. The applicant said that if he were deported to Nigeria he would be mistreated in the Nigerian criminal justice system, and deporting him would breach Australia's *non-refoulement* obligations under the ICCPR. The FCA held that the AAT had erred in applying the 'real chance' test (ordinarily applied for assessing a refugee claim) to assess Australia's *non-refoulement* obligations under the ICCPR. [78] Asking whether the formulation in *Chan* ['real chance' test for a refugee claim] is different to the formulation in *Pillai* ['necessary and foreseeable consequence' test for a *non-refoulement* claim under the ICCPR] … is an almost meaningless question. It is a more useful inquiry to ask what it is that both treaties are doing. The Refugees Convention seeks to define when a visa will be granted to a person seeking refuge. The ICCPR concept of non-refoulement is addressed to a different question; namely, whether a person can be sent to a particular State. So, too, the harms which are involved are different. The Refugees Convention will be satisfied by persecution which may fall well short of death, torture or other similarly irreparable harm. Non-refoulement under the ICCPR, by contrast, requires irreparable harms of the kinds contemplated by arts 6 and 7. Further, there may not necessarily be a bright line between the terms of the risk assessment question and the actual risk being assessed under it. Where the risk is death or torture, what is required by a test such as

			‘real chance’ or even ‘necessary and foreseeable consequence’ is likely more readily to be satisfied than where the risk is not being able to practice one’s religion or express one’s political views. [79] Ultimately, I do not think that dissecting the verbal formulae used by the Tribunal and comparing it to the formulae used by the Committee would be useful, although no doubt it would amuse those who study linguistics. The more critical issue seems to me to be that the functions being performed under these conventions are very different. Determining whether a person has a well-founded fear of persecution for a Refugees Convention reason is a fundamentally different inquiry to asking whether a State’s obligation under art 2 of the ICCPR to ensure a person’s rights under that treaty requires that the person not be deported. [80] The flaw in the Tribunal’s approach was to assume that these were interchangeable inquiries when, in fact, they are quite different. The simple transfer of the words of one test in one context to a similar test in a different context is erroneous (although entirely understandable). On this basis, the FCA held that the AAT had failed to take into account a relevant consideration; namely, the correct principles of international law (para 82). Hence,

			the FCA quashed the AAT's decision and directed the AAT to determine the matter according to law (para 84). Editorial note: This case conflicts with the position in *Minister for Immigration and Citizenship v MZYYL* [2012] FCAFC 147, in which the Minister conceded before the Full Federal Court that the appropriate test for complementary protection claims was equivalent to the 'real chance' test used in refugee law, and not the 'more likely than not' standard. This is consistent with the findings of North J in *Santhirarajah v Attorney-General for the Commonwealth of Australia* [2012] FCA 940, paras 271–73. Summaries of these cases appear below. In the instant case, the FCA does not seem to be aware of these cases or Australia's complementary protection legislation or jurisprudence generally. With respect, the distinctions drawn between the Refugee Convention and the ICCPR in paras 78–79 are inaccurate. As a matter of international law, it is incorrect to describe the function of the Refugee Convention as defining when a visa will be granted. The Convention defines a class of persons in need of international protection – refugees – and sets out the 'status' to which they are entitled under international law. The treaty itself does not refer to visas. Visas are a domestic law construct and are often the means by which refugees can access the rights to which they are entitled as a matter of international law. Not granting a refugee a visa does not relieve States of their

			obligations under international law towards such persons. Today, many States, including Australia, also provide visas to persons whom they have an obligation to protect under the ICCPR, among others (known as 'complementary protection'). Contrary to the FCA's view in paras 78–79, the harms involved under the Refugee Convention and the ICCPR are not necessarily different. 'Persecution' is a form of 'cruel, inhuman or degrading treatment' (and in some cases, a form of 'torture'). While it is true that persecution can consist of less severe forms of harm than death or torture, there is a wealth of jurisprudence on the meaning of 'cruel, inhuman or degrading treatment' which suggests that it will not always be sufficiently severe or prolonged so as to amount to 'persecution'.
Minister for Immigration and Citizenship v MZYYL [2012] FCAFC 147 (Lander, Jessup and Gordon JJ) Full Federal Court	24 October 2012	7, 33–40	This case relates to: • Exception to State protection: s 36(2B)(b) • Threshold of risk for complementary protection • Interpretation of complementary protection provisions Exception to State protection: s 36(2B)(b) This case concerns the meaning of s 36(2B)(b), which outlines one of the circumstances in which there is taken not to be a real risk that a non-citizen will suffer significant harm in a country. Specifically, it provides that there is taken not to be a real risk that a non-citizen

			will suffer significant harm in a country if the Minister is satisfied that: (a) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm. The Minister argued that the appropriate standard of protection was that of 'reasonable' protection. He argued that the RRT 'erred in holding that a higher standard was required than that under s 36(2)(a) of the Act, namely to reduce the level of risk of significant harm to something less than a real one' (para 7). The court rejected this interpretation. It held that s 36(2B)(b): 1. 'deems a particular circumstance to mean that the non-citizen will not suffer significant harm if the non-citizen were to be returned to the receiving country. If any of the circumstances mentioned in s 36(2B) are found to exist, the Minister must conclude that the non-citizen would not suffer significant harm for the purposes of s 36(2)(aa). However, the inquiry in s 36(2B) is not at large. It is an inquiry into the *particular circumstances that appertain to the non-citizen whose application for a visa is under consideration*. That is made clear by the reference in the chapeau to the "non-citizen" and the references in paragraphs (a) and (b) to

			the non-citizen relocating or seeking protection from an authority of the country but, even more particularly, by paragraph (c) which speaks of the non-citizen personally.' (para 33, emphasis added) 2. uses different language from the State protection test adopted in relation to the Refugees Convention (para 34) 3. does not 'require either the conclusion that it is inevitable that the non-citizen will suffer significant harm or the conclusion that it is certain that he or she will not. The express terms of the section require the Minister to be satisfied that, given the protection available to MZYYL in the receiving country, there would not be a *real risk* that he will suffer significant harm.' (para 35) The Minister argued that the standard of protection in s 36(2B)(b) was satisfied 'if the State authority in question operates an effective legal system for the detection, prosecution and punishment of acts constituting serious harm and the non-citizen has access to such protection.' (para 36). The court rejected that interpretation: ' It is contrary to the express words of the section. To

			construe the provision in that way would have the Court ignore or read out of s 36(2B)(b) (and, indeed, other sections in the Complementary Protection Regime) the phrase "real risk" and the reference to the non-citizen. The Minister's construction seeks to have the Court focus on the system rather than the individual. That is not the question posed by the section. At least part of the problem with the Minister's construction of s 36(2B)(b) arises because the Minister seeks to treat s 36(2B)(b) as a "carve-out" to be considered after the enquiry provided for in s 36(2)(aa). That approach should be rejected. The section must be read as a whole. The enquiry provided for in s 36(2)(aa) necessarily involves consideration of the matters referred to in s 36(2B). The Minister does not undertake the enquiry in s 36(2)(aa) and then move to s 36(2B).' (para 36) The court also examined two further problems with the Minister's interpretation. First, it was 'impractical and contrary to existing authority. It is impractical because if adopted it would not provide any objective criteria for assessing whether the "international standards" had been met' (para 37). Secondly, the Minister's construction proceeded 'from an assumption that is contrary to existing authority. In considering an application for a protection visa under s 36(2)(a), courts have recognised that the mere existence of a system of state protection may not of itself be sufficient' (para 38). The court therefore held that:

			'Section 36(2B)(b) poses the question whether, in obtaining protection from the receiving country, the protection is such that there would not be a real risk that the non-citizen would suffer significant harm if returned. The section proceeds from an assumption (correctly made) that there will be circumstances where the protection offered is not sufficient to remove the fact that there is a real risk that the non-citizen will suffer significant harm.' (para 39) This requires 'an assessment of whether the level of protection offered by the receiving country reduces the risk of significant harm to the non-citizen to something less than a real one.' (para 40) Threshold of risk for complementary protection cases The Minister had initially contended that the complementary protection standard of risk was higher than the standard in refugee cases (see para 7). He had argued that the appropriate standard in complementary protection claims was 'exposure to harm that is *probable or more likely than not to eventuate* and the Tribunal erred in holding that the standard of risk was the same as the "real risk" test implied in s 36(2)(a) of the Act' (para 7, emphasis added). However, the Minister subsequently abandoned this argument. In oral submissions, he deferred to the findings of North J in *Santhirarajah v Attorney-General for the Commonwealth of Australia* [2012] FCA 940,

			paras 271–73. Thus, the standard of risk or threshold for complementary protection cases *is the same* as for refugee cases – the 'real chance' test (see para 31 of *MZYYL*). Interpretation of complementary protection provisions As a preliminary point, the court held that the issue before the court was a matter of statutory construction of the *Migration Act*, because of the nature of Australia's complementary protection regime: 'The regime establishes criteria "that engage" Australia's express and implied non-refoulement obligations under the [ICCPR, CAT and CROC] … The Complementary Protection Regime is a code in the sense that the relevant criteria and obligations are defined in it and it contains its own definitions … Unlike s 36(2)(a), the criteria and obligations are not defined by reference to a relevant international law. Moreover, the Complementary Protection Regime uses definitions and tests different from those referred to in the International Human Rights Treaties and the commentaries on those International Human Rights Treaties.' (para 18) 'It is therefore neither necessary nor useful to ask how the … International Law Treaties would apply to the circumstances of this case. The circumstances of this

			case are governed by the applicable provisions of the Act, namely ss 36(2)(aa) and 36(2B)…' (para 20)
Santhirarajah v Attorney-General for the Commonwealth of Australia [2012] FCA 940 (North J)	31 August 2012	267, 271–75	This was an extradition case in which the standard of proof (or threshold) for cases involving potential return to torture under the Convention against Torture (CAT) was considered. The court noted that there is a difference between the way the US and Australia interpret the threshold for 'substantial grounds for believing' under CAT: 'The US interpretation places a heavier burden on the affected person than the Australian interpretation. Proof as required by the US that it is more likely than not that a person would be in danger of being subjected to torture is a higher standard than proof as required by Australia of a foreseeable, real and personal risk of torture' (para 273).
MZYRM v Minister for Immigration and Citizenship [2012] FCA 986 (Gray J)	15 August 2012	16–17	This case relates to: • commencement of complementary protection provisions The appellants applied for a protection visa in August 2010. Their application was refused by a delegate of a Minister on 31 May 2011. On 8 September 2011, the RRT forwarded to the appellants its decision to affirm the decision of the delegate (para 1). The Court held that the complementary protection provisions did not apply to the appellants: 'Item 35 [of Schedule 1 of the *Migration Amendment (Complementary Protection) Act 2011* (Cth) ('the amending Act')] provides that the amendments made by the schedule apply in relation to an application for a

			protection visa made on or after the day on which item 35 commences, or that is not finally determined within the meaning of s 5(9) of the Migration Act before the day on which the item commences.' (para 16) 'Section 2 of the amending Act deals with commencement. It contains a table detailing the dates on which various provisions of the amending Act and items in the schedule came into operation. By reference to that table, it is clear that item 35 came into operation on 24 March 2012. Well before that date, the appellants' applications for protection visas had been finally determined as that phrase is defined in s 5(9) of the Migration Act. In particular, para (a) of s 5(9) provides that an application is finally determined when a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Pt 5 or Pt 7. For the purposes of an application to the Tribunal for review, Pt 7 contains the relevant provisions. It is clear that s 5(9) treats an application for a protection visa as having been finally determined when a decision that has been made in respect of it is no longer subject to any form of review under Pt 7. A review under Pt 7 having been completed, and not being otherwise the subject of any jurisdictional error, it is clear that the application underlying it has been finally determined for relevant purposes, at the latest by 8 September 2011.'

Case	Decision date	Relevant paragraphs	Comments
SZRLB & Anor v Minister for Immigration & Anor [2014] FCCA 2851 Judge Nicholls (Successful)	5 December 2014	4, 6-9, 19, 29, 31-32, 35, 47 and 50-62	This case relates to: • the failure to properly distinguish between the two separate criteria for a protection visa under ss. 36(2)(a) and (aa). The applicants (husband and wife) were citizens of the People's Republic of China (China). The applicant wife claimed to have been arrested and detained in May 2005 based on the fact that she had taught Sunday school at a 'family church' in China (para 4). 'She stated she was again arrested in September 2010, badly beaten and detained for a day and a night' (para 4). The applicant wife claimed that she 'was released on payment of a fine, and signed a "guarantee" that she would not teach Sunday school or attend church' (para 4). The delegate refused the applicant's application for a protection visa on 21 June 2011 (para 6). 'The delegate had significant concerns about the credibility' of the applicant wife's claims (para 6). On 23 March 2012 the Refugee Review Tribunal (Tribunal) 'affirmed the delegate's decision on the basis that the applicants were not witnesses of truth'. The applicants sought judicial review. On 19 September 2012, by orders made by consent, the Federal Circuit Court of Australia (the Court) remitted the matter to the Tribunal for reconsideration (para 7).

			At the hearing on 2 April 2013, the Tribunal found that the applicants were not entitled to protection in Australia pursuant to s.36(2) of the Act (para 8). The Tribunal 'accepted and adopted the findings of the first Tribunal and found that the applicants' claims to fear Convention-related persecution were not well-founded (para 8). With respect to the complementary protection criteria, the Tribunal 'rejected that the applicants were Christians in China' and 'was not satisfied that the applicants' claims gave rise to substantial grounds for believing that there was a real risk they would suffer significant harm'(para 8). 'The Tribunal also found that the applicants would not face a real chance of persecution for failing to return to China at the end of their tour group visit after their visas had expired.' (para 8) The applicants sought review before the Court based on the following three grounds: 1. The applicants were not provided with a competent interpreter during the hearing 2. The Tribunal did not give the applicants reasonable time to provide relevant material and documentation to support of their claims 3. The Tribunal 'relied on the hearing with the applicants for its decision, rather than taking into account all the "relevant consideration"' (para 9).

			The Court dismissed grounds 1 and 2 (paras 19 and 29). With respect to ground 3, the Court found that this ground required further explanation to be to properly understood, but that the 'applicants did not provide any such satisfactory explanation' (para 31). The Court held that if the complaint by the applicants was 'that the Tribunal improperly relied on the decision of the earlier constituted Tribunal then, even in that circumstance', no jurisdictional error was revealed (para 32). The Court confirmed that 'there is no jurisdictional error simply by using material from an earlier Tribunal decision' (para 35). The Court held that 'in the current case it is tolerably clear that the Tribunal made its own findings in relation to all of the evidence before it (*Minister for Immigration and Citizenship v WZANC* [2010] FCA 1391; (2010) 119 ALD 275). While the Tribunal agreed with the earlier findings, it did so in circumstances where it separately turned its mind to the claims and evidence' (para 35). However, the Court found issue with the manner in which the complementary protection criterion was considered by the later constituted Tribunal. (paras 50-61).

			The Court held that the Tribunal erred in using its earlier findings relevant to s.91R(3) of the Act as part of its considerations with respect to the complementary protection criteria (paras 50-61). That is, 'the finding that s.91R(3) of the Act required the conduct in Australia to be disregarded was a finding which, amongst other findings, formed the basis of its conclusion as to the complementary protection criterion' (para 56). The Court confirmed that s.91R(3) has 'no application, or relevance, to the complementary protection criterion (*SZSXH v Minister for Immigration and Border Protection* [2014] FCA 914 at [21])' (para 47). Therefore, the Court held that a jurisdictional error had been revealed in the circumstances and the Court made orders: • quashing the decision of the second respondent (the Tribunal) made on 8 November 2013, • compelling the second respondent to reconsider the application according to law, and • that the first respondent (Minister for Immigration and Border Protection) pay the applicants' costs (fees and payments made to the Court in relation to the matter) (para 62).
SZSRX v Minister for Immigration & Anor [2014] FCCA 2447 Judge Manousaridis	24 October 2014	5, 6, 9-11, 13, 15-16, 18, 20, 28, 30, 32, 36, 40, 48-49, 51, 55, 56, 57 and 59-60.	This case relates to: • procedural fairness and the duty to notify the applicant that the decision maker will consider Australia's complementary protection

(Unsuccessful)			obligations as part of the applicant's claim, • consideration of all integers of a claim with respect to complementary protection, and • the application of the 'real chance' test to the 'real risk' test The applicant was a citizen of Vietnam and claimed to fear harm based on three discrete reasons. First, the applicant claimed to fear harm from person A, following a traffic accident with person A in Vietnam. The applicant claimed that she was threatened with harm if she proceeded to sue person A for the damages arising from the physical injuries she sustained in the accident (para 6). Second, the applicant claimed to fear harm based on the discrimination she faced in Vietnam as a practising Catholic (para 5). Third, the applicant claimed to fear harm from person B who assisted her to travel to Australia. The applicant had been unable to repay person B for assisting her to travel to Australia, and in response person B had threatened to take the applicant's family's property (para 9). Following a 'protection obligations determination' the relevant officer found that the applicant was not credible, and 'if the claims were true, the claims did not establish the need for protection' under the Refugee Convention (para 10). The case was then automatically referred for an independent protection assessment (para 11). Section 36(2)(aa) was introduced into the Act on 24 March 2012, before the independent protection

			assessment review interview for this case took place (which was on 16 May 2012) (paras 13 and 15). Following the interview, the reviewer was not satisfied that the applicant had a well-founded fear of persecution or that she would suffer significant harm if she were returned to Vietnam (para 18). The applicant raised three grounds of review in the Federal Circuit Court. Ground 3 – denial of procedural fairness Counsel for the applicant addressed ground 3 first. In ground three the applicant argued that the Reviewer's 'duty to accord procedural fairness required the Reviewer to notify the applicant that one of the issues the Reviewer intended to consider was whether the applicant met the criterion specified in s.36(2)(aa) of the Act', and 'the Reviewer failed to properly notify the applicant of that issue' (para 20). The Court held that 'as the Reviewer did take steps to identify s.36(2)(aa) as an issue, it was obliged to give the applicant notice that she intended to consider whether the applicant satisfied s.36(2)(aa) of the Act' (para 28). However, the Court held even though the Reviewer did not use the words 'complementary protection', 'the words the Reviewer used were enough to alert the applicant's migration agent that the Reviewer intended to consider whether the applicant satisfied the

			complementary protection criterion' (para 30). For example, the Reviewer stated that since the applicant's arrival in Australia and the applicant's interview on arrival, there were 'additional criteria for considering whether a person is entitled to a Protection Visa' and that the Reviewer needed to consider whether the applicant might be owed protection on the basis of the Convention against Torture, the Convention on the Rights of the Child, and the International Covenant on Civil and Political Rights. The Reviewer also stated that the criteria under these treaties is slightly different from 'the test that we use to determine whether or not you are a refugee'. Also, the Reviewer stated that the other Conventions 'talk about significant harm, rather than serious harm', and also refer to a person being 'at significant risk' or that the person 'will suffer significant harm' (para 16). The Court also held that the 'the applicant was given ample opportunity to make submissions after the interview in relation to complementary protection' (para 32). The applicant also submitted that the applicant's migration agent 'wholly misunderstood the complementary protection provisions' (para 36). The Court was not satisfied that applicant's agent misunderstood the complementary protection criteria. The Court also confirmed that if it was satisfied that the applicant's agent misunderstood the complementary protection criteria, this would not have given rise 'to

			any duty on the part of the Reviewer to assist the applicant to articulate a case' (para 36). Ground 1 – failure to consider integer of claims The applicant claimed the 'Reviewer considered s.36(2)(aa) only in relation to the applicant's claim that she will face harm on her return to Vietnam because she left Vietnam illegally', and did not consider all of her claims of harm (para 40). The Court held that the Reviewer did not consider all of the applicant's claims of harm, specifically the applicant's claim that she would face discrimination in Vietnam on account of being a practicing Catholic (para 45). However, the Tribunal held that this was not a legal error as 'neither the applicant's claims, or the material before the Tribunal reasonably raised a claim that the discrimination based on her being a Catholic constituted significant harm' (paras 48 and 49). Ground 2 – failure to apply "real chance" test The applicant claimed that the 'Reviewer made a legal error because, in her formulation of the legal principles in relation to s.36(2)(aa), the Reviewer did not say that it was necessary for the decision-maker to be satisfied that there was a real chance the person will suffer

			significant harm', for there to be real risk that a person seeking protection will suffer significant harm. The applicant submitted this omission constituted a 'legal error because the Full Federal Court in *Minister for Immigration and Citizenship v SZQRB* held that the test for determining whether there is a real risk that a person will suffer significant harm is whether there is a real chance the person will suffer such harm if he or she returned to their country of nationality' (para 51). However, the Court 'held that in neither of the two instances on which the applicant relied did the Reviewer apply an incorrect test of real risk' (para 55). As to the first instance, the Reviewer applied the word 'unconvincing' to the applicant's evidence (para 55). 'Having not accepted the applicant's evidence, the Reviewer did not consider whether there was nevertheless a risk the applicant would suffer the harm she claimed she would suffer at the hands of the people with whom she had the traffic accident' (para 55). The Court held that the 'Reviewer made no error in adopting that approach' (para 56). As to the second instance the Reviewer relied on country information and found that the applicant's 'questioning by the Vietnamese authorities, and the possible imposition of penalties', would focus on those 'who arranged the applicant's illegal departure' and therefore the Reviewer did not apply an incorrect test of real risk (para 57).

			Since the applicant did not succeed on any of the grounds on which she relied, the application was dismissed (paras 59-60).
SZTFZ v Minister for Immigration & Anor [2014] FCCA 1861 (Judge Driver) (Unsuccessful)	17 October 2014	1, 10, 11-16, 20, 24, 26-30	This case relates to: • consideration of an applicant's claim for complementary protection when the applicant relies on the same claim for protection under the Refugee Convention The applicant was a citizen of Sri Lanka and claimed to 'fear harm based upon an imputed political opinion of support for the Liberation Tigers of Tamil Eelam' (LTTE) (para 1). The Tribunal concluded that 'there is no credible evidence as to the true reasons the applicant left Sri Lanka' or 'as to why the applicant does not want to go back to Sri Lanka'(para 10) 'The Tribunal also undertook a detailed analysis of the applicant's claims by reference to independent country information. The Tribunal found that the risk of harm faced by a Tamil from an area previously controlled by the LTTE upon return to Sri Lanka is remote. The Tribunal found that the applicant did not have any characteristic (e.g. connection with the LTTE or perceived opposition to government) which would alter this risk profile' (para 11). 'In addressing the applicant's claims to fear harm on the

			basis of his status as a returnee or as a person who departed Sri Lanka illegally, the Tribunal also referred to independent country information. After assessing this information, the Tribunal concluded that the risk of harm arising from these matters was remote' (para 12) 'Having reviewed the country information, the Tribunal then assessed the specific submissions made to it. In line with its earlier findings in respect of the applicant's credit and the country information, the Tribunal found: a. the applicant is not a person who would be suspected of involvement in the LTTE; b. the risk of the applicant suffering harm from the army or the Sri Lankan government as a Tamil from Jaffna is remote; c. the risk of the applicant suffering harm as a failed asylum seeker returning to Sri Lanka were not substantiated by reliable information. Nor would the manner in which the applicant departed Sri Lanka result in a prison sentence' (para 13). Based on the above reasons, the Tribunal held that the applicant did not have a well-founded fear of persecution (para 14). In assessing the applicant's claims for complementary protection, the Tribunal held: 'In essence, it is claimed that the applicant meets the complementary protection criteria on the same grounds that his fear of persecution is well founded. For the same reasons the Tribunal finds the applicant does not

			have a well founded fear of persecution, it also finds that there is not a real risk he will suffer significant harm in Sri Lanka'. (para 15) 'Notwithstanding this general conclusion, the Tribunal did separately consider whether any harm arising from the applicant's alleged illegal departure from Sri Lanka would amount to significant harm' for the purposes of s.36(2)(aa) of the Act. 'It concluded that there was no "real risk" of such harm arising' (para 16) Before the Federal Circuit Court, the applicant submitted that the 'Tribunal did not give proper consideration to whether the applicant's claims for complementary protection satisfied the statutory criterion' in s.36(2)(aa) of the Act. Instead, it was claimed, 'the Tribunal relied on its findings made in respect of the applicant's claims' under the Refugee Convention. As a result, the applicant submitted that 'the Tribunal asked the wrong question because it failed to take into account the fact that the test for complementary protection under s.36(2)(aa) is separate to, and different from, the test for assessing refugee claims under s.36(2)(a)' (para 20). With reference to *SZSGA v Minister for Immigration* [2013] FCA 774 the Court held that 'it is not always necessary for the Tribunal to give extensive reasons for the rejection of complementary protections claims. This is especially so where the facts giving rise to the complementary protection claims are the same as those upon which refugee claims are based' (para 24).

