

## **COMPLEMENTARY PROTECTION IN AUSTRALIA**

### **ADMINISTRATIVE APPEALS TRIBUNAL**

*Last updated 16 March 2018*

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

Case	Decision date	Relevant paragraphs	Comments
<a href="#">PRHR and Minister for Immigration and Border Protection (Migration) [2017] AATA 2782</a> (Unsuccessful)	22 December 2017	1-2, 110-116, 119, 142-144, 153, 155-159, 167-168	<p>This case, while not on the complementary protection provisions, relates to <i>non-refoulement</i> obligations in light of requirements on decision-makers in refusal decisions and the interaction with s 197C of the Migration Act which sets out that Australia's <i>non-refoulement</i> obligations are irrelevant to removal of unlawful non-citizens under section 198. It considers the validity of sections of Direction 65, the status of Australia's international treaty obligations in domestic law and the weight to be given to <i>non-refoulement</i> obligations. In this case, the Tribunal finds that the applicant must be removed under s197C and that the risk to the Australian community outweighs the real risk of torture on return, a finding which appears to contravene the absolute nature of the prohibition against torture in international law.</p> <p>'The Refugee Review Tribunal (RRT) was satisfied on 10 June 2015 that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk he will suffer significant harm in the form of torture by Sri Lankan authorities. It also found that the risk of harm faced by PRHR is one that he faces personally due to his particular role on the boat on which he travelled to Australia from Sri Lanka. PRHR's particular situation is</p>

			<p>not one faced by the population generally.’ (para 1).</p> <p>‘On 3 October 2017, a delegate of the Minister for Immigration and Border Protection (Minister) refused PRHR’s<sup>[1]</sup> application for a Temporary Protection (Class XD) visa (TPV) under <a href="#">s 501(1)</a> of the <a href="#">Migration Act 1958</a> (Migration Act). The delegate did so on the basis that PRHR had not passed the character test under <a href="#">s 501(6)</a> because he had been convicted of one or more sexually based offences involving a child within the meaning of <a href="#">s 501(6)(e)</a>. There was no dispute between the parties that PRHR had not passed it because he had been convicted of the offence of make/produce child pornography and of knowingly possess child pornography. On 4 May 2017 and on appeal from the Magistrates’ Court, Judge Hicks of the County Court of Victoria sentenced PRHR to serve a Community Corrections Order (CCO) for a period of 18 months, to undertake 100 hours of unpaid community work. PRHR was required to undergo assessment and treatment (including testing) for alcohol abuse or dependency as directed by the Regional Manager and to participate in programs and/or courses addressing factors relating to his offending behaviour as directed. As a result of his conviction, PRHR was automatically placed on the Sex Offender’s Register for a period of eight years. The Department of Immigration and Border Protection (Department) advised PRHR of the decision to refuse his application for a visa in a letter dated 5 August 2017 and he received it by email on the same</p>
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			<p>day.’ (para 2).</p> <p>‘Although the parties have relied on only the one authority, I have also looked at the earlier authorities. The starting point is the concept of Australia’s <i>non-refoulement</i> obligations. Paragraph 12.1(1) describes the a <i>non-refoulement</i> obligation as an obligation not to forcibly return, deport or expel a person to a place where he or she will be at risk of a specific type of harm. It sets out three international conventions under which Australia’s <i>non-refoulement</i> obligations arise. Australia has ratified each of those conventions but ratification itself does not mean that the <i>non-refoulement</i> obligations they include are incorporated into Australia domestic law. Ratification is a matter for the Executive government and the content of the domestic law a matter for Parliament. Therefore, the conventions themselves cannot operate as a source of an individual’s rights and cannot describe an administrative decision-maker’s obligations.’ (para 110).</p> <p>‘Ratification does, however, have significance in two ways. One is summarised in the joint judgment of Mason CJ and Deane J in <i>Minister for Immigration and Ethnic Affairs v Teoh</i><sup>[79]</sup> (<i>Teoh</i>):</p> <p>‘... <i>If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it</i></p>