			‘Whilst many of the applicant’s claims were disbelieved’, ‘the Tribunal accepted some parts of the applicant’s factual claims’. ‘Specifically, the Tribunal accepted that the applicant was from an area formerly controlled by the LTTE, had done training with the LTTE and was, on five occasions between 1996 and 2002, rounded up by the army and maltreated’ (para 26). 'The Tribunal considered whether these factual matters gave rise to a risk of harm. The Tribunal found at [104] that the risk of a Tamil from an area previously controlled by the LTTE suffering harm for that reason alone was remote. This finding was not expressed to be limited to the risk of serious harm. Rather, on a proper reading, the finding should be understood as having been made with respect to any type of harm. There is no reason why this finding could not be relied upon with respect to both the refugee claims and complementary protection claims’ (para 27). ‘The Tribunal also addressed the applicant's claims to have done training with the LTTE and to have been maltreated between 1996 and 2002. The Tribunal found that the applicant would not be at risk of harm in Jaffna now or in the reasonably foreseeable future. Again, there is no reason why this finding could not be relied upon with respect to both the refugee criterion and the complementary protection criterion. It is not the case that the Tribunal found that there was no risk of persecutory harm, or harm for a Convention reason.

			Rather, the Tribunal found that there was no risk of any kind of harm' (para 28). 'A more general analysis of the reasons of the Tribunal confirms that it applied the correct test to the applicant's claims for complementary protection' (para 29) The applicant failed to establish that the Tribunal decision was affected by jurisdictional error and the applicant was dismissed (para 30).
SZTGN v Minister for Immigration & Anor [2014] FCCA 1467 (Judge Driver) (Successful)	3 October 2014	2, 17, 44, 46 and 48	This case relates to: • the failure to distinguish between the Refugee Convention and the complementary protection criteria 'The applicant is a citizen of Afghanistan and claimed to fear harm at the hands of the Taliban' (para 2). The applicant raised three grounds for review. Relevantly, Ground 1 detailed that the Independent Protection Assessor (Assessor) 'failed to address a basis for complementary protection, namely, whether the applicant was owed complementary protection in respect of the danger of travelling to Bamyan province (being the place the Assessor presumed the applicant would return to if his refugee application in Australia was rejected)' (para 17). The Court accepted 'the Minister's contention that the

			asserted claim was not clearly articulated by the applicant' but rejected the Minister's contention that the claim did not clearly arise on the material before the Assessor' (para 44). The Court accepted that there are 'circumstances where a conclusion in relation to a refugee claim is so comprehensive that it can also dispose of a claim for complementary protection based upon the same facts. For example, if the factual basis for the claim is rejected, then it may be rejected for all purposes. Further, if a conclusion is that there is no real risk of *any* harm, that may also be sufficient for all purposes. Here, however, the Assessor recognised that there was a risk of harm on the roads to Bamyan which may be taken to have been a real risk. The Assessor reasoned that the applicant would not be targeted for any reason bearing upon a connection to the Refugees Convention. This is not a finding so comprehensive as to relieve the Assessor from the need to consider the facts and circumstances in relation to complementary protection'. (para 46) The Court concluded that the 'Assessor fell into reviewable legal error' with respect to Ground 1 (para 48).
SZTGP v Minister for Immigration & Anor [2014] FCCA 2281 (Judge Barnes)	16 September 2014	2, 25, 29, 31, 39-40, 42-44, 49, 51-2, and 54-57.	This case relates to: • the reasonableness of relocation under s36(2B)(a) and whether there is a requirement to identify particular locations for relocation

(Unsuccessful)			The applicant was a citizen of Pakistan and claimed to fear harm based on 'his political opinion and membership of the Awami National Party (the ANP)' (para 25). The Refugee Review Tribunal found 'that there was a real chance the Applicant would face serious harm from the Taliban and other extremist groups for reason of his political opinion and his membership of a particular social group of ANP members in Pakistan if he returned to Swat or Karachi now or in the foreseeable future' (para 29). 'The Tribunal also accepted that the authorities could not provide the level of protection the Applicant was entitled to expect' (para 29). However 'the Tribunal concluded that it was reasonable for the Applicant to relocate within Pakistan and that his risk of being harmed by the Taliban or other extremist groups outside the specified areas was remote' and 'not well founded' (para 39). The Tribunal held that applicant did not have a profile as a 'high-profile anti-Taliban politician' or 'that the local Taliban (who would know him to be an ANP member and worker in Swat) would be motivated to pursue him to other parts of Pakistan' (para 31). 'The Tribunal then considered the complementary protection criterion. For the reasons it had accepted that the Applicant had a well-founded fear of persecution in his home village in Swat, it also accepted that there were substantial grounds for believing there was a real risk he would suffer significant harm if he returned to

			his home village in Swat'(para 40). However the Tribunal was satisfied that it was 'reasonable for the Applicant to relocate to an area of Pakistan outside Khyber Pakhtunkhwa, Balochistan and Karachi where there would not be a real risk that he would suffer significant harm' (para 40). The applicant sought judicial review of the decision of the Refugee Review Tribunal on the ground that the Tribunal 'failed to apply the law in relation to internal relocation correctly' (para 42). The applicant also sought an extension of time in which to make the application to the Federal Circuit Court (para 2). Firstly, the applicant argued that 'the Tribunal erred in failing to identify those areas of Pakistan to which the Applicant could effectively relocate' (para 43). However, the Court was not satisfied that 'the Tribunal had to identify a specific location to which it would be reasonable for the Applicant to relocate' and referred to *SZFYV v Minister for Immigration and Citizenship & Anor* [2007] FCA 304 in which Downes J found (at [11]): 'It was not for the Tribunal to seek to require the appellant to relocate to some particular place but to satisfy itself that safe relocation was possible. This it did'. (para 44) Secondly, the applicant argued that the Tribunal in its finding that 'there was no evidence before the Tribunal of attacks on ANP members or their families outside Khyber Pakhtunkhwa, Karachi and Balochistan in recent years, the Tribunal had failed to consider the

			evidence provided by the Applicant of such attacks' (para 48). The Court held that the Tribunal referred specifically to the particular information provided by the applicant's adviser, including information 'in relation to events in Balochistan, in a town outside Karachi and to a YouTube video, but found that there was an absence of country information to support evidence of attacks on ANP members or their families outside Khyber Pakhtunkhwa, Karachi and Balochistan in recent years' (para 49). Thirdly, in relation to the Tribunal's finding that various Taliban organisers did not communicate across Pakistan, the applicant argued that this finding was not supported by publically available country information before the Tribunal (para 51). The Court concluded that in the 'absence of identification of what country information is said not to have been considered, this complaint must fail' (para 52). Fourthly, the applicant 'submitted that the Tribunal had failed to consider properly the test whether the Applicant would suffer serious harm as per s.91R(2)(a) of the Act if he [was] asked to relocate in Pakistan' (para 54). The Court held that the Tribunal's reasons did not demonstrate that there is an 'arguable error on this basis. Rather, the Tribunal accepted that the Applicant faced serious harm for the purposes of s.91R(2) of the Act within specified, localised areas. However it found, for the reasons which it gave, that the Applicant was not at risk of such harm outside those specified areas' (para 54).

			Lastly, the applicant argued that recent events in Pakistan meant that it was not safe for him to return to Pakistan (para 55). However, the Court held that the applicant's submissions were 'not a basis for establishing jurisdictional error or, indeed, an arguable case or prospects of success such as to justify the grant of an extension of time' (para 56). The Court held that it was not in the interests of the administration of justice to grant the extension of time sought by the Applicant and the application for an extension of time was dismissed (para 57).
SZUDL v Minister for Immigration & Anor [2014] FCCA 2018 (Judge Nicholls) (Unsuccessful)	4 September 2014	4, 44, 46, 47-50, 87, 94 and 102.	This case relates to: • consideration of an applicant's claim with respect to the two criteria for a protection visa under ss. 36(2)(a) and (aa). The applicant is a citizen of Iran. 'The applicant claimed to fear harm if he were to return to Iran, variously, because he was known by the Iranian authorities to have engaged in a homosexual act, his political anti-regime views and activities, his "abandonment" of Islam, and his interest in, and conversion to, Christianity. The applicant's conversion to Christianity was the only claim which was considered in these proceedings (para 44). The applicant sought an extension of time to apply for judicial review of the decision of the Refugee Review

			Tribunal, which affirmed the decision of the Minister's delegate, to refuse the applicant a protection visa (paras 1 and 4). 'The applicant's argument was that, in addressing the complementary protection criterion, and in its relevant conclusion, the Tribunal relied on its consideration of the applicant's claims under the Refugees Convention. That is, it relied on, and applied to the complementary protection consideration, findings "bound up" in Refugees Convention related reasoning' (para 46). Specifically, the applicant referred to the proximity in which the Tribunal Member considered the applicant's claimed conversion to Christianity through baptism, the application of complementary protection provisions to the case and the potential application of section 91R(3) of the Migration Act to the case (paras 47-50). The Court found the 'applicant's argument rests on a selective reading of both the transcript of the Tribunal hearing and its decision record', and 'that decision records must be read fairly and holistically' (*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259) (para 87). The Court also added that 'transcripts of hearings cannot be read selectively (*SZRUI v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCAFC 80 at [75] per Robertson J)' (para 87), and that 'the Tribunal made a large number of findings of fact concerning the applicant's claimed conversion to Christianity and related activities' (para 94). The Court dismissed the application for an extension of

			time (para 102).

SZTCU v Minister for Immigration & Anor [2014] FCCA 1600 (Judge Cameron)	28 July 2014	39–42	This case relates to: • compliance with Ministerial Direction Number 56 in accordance with s 499(2A) of the Act. The applicant was a Sri Lankan national of Tamil ethnicity. He claimed to fear harm from the Sri Lankan Army and other authorities for a number of reasons. The applicant raised five grounds of review, each relating to complementary protection. *Grounds 1 and 2* The Court dealt with grounds 1 and 2 together. Both of these asserted that the Tribunal failed to consider that the applicant might be subjected to torture if detained upon return to Sri Lanka (para 10). The applicant claimed he would be at risk of harm in Sri Lanka because he had left illegally. He would be prosecuted for that conduct. There had been increasing reports of failed asylum seekers, particularly young and middle-aged Tamil men, having been subjected to various forms of serious harm upon returning to Sri Lanka (para 15). The applicant further claimed that, because he was a member of the Tamil diaspora, he would be exposed to additional screening and the risk of detention. He claimed that detainees in Sri Lanka, even if only detained for ordinary criminal offences, were at risk of torture by the authorities as a means of extracting confessions or information for use in criminal proceedings. He submitted that torture was endemic in

			Sri Lankan prisons, and occurred not just because a prisoner was suspected of supporting the LTTE, with the consequence that all detainees were at risk (para 17). The Court found that the Tribunal had considered the applicant's claims before rejecting them (para 23–8). *Grounds 3 to 5* Grounds three to five asserted that the Tribunal failed to consider the applicant's claim to fear cruel, inhuman or degrading treatment or punishment if he returned to Sri Lanka. The applicant submitted that in addition to being at risk of torture in detention he would be subjected, by reason of the poor conditions in Sri Lankan gaols, to cruel, inhuman or degrading treatment there (paras 10, 30). The Tribunal had stated that the statutory definition was exhaustive (para 32). The applicant claimed that the Tribunal had (paras 10, 38): • misunderstood or misapplied the law; • failed to comply with Ministerial Direction No 56 by failing to take into account the PAM 3 Protection Visa complementary protection guidelines; and • failed to take relevant considerations into account, namely international jurisprudence and the issues it raised. The Court observed that the CP Guidelines do not

			purport to define the component elements of 'significant harm'. Rather, they discuss matters which may be taken into consideration when determining whether a particular circumstance amounts to significant harm. As such, the Tribunal was not wrong to say that the terms were defined by the statute (para 40). The Court considered the Tribunal's reasons and concluded that it had had regard to the CP Guidelines and international jurisprudence (para 42): 'I infer from the choice of words in those latter sentences, particularly "victim" and "level of severity", that the Tribunal had had regard to para.29 of the CP Guidelines. As the international jurisprudence to which the applicant particularly referred was cited in that paragraph of the CP Guidelines, I conclude that the Tribunal's consideration of that paragraph included a consideration of the international jurisprudence referred to there. The Tribunal was not relevantly required to do more. Neither the ministerial direction nor the CP Guidelines required the Tribunal to look first at the guidelines and then separately at international cases. The guidelines simply required the Tribunal to have regard to international jurisprudence. As that jurisprudence was set out in the guidelines themselves, the Tribunal discharged its relevant obligation by considering those guidelines.' The Court dismissed the application for review.

SZSPT v Minister for Immigration & Anor [2014] FCCA 1388 (Judge Raphael)	1 July 2014	15–6	This case relates to: • the interpretation of s 36(2B)(c), i.e. whether the risk of harm is faced by the population generally. The applicant was a national of Sri Lanka, of Tamil ethnicity. Among other things, the applicant claimed he would suffer harm in Sri Lanka as a result of being a returned asylum seeker who had left Sri Lanka illegally (para 5). The applicant claimed that, if detained, he would be at risk of harm whilst in detention or prison given Sri Lanka's poor human rights record (para 6). The Tribunal found that it was unlikely the applicant would be detained. The Tribunal went on to note that, while the Sri Lankan government's human rights record was 'extremely poor', the law was of general application: as the punishment was a risk faced by the population generally, it fell outside the complementary protection legislation (s 36(2B)(c)). The applicant argued that imprisonment was not something the population generally risked as the population as a whole did not break the law and was not in prison (para 11). A person had to act in a certain way to bring him or herself within the class, or category exposed to the risk. The applicant argued that the Tribunal had misinterpreted s 36(2B)(c) and committed jurisdictional error. The Court rejected the applicant's interpretation. It noted that the law imposing punishment for illegal departure did not state that it applied differently to

			different ethnic groups within Sri Lanka. On the available evidence, it was not applied in a discriminatory way against Tamils (para 15). As such, the real risk applied to any person who broke the law and was thus a risk faced by the population generally.

SZTBE v Minister for Immigration & Border Protection & Anor [2014] FCCA 1288 (Judge Emmett) The Court dismissed the application for judicial review.	19 June 2014	75–97	This case relates to: • meaning of cruel or inhuman treatment or punishment. The applicant was a national of Sri Lanka, of Hindu faith and Tamil ethnicity. He claimed to fear harm in Sri Lanka for a number of reasons, including that he would be detained by the Sri Lankan authorities as a failed asylum seeker (para 2). The delegate and the RRT rejected the applicant's claims. With respect to the applicant's claim for complementary protection regarding detention as a failed asylum seeker, the RRT found that the harm faced by the applicant did not amount to significant harm as contemplated by s.36(2A) of the Act (para 41). The applicant sought judicial review of the RRT's decision on four grounds, two of which were not pressed (paras 44, 98). Ground 2 related to complementary protection (para 44): 'The Tribunal fell into jurisdictional error by misconstruing or misapplying the applicable law, being s.36(2A) of the Act and the definition of "cruel or inhuman treatment or punishment" in s.5(1) of the Act, or otherwise failing to ask itself the right question.' The RRT accepted that the applicant would be questioned by Sri Lankan authorities at the airport and in consultation with local police authorities. The RRT found that while the applicant might be remanded in prison for a few days in conditions which were

			'cramped, uncomfortable and unpleasant', returnees who left Sri Lanka illegally were only held on remand for a short duration of a few days while waiting to be brought before a court for bail, which was routinely given. The RRT found that the weight of country information indicated that the applicant would be subject to a fine, but not a custodial sentence for his illegal departure from Sri Lanka. On that basis, the RRT found the prospect of the applicant being detained for a prolonged period of time to be remote (paras 78–81). The RRT noted that there had been no reporting of involuntary returnees being exposed to acts or omissions amounting to significant harm (para 82). The applicant submitted that it was not open to the RRT to find that there was no reporting of such returnees being exposed to acts or omissions amounting to significant harm, in light of certain information the applicant's migration agent had provided (para 83). The Court observed that it was clear from the RRT's reasons that in considering 'significant harm', the RRT had regard to the particular definition in s.36(2A) of the Act in finding that there had been no reporting of such returnees being arbitrarily deprived of their life or of the death penalty being carried out upon them; or, of them being the subject of intentional mistreatment involving torture or cruel or inhuman treatment or punishment; or, extreme humiliation required for an act or omission to be degrading treatment or punishment amounting to significant harm as contemplated in s.36(2A) of the Act (para 84).

			The applicant also submitted that to describe the conditions in the Sri Lankan prison as 'cramped, uncomfortable and unpleasant' suggested that the RRT had not had proper regard to the country information before it that provided specific detail that went beyond those descriptions. However, the Court noted it was for the RRT to consider whether the conditions that the applicant may experience if he spent time in prison on remand amounted to cruel or inhuman treatment or punishment (para 86). The Court did not accept the applicant's submission that, because the RRT characterised the conditions in prison as 'cramped, uncomfortable and unpleasant', the RRT had ignored the country information referred to in the migration agent's submission as to the prison conditions in Sri Lanka. However, the Court found that none of the reports cited suggested that there was any particular deprivation of life or any *intentional* mistreatment involving torture or cruel or inhuman treatment or punishment as is required in the definition of significant harm as defined in s.36(2A) and s.5(1) of the Act (para 89). As such, the Court concluded that the RRT's findings and conclusions in relation to complementary protection were open to it on the basis of the evidence and materials before it.

SZSKC v Minister for Immigration & Anor [2014] FCCA 938 (Judge Lloyd-Jones) The applicant was successful in seeking judicial review of the Reviewer's decision.	16 May 2014	82–6	This case relates to: • the meaning of 'real risk' of significant harm; and • the application of s 36(2)(aa) generally. The applicant claimed to be a stateless Faili Kurd formerly resident in Iran. He sought injunctive relief restraining the Minister from relying, or acting, on the recommendation of the Independent Merits Reviewer (Reviewer) or the assessment by departmental officers (para 4). The applicant claimed to fear harm on account of his Faili Kurd ethnicity and his status as a stateless person (para 7). The Reviewer did not accept that the applicant was a Faili Kurd or that he was stateless. The Reviewer also rejected the applicant's claim to fear harm as a member of a social group consisting of failed asylum seekers (para 9). The applicant further claimed that he faced a real risk of significant harm on account of the prison conditions that he would face upon return to Iran. With respect to complementary protection, the Reviewer found that it was unlikely that the applicant would be imprisoned if returned to Iran and, as a result, did not meet the criterion in s.36(2)(aa) of the Act (paras 10–1) (even though the Reviewer acknowledged that prison conditions in Iran were problematic). Thus, the Reviewer: • referred to material from authoritative sources that suggested that persons imprisoned in Iran may face

			'significant harm'; • considered that it was 'unlikely' that the applicant would be imprisoned upon his return; and • concluded that, because it was 'unlikely' that the applicant would be imprisoned, there were not substantial grounds for believing that the applicant would suffer significant harm as a direct and foreseeable consequence of being returned to Iran (para 12). The applicant sought judicial review on the basis that the Reviewer misapplied the test relating to complementary protection (para 14). He argued that there was a real risk that he would be imprisoned in Iran upon return, and that imprisonment would constitute 'significant harm'. He argued that the requirement of 'real risk that the applicant will suffer significant harm' was capable of being satisfied even if it was 'unlikely' (as found by the Reviewer) that the applicant would suffer significant harm. In equating 'real risk' with 'unlikelihood', the Reviewer had erred in law. With reference to *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33, the Court made two observations with respect to the criterion of 'real risk' (para 18): • it is erroneous to approach the threshold of a 'real risk' as if it must be satisfied on the balance of probabilities (i.e. more likely than not); and • authorities explaining the threshold of risk applicable to s.36(2)(a) are also relevant to considering whether there is a 'real risk' of

			significant harm in s.36(2)(aa). The question of 'real risk' in s 36(2)(aa) is to be determined by reference to the same risk threshold as applicable to s.36(2)(a) (para 17). The Court set out the arguments made by the applicant and the respondent Minister, extracting quotes from authoritative decisions, including *Chan Yee Kim v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, *Minister for Immigration and Ethnic Affairs v Guo & Anor* (1997) 191 CLR 559, *Minister for Immigration and Citizenship v Anochie* (2012) 209 FCR 497, and *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505. After this review of the authorities, the Court found that the Reviewer had applied the incorrect test, stating (at para 82): 'On a fair reading of the Reviewer's reasons it does not disclose what precise test was applied in the reasoning process, however, in an assessment of the language used it appears that the balance of probability test was the approach adopted, although the words "balance of probabilities" does (*sic*) not appear on the face of the Decision Record. The language used is "unlikely" which means not generally and the language leaves open that there is a real possibility that the applicant will be imprisoned on his return to Iran. That language is consistent with the High Court decisions in *Chan* (supra) and *Guo* (supra). It is also consistent with his Honour Flick J in the decision of *SZRCI* where he stated you need not show that it is probable that it will occur.

			It simply needs to be a real risk, not negligible and not insignificant. The language that has been used is consistent with the departmental policy at the time as evidenced by the Full Federal Court decision in *SZQRB* that a balance of probabilities test was departmental policy in complementary protection cases at that time.' The Court continued that 'the test is not whether imprisonment is a necessary or foreseeable consequence, i.e. inevitable' (para 84), as contended by the Minister. The Minister argued that 'the applicant must show that it is a necessary consequence of the applicant being returned to Iran that he will be imprisoned and as a consequence the question of risk arises in relation to serious harm' (para 85). The Court concluded that the test is 'whether there is a real risk, as a necessary and foreseeable consequence of return, that serious harm will be suffered, in this case whether there is a real risk of imprisonment. There is no requirement of proof that the applicant will be imprisoned on return because that places the onus of proof far too high' (para 84). The statute requires that one assess the risk by reference to the integers of risk, being, will the applicant be imprisoned and, if imprisoned, will he suffer harm (para 85)? The Court found that the Reviewer had misunderstood and misapplied the relevant test (para 86). The Court awarded the relief sought. See also *SZQSN v Minister for Immigration & Anor*

			[2014] FCCA 1486 (14 July 2014), where Judge Lloyd-Jones found that the Delegate and the Independent Merits Reviewer had misapplied the test of 'real risk' by requiring a higher threshold for the complementary protection provisions than the 'real chance' test.
MZZGH v Minister for Immigration & Anor [2014] FCCA 984 (Judge O'Dwyer) The Court dismissed the application for judicial review.	15 May 2014	12–24	This case relates to: • the meaning of 'significant harm' ('degrading treatment', in particular); and • whether the claim was raised squarely on the material before the decision maker. The applicant was a national of Afghanistan, of Hazara ethnicity and Shia Muslim religion (para 4). The applicant was born in the Jaghori district of Ghazni province in Afghanistan. At the age of 2, he fled with his family, following the death of his uncle, to Quetta in Pakistan, where he had lived until leaving to come to Australia by boat (para 5). The applicant raised two grounds of review with respect to the Tribunal's consideration of his claims for complementary protection (para 6): • the Tribunal failed to consider the claim that the applicant would suffer significant harm in the form of 'degrading treatment' and an inability to survive or subsist. • the Tribunal applied the wrong test in its consideration of complementary protection by requiring the establishment of a Convention nexus in relation to the applicant's fear of harm, particularly travelling on the roads in Afghanistan.