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			<p><i>imposes on Australia, then that construction should prevail. So expressed, the canon 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 ...”.</i>’ (para 111).</p> <p>‘The other significance of ratification is that it gives rise to a legitimate expectation that a decision-maker will take the convention into account when exercising a discretion in the course of making an administrative decision. That is so even though the terms of the convention have not been incorporated in Australian domestic law.’ (para 112)</p> <p>‘Where Parliament does incorporate into Australia’s domestic law an international obligation that the Executive government has adopted by ratifying an international convention, the scope and nature of that obligation is determined by reference to the enactment it has passed in order to do so. An illustration of this is found in the judgment of Mason J in <i>Gerhardy v Brown</i><sup>[82]</sup> when considering the concept of human rights. They explained:</p> <p><i>“The concept of human rights as it is expressed in the Convention and in the United Nations Universal Declaration of Human Rights evokes universal values, that is, values common to all societies. This involves a</i></p>
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			<p><i>paradox because the rights which are accorded to individuals in particular societies are the subject of infinite variation throughout the world with the result that it is not possible, as it is in the case of a particular society, or in the case of homogenous societies which are grouped together, e.g. the European Economic Community, to distil common values readily or perhaps at all. Although there may be universal agreement that a right is a universal right, there may be no universal or even general agreement on the content of that right.”</i>” (para 113).</p> <p>‘What Parliament enacts into domestic law may, though, be different. His Honour had earlier said:</p> <p><i>“... As a concept, human rights and fundamental freedoms are fundamentally different from specific or special rights in our domestic law which are enforceable by action in the courts against other individuals or against the State, the content of which is more precisely defined and understood. The primary difficulty is that of ascertaining the precise content of the relevant right or freedom. This is not a matter with which the Convention concerns itself.”</i>” (para 114).</p> <p><b>‘A.4 Incorporation of <i>non-refoulement</i> obligation in domestic law</b></p> <p><b>A.4.1 Expression of <i>non-refoulement</i> obligation</b></p>
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			<p>In the case of the <i>non-refoulement</i> obligations, they have been incorporated into Australian domestic law in the terms in which it is expressed in the international conventions ratified by Australia. That follows from the fact that the expression is defined in <a href="#">s 5(1)</a> of the <a href="#">Migration Act</a> by reference to the nonrefoulement obligations that may arise because Australia is a party to the Refugees Convention, the Covenant or the Convention Against Torture as well as any obligations accorded by customary international law that are of a similar kind to those mentioned in paragraph (a). It is apparent from the definition that they are not limited to those obligations.’ (para 115).</p> <p><b>‘A.4.2 Relevance of <i>non-refoulement</i> obligation in deciding whether to grant or refuse an application for a visa where grant of visa not prevented by, for example, <a href="#">s 501</a></b></p> <p>While there is no modification of the <i>non-refoulement</i> obligation on its incorporation into Australian domestic law, the <a href="#">Migration Act</a> does not confer a corresponding right or entitlement once it has been determined that Australia has a <i>non-refoulement</i> obligation in respect of a particular person. Regard must be had to the particular provision in the <a href="#">Migration Act</a> and the Regulations to determine what regard is to be had to the <i>non-refoulement</i> obligations.’ (para 116).</p> <p>‘In the example I have given of a protection visa, the <i>non-refoulement</i> obligations arise because they have</p>
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			<p>been specifically incorporated as one of the criteria that a person must meet to obtain a protection visa. Where <i>non-refoulement</i> obligations have not been specifically incorporated as one of the criteria that must be met, they do not arise as a separate consideration. They do not arise implicitly for <a href="#">s 65</a> sets out the Minister’s obligation when considering a valid application for a visa and it is not a discretionary decision. <a href="#">Section 65(1)(a)(iii)</a> refers to specific sections of the <a href="#">Migration Act</a> that may prevent the grant of a visa and to which separate consideration must be given but, assuming they do not apply, the grant or refusal of the visa will turn on whether the applicant for the visa has satisfied any health criteria that have been prescribed and any other criteria that have been prescribed by the <a href="#">Migration Act</a> or Regulations.<sup>[87]</sup> The grant or refusal of a visa application will not turn on whether Australia has international <i>non-refoulement</i> obligations in respect of the person.’ (para 119).</p> <p>‘Since the enactment of <a href="#">s 197C</a>, it is clear that the whole of the final sentences in each of paragraphs 12(2) and (6) are an incorrect statement of the law. To say, as paragraph 12.1(2) currently does, that Australia “<i>will not remove a non-citizen, as a consequence of the refusal of their visa application, to the country in respect of which the non-refoulement obligation exists</i>”, is not a correct statement of the law. If the circumstances set out in <a href="#">s 198</a> apply, <a href="#">s 197C</a> imposes an obligation upon an officer to remove a non-citizen</p>
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			<p>regardless of whether Australia has <i>non-refoulement</i> obligations in respect of him or her. For the reasons I give below, I think that omission of the two sentences is the preferable course to substituting words for those that appear because I have doubts whether Direction No. 65 can be read as if other words were inserted. In case my doubts are unfounded, I will now set out my reasons for concluding that reading cl 12.1(2) as if the word “<i>might</i>” or “<i>may</i>” appeared rather than the word “<i>will</i>” would not plainly solve the inaccuracy of the sentence.’ (para 142).</p> <p>‘To say that Australia “<i>might not remove a non-citizen</i>” in the circumstances described is, I suggest, capable of misleading the reader. The word “<i>might</i>” is the past tense of the word “<i>may</i>”. Whichever is chosen, both are capable of being understood in the sense of expressing permission.<sup>[107]</sup> If that is the meaning in which they are understood, the amendment suggested to paragraph 12.1(2) would continue to be an incorrect statement of the law. The final sentence would indicate that Australia is not permitted – “<i>may not</i>” or “<i>might not</i>” – remove a non-citizen as a consequence of its <i>non-refoulement</i> obligations. If the word is used to express a possibility,<sup>[108]</sup> the final sentence suggests that there is a possibility that Australia will not remove a non-citizen as a consequence of its <i>non-refoulement</i> obligations. To say that there is a possibility is true if the Minister is considering whether to exercise power under <a href="#">s 195A</a> and if there were no country that would receive</p>
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			<p>the non-citizen if removed from Australia. The qualifications are not apparent if that is how the word “<i>may</i>” is to be understood. Therefore, I suggest that it should be omitted.’ (para 143).</p> <p>‘The last sentence of paragraph 12.1(6) is incorrect when it begins with the statement that “<i>Australia will not return a person to their country of origin if to do so would be inconsistent with its international non-refoulement obligations</i>”. In view of <a href="#">s 197C</a>, it is also incorrect to say that “... <i>the operations of <a href="#">sections 189 and 196</a> of the Act means that, if the person’s Protection visa application were refused, they would face the prospect of indefinite immigration detention.</i>” Therefore, I agree with the parties that the whole of the final sentence of paragraph 12.1(6) should not be included.’ (para 144).</p> <p>‘<a href="#">Section 499(2)</a> provides that <a href="#">s 499(1)</a> does not empower the Minister to give directions that would be inconsistent with the <a href="#">Migration Act</a> or with the Regulations. My finding that two passages are inconsistent does not render the whole of Direction No. 65 or even Part B of it null and void. As I have found that it is not a legislation instrument and as it cannot be characterised as rules of court, s 46(2) of the AI Act requires me to regard Direction No. 65 as if it were an Act of Parliament. Each of its provisions is to be regarded as a section of an Act and it is to be read and construed subject to, in this case, the <a href="#">Migration Act</a>, and</p>
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			<p>so as not to exceed the Minister’s power.’ (para 153).</p> <p>‘This is not a provision that authorises an instrument to be read as if it were rewritten with other words. It provides that, to the extent that it is not in excess of power, the instrument is to be taken as a valid instrument. This is consistent with the approach taken by the Full Court of the Federal Court in <i>Tervonen</i>.<sup>[116]</sup> The two sentences can be excised from paragraph 12.1 of Direction No. 65 leaving statements that are within power.’ (para 155).</p> <p><b>‘A.4.6 Application of principles in context of the refusal of PRHR’s visa</b></p> <p>In this case, the RRT has already decided that Australia has <i>non-refoulement</i> obligations in respect of PRHR in the context of his application for a protection visa. The claims that PRHR now makes in relation to his return to Sri Lanka are consistent with those on which the RRT found that Australia owed those obligations i.e. that the Sri Lankan authorities will consider that PRHR has knowledge about people smuggling because he initially acted a guard and was then represented to the Sri Lankan Navy as a crew member on the vessel that brought Tamil asylum seekers to Australia and will torture him to extract information from him.’ (para 156).</p> <p>‘Australia’s <i>non-refoulement</i> obligations to PRHR arise because they have been incorporated into its domestic</p>