			Degrading treatment and inability to survive or subsist The applicant contended that he had squarely raised his inability to subsist if he was returned to Afghanistan. This inability was centred on discrimination against Shia Muslims, as well as not having the assistance of a family network to help gain employment (para 12). The claims explicitly raised before the Tribunal centred on the religious and ethnicity attributes of the applicant allegedly resulting in discrimination warranting the engagement of Australia's protection obligations under the Convention (para 20). The Court found that the question of the applicant's capacity to survive or subsist in Afghanistan was not squarely raised before the Tribunal (para 22). *Application of wrong test by requiring a Convention nexus* The Court found that the Tribunal had properly applied the complementary protection provisions (para 36). The findings of fact with respect to the Convention claims were global in the sense that they were also applicable to the claim for complementary protection (paras 31, 35). The Court dismissed the application for judicial review.
SZSUW v Minister for Immigration & Border	12 May 2014	50–8	This case relates to: • the meaning of 'real risk' of significant harm.

Protection & Anor [2014] FCCA 940 (Judge Emmett) The Court dismissed the application for judicial review.			The applicant was a citizen of India, of Sikh faith and ethnicity. He claimed to fear harm from a money lender in India (paras 2, 21). In the considering the applicant's claims for complementary protection, the Tribunal had accepted that the applicant and his family felt under pressure to repay their loans, even if the applicant had exaggerated the amount owing (para 41). The Tribunal did not accept that the applicant's family was on the verge of default or that the money lender would increase pressure on the applicant's family in the event that the applicant returned to India. Further, the Tribunal did not accept that any pressure on the applicant's family to repay their loans, or even the threat of legal action including foreclosure of the parents' house, amounted to 'significant harm'. Nor did the RRT accept that such pressure would amount to 'cruel or inhuman treatment or punishment' or 'degrading treatment or punishment' as defined by the Act (para 42). The Tribunal acknowledged that complementary protection might be extended to people indebted to loan sharks in some circumstances, however this was not such a case (para 43). Two grounds of review were argued (paras 47–9): • The Tribunal erred in law in failing to apply the correct test for the grant of a protection visa. The Tribunal adopted the incorrect test, that being 'real risk' of significant harm, as opposed to the 'real

			chance' of significant harm, as per *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 (para 47). • The Tribunal failed to have regard to a relevant consideration (para 49) *Real risk* The applicant argued that *SZQRB* was authority for the proposition that in considering whether there is a 'real risk' that an applicant would suffer significant harm if returned to their home country, the decision maker must consider whether there is a 'real chance' that the applicant would suffer significant harm, rather than considering only whether it was 'more likely than not' (para 51). The Court accepted that *SZQRB* showed that a 'real chance' is something less than the balance of probabilities. SZQRB further held that a 'real risk' referred to in s.36(2A) meant the same as a 'real chance' in refugee law (para 53). In *SZQRB*, there was a clear indication that the standard that had been applied by the Tribunal in considering the complementary protection criterion was not the 'real chance' test but a higher standard of 'more likely than not' (para 57). That was not the case here. The Tribunal in this case had used the language of 'real risk', which was the language of the Act. A fair reading of the Tribunal's decision record also made it clear that the Tribunal had applied the 'real chance' test to the

			findings it made and against which it assessed whether the applicant met the refugee criteria in s.36(2)(a) (para 56). As such, this ground failed. *Failure to properly consider the applicant's argument* The applicant claimed the Tribunal had failed to consider the following aspects of his claim: • the Tribunal equated the loan shark to a legitimate loan provider (para 62); • the dire financial predicament of the family (para 67); • death threats and acts of intimidation by the loan shark (para 70); • debt bondage as a ground under complementary protection (para 78); • breaches of socio-economic right as a basis of complementary protection (para 84); • failure to have regard to the Complementary Protection Training Manual (because the Tribunal failed to find that applicant's claims constituted a breach of socio-economic rights, such a claim being a legitimate ground for protection) (para 88); • inability of local police to provide protection (para 91); and • failure to consider an analogous decision of the Tribunal, which was clear authority for the proposition that debt bondage can entitle one for protection (para 95).

			The Court found at each instance that the Tribunal had properly considered the facts before making a finding rejecting the applicant's argument (see paras 66, 68–9, 77, 86–7, 90, 92–4). With respect to the claims relating to debt bondage, the Court found that these claims had not been raised by the applicant before the Tribunal (paras 81–2, 96). As such, the Court found that this ground sought impermissible merits review (para 99). The Court dismissed the application for judicial review.
SZSWB v Minister for Immigration & Anor [2014] FCCA 765 (Judge Driver) The applicant was successful in seeking judicial review. The decision was overturned by the Full Court in: *Minister for Immigration and Border Protection v SZSWB* [2014] FCAFC 106 (Gordon, Robertson and Griffiths JJ)	5 May 2014 22 August 2014	50–69 5, 42–3	This case relates to: • whether, in cases where a person has modified their conduct (such as living discreetly as a homosexual, or ceasing political activities after suffering harm because of them), the Tribunal would fail to consider the issue properly if it determined the issue of real chance or real risk without determining whether the modified conduct was influenced by the threat of harm; • use of international materials. The applicant was an Iranian national. The application related to a claim made by the applicant to be entitled to complementary protection in respect of incidents arising in the course of the applicant's conduct of a cigarette distribution and selling business As a result of the applicant's successful trade in cigarettes and other goods, he was threatened by a man named Ali who told the applicant to 'pull out of this

			business – or we are going to hang you' (the applicant suspected Ali worked for 'Sepah' or Islamic Revolutionary Guards) (para 10). Shortly afterwards, the applicant was hit by a car, causing serious injury to his legs. The applicant believed this was orchestrated by Ali (para 11). In seeking complementary protection before the Tribunal, the applicant had referred in particular to the harm he had suffered at the hands of Ali and the Sepah in connection with his cigarette business as indicating that he faced a real risk of significant harm if he returned to Iran (para 14). The Tribunal rejected the application. The applicant raised three grounds of review: • The Tribunal failed to consider a claim made by the applicant, namely, that, as a result of incidents relating to his cigarette selling business, he faced a real risk of significant harm within the meaning of s.36(2)(aa) of the Act. • The Tribunal asked itself the wrong question and/or misunderstood the nature of its task and/or took into account an irrelevant consideration when it considered the applicant's cigarette business CP claim. • the Tribunal failed to apply the correct legal test and/or failed to consider a relevant consideration, in that when assessing whether there was a real risk that the applicant would suffer significant harm, the Tribunal failed to consider whether the applicant's modified conduct was influenced by the threat of harm.

			The Court rejected the first ground on the basis that the Tribunal did consider the applicant's complementary protection claim (paras 25, 29). In any case, in light of its factual findings, the Tribunal was not required to consider the applicant's claim to complementary protection by reason of his alleged involvement cigarette trading (para 30–32). The Court rejected the second ground on the basis that the Tribunal had not conflated the tests applicable to the applicant's refugee claim and complementary protection claim (para 48). The Tribunal had stated the law relating to complementary protection accurately (para 47). The third ground was based on the proposition that the Tribunal's reasons could be understood as including a finding, independent of its conclusions as to an absence of a Convention nexus, that the applicant did not face a real risk of significant harm arising out of the cigarette business incidents. The other basis for that finding was that the car 'accident' occurred in 2010 and the applicant was not in the cigarette business when he left Iran in 2012 (para 50). However, the applicant's claims revealed that the reason for the applicant not being involved in the cigarette business after the car accident in September 2010 until he left Iran in March 2012 was the harm he had suffered in relation to that business. From September 2010 until late 2011, the applicant was not involved in the business because he was recovering

			from his injuries. From late 2011 until March 2012, the effect of the applicant's evidence was that when he was taking steps to recommence the business he received further threats, and so he did not recommence the business but instead left Iran. Therefore, the applicant's claims indicated that he had modified his conduct (in not being involved in the cigarette business after September 2010), and this was caused by the harm that he had suffered (para 52). The applicant argued that, in cases where a person had modified their conduct (such as living discreetly as a homosexual, or ceasing political activities after suffering harm because of them), the Tribunal would fail to consider the issue properly if it determined the issue of real chance or real risk without determining whether the modified conduct was influenced by the threat of harm (paras 53–6). As such, the applicant contended that it was an error for the Tribunal to rely on the applicant's non-involvement in the cigarette business in the period before he left Iran as a basis for concluding that the applicant did not face a real risk of significant harm, without first determining whether that non-involvement was influenced by the threat of harm he faced (para 56). The Court observed that case law had shown that protection visa applicants should not be required to deny or conceal a Refugee Convention attribute in order to find safety in their country of origin when that attribute is the basis upon which they seek protection in Australia (para 64).

			In the Court's view, there was no logical reason why the same principle should not apply to the instruments that support the complementary protection provisions of the Migration Act – in particular, the International Covenant on Civil and Political Rights (ICCPR). A protection visa applicant cannot claim complementary protection in respect of conduct consistent with the ICCPR. Conversely, it would be an error for the Tribunal to expect a protection visa applicant to forego a right conferred by the ICCPR in order to find safety in his or her country of origin, especially if it was the exercise of that right which gave rise to the harm feared by the applicant (para 65). The Court observed (at para 66): 'There was no consideration by the Tribunal of the question of whether the applicant in this case would be giving up a right conferred by the ICCPR by avoiding his trade or profession of choice if he returned to Iran. In terms of s.36(2)(aa) the issue was whether the significant harm feared by the applicant would be the necessary and foreseeable consequence of his removal from Australia if he sought to exercise his Convention rights in Iran. The harm feared cannot be consistent with a relevant Convention if the only way of avoiding the harm is to accept a violation of a Convention right. There needed to be consideration of that issue because it was clear that the applicant claimed that he did not abandon cigarette selling by his free choice. He was scared out of the trade by the physical harm he suffered and the subsequent threat of further harm.'

			The Court concluded that the Tribunal had erred in failing to determine whether the applicant's modified conduct was influenced by the threat of harm he faced, which was inconsistent with the ICCPR, before finding that the applicant did not face a real risk of significant harm. That error could be characterised as failing to apply the correct legal test or failing to consider a relevant consideration, or as a constructive failure to exercise jurisdiction (para 68). *Minister for Immigration and Border Protection v SZSWB* [2014] FCAFC 106 (22 August 2014) The Full Court overturned the FCCA's decision. The Minister argued that 'the issue of whether the visa applicant could or should modify his behaviour did *not* arise because the Tribunal made no relevant finding on that matter and indeed, the visa applicant did not express any desire to resume cigarette trading in the event that he was returned to Iran' (para 29). As a result, the Full Court was required to identify the *basis* on which the visa applicant's application for complementary protection was made (para 30). Adopting the dicta in *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1, the Court observed: 'As the Full Court said in *NABE (No 2)* at [62], "[w]hatever the scope of the Tribunal's obligations it is not required to consider criteria for an application never

			made". Moreover, the claim must emerge clearly from the materials: *NABE (No 2)* at [68]. Put another way, on judicial review, a decision of the Tribunal must be considered in the light of the basis upon which the application was made.' The question therefore was whether the visa applicant made a claim for complementary protection based not only on past disputes which he had had with a rival distributor of cigarettes, but also on an *intention to resume* his cigarette business if he were returned to Iran (para 4). The Court found that the applicant had not made claims about future intention (paras 42–3): 'The submissions with which the Tribunal was dealing did not involve the proposition that the visa applicant would pursue the business of cigarette selling if returned to Iran. The claim …referred to the past harm as a result of the dispute with Ali as indicating the capabilities of Ali and his associates. The Tribunal did not find as a fact that the visa applicant would or would not return to the cigarette selling business and no such proposition was put. 'In our opinion, there was no basis in the present appeal for the conclusion of the primary judge that the Tribunal erred in failing to determine whether the visa applicant's modified conduct was influenced by the threat of harm he faced … [T]he visa applicant did not state that he would recommence his cigarette selling business if returned to Iran. It may be accepted that the visa applicant had not in the past resumed his cigarette selling business because of the threat of harm but that does not, in our opinion, show what the visa applicant

			would do if returned to Iran. There were no asserted or established facts on which to found the claim.' The Court allowed the appeal.

SZSZO v Minister for Immigration & Anor [2014] FCCA 242 (Judge Driver) The applicant was successful in showing that the Tribunal had fallen into jurisdictional error.	28 April 2014	21–36	This case relates to: • the meaning of 'real risk' of significant harm. The applicant was a Hazara male from the Jaghori district in Afghanistan. He worked as a taxi driver. The applicant claimed the Taliban were looking for him. The applicant claimed to fear harm due to his membership of two social groups: persons who had departed Afghanistan illegally and lodged an application for asylum, and 'Afghan taxi drivers'. The applicant contended that should he be forced to return to Afghanistan, he 'would be compelled to return to his family home in Ab Borda, Jaghori and his occupation as a taxi driver', which would take him along the treacherous roads in the Ghazni Province (para 9). The Tribunal had 'serious concerns' about the applicant's credibility, and found that the applicant 'was of no interest to the Taliban in the past and therefore he would not be of any interest to them now or in the reasonably foreseeable future for any of the reasons the applicant has speculated' (para 12). With respect to his claim for complementary protection, the Tribunal accepted that the applicant might face 'some degree of danger' travelling from Kabul to Jaghori, 'given some routes may be unsafe or insecure'. However, the Tribunal concluded there were not substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Afghanistan, there was a real

			risk that he would suffer significant harm, having regard to: • the applicant's own experiences travelling between Iran and Afghanistan on several occasions and working as a taxi driver for a period of months; and • the fact that the applicant had not experienced any problems in the past and did not have any of the characteristics on the basis of which the country information indicated people were being targeted (para 17). The applicant raised two grounds of review (para 18): • The Tribunal misconstrued or misapplied s.36(2B)(c) of the Act. It accepted that 'the applicant may face some degree of danger travelling from Kabul to Jaghori' but then found there to be no real risk that the applicant would suffer significant harm on the basis that 'no particular ethnic group is being targeted on roads in Afghanistan'. • The Tribunal misconstrued or misapplied the definition of 'real risk'. The Tribunal accepted that 'the applicant may face some degree of danger travelling from Kabul to Jaghori' but then concluded that there was no real risk that he would suffer significant harm because he did not have 'any of the characteristics' of 'the main targets on the roads' (i.e. those people employed by or with direct links to the Afghan Government or the international community regardless of ethnicity or those carrying documentation which pointed to a connection with the government).

			Real risk The Court began by considering the second ground first. It accepted the applicant's submissions on the general principles governing the construction of 'real risk' (set out at paras 21–2). On this point, the Court found that the considerations relied on by the Tribunal (i.e. the applicant's past travel along the route and the main targets on the route) were not capable of excluding the real risk necessarily arising from the Tribunal's finding that the applicant faced 'danger' (para 29). The applicant's experiences as a taxi driver had been limited to a period of two to three months (para 30). The Court hard regard to the dicta in *Minister for Immigration v Guo* (1997) 191 CLR 559 that 'The extent to which past events are a guide to the future depends on the degree of probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity' (para 31). On this basis, the Court found that the 'probability' of harm occurring in 'a period of two to three months' either at all or with any 'regularity' was so low as to be inconsequential. On a proper application of the 'real chance' test, the Tribunal's observation about the applicant's past could not have provided any 'guide' to the Tribunal about whether the future 'danger' faced by

			the applicant might give rise to future harm (para 32). Further, the question whether the applicant had 'any of the characteristics' of the 'main targets' was not the question presented by the applicant's complementary protection claim, namely, whether the applicant faced a real chance of significant harm as a taxi driver irrespective of who might happen to be targeted (para 33). The Tribunal was further required to consider whether there was a risk of significant harm to taxi drivers who were not targeted (para 34). As such, the Tribunal fell into jurisdictional error (para 36). *Application of s 36(2B)* The Court accepted the applicant's contention in general terms that the Tribunal also erred in rejecting the applicant's claims on the basis that he would be able to change his occupation on his return to Afghanistan (para 37). As stated in *Minister for Immigration v SZSCA* [2013] FCAFC 155, the Tribunal cannot require an asylum seeker to behave in a particular manner (para 38). While it was open to the Tribunal to find that the applicant was not in fact a member of the particular social group of taxi drivers as he claimed, or that, although he had been a member, he would not rejoin that group in Afghanistan if he returned there, the Tribunal did not in fact make either of those findings

			(para 41). In any case, the Tribunal did not clearly, and in terms of the statutory provisions, address s.36(2B) because its consideration miscarried in relation to the general issue of 'real risk' (para 43). On the basis of its finding with respect to the ground relating to 'real risk', the Court found the Tribunal had fallen into jurisdictional error.
MZZES v Minister for Immigration & Anor [2014] FCCA 758 (Judge O'Dwyer) The Court dismissed the application for judicial review.	17 April 2014	20–39	This case relates to: • the meaning of 'significant harm'; • threats The applicant claimed to be a stateless citizen of Indian Tamil ethnicity. However, a copy of a passport identified him as a Sri Lankan citizen of Indian Tamil ethnicity (para 3). The Tribunal found that the applicant was a citizen of Sri Lanka and that he had 'deliberately lied' when he claimed that he was stateless (para 11). The applicant feared harm for various reasons (see paras 3–10). In particular, he feared harm because he had had an affair with a woman who was married to a policeman; the policeman, upon discovering the affair, had threatened to kill both of them (para 5). Further, he had suspected his van had been stolen by his cousin, Suresh, which theft he had reported to the police. Suresh had joined the Sri Lankan army. Members of the army and the Karuna group were apparently looking for the applicant for reporting the theft of the van to the

			police (para 8). The applicant also feared harm as a failed asylum seeker (para 9).
			
			The applicant raised three grounds of review, two of which related to complementary protection:
			• The Tribunal erred by failing to consider whether unfulfilled threats could amount to 'significant harm' as defined in the Act. Alternatively, the Tribunal failed to ask the right question, namely, can threats alone amount to 'significant harm'?
			• The Tribunal's decision was affected by jurisdictional error in that the decision maker:
			  • was required to determine whether there was a real chance of serious or significant harm in the reasonably foreseeable future for the applicant from the policeman with whose wife the applicant had an affair; and
			  • made his ultimate determination based upon a finding of fact that the policeman would not carry out the threat to kill the applicant, which threat was found to exist; and
			  • had no evidence or other material from which he could reasonably be satisfied that the policeman would not carry out the threat to kill the applicant; and
			  • had evidence that the policeman, as a police officer, had both the means and the connections to carry out the threat.
			
			With respect to the first ground, the Court stated (para 26):
			'In my view, for a threat to amount to significant harm

			there has to be immediacy in respect of the threat to cause that mental anguish that might amount to significant harm and that there be no other factor which would militate against the likelihood of the threat being carried out, which was in the knowledge of the victim. The threat complained of in respect of the International cases cited were threats made with evident capacity to follow through with the threat in short time. In respect of *BVB*, again the context of that decision discloses a genuine belief in the victim that the threats being made were capable, and likely, in the mind of the victim, to be implemented. It was not so much her subjective assessment of the threat, but also the not unreasonable objective assessment of the context that gave foundation for the subjective assessment. In the case before me, the context does not reflect that immediacy and there are other circumstances, discussed below, that militate against the subjective belief of the Applicant as being a credible and real threat.' Further the Court found that the applicant had, at no stage, actually advanced the claim that Australia owed him complementary protection obligations on the basis that there was a real risk that the applicant would suffer 'significant harm' in the form of threats if he returned to Sri Lanka. The claim made by the Applicant, which was considered and rejected by the Tribunal, was that the policeman, who had threatened the Applicant, would make good his threat; that he would kill the Applicant (para 29). This did not require the Tribunal to entertain an enquiry

			as to whether the threat *per se* constituted significant harm. The Court accepted that there would be circumstances where a threat, in itself, could constitute significant harm; but only in particular circumstances could a threat be caught by the statutory description. In this case, the question of whether the threat *per se* constituted significant harm did not arise. The applicant's claim was never along the line that he feared that should he be returned to Sri Lanka, he would be threatened again and that such a threat would be torture, or the cause of significant harm (para 29). The Court rejected the first ground. In essence, the second ground asserted that the Tribunal erred in making a finding that the policeman would not carry out the threat to kill the applicant, in circumstances where there was no evidence to support this finding (para 32). The Court found that several factors were significant on this point: the policeman knew of the affair for six months prior to his wife and the applicant departing for Saudi Arabia and did nothing about it, and there was a window of opportunity between October 2011 and February 2012 when the policeman could have followed through on his threat. Further, the threat was made to the policeman's wife as well, but there was no evidence of it having been followed through in respect of her. It was open, therefore, for the Tribunal to make a finding of fact that the policeman would not follow through on his threat (para 37).

			The Court dismissed the application for judicial review.
SZSVT v Minister for Immigration & Anor [2014] FCCA 768 (Judge Barnes) The Court dismissed the application for judicial review.	17 April 2014	62–82	This case relates to: • the meaning of degrading treatment or punishment in s 5(1) of the Act; • use of international materials. The applicant claimed to fear harm as a stateless Faili Kurd from Iran (para 2) without citizenship or identity papers (para 6). He claimed that as a stateless Faili Kurd he was subjected to discrimination and harassment in Iran, that he had no legal right to work, had restricted freedom of movement, no access to health care and that he was not able to purchase property. He claimed Faili Kurds were targeted by the Iranian authorities for ill treatment. He claimed that he had been detained and assaulted by the Basij, a paramilitary group, on two occasions on one of which the Basij broke his shoulder (para 6). The applicant argued one ground of review (para 27): • the Tribunal constructively failed to exercise its jurisdiction in that it did not consider an integer of the applicant's claims for complementary protection, namely that the discrimination on the grounds of race experienced by the applicant of itself amounted to "degrading treatment or punishment" as defined in s 5(1) of the Act because this discrimination was on the basis of race and therefore, and in the circumstances, inherently degrading. This is to be distinguished from the differential treatment actually meted out to Faili Kurds and to the applicant considered in isolation

			from its racial basis to which the Tribunal limited its review. The applicant made the following arguments: • In interpreting 'degrading treatment or punishment' in s 5(1), the explanatory memorandum could be taken into account (para 32). • The explanatory memorandum made it clear that the criteria and obligations in relation to the concept of 'degrading treatment or punishment' were defined by specific reference to Article 7 in the ICCPR (para 33). As such, Article 7 of the ICCPR was to be applied in the context of the s.5(1) definition of 'degrading treatment and punishment' (para 35) • As the ICCPR did not contain any definitions of the concepts contained in Article 7, it was relevant to have regard to jurisprudence in relation to Article 3 of the European Convention on Human Rights 1950 (ECHR) which is in similar terms to Article 7 of the ICCPR (para 36). • The European jurisprudence in relation to Article 3 of the ECHR which existed at the time of the Act introducing the complementary protection regime formed part of the context of that amendment and should be assumed to be within the intention of the parliament (para 37). This made it relevant to consider the the jurisprudence of the International Court of Justice, the European Court of Human Rights and the European Commission of Human Rights in relation to the ICCPR and the ECHR (para 38). • On these bases, the applicant argued that both the

			definition of degrading treatment or punishment in s.5(1) of the Act and the international jurisprudence was concerned with humiliating treatment (para 40). • Case law showed that discrimination based on race *could*, in *certain* circumstances, of itself amount to degrading treatment within the meaning of Article 3 of the ECHR (paras 41–2). • There was some articulation or expression in the material before the Tribunal of a claim of differential treatment of Faili Kurds on the basis of race such that the applicant's claims included as an integer the claim that race of itself rendered the differential treatment of Faili Kurds degrading. The Tribunal failed to consider this integer of the applicant's claims in the context of determining whether there was differential treatment amounting to degrading treatment within the s.5(1) definition (paras 44–5). • The Tribunal had accepted that the differential treatment meted out to Faili Kurds amounted to discrimination that was less favourable treatment, but it also had to consider whether the ground of the discrimination, that is race, was itself inherently degrading such as to attract complementary protection. The applicant submitted that as the Tribunal did not consider race as a separate factor it had constructively failed to exercise its jurisdiction in that it did not consider this integer of his claims for complementary protection (para 48). While the Tribunal made findings in respect of the treatment experienced by Faili Kurds, considered apart from the racial basis for such treatment, there was no

			separate finding by the Tribunal on whether, in the circumstances of the case, race could render the differential treatment experienced by the Applicant degrading (para 49). With respect to the definition of 'degrading treatment and punishment', the Court observed (para 62): '[A]s a matter of statutory construction…, whether or not regard is had to international jurisprudence… the s.5(1) definition could encompass differential treatment of a kind that caused and was intended to cause extreme humiliation because of the racial basis for that treatment, even if the same treatment on some other ground would not satisfy the definition. However it is not necessary in these proceedings to determine whether, and if so the extent to which, it is to be accepted as a legal principle that the racial nature of differential treatment would render that treatment degrading in certain circumstances. It is not contended that all racial discrimination of itself amounts to degrading treatment or that all claims of racial discrimination necessarily include, as an integer of the claims, a claim to that effect. The difficulty that faces the Applicant is that it has not been established that the asserted claim was raised squarely or clearly on the material before the Tribunal.' As to the latter issue, the Court noted that, where a claim had not been expressly advanced, a Tribunal would be obliged to consider it only in circumstances where the unarticulated claim had been raised 'squarely' on the material available before the Tribunal

			(para 46). The Court found that it had not been established that a claim as pleaded (i.e. degrading treatment on the basis of race) was either expressly raised by the applicant or arose clearly or squarely on the material before the Tribunal such as to give rise to an obligation on the part of the Tribunal to address such claim (para 64) (details of the applicants claims are discussed at paras 2, 66, 70–5). The Court found that, as the posited integer was not raised squarely or clearly on the material before the Tribunal, the Tribunal was under no obligation to consider it (para 83). The applicant was dismissed.
MZZIA v Minister for Immigration & Anor [2014] FCCA 717 (Judge Riethmuller) The Court dismissed the application for judicial review.	16 April 2014	22–35	This case relates to: • overlap between the test in s.36(2)(a) (real chance of serious harm) and the test in s.36(2)(aa) (real risk of significant harm) The applicant, born in 1999, was a national of Sri Lanka. The applicant sought a protection visa on the basis of his Tamil ethnicity, membership of a particular social group being a male Tamil child who lacked a male protector, a male Tamil youth born in an LTTE controlled area and potentially being a failed returned asylum seeker from the west (para 6). The Tribunal rejected the applicant's claims for protection under the complementary protection provisions on the same bases

			as it rejected his claims for refugee status, i.e. having found that there was no real chance of serious harm for Convention reasons, the Tribunal concluded that there were no substantial grounds for believing that there was a real risk he would suffer significant harm on the same facts (para 9). The applicant asserted two grounds of review, one of which related to complementary protection (para 10): • that the Tribunal had applied an incorrect test when determining the Applicant's claims pursuant to the complementary protection provisions (s.36(2)(aa)). The applicant argued that the Tribunal failed to apply the appropriate test under s.36(2)(aa), instead simply dismissing the complementary protection provision claims for the same reasons that it dismissed the Convention based claims, even though the Convention claims and the complementary protection claims were subject to different legal tests (para 12). It was argued the test to be applied with respect to Convention related matters is one of 'serious harm' as defined in s.91R of the Act, whereas the test to be applied with respect to the complementary protection regime is one of 'significant harm' as defined in ss.36 and 5 of the Act. The Court accepted that the tests were different and both needed to be squarely considered, however this did not mean that findings of fact made during the course of findings relating to Convention based claims could not be relied upon for the purpose of assessing complementary protection based claims (para 20). What

			was required was a detailed review of the factual findings. On review, the Court found that the Tribunal had undertaken considerable analysis of the Convention based claims. The applicant had not shown further facts or circumstances that would have been necessary to consider in making the findings with respect to complementary protection (para 30). With respect to the different tests of 'real chance' and 'real risk', the Court noted (para 32): 'To the extent that the different tests utilise the different form of words "real chance" and "real risk", there is nothing that has been identified in the case put by the Applicant, nor the findings made by the Tribunal in this case, from which one could conclude that any possible difference in the nuanced meanings of those two phrases (which must very significantly overlap) could be relevant in this case.' In addition, there was nothing particularised by the applicant with respect to his claims to show an arguable case that circumstances which did not amount to 'serious harm' could, in the context of the case, be considered differently on the test of 'significant harm' (para 33). The Court noted that, though the tests were distinctive, there was some overlap between them (para 34). The Court dismissed the application. Similar reasoning was adopted by Judge Riethmuller in

			MZZIB v Minister for Immigration & Anor [2014] FCCA 756 (16 April 2014) (see para 4).
SZTFI & Anor v Minister for Immigration & Anor [2014] FCCA 740 (Judge Manousaridis) The application was judicial review was dismissed.	11 April 2014	35–44	This case relates to: • the extent to which claims for refugee status and complementary protection must be considered separately. Details identifying the applicant were removed from the decision and reasons, as the applicant submitted that these details might enable the applicant's country of nationality (ACN) to readily identify the applicant (para 2). The state agencies he had worked for were referred to as SA1 and SA2. The applicant claimed fear of being persecuted for having political opinion against the current regime in the ACN. He also claimed to fear significant harm as he believed he would be charged with being a spy on his return to the ACN. The Tribunal was of the view that the applicant's fear of harm related solely to his concern that a political opinion might be imputed to him (para 5). The Tribunal found that, on the evidence, it was not established that such an opinion would be imputed to him (paras 6–9). The first and third grounds of review (paras 10, 45) before the FCC related to errors with respect to consideration of the applicant's claimed refugee status. The second ground asserted failure to properly consider

			complementary protection (para 35). The applicant claimed that the Tribunal did not consider his claim that upon his return to the ACN he would be considered as spy. This was because the Tribunal considered the application on the basis that the 'applicant's fear of harm [in the ACN] relates solely to his concern that a political opinion might be imputed to him'. The asserted error was that the Tribunal considered the spy claim only by reference to the Convention nexus of imputed political opinions whereas the spy claim was based on matters that extended beyond imputed political opinions (para 36). The Court accepted that the Tribunal had based its reasoning on the view that the applicant's claim was based solely on imputed political opinion (paras 39–41). However, the Court noted that the Tribunal had been correct to do this, as the applicant had not asserted that his claim was based on any other reason (para 42). As such, the Court concluded (para 43): 'The Tribunal's statement that the "applicant's fear of harm [in the ACN] relates solely to his concern that a political opinion might be imputed to him" does not reflect an erroneous belief on the part of the Tribunal that the applicant's claim for complementary protection was to be assessed only by reference to Convention-based fears of harm. It reflects the Tribunal's correct view that all of the applicant's claims for protection, whether based on the Convention or on complementary protection, were based on the applicant's fear of being imputed with political opinions hostile to the regime of the ACN.'

			The application was dismissed.

SZSYP v Minister for Immigration & Anor [2014] FCCA 7 (Judge Driver) The application for judicial review was dismissed.	31 January 2014		This case relates to: • the meaning of 'significant harm'; • the application of s 425 ('issues arising in relation to the decision under review'); • use of international materials. The claimant was from Sri Lanka and had made claims of persecution because of his Tamil race, Hindu religion, imputed political opinion as a supporter of the Liberation Tigers of Tamil Eelam (LTTE) and membership of the particular social group of "failed Tamil asylum seekers" (para 2). The delegate refused to grant a protection visa. The applicant's claims before the Tribunal included that he feared significant harm in Negombo prison in Sri Lanka (para 8). In particular: • he feared the use of torture; • he feared cruel or inhuman treatment or punishment; and • he feared degrading treatment or punishment. The applicant sought judicial review on the basis that the Tribunal fell into jurisdictional error by misconstruing or misapplying the applicable law, or otherwise failing to ask itself the right question (para 10). Judge Driver began his analysis by setting out the principles that underlie complementary protection, stating that it was not problematic to recognize that the complementary protection regime in the Act was

			informed by international instruments (para 18): 'The proper construction of s.36(2)(aa) of the Migration Act, and the provisions which give content to the expression "significant harm" appearing in that paragraph, are thus informed by Australia's international obligations under the CAT and the ICCPR. To say that the text of the statute ultimately controls its construction is not to deny that the meaning of the text may legitimately be informed by the international obligations to which it seeks to give effect.' The limbs of s 36(2A) relevant to this case were cruel or inhuman treatment or punishment and degrading treatment or punishment (para 19). The applicant claimed that he risked facing harm by being placed in a Sri Lankan prison for the offence of having departed Sri Lanka illegally, without his passport and from an unauthorised port of departure. In particular, the applicant claimed that any level of interaction with Sri Lanka's prison system would result in the applicant being exposed to a real risk of significant harm in the form of cruel or inhuman treatment or punishment and/or degrading treatment or punishment. The applicant submitted evidence of and relied on the use in Sri Lankan prisons of methods of torture and conditions such as overcrowding, inadequate medical treatment, insufficient water, poor hygiene, rat infestation and the presence of poisonous snakes as being conditions amounting to cruel or inhuman treatment or punishment and/or degrading treatment or punishment.

			The Tribunal reasoned that the applicant would not be subjected to cruel and inhuman treatment or degrading treatment because first, the risk of detention only arose on a weekend or public holiday, and secondly, the likely period of his detention in prison would only be for a few days. It was in my view a necessary part of that reasoning that the conditions in prison were not so bad that a detention for a brief period would amount to cruel and inhuman or degrading treatment and that the chance of the applicant being detained for a prolonged period of time was remote (para 44). The Tribunal reasoned that the likely period of time that the applicant would be held in prison, if at all, and the known conditions of that detention, were not such as to satisfy the test for significant harm (whether that harm would be inflicted intentionally or otherwise). The Court found that this reasoning was open to the Tribunal (para 47). The Tribunal had further found that returnees would stay in Negombo prison until a bail hearing was made available. Further, a family member would be required to provide surety (para 51). The Tribunal concluded that a family member would be able to provide surety and the risk of the returnee being detained for more than a few days was remote (para 52). The applicant contended that the 'issues arising in relation to the decision under review' within the meaning of s.425 of the Act therefore included the issue whether the applicant had a family member who would be able and willing to provide surety in the manner or in the amount required for the applicant's bail so as to cause him to be

			released from Negombo prison (para 53). The Court did not accept this. According to the Court, the essential and significant issue upon which this aspect of the review turned was the Tribunal's view, drawn from country information, that the applicant would be held in prison for only a short time if at all pending the granting of bail, which would be very likely to be granted, and the applicant would be unlikely to be given a custodial sentence for the offence of having left Sri Lanka unlawfully. The Court did not accept that the relevant issue was whether the applicant had family members who could provide a surety (para 58). The Court did recognize that the decisions of the Tribunal had differed on the issue of being detained in Sri Lankan prisons. For example, in case *1301683* the Tribunal had found that the risk of time spent in a Sri Lankan prison, even for a brief period, could constitute significant harm. In that case, however, the applicant was particularly vulnerable (para 45). The Court noted that each case depends on its own facts (para 46). The application for judicial review was dismissed. Similar issues arose in *SZTBH v Minister for Immigration & Anor* [2014] FCCA 8 (31 January 2014), where the Court accepted the Tribunal's view, 'drawn from country information, that failed Tamil asylum seekers who had left the country illegally would not face torture or human rights abuses on return and that, if they were detained at all on return to Sri Lanka,

			they would only be detained for a short time in remand until being granted bail, and that they would not be subject to a custodial sentence for the offence of leaving Sri Lanka unlawfully' (para 14)
MZNN & Anor v Minister for Immigration & Anor [2014] FCCA 74 (Judge Jones)	22 January 2014	55–70	This case relates to: • whether conduct undertaken in Australia to strengthen a protection claim can be taken into account when assessing a complementary protection claim (see s 91R(3) of the Act). The applicants were from Iran and claimed to be Christians. They sought judicial review of the Tribunal's decision on the basis that it had failed to taken into account an integer of their claim, namely, their practice of Christianity in Australia (para 23). Particularly, in addition to attending church, the applicants had been baptized while they were in Australia (para 26). In its decision, the Tribunal had not accepted that the applicants were genuine Christians. The Court noted that there were two relevant integers of the applicants' claim (para 58): a) because they converted to Christianity they would suffer harm (detention and/or death) if they returned to Iran; and b) their actions or conduct in Australia (being baptised, attending church) would come to the knowledge of authorities and they would suffer significant harm (detention and/or death) if they returned to Iran (in relation to this second integer, also see paras 62–3).

			The Court observed that the directive in s 91R(3) does not apply to the assessment of complementary protection under s 36(2)(aa) (para 59). It was evident that the Tribunal had applied s 91R(3) in considering the applicants' Convention claims. The issue was whether the Tribunal had failed to take into account the second integer of the applicants' claims, i.e. their conduct in Australia, for the purposes of the complementary protection claim as well. The Court found that the Tribunal had failed to take into account the second integer of the applicants' claims, i.e. that their religious conduct in Australia would come to the attention of the authorities in Iran and as a consequence they would suffer significant harm (para 74). The bare fact that the Tribunal did not mention s 91R(3) while failing to take into account this conduct did not remedy the absence of findings of fact regarding the applicants' claims that their conduct in Australia would come to the attention of the authorities in Iran (para 79). As a result, the Tribunal fell into jurisdictional error (para 80). The Court also considered the application of s 91R(3) in *SZSEQ v Minister for Immigration & Anor* [2014] FCCA 645 (4 April 2014) at paras 68–78. In that case, the Court found that the Tribunal had correctly dealt with the complementary protection claims (though affirming that the restriction in s 91R(3) did not apply to complementary protection claims).
MZZKM v Minister for	17 January 2014	23–27	This case relates to:

Immigration & Anor [2014] FCCA 24			• whether it was reasonable for the applicant to relocate internally within Pakistan. The applicant was a Shia Muslim man from Pakistan. The Tribunal had found that 'there was a real chance that the applicant would face serious harm now or in the reasonably foreseeable future if he was to return to various places in Pakistan for convention reasons' [3]. However, it had also found that it was reasonable for the applicant to relocate within Pakistan [4]. The applicant argued that the Tribunal erred in making this finding. In addition to a number of other points (which were rejected by the Court), the applicant argued that relocation was unreasonable as a result of the generalised violence in Pakistan [19]. The applicant argued that the Tribunal did not consider this issue with respect to the relocation point. The Court accepted that the Tribunal had considered the issue of generalised violence with respect to the test of complementary protection only, and not with respect to whether relocation was reasonable (paras 24 to 27): 'It is apparent from reading the paragraphs that the test being applied at that point was whether or not the generalised violence amounted to "a real risk of significant harm" within the meaning of s 36(2), that is, the complementary protection obligations. It seems to me that this cannot be reasonably read as having been the same test as the test of reasonableness to relocate, for two very significant reasons. 'First, the reasoning that is set out by the High Court in

			SZATV with respect to the Refugee Convention, and as applied in more recent cases such as *MZYQU*, would by analogy be equally applicable to the question of whether or not a 'real risk of significant harm' is the same test as the test for reasonableness to relocate. Secondly, when one turns to s 36(2B)(a), the section clearly contemplates a consideration of the "reasonableness" of relocation as a requirement separate from the identification of a risk of significant harm for the operation of that section. Were they to be the same tests, one would have expected that the section could have been shorter and not mentioned the word "reasonable" at all. … 'Counsel sought to argue that there will be considerable overlap between a risk of significant harm and facts and circumstances that may make it unreasonable to relocate. I accept this proposition, however the difficulty with it is that the considerable overlap is insufficient in this context. Clearly, the two tests are not the same and there may well be circumstances which are not sufficient to reach the test for significant harm for the purpose of the complementary protection provisions but may be sufficient when taken in the context of the case as a whole, or with other factors… to ultimately persuade the tribunal member that it is not reasonable to expect a person to relocate. … 'As a result of this reasoning, it is apparent that the tribunal member either did not turn their mind to generalised violence in making a determination as to the reasonableness of the applicants relocating within

			Pakistan or, if one reads the comment at p.24 of the transcript together with the reasons, potentially, the tribunal member did not accept that generalised violence could be a relevant consideration for the purpose of whether or not it was reasonable to expect a person to relocate.' On this basis, the Court granted relief to the applicant.
SZSRY v Minister for Immigration & Border Protection [2013] FCCA 1284 (Driver J)	13 December 2013	45–80	This case relates to: • the meaning of 'real risk' • risk faced by population generally The subject of this application for judicial review was a recommendation made by an Independent Protection Assessor (Assessor) to the Minister that the applicant was not a person to whom Australia owed protection obligations. The Court allowed the application on the basis that the Assessor, having made findings about general violence in Ghazni Province, had erroneously failed to consider whether there was a 'real risk' of significant harm to the applicant, as a result of the situation in Ghazni, that was not disqualified by s 36(2B)(c) of the Act. The Court held: '…I find that the Assessor made no finding that the applicant was not from Ghazni province, and I am willing to infer from the Assessor's report and recommendation as a whole that she proceeded on the basis that he was from Ghazni province. There was country information before the Assessor which pointed

			clearly to the poor security situation in Ghazni province. Indeed at [134] the Tribunal found that Ghazni province is one of the most volatile in the country with attacks by insurgents against civilian targets, government representatives and international forces. The situation is one which apparently affects Hazaras and Pastuns alike. It was apparent, therefore, that the risk facing the applicant in Ghazni province was one of violence not personally directed to him as an individual but nevertheless a risk of being caught up in violence directed towards people in the province which included the applicant.' (para 78, footnotes omitted) 'The Assessor needed to consider whether the applicant faced a risk of harm which was greater than that faced by the people of Afghanistan generally. The answer to that question is not inevitably in the negative. It was, in my view, open to the Assessor to consider whether the risk faced by a Hazara Shi'a resident of Ghazni province was greater than that faced by the population of Afghanistan generally, including residents in other provinces in Afghanistan. If the risk facing the applicant in Ghazni province was greater than the risk facing residents of other provinces, the Assessor would need to consider whether that risk could be said to be personal to the applicant (as a resident of an especially violent province).' (para 79) The Court found that the applicant had been deprived of the possibility of a successful outcome due to the Assessor's failure to consider section 36(2B)(c) of the Act, and therefore granted the relief sought (paras 67,

			76).
SZTDM v Minister for Immigration & Border Protection (No 2) [2013] FCCA 2060 (Barnes J)	5 December 2013	51–76	This case relates to: • section 91R(3) ('contrived' refugee claims) The subject of this application for judicial review was a decision of the RRT in relation to an applicant from China. The applicant filed the application outside the time limit prescribed in s 477(1) of the Act, and hence sought an extension of time to seek review of the RRT's decision. The Court found that the RRT's decision was affected by jurisdictional error, based on one of the two grounds advanced by the applicant (ground 1(a)). The Court granted the applicant an extension of time to seek review. *Jurisdictional error: ground 1(a)* (paras 51–76) Relevantly, the applicant claimed to fear harm in part because he was a follower of the underground Catholic Church in China (paras 34–5). However, the RRT found that the applicant was not a credible witness and was not satisfied that the applicant was a follower of the Catholic Church (paras 35–45). The RRT accepted that the applicant had participated in church activities in Australia, but was not satisfied that he did so otherwise than for the purpose of strengthening his claim to be a refugee (para 46). Hence, the RRT disregarded the applicant's church activities in Australia for the purpose of determining his refugee claim, in accordance with s 91R(3) of the Act (para 46). The applicant submitted, and the Court accepted, that the RRT's decision in relation to complementary

			protection was affected by jurisdictional error. In reaching this conclusion, the Court noted that it was 'not in dispute that s.91R(3) of the Act does not apply to the complementary protection criterion' (para 53). The Court found: 'In my view it can be inferred that the Tribunal disregarded the Applicant's conduct in Australia pursuant to s.91R(3) of the Act for all purposes. However, given the Tribunal's acceptance of some of the Applicant's claims about his activities in Australia, it was incumbent on it to engage with the test for complementary protection and to consider the evidence about the Applicant's activities in Australia in the context of that provision. It did not do so. It failed to apply the correct test and fell into error in the manner contended for in ground 1(a) in the further amended application.' (para 76) *Extension of time* (paras 90–3) The Court was satisfied that it would be in the interests of the administration of justice to grant the applicant an extension of time to file the application (para 91). Although the applicant had not provided a satisfactory explanation for the delay in filing the application, the Court found that there was 'strong merit in one of the grounds relied on such as to establish jurisdictional error' and that there would 'clearly be a significant effect on the Applicant if the extension of time were not to be granted' (para 90). Moreover, there was 'no suggestion of any prejudice to the First Respondent in granting an extension of time' (para 90). The Court also

			considered 'the interests of the public at large, not only in the proper resolution of these matters, but also in the Tribunal carrying out its function without falling into jurisdictional error' (para 90). Having regard to these considerations, the Court granted an extension of time to file the application (para 92). Moreover, having found that the RRT's decision was affected by jurisdictional error (see above), the Court quashed the RRT's decision and directed the RRT to determine the matter according to law (para 92).
WZASD v Minister for Immigration & Border Protection [2013] FCCA 1940 (Lucev J)	29 November 2013	47–50	This case relates to: • relocation (reasonableness) This was an application seeking judicial review in relation to the recommendation of an Independent Protection Assessor (IPA) to the Minister that the applicant not be recognised as a person to whom Australia owed international obligations (para 3). The Court considered five grounds of review advanced by the applicant, and accepted two of these grounds (grounds 4–5). *Ground 4: Procedural fairness* (paras 38–42) Relevantly, the applicant claimed that he had been assaulted in Afghanistan by two Pashtun men at his uncle's behest, because the applicant sought to make an inheritance claim against his uncle (para 6). The IPA accepted that these events occurred (para 7). However, the IPA asserted that if the applicant were to return to Afghanistan, he would suffer no further harassment unless he provided details of his location to his uncle,

			which the IPA considered to be unlikely (para 38). The IPA also asserted that the applicant could pursue the inheritance claim without disclosing his location to his uncle (para 38). The Court accepted the applicant's submission that the IPA had denied the applicant procedural fairness (para 42). This was because 'the applicant was not given an opportunity to deal with the allegation that pursuing the Inheritance Claim if he were to return to Afghanistan would not necessitate his whereabouts being revealed to his uncle' (para 41). The Court held that 'this proposition is itself adverse to the applicant, and results in a conclusion adverse to the applicant' (para 39). Hence, there was 'an obligation on the IPA to put the matter to the applicant in such a way as to give him a sufficient opportunity to give evidence or make submissions about the issue … because that issue was in part determinative of the question as to whether the Minister might have grounds to believe that the applicant would or would not suffer significant harm if returned to Afghanistan.' (para 39) *Ground 5: Relocation* (paras 47–50) Relevantly, the IPA found that it was not necessary to consider the issue of relocation, in part because the uncle would not know the applicant's location if the applicant did not inform him (para 47). The Court found that the IPA had erred in law by failing to consider whether it would be reasonable for the applicant to relocate to another area of Afghanistan,

			contrary to s 36(2B)(a) of the Act (para 50). The Court held that this conclusion was related to the Court's conclusion in relation to procedural fairness (ground 4): 'Had the IPA afforded the applicant procedural fairness by giving the applicant an opportunity to respond to the issue of whether or not his location would have been disclosed in the event that he pursued the Inheritance Claim upon return to Afghanistan, it might also have been the case that any possibility that the applicant's location might have been disclosed as part of any adjudicative process on the Inheritance Claim process (either directly to the uncle, or indirectly through the current owners), would have necessitated the IPA considering whether or not it was possible for the applicant to relocate to an area in Afghanistan where there would not be a real risk that the applicant would suffer significant harm.' (para 47, footnotes omitted) 'Absent the failure to afford procedural fairness found in relation to the fourth ground of review, the Court would have been of the view that the IPA was not under an obligation to consider the issue of relocation given that there was an independent finding that there was not a real risk that the applicant would suffer persecution or significant harm. However, as explained above, that finding must now be in some doubt as a consequence of the failure to accord procedural fairness, and the further possible outcomes if procedural fairness had been afforded to the applicant.' (para 49, footnotes omitted) Having found that the IPA's recommendation was

			affected by jurisdictional error (in respect of grounds 4 and 5), the Court ordered that the Minister be restrained from relying on the IPA's recommendation.
SZRZM v Minister for Immigration & Border Protection [2013] FCCA 2018 (Nicholls J)	28 November 2013	29–128	This case relates to: • threshold of risk for complementary protection • distinction between refugee and complementary protection criteria This was an application for judicial review in relation to two recommendations made to the Minister as to whether to 'lift the bar' to enable the applicant (from Iran) to apply for a protection visa (para 35; s 46A(2) of the Act). One recommendation was made by an Independent Protection Assessment Reviewer (the reviewer) that the applicant not be recognised as a person to whom Australia had protection obligations (para 1). This recommendation was made prior to the implementation of the complementary protection provisions and hence related solely to the refugee provisions (para 45). The other was a departmental assessment and recommendation that the applicant did not meet the Minister's Guidelines for protection in Australia (para 1). This was made after the implementation of the complementary protection provisions, and hence related to both refugee and complementary protection provisions (paras 55–6). The applicant advanced four grounds of review. Three of these grounds were relevant to complementary protection (grounds 1–3), of which two grounds were accepted by the Court (grounds 2–3). *Grounds 2(a) and 3* (paras 66–111)