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			<p>law. They depend upon that law and are shaped and modified by it. In the context of this case, which centres on a decision to refuse PRHR's application for a TPV, regard must first be had to s 65(1). Section 65(1)(a) requires the Minister to be satisfied of all three matters set out in s 65(1)(a)(i), (ii) and (iii) before it imposes an obligation on the Minister to grant a visa. In this case, satisfaction of the criteria in s 36 for the grant of a protection visa is one of the three essential of which the Minister must be satisfied before he is obliged to grant visa. Of the criteria in s 36, PRHR has met that in s 36(2)(aa) in light of the RRT's decision that he is a non-citizen in respect of whom the Minister is satisfied Australia has protection obligations because he has substantial grounds for believing that, as a necessary and foreseeable consequence of PRHR's being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm. The third matter of which the Minister must be satisfied before being obliged to grant a visa by the terms of s 65(1)(a) is that the grant of the visa is not prevented by, in this case, s 501.' (para 157).</p> <p>'In light of the authorities I have set out above, regard is to be had to the <i>non-refoulement</i> obligations found by the RRT as part of the suite of claims and considerations that arise in the factual context of PRHR's circumstances. In addition to the claims and considerations that arise in a factual context, regard must also be had to the legal consequences that flow</p>
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			<p>from any decision to refuse a protection visa. In light of ss 197C and 198 of the Act, one of those legal consequences is that, if PRHR’s application for a visa is refused, an officer is obliged to remove him from Australia as soon as reasonably practicable. An officer must do so irrespective of the <i>non-refoulement</i> obligations that Australia owes to PRHR. What is “<i>reasonably practicable</i>” is not developed in the <a href="#">Migration Act</a>. Whether it would take account of the possibility or likelihood that the Minister might exercise his power to grant PRHR a visa under <a href="#">s 195A</a>, is not a matter I need to consider. That follows from the fact that there is no indication in this case that there is any likelihood that he will choose to do so and there is no evidence that Sri Lanka will refuse to receive PRHR if removed from Australia. In view of the removal obligation in those circumstances and the unlikelihood of the Minister’s exercising his power under <a href="#">s 195A</a>, PRHR’s indefinite detention in Australia under the <a href="#">Migration Act</a> is not a legal consequence of a decision to refuse PRHR’s application for a protection visa.’ (para 158).</p> <p>‘Given that legal consequence is that PRHR would be returned to Sri Lanka, consideration must be given to there being a real risk that he will suffer significant harm on his return through the infliction of torture. It is one of the factors that must be considered alongside the suite of other claims and considerations that arise in the</p>
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			<p>factual context of PRHR’s circumstances.’ (para 159).</p> <p>‘Australia has protection obligations to PRHR on the basis that there is a real risk he will suffer significant harm in the form of torture by Sri Lankan authorities when they seek information from him regarding those engaged in people smuggling. Torture in any circumstances is abhorrent to the Australian community but the risk to PRHR from torture is outweighed in this matter by the risk that he presents to the Australian community and to its members should he be permitted to remain. PRHR has also expressed concern about danger he might face from others with whom he has engaged in the past. That is of lesser concern for two reasons. One is that he told the RRT that he had previously returned to the area in Sri Lanka on a number of occasions after 2006 and had done so without incident and without feeling threatened.<sup>[117]</sup> The other is that the threat of which he speaks is expressed in nebulous terms and I cannot identify it with any specificity.’ (para 167).</p> <p>‘Having regard to all of the matters that I have considered in these reasons, I have decided that PRHR’s application for a visa should be refused. I therefore affirm the decision of the delegate of the Minister dated 3 October 2017 to refuse PRHR’s application for a Temporary Protection (Class XD) visa (TPV) under <a href="#">s 501(1)</a> of the <a href="#">Migration Act</a>.’ (para 168).</p>