			The applicant submitted, inter alia, that the departmental assessment adopted the wrong standard of proof, by applying a 'more likely than not' test (para 19, grounds 2(a) and 3). The Court held, and the Minister did not dispute, that this was the wrong test, applying *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 (paras 72–3). Nonetheless, the Minister submitted that the Court should not exercise its discretion to grant the relief sought (paras 21, 74). The Court rejected the Minister's argument. The Court held that the relevant question was 'whether in relation to the error, the grant of relief would be futile in the circumstances. That is, if the correct legal test and standard had been applied it could not have led to a different outcome.' (para 92). The Court found that it could not be said that the grant of relief would be an 'exercise in futility' (para 110). This was because the departmental assessment in relation to complementary protection involved a 'simplistic' and 'formulaic' reliance on the reviewer's recommendation, which was made in relation to the refugee provisions (para 110). The Court explained: 'The relevant scheme under the Act (which was in force at the time of the departmental officers' assessment) is that a particular relationship exists between s.36(2)(a) and s.36(2)(aa) of the Act. That is, the complementary protection criterion only need be considered following an assessment of the applicant's claims to protection under the Refugees Convention and in circumstances

			where there has been a finding that the applicant is not a refugee (*SZQRB* at [71] per Lander and Gordon JJ).' (para 103) 'In this context, therefore, it is available to the decision maker to apply findings of fact made in the Refugees Convention assessment to the complementary protection assessment. (*SZSGA v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCA 774 ("*SZSGA"*) at [55] – [56] per Robertson J and *SZSHK v Minister for Immigration and Border Protection* [2013] FCAFC 125).' (para 104) 'However, in my respectful view, the import of what was said in *SZSFK* (and *SZSGA*) is to provide a caution that those factual findings, if these are to be relied upon subsequently in the complementary protection assessment, must derive from the facts presented, and be free in the initial assessment of Refugees Convention concepts such as "serious harm" or "persecution" not found in the complementary protection suite of relevant elements (*SZSGA* at [55] – [56] per Robertson J).' (para 105) The Court found that 'some of the reviewer's findings were plainly findings derived from the facts presented, and claimed, and the applicant's evidence about those facts' (para 106). The Court held that 'such factual findings can be "imported" into and relied upon in the subsequent complementary protection consideration' (para 106).

			However, the Court held: 'The difficulty, however, is where the reviewer's factual findings are "bound up", or are even partially derived from reasoning that relies on the Refugees Convention. In the current case there is greater difficulty than that in *SZSFK*. That is that, given the circumstances at the time, the reviewer's assessment was properly conducted solely in the context of the Refugees Convention. This would have, and should have, required the departmental officers to have exercised some caution in simply "importing" these findings into the complementary protection assessment.' (para 107) 'The reviewer's approach in this regard (and it must be stressed, no criticism is made of the reviewer here), can be demonstrated with references to "persecuted" ([142] at CB 221 and [148] at CB 222), "serious harm" ([143] at CB 221 and [148] CB 222), "well-founded fear of persecution" ([144] at CB 221 and [149] at CB 222), "persecution" ([148] at CB 222), "fear of persecution" ([155] at CB 223).' (para 108) 'It may have been possible for the departmental officers to have separated and differentiated between those findings of the reviewer, which included these references, and those which did not, and to have relied on the latter.' (para 109) 'But in their simplistic and, in presentation, formulaic, approach they did not. This allows for the view, based

			on something stronger than the inference drawn in *SZSFK*, that if the matters were the subject of another assessment applying the correct test, the correct standard of proof, and in properly considering the findings of the reviewer, it cannot be said that a different outcome could not be achieved such that to grant the relief would be an exercise in futility.' (para 110) On this basis, the Court granted the relief sought by the applicant (para 111): namely, a declaration that the departmental assessment was not made in accordance with law, and an injunction restraining the Minister from relying on the departmental assessment (paras 1–2). *Ground 2(b)* (paras 29–65) The applicant also submitted that he was denied procedural fairness in the departmental assessment (para 19, ground 2(b)). The Court accepted this argument, since the applicant 'was not given the opportunity to be heard (even in writing) on the question of his complementary protection claims in the context of the amendment to the Act.' (para 63). The Court found that this denial of procedural fairness infected the departmental officers' recommendation to the Minister (para 65). On this basis, the Court made a declaration that the Minister should be restrained from relying on the departmental officers' assessment and recommendation (para 65). *Ground 1* (paras 112–28)

			The Court rejected the applicant's submission that the reviewer had erred in law by failing to consider, or have regard to, the complementary protection criterion (para 112). The Court held: 'The reviewer cannot be said to have failed to have taken into account a relevant consideration being, at the time of the conclusion of the reviewer's assessment, a statutory provision that had not been enacted.' (para 114) Further, the Court rejected the applicant's submission that s 35 of Schedule 1 of the *Migration Amendment (Complementary Protection) Act 2011* (Cth) (the Amendment Act) required the reviewer to consider the complementary protection provisions: 'The difficulty for the applicant is that he had not, and has not, made an application for a protection visa. As the Minister submitted, as an "unauthorised maritime arrival" the applicant was, and is, unable to make a valid application for a protection visa unless, and until, the Minister "lifts the bar" to such action pursuant to s.46A of the Act. A power that may only be exercised by the Minister (s.46A(3) of the Act).' (para 118) '[T]he wording of s.35 of the Amendment Act is clear. The amendments relate to "an application for a protection visa". As the applicant did not, has not

			(unlike in [*SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71]), and cannot in the current circumstances, make such an application, s.35 of the Amendment Act is not of assistance to him.' (para 120)
SZSPE v Minister for Immigration & Border Protection [2013] FCCA 1989 (Emmett J)	27 November 2013	44–73	This case relates to: • the meaning of 'significant harm' • whether harm arising from 'mere negligence' is sufficient to amount to 'cruel or inhuman treatment or punishment' or 'degrading treatment or punishment' • relevance of international jurisprudence The subject of this application for judicial review was a decision of the RRT in relation to an applicant from Turkey. The applicant advanced two grounds of review, both of which were rejected by the Court. Relevantly, one of these grounds of review was that the RRT had erred in its application of the complementary protection provisions by 'finding that the likely pain and suffering to be experienced by the Applicant during imprisonment in Turkey would not be "intentionally" inflicted because it would arise from "mere negligence"' (para 43). The applicant submitted that harm suffered by reason of 'mere negligence' could amount to 'cruel or inhuman treatment or punishment' or 'degrading treatment or punishment' (para 45). In rejecting the applicant's submission, the Court held: 'A fair reading of the RRT's decision record makes clear that the RRT understood that the complementary

			protection regime uses definitions and tests different from those referred to in International Human Rights Treaties. The RRT acknowledged it was therefore neither necessary nor useful to ask how the convention against torture or any of the other International Human Rights Treaties would apply to the circumstances of this case.' (para 57) 'The RRT also acknowledged that the intention requirement introduced in the definition of "*cruel or inhuman treatment or punishment*" and *"degrading treatment or punishment*" in s.5(1) of the Act is not reflected in international jurisprudence. However, the RRT found that this did not mean s.5(1) of the Act should be read down or given a liberal interpretation to accord with the international jurisprudence. The RRT referred to the statement in the complementary protection training manual that "*demonstrating the intention of an unrepresented actor in a future act of ill treatment in a legal proceeding is inherently difficult.*"' (para 58) 'In reaching that conclusion, the RRT thoroughly examined the authorities and counter arguments, but was ultimately not persuaded by them. In particular, the RRT referred to the judgment of Lander, Jessup and Gordon JJ in *Minister for Immigration and Citizenship v MZYYL & Anor* [2012] FCAFC 147 and found as follows: *"[29] the starting point must be the words of the Act."* *"[18] the complementary protection regime used*

			definitions and tests different from those referred to in the international human rights treaties." *[20] it was therefore neither necessary nor useful to ask how the Convention against Torture or any other international human rights treaties would apply to the case before them."*" (para 59) 'In that context, the RRT found that mere negligence is insufficient to satisfy the definition in s.5(1) of the Act in light of the statutory requirement that such conduct must be inflicted intentionally.' (para 60) 'The RRT found that pain or suffering caused by overcrowding and other consequential problems in the Turkish prison system referred to in the applicant's submissions, is not intentionally inflicted on prisoners, and therefore does not satisfy the definition of "*cruel or inhuman treatment or punishment*". The RRT also found that the overcrowding and other consequential problems were not "*intended to cause*" extreme humiliation, as required by the definition of "*degrading treatment or punishment"* in s.5(1) of the Act.' (para 62) 'Ground 1 is a misstatement of the RRT's findings in suggesting that it found that pain and suffering would not be intentionally inflicted because it arose from mere negligence. As stated above, the RRT did no more than find that cruel or inhuman treatment or punishment and degrading treatment or punishment must be intentionally inflicted, in accordance with s.5(1) of the Act; and that mere negligence, without more, was not capable of amounting to intentional infliction of that

			pain and suffering.' (para 68) Hence, the Court dismissed this ground of review.
SZSFF v Minister for Immigration & Border Protection [2013] FCCA 1884 (Lloyd-Jones J)	22 November 2013	39–54	This case relates to: • risk of generalised violence • risk faced by the population generally This was an application for an extension of time to seek judicial review of a decision of the RRT to affirm the decision of a delegate of the Minister to refuse to grant a protection visa to the applicant, a Syrian citizen. The Court dismissed the application, since it was not satisfied that the applicant's grounds for seeking review of the Tribunal's decision could be sustained (para 54). The applicant claimed that the Tribunal erred in its application of s 36(2B)(c) of the Act to the applicant's complementary protection claim based on 'ongoing conflict and strife' and generalised violence in Syria. The applicant claimed that the Tribunal failed to consider whether the violence that he feared was faced by him personally, because he was a Sunni Muslim who would be returned to his home district of Daraa in Syria (paras 23, 30, 45, 49). The applicant claimed that this amounted to an error of construction, since s 36(2B)(c) of the Act 'contemplates that a risk may be faced both by a section of the population (rather than the "population of the country generally") and by an applicant personally such that the exclusion in s 36(2b)(c) does not apply to the real risk of significant harm faced by a claimant which is peculiar to his return to a specific district' (para 18(e)).

			The Minister submitted that the applicant's argument could be answered by reference to the Tribunal's findings of fact (para 31). The Tribunal found that the violence feared by the applicant was faced by the population generally and was satisfied that the violence feared was not faced by the applicant personally (para 32). Hence, the issue of construction identified by the applicant (in para 18(e)) did not arise (para 32). The Court accepted this submission (para 49). Relevantly, the Court also accepted a number of submissions made by the Minister in relation to the proper construction of s 36(2B)(c) of the Act (paras 32–8, para 49). On the proper construction of s 36(2B)(c) of the Act, the Minister submitted: '[T]he Minister accepts that s.36(2B)(c) contemplates that a risk may be faced by a section of the population and by the applicant personally, as the applicant states at particular (e). Properly construed, the complementary protection provisions and, specifically, s.36(2B)(c) emphasise the requirement that the real risk of significant harm must be a personal risk. That is, it must be a risk which is faced by the individual personally in light of the individual's specific circumstances.' (para 33) 'The prevalence of serious human rights violations (in the context of generalised violence) in the destination

			country will not, of itself, be sufficient to engage a non-refoulement obligation for all people who may be returned to that country. However, where serious human rights violations in a particular country are so widespread or so severe that almost anyone would potentially be affected by them, an assessment of the level of risk to the individual may disclose a sufficiently real and personal risk to engage a non-refoulement obligation under the ICCPR and/or CAT. As such, s.36(2B)(c) does not necessitate in all cases that the individual be singled out or targeted for any particular reason. What is ultimately required is an assessment of the level of risk to the individual and the prevalence of serious human rights violations is a relevant consideration in that assessment.' (para 34) The Minister also submitted that s 36(2B)(c) of the Act 'should be construed consistently' with s 424A(3)(a) of the Act, a provision containing similar phrasing (paras 35–8). Section 424A(3)(a) provides that s 424A(3) does not apply to information 'that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member'. The proper construction of s 424A(3)(a) has been considered in a number of authorities: 'A line of authority has suggested that s.424A(3)(a) contained a two part test, requiring information not to be specifically about the applicant or another person and just about a class of persons of which the applicant or other person is a member. However, in *VHAP of 2002 v Minister for Immigration and Multicultural and*

			Indigenous Affairs [2004] FCAFC 82; (2004) 80 ALD 559 at [14] Giles and Conti JJ (with Allsop J (as he then was) agreeing at [21]) found that the subsection should be construed to preclude s.424A obligations arising, except where the Tribunal relies on information specifically about the applicant or another person. The Court thus found that the words "*and is just about a class of persons of which the applicant or other person is a member"* emphasise how specific the information must be to the applicant (or another relevant person). *VHAP* was applied by a differently constituted Full Court in *Minister for Immigration and Multicultural and Indigenous Affairs v NAMW & Ors* [2004] FCAFC 264; (2004) 140 FCR 572 at 586-587. Beaumont J accepted the appellant (Minster's) submissions that: *64. The provision, as was held in VHAP, imposes one test and does not contain two disjunctive elements; that is to say, the provision is referring to information that is not specifically about an applicant or another person (such as a witness) but is 'by way of contradistinction about a class of persons of which an applicant or the other person is a member'.* See further *QAAC of 2004 v Refugee Review Tribunal* [2005] FCAFC 92, at [1], [2], [26]-[30].' (para 37) The Court held that the submissions submitted on behalf of the Minister (paras 32–8) correctly responded to the applicant's claims (para 49).
SZSSM v Minister for	1 November 2013	81–91, 97–104	This case relates to:

Immigration & Border Protection [2013] FCCA 1489 (Driver J)			• relocation (reasonableness) • risk of generalised violence • risk faced by the population generally The subject of this application for judicial review was a decision of the RRT in relation to an applicant from Pakistan. The Court allowed the application, on two bases. *Relocation* (paras 81–91) The RRT accepted that there was a real chance that the applicant would suffer serious harm due to his Shi'a Muslim religion in his home district and more generally, the Kurram Agency (para 81). However, the RRT found that the applicant could avoid the risk of persecution by relocating to Karachi, and that it was reasonable for the applicant to do so (para 82). The Court found that the RRT's decision in relation to relocation was affected by jurisdictional error, similar to the error identified by the Court in *MZYQU v Minister for Immigration* [2012] FCA 1032: '[A]s was pointed out by the Federal Court in *MZYQU*, a decision maker cannot ignore or discount a claimed risk of harm in considering the practicability of relocation, by the simple expedient of finding that the risk is not "serious harm" as defined in s.91R of the Migration Act. By extension of that reasoning, neither could the Tribunal ignore or discount harm by reference to the other limitations in s.91R, in particular because the risk is not Convention related or that the

			applicant would not be personally targeted. The Tribunal noted at [73] the risk of generalised violence in Karachi but discounted it as being "ethnic" and "politically linked" in part. The Tribunal needed to take into account the risk of generalised violence facing the applicant in Karachi in considering the practicability of him relocating there.' (para 88) 'In my view, the Tribunal fell into a similar error as that identified by the Federal Court in *MZYQU* and this amounted to a jurisdictional error.' (para 89) 'In considering the practicality of relocation, the Tribunal discounted the risk of violence which did not engage [s 91R(1) of the Act], either because of a lack of a Convention nexus, or because of a lack of systematic and discriminatory conduct.' (para 90) *Complementary protection* (paras 97–104) In rejecting the applicant's complementary protection claim, the RRT applied the same reasons as it applied to relocation in the context of the refugee criterion. The Court found that the RRT's decision in relation to complementary protection was also affected by jurisdictional error: 'Viewed generously and as a whole, the Tribunal's reasons appear to be based on the proposition that the applicant did not qualify for complementary protection because of the application of s.36(2B)(a). The difficulty is that the Tribunal appears to have applied the same reasoning process on relocation to the complementary

			protection issue as it applied to the question of whether the applicant should be recognised as a refugee...' (para 102) 'In order to deal with the issue of complementary protection, the Tribunal needed to consider the risk of generalised violence which it had discounted at [73] in considering the applicant's claims to be a refugee. The Tribunal could not limit its consideration to those refugee claims. Further, in considering the risk of generalised violence the Tribunal could not avoid consideration of s.36(2B)(c) of the Migration Act.' (para 103) '[T]he Tribunal fell into error in dealing with the complementary protection criterion. For that reason and because of the Tribunal's error in dealing with the relocation issue in relation to the applicant's claims under the Refugees Convention, he should receive the relief he seeks.' (para 104) The Court quashed the RRT's decision and ordered that the RRT determine the matter according to law.
SZSMQ v Minister for Immigration & Border Protection [2013] FCCA 1768 (Nicholls J)	31 October 2013	102–21	This case relates to: • assessment of the 'receiving country' • distinction between refugee and complementary protection criteria The subject of this application for judicial review was a recommendation made by an Independent Protection Assessor to the Minister that the applicant not be

			recognised as a person to whom Australia had protection obligations, either under the Refugee Convention or the complementary protection criteria. The applicant's application was based on three grounds. The Court accepted one of these grounds, relating to the way in which the assessor dealt with the applicant's complementary protection claim. In that respect, the applicant made two claims: that the assessor failed to assess the 'receiving country' according to law, as required by the Act (paras 101–2); and that the assessor failed to distinguish between the refugee and complementary protection criteria (paras 90–9). The Court found that jurisdictional error was made to the extent that the assessor failed to assess the 'receiving country' according to law (para 89). *Assessment of the 'receiving country'* The 'receiving country' in relation to a non-citizen (set out at s 5(1) of the Act) is required to be 'determined solely by reference to the law of the relevant country' (s 5(1) of the Act; para 101). The applicant submitted that the assessor's finding that Iran was not a 'receiving country' for the purpose of s 36(2)(aa) of the Act, and that there was no receiving country in the circumstances of the case because the applicant was stateless, was not made in accordance with law (para 100). The Court accepted this submission: '[T]he assessor did not find the receiving country as

			required by s.5(1) of the Act in this case. In her analysis, the assessor made no reference to any relevant law of Iran to determine, for the purposes of whether Iran was a "receiving country", whether the applicant was a national of Iran or if he was an "habitual resident" of Iran. Even if there was no such relevant law, there is nothing in the actual assessment to show that the assessor turned her mind to this statutory requirement.' (para 102) 'What the assessor referred to in making the relevant determination was the applicant's own evidence and the matter of his expired identity ("white") card ([216] at CB 383).' (para 103) 'The assessor's reasoning in relation to the Refugee Convention was clear and consistent with relevant legal principles. It stands in contrast to that part of the assessment dealing with complementary protection. In my view that latter part of the analysis cannot relevantly be described as being even ambiguous as to whether the relevant determination was made solely with reference to the law of Iran. It is clear that even on a fair reading the assessor did not have regard to the law of Iran, and further, sole regard, as is required by law.' (para 111) On this basis, the Court found that the assessor fell into an error of law (para 112). *Distinction between refugee and complementary protection criteria* The applicant submitted that the assessor found that

			there were no substantial grounds for believing that there was a real risk of significant harm to the applicant 'for the reasons given above' (para 90). On this basis, the applicant submitted that this case was analogous to *SZSFK v Minister for Immigration & Anor* [2013] FCCA 7 (para 91). However, the Court did not accept this submission: 'In my view, the assessor in the current case was aware of the different tests as between the Refugees Convention criterion (s.36(2)(a) of the Act) and the complementary protection criterion (s.36(2)(aa) of the Act). This distinction was set out in unexceptional terms in the assessment record (see at [6] at CB 349 to [14] at CB 350 and [15] at CB 350 to [17] at CB 351). Further, the assessor made specific references to the different tests and the distinction between the two in her analysis (see [215] at CB 383 and above at [83]).' (para 97) '[T]he applicant relies on *SZSFK* (per Judge Driver) (particularly at [92] – [97]). In essence, I respectfully understand that Judge Driver found in that case that the relevant decision maker, in considering the complementary protection criterion did not separately assess relevant factual findings as against the complementary protection criterion but relied only on factual findings made in relation to the Refugees Convention and used concepts relevant to that Convention. This situation allowed the Court, in *SZSFK*, to draw an inference that the decision maker misunderstood the relevant tests.' (para 98)

			In relation to this issue, the Minister submitted that the applicant's need to pay for medical expenses and his inability to obtain employment could 'never' amount to significant harm under s 36(2)(aa) of the Act. However, the Court did not accept this submission (para 113): 'In my view, this is speculation. While the circumstances where such matters may amount to cruel, inhuman or degrading treatment or punishment may be few, they need to be determined with actual reference to an applicant's circumstances, and not in the abstract. Nor is such an assessment for the Court to make. It is trite to say that any such assessment sits at the heart of, as here, the assessor's task.' (para 114) According to the Court, 'it is here that the words "For the reasons given above …" … assume significance' (para 115): 'First, the assessor's reasoning in relation to the payment for health care was entirely based on whether such requirement for payment for health care amounted to "serious harm" (as at [191] – [192] at CB 380). Similarly, as to whether his mental health would "increase" the risk that he would be targeted for "persecution" ([212] – [213] at CB 383).' (para 118) 'Second, if the words "...For the reasons given above..." are meant to include the reasoning at [191] – [192] (at CB 380) and [212] – [213] (at CB 383), then the plain meaning and consequence of these words is to say that

			because these matters did not rise to reveal the likelihood of "persecution", or "serious harm", then they do not reveal "significant harm".' (para 119) 'This is the very error which Judge Driver found in *SZSFK*. That is, there was no attempt to distinguish the different tests posed by s.36(2)(a) and s.36(2)(aa) of the Act (see *SZSFK* at [90]) ("serious harm" and "significant harm")' (para 120). For these reasons, the Court was not persuaded that the legal error made by the assessor (that is, failure to identify the 'receiving country' according to law) had no effect on the outcome (para 121). Hence, the Court made an order restraining the Minister from relying on the assessor's recommendation.
SZSRR v Minister for Immigration & Citizenship [2013] FCCA 1712 (Barnes J)	25 October 2013	41–71	This case relates to: • failure to consider claims under complementary protection criterion The applicant in this case was a national of Sri Lanka who claimed to fear a real chance of persecution, inter alia, by reason of his political opinion. The RRT rejected this claim. The RRT accepted that the applicant may have supported the United National Party (UNP) and/or the Sri Lankan Freedom Party (SLFP)/United People's Freedom Alliance (UPFA) to the extent of voting for them, and that the applicant may have joined the UNP in 2010. However, due to concerns about the applicant's credibility, the RRT was not satisfied that his political involvement extended, as claimed, to being a political activist or a youth leader (para 26). The RRT

			was not satisfied that the applicant had any political profile or that he had ever suffered harm for such a reason (para 27). In relation to complementary protection, the submissions of the applicant's representative focused on a risk of harm to the applicant due to his being a failed asylum seeker (para 53). The RRT rejected this claim, and on this basis, found that there was no real risk of significant harm to the applicant if he returned to Sri Lanka (para 66). The RRT did not consider any risk of significant harm to the applicant due to his political involvement in the UNP (paras 65–71). The Court held that this constituted jurisdictional error: 'I am satisfied that a claim that the Applicant feared significant harm from the Sri Lankan authorities, the UPFA or political factions in Sri Lanka arose "*squarely*" on the material before the Tribunal in the sense considered in [*NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1] at [58] – [61] and [*SZSGA v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCA 774] such that it had to be considered by the Tribunal in the context of the complementary protection criterion.' (para 53; see also para 64) The Court was satisfied that such a claim under the complementary protection criterion arose 'squarely' on the material because: 'Relevantly, in addressing the claim of a fear of

			persecution on the basis of political opinion, the advisor referred to evidence of people being targeted on the basis of their "*affiliation*" with the UNP and also to evidence of violence and abductions targeting UNP "*supporters*" in the context of describing the Applicant's public change of his political allegiance. The advisor suggested that a significant political profile was not a prerequisite to experiencing persecution on account of political opinion. There was said to be compelling evidence that low profile UNP political supporters had been and continued to be targeted for political purposes by agents of the state.' (para 61) 'Moreover, before raising the Applicant's claims to complementary protection as a failed asylum seeker, the advisor criticised the tests applied by the delegate [of the Minister] in assessing the Applicant's claims under the complementary protection provisions and his use of findings in relation to the level of risk under the Refugees Convention criterion in relation to the complementary protection claim to fear significant harm from the authorities, the UPFA or political factions supporting the ruling party.' (para 62; see also para 59). The Court was not satisfied that the RRT had considered the applicant's political claim under the complementary protection criterion. There was no express reference to this claim in the RRT's reasoning on complementary protection (para 65), and the Court was not satisfied that the RRT had implicitly rejected any real risk of significant harm to the applicant based

			on its findings of fact in relation to the refugee criterion (para 70): '[E]ven if the Tribunal's complementary protection conclusion is to be read in light of the earlier Refugees Convention findings as the Applicant submitted, the Applicant's claim based on being a "*supporter*" of the UNP survived the Tribunal's adverse findings in respect of his claims to have been a political activist or youth leader or to have had a political profile for the UNP. The Tribunal accepted that the Applicant may have supported the UNP and joined it in 2010, although it was not satisfied his political involvement extended further such that he was seen as an activist or had a political profile or a real or imputed political opinion for the UNP and against the SLFP/UPFA or the government.' (para 69) The RRT's failure to consider the applicant's claims to fear harm from the UPFA, the Sri Lankan authorities and their associated paramilitary groups under the complementary protection criterion constituted jurisdictional error (para 71). Hence, the Court quashed the RRT's decision and ordered that the RRT to reconsider the matter according to law.
SZSPX v Minister for Immigration, Multicultural Affairs & Citizenship [2013] FCCA 1715 (Barnes J)	25 October 2013	42–77	This case relates to: • failure to properly consider claim under refugee and complementary protection criteria The applicant was a minor who was born in Australia to Iranian nationals. His parents' applications for protection visas were rejected. The applicant's

			protection visa application claimed, inter alia, that he feared harm because he would be an undocumented child in Iran (paras 4, 11). In this case, the Court held that the RRT had made an error of law in its decision: 'I am not satisfied that the Tribunal's findings in relation to the situation for the Applicant as an undocumented child are such that the Tribunal sufficiently addressed the claim that the Applicant had a well-founded fear of persecution as an undocumented child in Iran, or that it sufficiently considered the complementary protection criterion in that respect.' (para 77) This is because the RRT had accepted, on the basis of the applicant's father's evidence, that the applicant's parents did not intend to take the steps required to have the applicant registered in Iran (para 59). Despite this, the RRT did not properly consider the situation that the applicant might face as an undocumented in child in Iran. Instead, the RRT considered whether the applicant would in fact be an undocumented child in Iran (para 64): '[T]he Tribunal found that certain documents were required in order to obtain an Iranian passport. Given the youth of the Applicant, it was satisfied that if the Applicant were to return Iran in the reasonably foreseeable future he "*could*" only do so as the holder of an Iranian passport and that he "*could*" only be the holder of an Iranian passport if registered and holding the necessary ID to facilitate his documentation. Based

			on the discussion of the documentation needed to enter Iran, the Tribunal found that the Applicant could only enter Iran as the holder of a passport, so if he were to enter Iran he would do so "*only*" as a documented child. It was on the basis of considering whether the Applicant could return to Iran that the Tribunal found that he did not face any risk of harm as an undocumented child in Iran as it was not satisfied he would be removed or returned to Iran as an undocumented child.' (para 66) According to the Court, this constituted jurisdictional error: '[The Tribunal] erroneously asked whether the Applicant "*could*" return to Iran as an undocumented child, rather than asking whether his fear of persecution as an undocumented child or person if he were returned to Iran was well-founded.' (para 69) 'As mentioned, the Tribunal did briefly discuss the correct question, being the hypothetical possibility of what the Applicant may face as an undocumented child should he enter Iran (at paragraph 153 of the reasons for decision). However such consideration was incomplete. The Tribunal referred to submissions that the Applicant would not be able to access education or medical services and that his situation would be "*similar*" to undocumented persons such as foreign nationals and Faili Kurds. However the only finding it made in this respect was limited to a finding that the Applicant's position as a child considered under Iranian law to be an Iranian national by virtue of his birth to an Iranian

			national father would not be "*the same*" as for an undocumented foreign national or Faili Kurd. The Tribunal made no finding as to what the position would be for a person in the position of an undocumented child of an Iranian national father, in particular in relation to access to education and medical services.' (para 70)
MZZKJ v Minister for Immigration & Border Protection [2013] FCCA 1770 (Whelan J)	21 October 2013	24–41	This case relates to: • relocation (reasonableness) The subject of this application for judicial review was a decision of the RRT in relation to an applicant from the Punjab in India. The applicant had lived with his two brothers in the Punjab until 2006: one of his brothers moved to Australia in 2005, and the other moved to Thailand in 2006. His parents were deceased. In 2006, the applicant moved to live with Mr K and his family, in a different town in the Punjab. The applicant claimed that he was sexually assaulted by Mr K and that Mr K had threatened to have the applicant killed if he told anyone about the sexual assaults. The applicant claimed that Mr K had a good reputation and was influential in the community (paras 7–12). The RRT accepted the applicant's evidence about the sexual assaults and threats as credible. The applicant was not recognised as a refugee, since his fears of harm did not relate to any Convention ground. However, the Tribunal accepted that there were substantial grounds for believing that there was a real risk that the applicant would suffer significant harm at the hands of Mr K (paras 14–15).

			However, the RRT found that the applicant's claims were localised to the Punjab, and that there would be no real risk of significant harm to the applicant in Mumbai or Delhi. The RRT further found that it would be reasonable for the applicant to relocate to such places, in accordance with s 36(2B) of the Act, such that there was taken not to be a real risk of significant harm (para 25). The RRT considered the following factors to support its conclusion that relocation would be reasonable (para 30): • the applicant's age; • the applicant's flexibility and adaptability shown by travelling to Australia; • the applicant's fluency in Hindi and English; and • the applicant's year 12 qualification in India and employment in Australia. In this case, the Court found that the RRT's decision in relation to relocation was affected by jurisdictional error. This is because the Court was not satisfied that the RRT correctly applied the test for determining whether relocation was reasonable (para 40). In reaching this conclusion, the Court first held: 'The First Respondent correctly identified that the test for relocation, with respect to the complementary protection criteria, is the same as that posed by the Court with respect to the criteria for the granting of a protection visa and further, that the issues which arise

			when considering the reasonableness of relocation in the complementary protection context are the same as those which arise in the refugee context.' (para 24) The Court then drew attention to the following problems with the RRT's reasoning in relation to relocation: • It was 'not clear [to the Court] why the age of the Applicant was relevant unless it was taken to be an indication of his capacity to live away from his family' (para 30). • It was 'difficult to ascertain how the Tribunal concluded that the Applicant had shown that he was "flexible and adaptable" in coming to Australia, when he had essentially left a situation of five years of abuse only with the assistance of his brother and came here to live with him' (para 36; see also para 32). • It was also 'difficult to ascertain how the Tribunal concluded that the Applicant was fluent in English and Hindi' (para 34). Although the applicant indicated on his protection visa application that he spoke, read and wrote English and Hindi, he gave evidence before the RRT with the assistance of an interpreter and told the RRT that he knew a 'little bit' of English (para 34). Moreover, on the basis of his test results in the International English Language Testing System, the Court held that 'it would be hard to find that the Applicant was fluent in English' (para 34). The Court further indicated that the 'only evidence of the Applicant's fluency in Hindi is one certificate from the Punjab Education

			Board, which shows that in March 2005, he received a mark of 58 out of 100 for Hindi' (para 35). The Court was 'unsure how fluent that indicates the Applicant is in that language' (para 35). • It was also 'difficult to see, on the evidence, how the Tribunal concluded that the Applicant's year 12 qualification in India would assist him in finding employment, when the Applicant had concluded year 12 in 2007 and had not had a job in India since. In Australia, the Applicant has worked as a kitchen hand, a job he most likely obtained also with the assistance of his brother.' (para 37). The Court also noted the following considerations: • 'The evidence before the Tribunal was that the Applicant had never lived alone … Since coming to Australia he has lived with his brother. He has no siblings in India and both his parents and grandparents are dead.' (para 31) • 'The Applicant had never been outside the Punjab until he arrived in Australia.' (para 33) The Court concluded that the RRT failed to apply the correct test for determining whether relocation was reasonable. On this basis, the Court quashed the RRT's decision and directed that the application be determined according to law.
SZSFX v Minister for Immigration & Border Protection [2013] FCCA 1309 (Driver J)	18 October 2013	32	This case relates to: • the meaning of 'significant harm' • risk faced by the population generally

			The applicant, from China, sought judicial review of the RRT's decision to affirm the decision not to grant her a protection visa. The Court found that the RRT fell into jurisdictional error because it failed to consider an integer of the applicant's refugee claim (para 31). The Court also considered the applicant's argument that the RRT erred in relation to her complementary protection claim: 'It is not strictly necessary to consider whether the Tribunal also erred in considering the claim to complementary protection. For completeness, however, I have considered it. I do not find persuasive the applicant's contention that being exposed to pollution can of itself amount to "degrading treatment" for the purposes of s.36(2)(aa) of the Migration Act. The mere fact that someone happens to live in a polluted environment cannot of itself, in my view, found a claim to complementary protection. Even if such a claim could be made it would have to be considered in context of s.36(2B)(c). On the basis of the material before the Tribunal it was unnecessary for the Tribunal to make that assessment. The applicant will have the opportunity to develop such a claim if she wishes on rehearing before the Tribunal.' (para 32)
SZSNY v Minister for Immigration, Multicultural Affairs & Citizenship [2013] FCCA 1465 (Cameron J)	27 September 2013	17–26	This case relates to: • section 91R(3) ('contrived' refugee claims) • Falun Gong The applicant in this case was a national of China who claimed to fear a risk of persecution in China due to his involvement in Falun Gong. The RRT rejected his

			claims due to concerns about his credibility. The RRT found that if the applicant had engaged in any Falun Gong protests outside the Chinese Embassy in Canberra, as claimed, such activities were engaged in solely for the purpose of strengthening his refugee claim and hence to be disregarded in determining whether he had a well-founded fear of persecution, in accordance with section 91R(3) of the Act. The Court found that the RRT (correctly) did not purport to apply section 91R(3) in the context of the applicant's complementary protection claim (para 19). However, the Court found that the RRT's decision in respect of complementary protection was affected by jurisdictional error. This is because the RRT rejected the applicant's complementary protection claim without finding as a fact that the applicant had not engaged in Falun Gong protests outside the Chinese Embassy in Canberra (para 24). Although the applicant did not expressly claim that his activities outside the Chinese Embassy provided a basis to fear a real risk of significant harm in China, the Court held that the RRT was obliged to consider this possibility because it was a claim that arose on the basis of all the materials before it (citing *NABE v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* (2005) 144 FCR 1, 20; *Paramananthan v Minister for Immigration & Multicultural Affairs* (1998) 94 FCR 28, 63) (paras 22–3): 'The Tribunal, although apparently sceptical, did not find as a fact that the applicant had not protested outside

			the Chinese Embassy. Because the Tribunal did not make a finding to that effect and reject or give no weight to the applicant's evidence on that issue, that evidence could not be disregarded for all purposes. Relevantly, it raised a case which the applicant did not articulate but which nevertheless arose clearly from the materials before the Tribunal: that if he returned to China he might face significant harm there because of his participation in the protest. The possibility that the applicant's conduct in Australia might create a risk of harm to him in his country of nationality was a circumstance with which the Tribunal can be expected to have been very familiar, albeit in the context of claims to fear Convention-based persecution. Nevertheless, the possibility also exists in the context of the more recent complementary protection grounds. The possible existence of a *sur place* claim which would engage Australia's complementary protection obligations was an issue which, in the circumstances, the Tribunal should have considered.' (para 24) 'However, such a claim was not obviously considered by the Tribunal. Indeed, I find that it must not have been considered because, if it had been, the Tribunal would have first had to make a finding or an assumption concerning whether the applicant had conducted himself outside the embassy as he alleged and no such finding or assumption was made.' (para 25) 'The failure by the Tribunal to consider the entirety of the case before it amounted to a failure to complete the exercise of its jurisdiction to review and thus

			jurisdictional error.' (para 26)
SZSIB v Minister for Immigration & Border Protection [2013] FCCA 1413 (Raphael J)	23 September 2013	12–16	This case relates to: • the meaning of 'significant harm' • *Wednesbury* unreasonableness The subject of this application for judicial review was a recommendation made by an Independent Protection Assessor (IPA) that the applicant, from Iran, was not a person to whom Australia owed protection obligations. The Court dismissed the application. The applicant submitted, inter alia, that the IPA erred in finding that a penalty of imprisonment for ten days to two months for dress code violations in Iran did not amount to 'significant harm' (para 12). The applicant claimed that this finding was unreasonable (in the sense considered in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* (1948) 1KB 223 – i.e. 'so unreasonable that no reasonable authority could ever have come to it'). In rejecting this argument, the Court held: 'The applicant tended to suggest that the absurdity lay in the proportionality of the sentence for the crime. In other words to imprison someone for having a tattoo amounted to significant harm. But in the court's view this is not the appropriate test. It is the harm that has to be tested not the reasons for inflicting. Even if the court is wrong in that, and one can see an argument that a totally out of proportion penalty could be said to invoke serious harm, it has to be doubted whether this is one

			such. When one considers the penalties that might be invoked by Australian courts for what some may consider to be minor infractions of breach of public order or creating graffiti a penalty such as that imposed in Iran for what Iranian society considers to be an insult against its guiding philosophy, Islam, is not intuitively so seriously disproportionate to allow the views of the assessor expressed here to be considered absurd.' (para 16, footnotes omitted)
MZZIG v Minister for Immigration, Multicultural Affairs & Citizenship [2013] FCCA 1236 (Burchardt J)	6 September 2013	16–30	This case relates to: • relocation (reasonableness) The subject of this application for judicial review was a decision of the RRT in relation to relocation, in the context of both the applicant's refugee and complementary protection claims. The RRT had dismissed the applicant's protection claims on the basis that it was reasonable for him to relocate to another part of Pakistan. In coming to this conclusion, the RRT 'focussed its considerations of the question of relocation and its practicability wholly on the claims advanced by the applicant as to specific harm, namely his ethnicity, his religion and imputed political opinion' (para 16). The applicant submitted that the RRT 'failed to consider, as it should have done, whether the applicant was at risk not just in relation to Convention grounds, but in the context of relocation, to general endemic violence, both in the context of the Convention application and the Complementary protection criterion' (para 19). The Court accepted the applicant's argument and held (at para 28):

			'the fact is that relocation is not merely a subset of the grounds of persecution or of significant harm, referred to in the Convention and in the Complementary protection criterion. It concerns whether or not it is reasonable and practicable for the applicant to relocate. The applicant's materials … had squarely raised the issue of endemic violence in Karachi and the inevitable associated risks. Although not clearly pressed at the hearing, it was an issue that should have been addressed.'
SZSPW v Minister for Immigration, Multicultural Affairs & Citizenship [2013] FCCA 973 (Driver J)	30 July 2013	28–31	This case relates to: • distinction between refugee and complementary protection criteria The subject of this application for judicial review was a decision of the RRT to affirm the decision of a delegate of the Minister not to grant the applicant, from China, a protection visa. The Court dismissed the application. The applicant had claimed to fear persecution because of her family's involvement in Falun Gong. She claimed, inter alia, that she had suffered physical harm at school and outside of school. In assessing her refugee claim, the RRT found that the applicant had not been bullied, insulted or scorned when she lived in China on account of Falun Gong (para 28). The RRT did not accept the applicant's claims regarding her family's involvement in Falun Gong (para 10). In assessing the applicant's complementary protection claim, the RRT did not specifically deal with the physical harm that the applicant claimed that she had

			suffered as a child. The Court considered whether this amounted to jurisdictional error: 'It probably would have been better if the Tribunal had specifically dealt with the applicant's claims of physical harm as a child disconnected from the Refugee's Convention nexus but, in circumstances where the asserted harm occurred while the applicant was a child attending school and it was not claimed that that harm would recur in circumstances unconnected with the applicant's asserted practice of Falun Gong, I do not consider that the Tribunal fell into jurisdictional error by failing specifically to deal with the claim of past physical harm under the complementary protection criterion.' (para 30)
SZSQH v Minister for Immigration, Multicultural Affairs & Citizenship [2013] FCCA 817 (Driver J)	15 July 2013	12–13	This case relates to: • relocation (reasonableness) The subject of this application for judicial review was a decision of the RRT in relation to relocation under section 36(2B)(a) of the Act. The RRT had held that there was a real risk of significant harm to the applicant in the Punjab, India, but found the applicant could reasonably relocate to another area of India where there would not be a real risk of significant harm. The RRT did not identify any specific area of India, other than 'the cities' (para 6). The issue in this application was whether a decision-maker, in making a relocation finding for the purposes of section 36(2B)(a) of the Act, was required to consider the practicability of relocating to a particular location or locations.

			In determining this issue, the Court considered and agreed with the analysis of Judge Nicholls in *SZOJV v Minister for Immigration (No. 2)* [2012] FMCA 29, in relation to relocation in the refugee law context. On this basis, the Court held: '10. … In considering the possibility of relocation, depending on the circumstances, a decision-maker may take several approaches. A decision-maker may find that an applicant would face a well-founded fear of persecution in some areas of a country but that risk could be avoided by relocating to one or more specific safe locations. In such an analysis the decision-maker is drawing the boundaries of safety in particular locations in a country.' '11. In other circumstances, however, where the risk is localised, it is in my view open to a decision-maker to draw the boundaries of safety around the local area so that potentially the whole of a country may be safe outside the risk area. That is not to say that a decision-maker can avoid considering the practicalities of relocation but in the present case the tribunal did give adequate regard to that issue.' For the purpose of assessing the issue of relocation in the complementary protection context, the Court held that what was of 'potential significance' was that 'the Migration Act says nothing about relocation for the purposes of the Refugees Convention criterion. Parliament has, however, provided specific guidance to

			decision-makers on relocation for the purposes of dealing with the complementary protection criterion' (para 12). Ultimately, however, the Court held: '13. [The words of section 36(2B)(a)] suggest that some area needs to be identified. However, I see no reason why the area cannot be identified in one of the two ways I have described, namely, either the identification of particular safe localities or the delimiting of a local area of risk which results in the conclusion that the rest of the country is safe…' Hence, the application was dismissed.
SZRUT v Minister for Immigration & Anor [2013] FCCA 368 (Driver J)	15 July 2013	25–7	This case relates to: c) the meaning of 'significant harm' On whether criticism of the applicant amounted to 'significant harm', the Court held: 'I accept that "criticism" simpliciter could not amount to "significant harm" given the definition of this term in ss.5 and 36(2A) of the Migration Act.' (para 26)

SZRTN v Minister for Immigration & Anor [2013] FCCA 583 (Judge Nicholls)	21 June 2013	40–50	This case relates to: • the meaning of 'cruel, inhuman or degrading treatment'; and • whether consideration of international instruments is required when applying the CP regime in the Act. The applicant was from Western Samoa. He was taken by his family to New Zealand at the age of 2 years, and then his father brought him to Australia around the age of 5. Shortly thereafter, his father abandoned him, after which time was looked after by his aunt and uncle. The applicant feared being returned to Western Samoa because he did not speak the language and had no family there. He feared 'significant threats' to his 'personal security, human rights and human dignity' if he returned to Western Samoa. He had no work history, no driver's licence and no 'particular skills' that would allow him to 'live as other Western Samoans live[d]' (para 4). The applicant raised four grounds of appeal (para 17), two of which were pressed (para 19), both relating to complementary protection (para 32). The applicant argued that the Tribunal erroneously considered that 'discrimination' was an element of 'cruel, inhuman or degrading treatment' in its assessment of whether there was a real risk the applicant would suffer 'significant harm' if he returned to Samoa (para 22). The Tribunal misapplied the relevant statutory test because it failed to consider the meaning of 'cruel, inhuman or degrading treatment' and

			whether the applicant's 'socio-economic rights' could amount to such treatment (para 23). Further, the applicant asserted that the Tribunal failed to understand the meaning of 'substantial grounds for believing' (as it appears in s.36(2)(aa) of the Act) also and failed to have regard to the Complementary Protection Training Manual (Manual), which would have assisted in the Tribunal's understanding of 'substantial grounds for believing' (para 24). With respect to this, the applicant submitted that the test was 'something less than the balance of probabilities', however, from the Tribunal's decision record, it was not clear what threshold the Tribunal had applied (para 25). In considering the applicant's claim, the Tribunal had stated (para 39): 'Having considered all the information before the Tribunal, however, I am unable to be satisfied that the Applicant would be seen as a non-Samoan or that any difficulties he might face in Samoa would result from discriminatory treatment, either by the Samoan authorities, members of his own extended family or society at large. Nor, even without the element of discrimination, am I satisfied that there difficulties, considered individually and cumulatively, would represent significant harm sufficient to bring him within the scope of Australia's complementary protection provisions. Specifically, I am not satisfied they would involve cruel and inhuman treatment, degrading treatment or arbitrary deprivation of life.'