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<p><a href="#">MBOX and Minister for Immigration and Border Protection (Migration) [2017] AATA 2410</a> (Unsuccessful)</p>	<p>30 November 2017</p>	<p>97-98, 106-109</p>	<p>This case clarifies the position of visa cancellation and the requirement to consider non-refoulement obligations, noting that the Minister was denied leave to appeal <i>BCR16 v Minister for Immigration and Border Protection</i> [2017] FCAFC 96.</p> <p>‘These submissions were not initially advanced by counsel within the context of Australia’s non-refoulement obligations. Counsel for both parties were recalled for further closing submissions after the High Court handed down its decision in <i>Minister for Immigration and Border Protection and BCR 16</i> [2017] HCA Trans 240 on 17 November 2017. It was agreed by both parties that the High Court has now upheld the decision of the Full Court of the Federal Court in <i>BCR16 v Minister for Immigration and Border Protection</i> [2017] FCAFC 96; (2017) 248 FCR 456 (<i>BCR16</i>). As such, following the principles outlined by the Full Federal Court, it was agreed that the Tribunal must now assess any international non-refoulement obligations that might arise if MBQX is returned to Zimbabwe (even if not specifically framed as such by an applicant or his lawyers).’ (para 97).</p> <p>‘In assessing any non-refoulement obligations, however, the Full Court has previously noted that the level of analysis required by the Tribunal is less than that required in assessing a claim for a Protection visa. Relevantly, in <i>Ayoub v Minister for Immigration and Border Protection</i> [2015] FCAFC 83 in relation to a s</p>
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		<p>501 refusal, the Court found (at [28]):  <i>An exercise of the statutory power conferred by s 501 of the Migration Act does not require the same analysis to be undertaken as would be required if an application for a protection visa is made and s 36 is invoked. Nor is that analysis to be undertaken even where the Minister does take into account Australia's non-refoulement obligations.'</i> <b>(para 98).</b></p> <p>'On the evidence, the Tribunal finds that MBQX has not provided sufficient evidence to satisfy the Tribunal that he faces a real risk of harm such that Australia's non-refoulement obligations would be triggered, other than to say he is 'fearful' of returning to Zimbabwe.'  (para 106).</p> <p>'This, as rightly noted by Mr Blades, is a consideration that the Tribunal can assess elsewhere (and does so below under the heading "impediments upon return"). Overall, however, the Tribunal considers MBQX's 'fears' at being returned to Zimbabwe to be in relation to the extent of impediments which he may face if returned rather than an articulation of a fear that his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'  (para 107).</p> <p>'The Tribunal was advised that other country information and more substantial evidence might exist and that the current political situation in Zimbabwe</p>
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			<p>means that it is difficult to know, precisely, what that situation is from day to day. The Tribunal has no reason to doubt this submission. While this Tribunal can only deal with the limited evidence it is noted (and agreed by the parties) that MBQX has not previously had a visa refused or cancelled under <a href="#">section 501, 501A or 501B</a> of the <a href="#">Migration Act</a>. He is, accordingly, able to apply for a Protection visa in accordance with <a href="#">s 501E(2)</a> of the <a href="#">Migration Act</a>. It is at that time that a thorough analysis of the current state of daily life in Zimbabwe will be undertaken. Mr Rothstein advised the Tribunal that his client would consider this option if not successful here. It is noted in this context that any character findings made in relation to MBQX in these proceedings would not negate any protection claims he may have from being assessed. This is so because of the operation of <i>Direction No. 75 – Refusal of Protection Visas Relying on <a href="#">Section 36(1C)</a> and <a href="#">Section 36(2C)(b) – Part 2</a></i>, which specifically precludes character findings arising from a criminal deportation finding being assessed first (and instead requires any protection claims to be assessed first).’ (para 108).</p> <p>‘On the limited evidence before it, the Tribunal finds that no non-refoulement obligations arise in relation to MBQX.’ (para 109).</p>
<a href="#">1514908 (Refugee) [2017] AATA 2962</a> (Unsuccessful)	22 November 2017	7, 18, 55-58	This case concerned the meaning of cruel or inhuman treatment or punishment, and degrading treatment or

			<p>punishment.</p> <p>‘The applicant provided the following information about her background and claims to the Department and Tribunal:</p> <p>She was born in Gaborone, and is a Motswana. Her mother worked in [a company], and her father ran [a] business. They are now retired, and still living in Gaborone. She has a brother and sister in Gaborone. She is not sure if her brother is working as she has not spoken to him for seven years, as she felt betrayed by him. She grew up being best friends with him. She tried to talk to him about her break-up with her partner, as she thought that he was the closest person to her. She thought that he would have explained her choice of sexual preference to their parents, but he did not. His reaction was a shock to her, as he opposed her sexual choices. He said that she should be prayed for, and was possessed by demons. He said that he knew somewhere where she could go and get cleansed. Her sister is supportive, but could not be vocal about it as her parents do not support her being a lesbian; ...’ (para 7).</p> <p>‘The Tribunal is satisfied based on the applicant’s evidence that she is a lesbian, and has had a number of relationships with women. She was a credible witness who was able to talk about the evolution of her realisation that she was interested in girls at school, knowing that her attraction was more than friendship,</p>
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			<p>because of the emotional side of her feelings. She explained convincingly in the context of her realisation, that she had no real definition for her feelings. Her evidence about the way she came to terms with her feelings, in an environment where “lesbianism was not part of the conversation”, was persuasive. Clearly the experience she had with her brother, who she had thought would support her choices, but in fact rejected her, had significant emotional impact on her. She has given detailed evidence about various relationships in [Country 1] (where lesbians could freely have relationships) and in Australia. The Tribunal is satisfied on her evidence that she had a relationship with a man in Botswana, who fathered two children, but that the relationship was not “smooth” as her relationships have been with women. The Tribunal is satisfied that since then, she has been in relationships with women, including a 6 year relationship with a woman in Australia, and has attended gay clubs and events in Australia.’ (para 18).</p> <p>‘Cruel or inhuman treatment or punishment’ for the purposes of s.36(2A)(d) is exhaustively defined in s.5(1) of the Act to mean an act or omission by which severe pain or suffering, whether physical or mental, is inflicted on a person, or pain or suffering, whether physical or mental, is inflicted on a person, so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature. The pain or suffering must be intentionally inflicted.</p>
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			<p>The Explanatory Memorandum states that the first type of cruel or inhuman treatment or punishment, an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, refers to an act or omission which would normally constitute torture, but which is not inflicted for one of the purposes or reasons under the definition of ‘torture’.<sup>[21]</sup> An act or omission which causes pain or suffering, but which does not rise to the level of ‘severe’ may nonetheless amount to cruel or inhuman treatment or punishment so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature. Although this aspect of the definition does not refer directly to the ICCPR, the use of the more general ‘cruel or inhuman in nature’ may invite consideration of international jurisprudence as to what may be regarded as cruel or inhuman. The Complementary Protection Guidelines direct decision-makers to interpret this part of the definition by reference to international jurisprudence on Article 7 of the ICCPR<sup>[22]</sup> and contain examples of treatment which has or has not been found to breach that Article.<sup>[23]</sup> In international jurisprudence, ‘inhuman treatment’ has been said to include such treatment that ‘deliberately causes severe suffering ... which, in the particular situation, is <i>unjustifiable</i>’.<sup>7</sup> (para 55).</p> <p>‘The wording used in the provisions suggests a significant level of harm: “severe” pain or suffering, or</p>
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			<p>pain or suffering which could reasonably be regarded as “cruel or inhuman”. Given this wording, as well as country sources set out above, which indicate wider acceptance of LGBTI people, the fact that an LGBTI organisation and LGBTI events operate openly, and that articles have suggested that gays and lesbians are announcing their sexual preferences publicly with support from some public figures, the Tribunal is not satisfied that there is a real risk (more than a remote or insubstantial risk) of cruel or inhuman treatment or punishment. While there may be some social ostracism, discrimination or insults directed at her as she is outspoken, sometimes people do not know if she is a boy or girl, and she is openly lesbian, the Tribunal is not satisfied that such behaviour would reach the level of significant harm envisaged pursuant to this provision.’ (para 56).</p> <p>‘Degrading treatment or punishment is exhaustively defined in s.5(1) of the Act to mean an act or omission which causes, and is intended to cause, extreme humiliation which is unreasonable. The definition requires ‘extreme humiliation which is unreasonable’. Whether or not humiliation is ‘reasonable’ will be a question to be determined with regard to the particular circumstances of the case. For example, in <i>SZRSN v MIAC</i> the Federal Magistrates Court found that forced separation of an applicant from his children would not meet the high threshold of ‘extreme humiliation’ which is unreasonable.<sup>[25]</sup> Similarly, in <i>SZSFX v MIBP</i> the</p>