			Discrimination The Minister accepted that discrimination was not an element of the complementary protection regime (para 64). The Court found that the Tribunal dealt extensively with the matter of discrimination because, on a plain reading of the applicant's claims, discrimination was, in essence, the basis on which the applicant had said he would suffer significant harm if he were to return to Samoa (para 66). As this was the basis of his claim for complementary protection (para 68), the Tribunal had had to deal with it (para 71). *Balance of probabilities* The applicant argued that 'substantial grounds for believing' meant a standard that was 'something less than the balance of probabilities' (para 54). The Minister agreed dispute that the Tribunal would have fallen into error if it had applied a balance of probabilities test (para 55): *Minister for Immigration and Citizenship v SZQRB* (2013) 296 ALR 525. However, the Court found that the Tribunal did not fall into the error of applying this test (para 56). *International jurisprudence and the Manual* The applicant further claimed that the Tribunal did not 'satisfy' the legal test because of a 'bridge' between the facts and the law (para 41). He claimed that the Australian law is derived from international treaties, which have been the subject of overseas jurisprudence. The Tribunal's failure to consider any of the

			international jurisprudence, and its failure to have regard to the Manual, which discussed that jurisprudence, revealed that the Tribunal was not in a position to find that the applicant was 'not eligible' for complementary protection because it did not consider 'what complementary protection means, not just what it says in the Act' (para 41). The Court found that the definition of 'significant harm' was exhaustively contained in the Act. Further, the 'technical' meanings of phrases, derived from academic studies, do not assist in light of the definition in the Act (para 43). As such, the Tribunal did not fall into error by not having regard to international jurisprudence, or the Manual. As stated by the Full Court in *Minister for Immigration and Citizenship v MZYYL* [2012] FCAFC 147, it is not necessary to have regard to the terms of the international instruments upon which the complementary protection provisions are based (paras 45–6). The applicant's claims are governed by the terms of the Act. The Court dismissed the application for review. The Federal Court affirmed the decision in *SZRTN v Minister for Immigration and Border Protection* [2013] FCA 1156 (6 November 2013) (see paras 58–69). An application by the applicant for special leave to appeal was refused by the High Court: *SZRTN v Minister for Immigration and Border Protection & Anor* [2014] HCASL 51 (12 March 2014).

BZACF & BZACG v Minister for Immigration & Citizenship (No.2) [2013] FCCA 486 (13 June 2013)	13 June 2013	6–16	This case relates to: • commencement of complementary protection provisions The Court considered whether the RRT's decision to affirm a decision not to grant the applicants a protection visa was affected by jurisdictional error because the RRT did not consider the applicants' claims against the complementary protection criterion. Relevantly, item 35 of Schedule 1 to the *Migration Amendment (Complementary Protection) Act 2011* (Cth) provides that the complementary protection provisions apply, inter alia, to 'an application for a protection visa … that is not finally determined (within the meaning of subsection 5(9) of [the Act] before [24 March 2012]'. The Minister conceded that: a. 'in [*Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 131] the Full Court held that a decision of the Tribunal is not "beyond recall", and the Tribunal member is not *functus officio,* until such time as that decision is communicated to a party external to the Tribunal; b. the Tribunal's decision, while dated 23 March, 2012 was not communicated to the applicants until 26 March, 2012; c. the Tribunal member was *not functus*

			officio when s.36(2)(aa) of the Act commenced on 24 March, 2012; d. one of the effects of *SZQOY*, implicit from the reasoning of all three judges of the Court is the proposition that a matter before the Tribunal is "no longer ... subject to any form of review under Part ... 7", and hence "finally determined" for the purpose of s.5(9) of the Act, only when the Tribunal's decision is unable to be recalled by the Tribunal member; and e. as the Tribunal's decision in the present matter was not beyond recall when s.36(2)(aa) commenced on 24 March, 2012 that subsection applied in relation to the visa applications in this case; f. the Tribunal did not consider s.36(2)(aa).' (para 7) The Minister also conceded that it was 'probable' that the RRT's decision was affected by jurisdictional error because 'the Tribunal failed to invite the applicant to appear before the Tribunal to give evidence and present arguments relating to "the issues arising in relation to the decision under review" for the purposes of s.425(1) of the Act.' (para 10) The Minister submitted that: '"the issues arising in relation to the decision under review" were enlarged between the date of the Tribunal hearing and the date of the Tribunal's decision by the commencement of s.36(2)(aa) … having regard to cases

			such as *SZILQ v Minister for Immigration and Citizenship* [2007] FCA 942; (2007) 163 FCR 304 and *SZHKA v Minister for Immigration and Citizenship* (2008) 172 FCR 1 the Tribunal was obliged to give the applicants another invitation pursuant to s.425 of the Act to participate in a further hearing about those issues.' (para 11) Nonetheless, the Minister submitted that the Court should exercise its discretion to withhold relief, since it would be 'futile', given the RRT's finding that the applicant was not a truthful witness (paras 12–14). However, the Court rejected this submission: '[A]s the applicants point out, in a rehearing, potentially conducted by a differently constituted tribunal on quite possibly additional or different evidence and submissions, that tribunal will be asked to consider two related but separate questions: one under s.36(2)(a) and one under s.36(2)(aa) of the Act. I accept the applicants' submissions that those separate questions invite different factual assessments, and that a tribunal on rehearing the matter could come to different conclusions.' (para 15) Hence, the Court allowed the application for judicial review.
SZSFK v Minister for Immigration & Citizenship [2013] FCCA 7 (Driver J)	16 May 2013	87–98	This case relates to: • distinction between refugee and complementary protection criteria The subject of this application for judicial review was a

			recommendation of the Independent Protection Assessor to the Minister that the applicant, from Iran, not be recognised as a person to whom Australia had protection obligations. The application was allowed on two grounds, one of which was relevant to complementary protection. (The other ground was that the Reviewer erred by failing to deal with a particular social group claim.) The Reviewer rejected the applicant's complementary protection claim because 'such claims are based on the same evidence as his refugee protection claims' and that 'on the basis of the evidence provided by the claimant, country information as discussed above and the findings set out above', the complementary protection claim was not established (para 89). However, the Court found that the Reviewer failed to distinguish between the refugee and complementary protection tests: 'The problem with this reasoning is that the Reviewer makes no attempt to distinguish the different tests posed by s.36(2)(a) and s.36(2)(aa). This is particularly problematic in the present case, where the Reviewer has accepted claims of detention and assault, but rejected a number of the claims on the basis of the absence of a Convention nexus or for some other reason peculiar to the Convention.' (para 90) 'This is evident at several places in the report. See for example: a. at [48]http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCCA/2013/7.html?st

			em=0&synonyms=0&query=%22complementary%20protection%22 - fn119, the Reviewer accepts that there is discrimination against undocumented stateless Faili Kurds, but found that he did not accept that the treatment amounts to persecution for the purposes of the Convention. The question remains, however, whether the treatment is "significant harm" for s.36(2)(aa) purposes; b. At [52], the Reviewer accepts that the applicant was apprehended and beaten, but concludes that this was because he was part of a public gathering and not for a Convention reason. The reason for the harm, however, is irrelevant to the consideration required by s.36(2)(aa); c. At [52], the Reviewer also finds that there was no subjective fear on the part of the applicant. Section 36(2)(aa), however, imposes no "subjective fear" requirement; d. At [53]-[54], the Reviewer accepts that the applicant was assaulted but rejects the Convention claim on the basis that he was assaulted because he shouted at the police (and not for a Convention reason). The reason for the harm, however, is not relevant to the s.36(2)(aa) inquiry; e. At [55], the Reviewer accepts that the applicant was beaten, but rejects the Convention claim on the basis that he was beaten because he was selling goods illegally. Again, the reason for the harm is not relevant to s.36(2)(aa);

			92. At [72], the Reviewer makes a point of stating that the three recounted incidents of being apprehended and beaten were not *"*systematic or targeted*"* at the applicant. This language may be derived from the statutory definition of persecution (ie s.91R(1)(c)).' (para 91, footnotes omitted) 'Given the manner in which the Reviewer approached his task (ie to accept the claimed apprehensions and beatings, but to reject the claim under s.36(2)(a) for reasons specific to Convention claims), it was not open for the Reviewer to simply say, as he did, that the complementary protection claim was rejected for the same reasons. It was incumbent on him to engage with the language of s.36(2)(aa) and to consider the evidence relevant to that provision.' (para 92) The Minister submitted that the Reviewer properly considered the complementary protection criterion, and that the focus should be on only [72] and [75] of the Reviewer's report (para 93). However, the Court rejected this submission: 'On balance, I prefer the submissions of the applicant on this ground. It was open to the Reviewer to deal with the complementary protection criterion in a self contained way in part of his report. He chose, at [72] to emphasise what he saw as the "non systematic or targeted" threat to the applicant. This could have been a reference to s.91R(1)(c) of the Migration Act (which the parties agree is not relevant to the complementary

			protection criterion) or it could have been a general reference intended to quantify the risk. The use of the word "systematic" is problematic. Decision makers need to clearly distinguish between statutory provisions which bear on the complementary protection criterion and those which do not. The use of language drawn from an irrelevant provision of the Migration Act at least creates confusion and may point to reviewable legal error. Further, the reliance by the Reviewer at [75] on unspecified "findings set out above" is particularly problematic. On its face, it appears to be a reference to all of the Reviewer's findings, some of which were clearly irrelevant to the complementary protection criterion (such as a finding of a lack of Refugees Convention nexus with harm suffered by the applicant).' (para 97)
MZXYN v Minister for Immigration & Citizenship [2013] FCCA 134	15 May 2013	5–24	This case relates to: • commencement of complementary protection provisions The subject of this application for judicial review was a decision of the RRT to affirm a decision not to grant the applicant, from Pakistan, a protection visa. The RRT did not address the applicant's claims against the complementary protection criterion (para 9). The Minister conceded that the application made by the applicant was not 'finally determined' before 24 March 2012 (the commencement date of the complementary protection provisions) and hence that the RRT was obliged to consider the complementary protection criterion (para 10). In these circumstances, the Court held that the RRT erred in failing to consider the

			applicant's claims against the complementary protection criterion (para 11). The Minister submitted that the Court should exercise its discretion not to grant relief because it would be futile. The Court rejected this argument: 'In the present case the Minister relies heavily upon the findings made by the Tribunal to the effect that the applicant could relocate within Pakistan to avoid the serious harm that falls within the ambit of the convention grounds. It is argued that there is not serious harm, or factual circumstances, which are arguably outside of the ambit of the convention, but which may fall within the complementary protection provisions. As a result, counsel for the Minister argues that the Tribunal's finding that the applicant could relocate within Pakistan addresses all of the concerns the applicant raised.' (para 20) 'On a practical level it is apparent that neither the tribunal member, nor the applicant's advisors, turned their mind to the complementary protection provisions prior to the hearing or at any point during the process. As a result, it is not unlikely that the applicant's advisors would not have explored risks to the applicant that were outside the ambit of the convention, but may potentially be within the ambit of the complementary protection provisions.' (para 21) 'Importantly the wording of the provisions relating to the convention and the complementary

			protection provisions are different, indicating at least some slight difference in the test that must be applied. Whilst there was not technically a denial of procedural fairness in this case, as the applicant did receive a hearing, the practical effect of the events is substantially the same. That is, as no-one addressed, nor turned their minds to the complimentary protection provisions, the circumstances are no different to a failure to hear the application on this aspect of the case.' (para 22) 'As a result, I am not able to be satisfied that it would be certain that a rehearing would be futile in this case.' (para 23) Hence, the Court remitted the matter to the RRT for rehearing (para 24).
SZRNY v Minister for Immigration & Citizenship [2013] FCCA 197 (Barnes J)	7 May 2013	69–135	This case relates to: • the point at which a visa application is "finally determined" The subject of this application for judicial review was a decision of the RRT in relation to the appellant (a citizen of Pakistan) to affirm the delegate's decision not to grant him a protection visa. The Court allowed the application. Relevantly, the appellant lodged his protection visa application in March 2010. After his application was refused, he sought review in the RRT. On 12 March 2012, the RRT affirmed the delegate's decision. On the same day, the Tribunal wrote to the applicant's former (that is, incorrect) address, notifying him of the decision

			(although he had notified the RRT of a change of address in February 2012) (para 24). On the same day, the RRT also sent a copy of its decision to the Secretary of the Department of Immigration (para 24). On 28 May 2012, after the error had been identified, the RRT wrote the applicant's correct address, notifying him of the decision (para 25). In between 12 March 2012 and 28 May 2012 (on 24 March 2012), the provisions in Schedule 1 to the *Migration Amendment (Complementary Protection) Act 2011* (Cth) came into operation. Item 35 of Schedule 1 to the *Migration Amendment (Complementary Protection) Act 2011* (Cth) provides that the complementary protection provisions apply, inter alia, to 'an application for a protection visa … that is not finally determined (within the meaning of subsection 5(9) of [the Act] before [24 March 2012]'. Section 5(9) of the Act provides that 'an application under this Act is finally determined when … [inter alia] a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Part 5 or 7'. The question in this case was whether the appellant's application was 'no longer … subject to any form of review under Part … 7' of the Act as at 24 March 2012 (para 75). In considering this question, the Court considered the decision of the Full Federal Court in *Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 131 (in which the Court considered the question of

			when the Tribunal becomes *functus officio*) to be relevant: 'At the least, it is apparent that in *SZQOY* Logan J (with whom Barker J agreed) expressly considered relevant the question of when the Tribunal's core function of review was complete and, in that context, regarded communication to the applicant as essential to completion of such core function. Such principle was treated as a necessary step towards the conclusion reached, having regard to the line of reasoning adopted. As a lower court in the hierarchy this Court must, of course, follow the decisions of the Federal Court.' (para 132) 'In any event, even if this Court were not, strictly speaking, bound to follow the approach taken in *SZQOY* in the context of considering s.5(9) of the Act, in my view I should follow the clear expression of principle by the Federal Court. It can only be said that a delegate's decision is no longer subject to any form of review by the Tribunal if the Tribunal's core function of review has been completed.' (para 133) 'On this basis, for the Applicant's protection visa application to be no longer subject to any form of review by the Tribunal within s.5(9) of the Act it was necessary, at the least, that either the decision had been communicated to the Applicant or irrevocable steps had been taken to have that done in accordance with the notification provisions in the Act. That had not occurred in the present case before the Amending Act came into

			force on 24 March 2012. Hence the application for review had not been finally determined within s.5(9) of the Act at that date.' (para 134) On this construction of the Act, the RRT fell into jurisdictional error by not giving consideration to the complementary protection provisions in relation to the applicant (para 135). The Court therefore quashed the RRT's decision and remitted the matter to the RRT for reconsideration according to law (para 135). Editorial note: This decision was affirmed on appeal: *SZRNY v Minister for Immigration and Citizenship* [2013] FCAFC 104 (11 September 2013).

FEDERAL MAGISTRATES COURT

Case	Decision date	Relevant paragraphs	Comments
SZRSN v Minister for Immigration and Citizenship & Refugee Review Tribunal [2013] FMCA 78 (Driver FM)	1 March 2013	38–67	The applicant was a New Zealand citizen who had a de facto partner and five children who were Australian citizens. The applicant faced removal from Australia, following the cancellation of his residence visa and his failed application for a protection visa. The Court considered, and rejected, the contention that the 'forced separation' of the applicant from his children or the ongoing effect of that separation in NZ would constitute 'significant harm' within the meaning of s 36(2A), and specifically 'degrading treatment' (paras 60–7). The Court's decision was based on the following reasoning: • First, the language of s 36(2)(aa) made reference to

			Australia's 'protection obligations'. The purpose of this provision was to provide a statutory scheme giving effect to those obligations. In relation to the applicant, the obligation invoked was the *non-refoulement* obligation implied under Articles 2 and 7 of the ICCPR. Citing *Human Rights Committee General Comment No. 31*, the Court held that this was an obligation not to remove a person from their territory where there were substantial grounds for believing that there is a real risk of 'irreparable harm … either in the country to which removal is to be effected or in any country to which the person may subsequently be removed' (para 61). The *non-refoulement* obligation was hence an obligation to afford protection to a non-citizen where the harm faced was that arising in the receiving country. In this case, the harm would stem from the applicant's removal from Australia, not from his presence in NZ or any particular other country (para 62). • Second, this interpretation was necessary if the exceptions under s 36(2B) relating to relocation (s 36(2B)(a) and state protection (s 36(2B)(b)) were to have any application: '[I]f the risk of harm claimed by the non-citizen is, as suggested in the present case, the risk of degrading treatment as a consequence of removal from Australia (where his children reside), then the prospect of relocation to another area of Australia, or protection from a public authority, would be nonsensical.' (para 63). • Third, 'if the relevant act were considered to be that of being removed, then s.36(2)(aa) would require that the Minister be satisfied that there are

			substantial grounds for believing that, *as a necessary and foreseeable consequence of the non-citizen being removed* from Australia to a receiving country, *there is a real risk that the non-citizen will be removed*. This circularity suggests that the relevant act in the definition of "degrading treatment" cannot be the act of removal itself.' (para 64, emphasis original). • Fourth, 'in determining whether forced separation from children constitutes "degrading treatment", it cannot be accepted that "forced separation", which is ancillary to the return of the non-citizen to the receiving country, is an act that is "intended to cause" extreme humiliation which is unreasonable … Even if one views the relevant act as "removal" (such that removal itself constituted the "degrading treatment") it cannot be said (in the absence of evidence) that the act of removal is perpetrated by the State with the intention to cause extreme humiliation that is unreasonable.' (para 65). • In any event, even if it were accepted that 'forced separation' could constitute 'significant harm', the circumstances of the applicant's removal in this case did not constitute 'degrading treatment'. This was because it 'did not meet the high threshold of an act or omission that causes "extreme humiliation" which is unreasonable. This is consistent with international jurisprudence that indicates that the humiliation or debasement must exceed a particular level.' (para 66). Editorial note: This decision was affirmed on appeal:

			SZRSN v Minister for Immigration and Citizenship [2013] FCA 751 (6 August 2013). In January 2014, the claimant sought re-examination of his application under the complementary protection legislation on the basis that his family members were all Australian residents. The delegate found that this application was not validly made as the material issues had been dealt with in the previous application. The claimant subsequently sought review of the delegate's decision in *SZRSN v Minister for Immigration* [2014] FCCA 557 (18 March 2014). The Court found that the issue had already been entertained in the original decision of FM Driver and was not materially different to the previous application.
MZYXS v Minister for Immigration and Citizenship & Refugee Review Tribunal [2013] FMCA 13 (Riethmuller FM)	31 January 2013	17–48	The applicant advanced four grounds of review against a decision of the RRT to reject his complementary protection claim. The Court rejected each of these grounds. *Ground 1: Incorrect standard of proof* (paras 17–25) The applicant argued that the RRT Tribunal Member had (incorrectly) thought that a 'real risk' of significant harm required the risk to go beyond 'mere theory, suspicion or possibility' (as opposed to mere theory, *mere* suspicion or *mere* possibility). The Court held that this was 'a particularly important point in this case as a possibility of harm is sufficient, in some circumstances, to satisfy the test required under the legislation' (para 18). However, the Court was not persuaded that the

			Tribunal Member meant that the risk must go beyond a possibility. Rather, the Tribunal Member had intended to convey that the risk must go beyond a 'mere possibility' (para 25). On the meaning of 'real risk', the Court held: 'The "real chance" test has been well established under the provisions relating to the Refugee Convention, although for reasons that are less than clear the Government has used different words in s.36 than those that appear in the Refugee provisions. However the test appears to be substantially the same: see generally *Minister for Immigration and Citizenship v MZYYL* [2012] FCAFC 147.' (para 19) *Ground 2: Failure to consider certain risks to applicant* (paras 26–33) The Court rejected the applicant's argument that the RRT had failed to consider the risks to the applicant in the initial stages of police custody, pursuant to enforcement of Decree 33 under Nigerian law (para 29). The Court also upheld the RRT's determination that there was no real risk that the applicant would be arrested, detained or jailed under Decree 33: 'The Applicant argues that a proper reading of s.36 is to the effect that s.36(2)(A) defines significant harm by reference to the laws in force in the country, subject only in cases involving the death penalty to the consideration of whether or not the death penalty will

			be carried out. Thus, the argument goes, if the laws of a country would result in torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment, then whether or not that law would be carried out is irrelevant. It does not appear to me that this is the proper reading of s.36(2)(A). Various forms of significant harm are listed in that section.' (para 30) 'Sections 36(2)(A)(a) and (b) are unusually drafted to deal with the particular problem that arguably the imposition of the death penalty is not an arbitrary deprivation of life. It appears to me that the wording of this section is to avoid the consequence that the imposition of the death penalty (even it would not be carried out) would be considered to be "significant harm".' (para 31) Hence, the Court accepted the RRT's finding that there had been no prosecutions under Decree 33 since at least 2005 and that there was no risk that the applicant would be arrested, detained or jailed under that decree (para 32). *Ground 3: Failure to take account of recent information* (paras 34–9) The Court rejected the applicant's argument that the RRT had failed to 'take the most recent information into account, namely a cable of the Department of Foreign Affairs and Trade dated 29 March 2012 regarding Decree 33' (i.e. dated 4 days before the RRT decision). The Court held that the 'obligation upon the Secretary of the Department is to provide all of the

			materials at the time of the application to the RRT. This obligation is not an ongoing obligation' (para 37). Hence, 'there was no obligation on the Secretary to provide this material to the Tribunal member and there can be no error by the Tribunal member for not having regard to material that was not before the Tribunal' (para 38). *Ground 4: Failure to apply the correct test under s 36(2B)(a)* (paras 40–6) The applicant argued that the RRT erred in drawing guidance from relocation cases in relation to refugee protection, as the test was different in the complementary protection context (para 42). The applicant submitted that 'in the refugee context, when the state meets reasonable or adequate standards of protection a person would not be covered by the Refugee Convention even if they otherwise have a real chance of "significant harm". Under s.36, however, relocation must be sufficient to show that there is no longer a real risk of significant harm following relocation' (para 42). However, the Court held that this was 'not a case where it was thought that the relocation would provide the Applicant with greater access to state protection. Thus the argument with respect to the relevance of state protection when relocating for the Refugee Convention-based issues would not be relevant here.' (para 46). The Court also held that the High Court authorities on relocation offered 'some degree of guidance' and that it

			was not an error by the RRT to refer to them (para 43). Editorial note: This decision was affirmed on appeal: *MZYXS v Minister for Immigration and Citizenship* [2013] FCA 614 (21 June 2013).
SZRLK v Minister for Immigration and Citizenship & Refugee Review Tribunal [2012] FMCA 1155 (Smith FM)	14 December 2012	37–51	The applicant was a citizen of Nepal who had lived in a southern district known as the Terai. He advanced three principal contentions of jurisdictional error affecting the RRT's decision (para 31). Two contentions are relevant to complementary protection and examined below. It should be noted that the Minister conceded deficiencies in relation to the last contention, but argued that the Court should nonetheless uphold the RRT's decision on account of its findings on relocation. The Court was not persuaded that it should decline relief for that reason. *Relocation – reasonableness* The Court held that the RRT's finding that it was reasonable for the applicant to relocate (for the purposes of assessing his refugee claim) was affected by jurisdictional error (paras 37–42). This was because it was made without consideration of the practical circumstances which might face the applicant in establishing a home away from the Terai. 'In short, the relocation finding appears based on no more than a finding that the applicant had between February and July 2008 objectively been able to "avoid harm by living outside the region" of the Terai. The Tribunal then extrapolated that he could in the future

			avoid harm by living outside the region "as he did previously", and therefore concluded that this was a "reasonable option" for the future.' (para 38) The RRT did not 'investigate the actual circumstances of his temporary residences, domestic arrangements, and employment, over this period. It certainly did not explore in its reasoning whether the actual circumstances of his living "from place to place" could reasonably, or at all, be projected into the future, and whether they would provide a prospect of a settled existence which would be practicable and reasonable to expect the applicant to adopt in the future.' (para 39) The RRT failed to investigated these issues at interview and thus had no evidence upon which it could properly evaluate the issues of reasonableness (para 40). *Failure to consider complementary protection* The Court held that the RRT had a duty to consider the complementary protection criteria, arising under the transitional provision to the complementary protection amendments (para 44). Although the RRT had made reference to the complementary protection criteria in its judgment, the Court held that it could be inferred from the RRT's reasoning that it had failed to give adequate consideration to the complementary protection criteria (paras 42–5). This is because the RRT's finding against the existence of a 'real risk' of 'significant harm' was unexplained and *prima facie* contrary to its own earlier

			findings that the applicant would face death threats from extremist groups if returned to Nepal (paras 31, 42). The Minister did not dispute this (para 42). Thus, 'the applicant has established a *prima facie* right to orders by way of judicial review which would require it to further consider the whole of the applicant's application to the Tribunal according to law.' (para 45) However, the Minister pointed out that the RRT's finding in relation to reasonableness of relocation in effect contained factual findings which might be regarded as satisfying the exclusionary principle of s 36(2B)(a) (para 46). Although the Minister accepted that this finding could not be regarded as providing an 'independent' and error-free finding which directly supported the RRT's decision in relation to s 36(2)(aa), the Minister submitted that the Court should refuse relief on the basis of the *Stead* principle (i.e. 'there is not even a possibility that the outcome could or might be different' if a further consideration of the applicant's case was undertaken). However, the Court rejected this argument: 'I am far from satisfied that I should apply the *Stead* futility principle to the present case. A fundamental difficulty is, as I have found above, that the Tribunal's relocation finding was flawed by jurisdictional error, even for the purposes of the judicially developed principles of relocation relevant to the Refugees Convention. Moreover, the points which I have made above about that finding, even if they were

			not sufficient to establish positively the error which I have found, must at least leave the Court lacking in confidence that no conclusion could be reached by a differently constituted Tribunal other than that s.36(2B)(a) would apply to the applicant if he were removed to Nepal.' (para 49) On this basis, the Court granted writs of certiorari and mandamus, quashing the RRT's decision and requiring the RRT to determine the application according to law.
SZRJX v Minister for Immigration and Citizenship & Refugee Review Tribunal [2012] FMCA 1220 (Raphael FM)	5 December 2012	10–20	*Jurisdictional error* The central issue in this case was whether the RRT fell into jurisdictional error by failing to consider the complementary protection criteria under s 36(2)(aa) when reviewing the applicant's claim for a protection visa (paras 10–6). The Minister argued that there was no jurisdictional error unless the applicant was denied natural justice (para 10). The Minister further argued that the applicant had not been denied natural justice because the RRT had 'rejected the whole foundation of the applicant's claims and in so doing necessarily rejected the only premise upon which a complementary protection claim could have been based; the circumstances that caused him to depart China.' (para 12). However, the Court rejected this argument: 'The requirement to consider complementary protection is a mandatory one formed by a reading of ss.36 and 65. The Minister cannot consider whether the other criteria

			for the visa prescribed by the Act have been satisfied (65(1)(a)(2)) unless the Minister considers the complementary protection requirement in s.36(2)(aa). And it is accepted that this was not considered.' (para 13). The Court also noted that there was a 'real difference' between the refugee criteria and complementary protection criteria (para 14). Hence, the Court held that the RRT's failure to give any consideration at all to the complementary protection criteria constituted a jurisdictional error on the part of the RRT, even though it was 'completely understandable in the particular circumstances of this case' (para 16). *Discretion not to refer matter back to RRT* The Minister also argued that the Court should exercise its discretion not to refer the matter back to the RRT for rehearing on the basis that no useful result could ensue (para 17). This was because the RRT had made findings of fact which, of their nature, excluded any complementary protection claim that might otherwise have been made (para 18). However, the Court rejected this argument: 'If this matter is referred back to the Tribunal for rehearing by a different Tribunal member it is possible that the applicant's story might be accepted. The Tribunal member may consider that the claims being

			made by the applicant are either Convention related or, if they are not Convention related, may allow him to be granted the visa pursuant to the provisions of ss.36(2)(aa). The Tribunal may consider that if this applicant returns to China he will suffer significant harm. In my view none of the findings of this Tribunal are such that it can be said that a conclusion along these lines is so unlikely that the rehearing would be futile.' (para 19). In these circumstances, the Court granted a writ of mandamus, directing the RRT to determine the application according to law (para 20).
SZQPA v Minister for Immigration [2012] FMCA 123 (Driver FM)	29 March 2012	37	The applicant, a Sri Lankan offshore entry person, sought to restrain the Minister from relying upon a report and recommendation of an Independent Merits Reviewer. At the end of his judgment, under the heading 'The consequences of the Court's orders', Driver FM stated that: 'The orders that I have made envisage a further review process by a Reviewer but they do not compel such a process. As was made clear by the Full Federal Court in *SZQDZ v Minister for Immigration* at [34] the Minister is entitled to exercise his powers under s.46A of the Migration Act without regard to anything in a Reviewer's report and recommendation. The orders made by the Court prevent the Minister from relying upon the present report and recommendation in considering whether to exercise his power. However, the Court's orders do not prevent the Minister from exercising his powers without regard to that report or recommendation. In short, in respect of this case, or it seems to me, any case that is

			or has been before this Court in relation to a report and recommendation of a Reviewer concerning the claims of an offshore entry person, the Minister remains free to exercise his power under s.46A of the Migration Act to permit such persons to apply for a protection visa.' This suggests that it may be easier for the Minister to permit offshore entry persons whose claims raise complementary protection issues to apply for a protection visa so that their claims can be considered in the same way as onshore claims, rather than via a further review process.
SZQOT v Minister for Immigration [2012] FMCA 84 (Driver FM)	10 February 2012	22	Noting the use of 'serious harm' (refugees) and 'significant harm' (complementary protection), Driver FM stated that: 'There is an implication from that deliberate distinction made by Parliament that a different test of harm was intended.' This envisages that the type of harms that give rise to complementary protection (eg inhuman or degrading treatment) do not have to reach the level of 'persecution'. This approach is correct as a matter of international law (cf the NZ approach in *AC (Syria)* [2011] NZIPT 800035, para 78).

ADMINISTRATIVE APPEALS TRIBUNAL

Note: 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 below relate to cases where a visa was cancelled or refused on character grounds (including exclusion cases).

Case	Decision date	Relevant paragraphs	Comments
JXVH and Minister for Immigration, Multicultural Affairs and Citizenship [2013] AATA 550	6 August 2013	67–73, 84–9	This case relates to: • Australia's *non-refoulement* obligations under international treaties In this case, the AAT set aside the decision under review and in substitution, decided not to exercise the power to refuse to grant a protection visa to the applicant on character grounds. The applicant had been convicted of drug offences and had served a 10-month custodial sentence (para 1). The AAT found that Australia's *non-refoulement* obligations were relevant. The RRT had found that the applicant was owed protection obligations because there were substantial grounds for believing that there was a real risk that he would suffer significant harm in China (para 2). The AAT accepted this consideration assisted the applicant, although it did not preclude the refusal of a visa, since Australia would not necessarily remove the applicant to China as a consequence of refusing to grant the applicant a visa (Ministerial Direction No 55): 'As the Minister correctly points out a decision to refuse to grant the applicant a protection visa will not

			mean that Australia will be in breach of its international obligations. This is because even if that decision were made it would be unlawful for the applicant to be deported to China or any other country, if that were to involve infringing Australia's non-refoulement obligations. As the Minister points out, if the decision under review is affirmed a number of options would be available, including indefinite detention in Australia, or, his return to China if at some later date it were found that he were no longer at risk of harm.' (para 85) The AAT also considered the impact of visa refusal on the applicant's brother, and found that this factor assisted the applicant, although 'not to any great extent' (paras 74–79, 86). The AAT was satisfied that these considerations (Australia's *non-refoulement* obligations and the impact of visa refusal on the applicant's brother) outweighed the consideration of the protection of the Australian community (para 88). Although the AAT considered that the offences committed by the applicant were 'serious in nature', the AAT found that the applicant 'poses a low risk of re-offending' (para 87). On this basis, the AAT found that the risk of future harm posed by the applicant was not 'unacceptable' (para 87). Hence, the AAT decided that the preferable decision was not to exercise the power under s 501 of the Act to refuse to grant a protection visa to the applicant (para 89).
Re Xin Liang and Minister	12 June 2013	110–48	This case relates to:

for Immigration and Citizenship [2013] AATA 392			• Australia's *non-refoulement* obligations under international treaties Mr Liang was a citizen of China, who came to Australia on a Class DE Subclass 881 Skilled – Australian sponsored Overseas Student visa. While in Australia, Mr Liang was convicted of drug offences and sentenced to imprisonment. On 7 March 2013, a delegate of the Minister made a decision under section 501 of the Migration Act to cancel Mr Liang's visa, on the basis of Mr Liang's failure to pass the character test. In this case, the AAT set aside the decision made by the delegate of the Minister and substituted a decision that Mr Liang's visa not be cancelled. In making this decision, the AAT noted that it was required to comply with *'Direction no 55 – Visa refusal and cancellation under s 501'* (the Direction), which had been issued by the Minister under section 499 of the Act (para 53). Relevance of Australia's non-refoulement obligations Clause 9.4(2) of the Direction stated that 'any non-refoulement obligation should be weighed carefully against the seriousness of the person's criminal offending or other serious conduct in deciding whether or not the person should continue to hold a visa' (para 110). The AAT held that, as stated in clause 9.4(3), section 36 of the Act set out Australia's view of its international obligations under the Refugee Convention, CAT and ICCPR (para 115). Although section 36 of the Act was concerned with the grant of protection visas, the AAT held:

			'117. … [T]he wording of cl 9.4(3) and its reference to s 36 as Australia's interpretation of its non-refoulement obligations should not be allowed to dismiss the import of cl 9.4(2). The import of cl 9.4(2) is that regard is to be had to Australia's non-refoulement obligations whether the visa whose cancellation is under consideration is a protection visa or not. Regard to those obligations would not be inconsistent with the Migration Act or with the Regulations and so the Direction would not be counter to s 499(2)…' The AAT held that this view was consistent with the principle stated in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 to the effect that 'absent statutory or executive indications to the contrary, … administrative decision-makers will act in conformity with the Convention' ratified by Australia (in that case, the Convention on the Rights of the Child) (para 117). Moreover, it was consistent with the statement in the Explanatory Memorandum to the 2011 Amendment Bill that 'Australia's non-refoulment obligations under the [ICCPR] and the CAT are absolute and cannot be derogated from. Therefore, even if a non-citizen is considered ineligible to be granted a protection visa, Australia would be bound by its non-refoulement obligations not to remove the non-citizen to a country in respect of which there are substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen's removal to that country, there would be a real risk that the non-citizen will suffer significant harm' (para 118).

			Real risk of significant harm Mr Liang feared that if he returned to China, he would be charged and convicted of offences arising out of the course of conduct that led to him being charged and convicted in Australia, and that that would result in torture, degrading treatment and capital punishment (para 140). The AAT considered Articles 7 and 10 of the Criminal Law of the PRC, which the AAT held made it clear that the PRC considered that its judicial power extended to offences committed both inside and outside its geographical borders and in respect of offences for which a Chinese national had already been convicted and sentenced in a foreign country (paras 123, 141). The AAT also considered country information indicating that conditions in Chinese prisons were harsh and that there were incidents where detainees were tortured or killed (para 127). According to the AAT: ‘141. The question is whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed to China, there is a real risk of Mr Liang’s suffering significant harm … The answer hinges on whether there is a real

			risk that he would be prosecuted in relation to his activities in relation to illegal drugs…' *Drug activities for which Mr Liang had been convicted* In respect of those matters in relation to which Mr Liang had been convicted in Australia, the AAT held that there were no substantial grounds for believing that there was a real risk that Mr Liang would suffer significant harm (para 146). In reaching this conclusion, the AAT noted that the Australian authorities, including DFAT, the RRT and DIAC, reported that there were no recorded incidents of cases in which a Chinese national had been prosecuted in China in relation to offences arising from events for which he/she had already been convicted in a foreign country and served the sentence (para 143). There was one case decided in the UK (considered in *JC (double jeopardy: Art 10 CL) China CG* [2008] UKAIT 00036 (*JC*)) in which China could be said to have retried a Chinese national for an offence committed in Kuwait and for which the offender had been convicted and sentenced in Kuwait, although in that case, the offender had not served his entire sentence in Kuwait (paras 133, 143). The AAT also considered country information showing an increasing emphasis by the Chinese government on reducing drug trafficking and drug use (para 144). The AAT noted that the UK Upper Tribunal had held in *YF (Double jeopardy – JC confirmed) China v Secretary of State for the Home Department, CG* [2011] UKUT 32

			that political factors (which might include the importance attached by the Chinese authorities to cracking down on drug offenders) might increase the risk of prosecution or re-prosecution of returning nationals under Articles 7 and 10 of the Criminal Law of the PRC (paras 132, 145). However, the AAT also noted that the UK Tribunal in *YF* did not alter the conclusion in the earlier case of *JC* that the risk of prosecution or re-prosecution of returning nationals under Articles 7 and 10 of the Criminal Law of the PRC was discretionary, extremely rare and a question of fact in individual cases (para 145). The AAT acknowledged that the country information indicated that overseas agencies experienced difficulties in obtaining information about what occurred in China's legal and prison systems (para 142), which made the AAT cautious about discounting the risks of significant harm (para 146). However, the AAT noted that there was information about other types of cases where Chinese nationals had been prosecuted on their return to China, which dispelled the AAT's caution in this case (para 146). *Drug activities for which Mr Liang had not been convicted* In relation to Mr Liang's drug activities overseas, for which he did not receive a conviction, the AAT held that there were substantial grounds for believing that there was a real risk that he would suffer significant harm (para 148).

			Article 347 of the Criminal Law of the PRC made it an offence to traffick in a 'drug of large quantity' and also to 'take part in organized international drug activities' (paras 123, 147). Mr Liang had travelled to China, purchased an amount of cocaine (regarded in Australia as a traffickable amount), and had negotiated for the supply of drugs on Chinese soil (para 147). The AAT did not have any material before it to determine whether an amount regarded as a traffickable amount of cocaine in Australia would fit the description of a 'large quantity' in China (para 147). However, the AAT held that Mr Liang could be exposed to conviction for taking part in organised drug activities, since the purpose of his visit to China was to put in place a source of supply on an ongoing basis (para 147). Conviction would expose Mr Liang to a 'fixed-term imprisonment of fifteen years, life imprisonment or death and concurrently to confiscation of property' (para 147). The AAT found, on the basis of cases in which Chinese authorities had prosecuted nationals on their return to China for activities that had a connection with activities taking place in China (or in the case of a ship registered in China, deemed to be part of that country), China's increased focus on pursuing drug traffickers, and the fact that Mr Liang's activities in China in relation to drug trafficking were documented and publicly available by means of Australian judgments, that there were substantial grounds for believing that there was a real risk of significant harm to Mr Liang (para 148). *Risk of harm to the Australian community*

			The AAT held: '156. I have already set out my reasons for coming to the view that Australia's non-refoulement obligations are raised in relation to Mr Liang. That on its own is not sufficient to determine the way in which I should exercise the discretion under s 501 of the Migration Act. It is one of the factors as the Direction makes provision for. Having regard to all of the factors, I have come to the view that the risk of future harm as a result of Mr Liang's behaviour is at a level that is acceptable to the Australian community should he be permitted to remain in Australia. The risk of his reoffending is low ... At the same time, it is a foreseeable consequence of his returning to China that there is a real risk that he will suffer significant harm. It could be said that this follows naturally from the choices that Mr Liang made as a younger person but, if it were to follow, it would arise as a result of a course of conduct undertaken as part of his activities in Australia. That is a part of his life that I am satisfied arose from behaviour and values he has put behind him. In the circumstances, I have come to the view that the Australian community would tolerate that very low risk rather than exposing Mr Liang to a real risk of significant harm should he return to China.'
"BHFC" and Minister for Immigration and Citizenship [2013] AATA 166	25 March 2013	39–46	This case relates to: • Australia's *non-refoulement* obligations under international treaties The AAT affirmed the decision under review to refuse to grant the applicant a transitional visa on character

			grounds. During the 22-year period that the applicant had lived in Australia, he had recorded almost 200 convictions and served 15 years of imprisonment (para 23). The AAT considered Australia's *non-refoulement* obligations to be a relevant consideration (Ministerial Direction No 55). The RRT had found that the applicant was a person to whom Australia had protection obligations (para 39). The AAT considered the consequences for the applicant if he was refused the visa: '[P]aragraph 11.3 of the Direction [Ministerial Direction No 55] provides that the existence of a non-refoulement obligation does not preclude the refusal of a person's visa, because Australia will not necessarily remove a person, as a consequence of refusing to grant them a visa, to the country in respect of which the non-refoulement obligation exists.' (para 42) 'It was decided in *MZYYO v Minister for Immigration and Citizenship* [[2013] FCA 49] that the Minister's power under s 198 of the Act to remove a person in immigration detention from Australia is subject to the non-refoulement obligation, and so the Minister has no statutory power to remove the applicant from Australia to any country where the applicant would have a well-founded fear of persecution for grounds recognised in the Refugees Convention.' (para 43)

			‘Counsel for the Minister, Mr Kikkert, submitted that this decision would apply equally to the present proceedings, and submitted that I should consider the non-refoulement obligation on the basis that a number of options would be available if the decision under review were affirmed. He submitted that the first option comprised issuing the applicant with a Bridging (Removal Pending) visa along the lines that applied in *MZYYO*, where the applicant was permitted to remain in Australia temporarily with access to certain Centrelink and Medicare benefits, on the basis that his position would be reconsidered in three years, taking into account his behaviour and compliance with Australian laws over that period. Mr Kikkert submitted that a second option was that the applicant would be deported to a third country (other than Iran), and a third option was that he would be retained in immigration detention.’ (para 44) ‘In view of the applicant’s criminal record in Australia and the United States, it appears unlikely that the Minister would be able to find a third country as a destination for deportation, but I am unable on the evidence to determine which of the remaining two options more likely to apply in this case. Of course each of the three options involves very serious consequences to the applicant. However, it is clear that as a matter of law the Minister would be unable to deport the applicant to Iran, or to any other country if that would involve infringing Australia’s non-refoulement obligation. It is also clear from *MZYYO* that a decision to refuse a protection visa on character grounds does

			not amount, in itself, to a decision to remove the applicant from Australia, because at any time prior to removal, it would be open to the Minister to exercise his power under s 195A of the Act to grant the applicant a visa of a particular class, if satisfied that it was in the public interest to do so.' (para 45, footnotes omitted) Although this consideration assisted the applicant, the AAT was ultimately not satisfied that it outweighed the seriousness of the applicant's 'long pattern of criminal offending' (para 46). The AAT considered that the protection of the Australian community from criminal or other serious conduct 'weighs heavily in favour of refusing the visa' and that it was not outweighed by other considerations (para 52). Hence, the AAT affirmed the decision under review.
Anochie v Minister for Immigration and Citizenship [2013] AATA 391	12 June 2013	46–52, 55–7	This case relates to: • Australia's *non-refoulement* obligations under international treaties This case concerned a decision of the Minister to cancel Mr Anochie's visa under section 501(2) of the *Migration Act 1958* (Cth). In *Anochie v Minister for Immigration and Citizenship* [2012] AATA 234, the AAT exercised its discretion not to cancel Mr Anochie's visa, in part because it was satisfied that his removal to Nigeria would place Australia in breach of its *non-refoulement* obligations under the ICCPR and CAT. However, the AAT's decision was set aside by the Federal Court in *Minister for Immigration and*

			Citizenship v Anochie [2012] FCA 1440. In that case, Perram J held that the AAT had erred in applying the 'real chance' test in assessing Australia's *non-refoulement* obligations under human rights law. Hence, the case was remitted to the AAT (para 47). However, in a subsequent and unrelated matter, the Full Federal Court held in *Minister for Immigration and Citizenship v SZQRB* [2013] FCAF 33 (Lander, Besanko, Gordon, Flick and Jagot JJ) that the 'real chance' test was to be used in assessing Australia's *non-refoulement* obligations under human rights law, as defined in the complementary protection provisions of the *Migration Act 1958* (Cth). Hence, in this case, the AAT referred back to the reasons expressed in its earlier decision in *Anochie v Minister for Immigration and Citizenship* [2012] AATA 234 as support for its conclusion that Mr Anochie's removal would place Australia in breach of its *non-refoulement* obligations (paras 50–2). This consideration, combined with the AAT's satisfaction that Mr Anochie did not pose an unacceptable risk of harm to the Australian community, led the AAT to conclude that his visa should not be cancelled under section 501(2) of the *Migration Act 1958* (Cth) (para 56).
Anochie v Minister for Immigration and Citizenship [2012] AATA 234	24 April 2012	82	This case relates to: • Australia's *non-refoulement* obligations under international treaties Here, in assessing Australia's *non-refoulement*

			obligations under human rights law, the AAT simply applies the same test as for a refugee claim: 'However, in the language of the High Court in *Chan Yee Kin v MIEA* [1989] HCA 62 in relation to the meaning of "well-founded fear" of persecution in Article 1A(2) of the Refugees Convention, the chance that he may be detained under Decree 33 and subjected to the type of harm that would engage Australia's non-refoulement obligation cannot be dismissed as remote or insubstantial, or a far-fetched possibility and is, therefore, "real".'
RCLN and Minister for Immigration and Citizenship [2011] AATA 418	17 June 2011	76–78	This case relates to: • Australia's *non-refoulement* obligations under international treaties This case is relevant to the 'standard of proof' and 'necessary and foreseeable consequence' elements of complementary protection. It suggests that the threshold is the same as for a refugee claim. The case examined the relevant test in relation to non-return to arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment under the ICCPR and CAT, in the context of a visa cancellation. The AAT found: '[76] The minister also contends there must be a causal link between the cancellation of the visa and the "real risk" of violation of the ICCPR (Tracey J in *AB v*

			Minister for Immigration and Citizenship (2007) 96 ALD 53; [2007] FCA 910) and that such a risk would only be established where "the likely consequences for the applicant would be the deprivation of … fundamental rights: *Bustescu and Minister for Immigration and Multicultural Affairs* [2000] AATA 819 at [39] (*Bustescu*). ... [78] RCLN accepts that there must be a causal connection between the cancellation and return of the person to their original country of residence and the expected breach but submits that the test in *Bustescu* is wrong. It is not necessary to establish it is "likely" there would be a deprivation of fundamental rights but rather a "real chance" as explained by Mason CJ in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389; 87 ALR 412 at 418 ... [79] I agree with the contentions of RCLN on the construction of Direction 41 and the test to be applied to assess the threshold to engage Australia's international obligations. The question is, whether on the facts in this case, there would be a breach of those obligations if, as a consequence of cancellation of his visa, RCLN is removed from Australia and returned to Iran. If so, the decision of the delegate must be set aside.' [emphasis added]