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			<p>Federal Circuit Court considered that exposure to pollution does not of itself amount to ‘degrading treatment’ for the purposes of <a href="#">s.36(2)(aa)</a> of the <a href="#">Migration Act</a>.<sup>[26]</sup> That Court has also rejected that a fine and brief period of detention pending bail could amount to ‘extreme humiliation’.<sup>[27]</sup> In light of these cases, and the country information referred to earlier in this decision, the Tribunal is also not satisfied that there is a real chance that social ostracism, discrimination or insults which the applicant may experience, would reach the level of harm envisaged pursuant to this provision involving “extreme” humiliation which is unreasonable.’ (para 57).</p> <p>‘The Tribunal is not satisfied therefore that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicant being removed from Australia to Botswana there is a real risk of significant harm.’ (para 58).</p>
<a href="#">1715533 (Refugee) [2017] AATA 2928</a> (Unsuccessful)	13 November 2017	5, 13-14, 58-70, 73-74	<p>This case considered the application of the lawful sanctions exception in the Migration Act, and the concept of double jeopardy.</p> <p>‘In his application form, the applicant provided no details in relation to his past residential addresses, employment history and family composition. In relation to his reasons for claiming protection, he stated that he was a real estate developer in Taiwan. In 2015, he tried to obtain a piece of land for property development</p>

			<p>purposes. He and his business partner borrowed ‘[a substantial amount of money] from loan sharks’. In September 2016, ‘policies adverse to the real estate market were released’. His ‘project’ could not be ‘sold’ within a short period and he could not repay his debts. He was ‘falsely imprisoned’ and [he was] ‘severely injured’. The ‘gang members’ also threatened members of his family. He called the police and they said that they would investigate. However, he ‘did not get any response’. He was ‘hunted’ by gang members and had to leave Taiwan in order to survive.’ (para 5).</p> <p>‘He stated that, in January or February 2012, five people were dispatched from Taiwan to claim the money. These people went to his house and asked for money. When he told them that he did not have any money, they slapped him and threatened his family. One month later, these people returned to his house. This time they punched and kicked him, causing him to bleed from the nose. They threatened him again and told him that this would be his final warning. They returned 20 days later and asked the applicant for money. He pleaded and told them that he would be prepared to do anything. They left, but returned two weeks later. This time they attacked him with a knife and ‘cut’ [him]. As a consequence, he was hospitalised and required surgery. He called the police but the police said they could not find those who had attacked him. He remained in hospital for two months. Following this episode, his assailants returned and told him that they</p>
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			<p>knew he did not have the money to repay his debts. However, they asked him to do something which would help him to repay his debt. They also told him that they would pay all his living expenses if he accepted to assist them. In September 2012, the applicant was asked to take [illegal goods] to another country. He initially refused, but he accepted after they threatened his wife and children.’ (para 13).</p> <p>‘He was arrested immediately after arriving in Australia. He was subsequently convicted and sentenced to [a term of] imprisonment. He told the police everything. He also contacted the police in Taiwan and told them that these people were going to hurt him. He also called [Mr B] and told him that he was in jail. While he was in prison, his wife and children moved to a different address in Zhuhai, but the debt collectors found his parents. They found out that he was being released from prison, so they sent him a threatening letter to the prison from Taiwan.’ (para 14).</p> <p>‘As it was put to the applicant at the hearing, there is no evidence before the Tribunal to suggest that the relevant criminal laws under which he is likely to be charged, prosecuted and, possibly, sentenced, are discriminatory or that they will be enforced against him in a discriminatory manner. The Tribunal finds that charging and prosecuting the applicant, as well as any penalties that may be imposed on him, are the result of the non-discriminatory enforcement of laws of general</p>
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			<p>application. The Tribunal, therefore, does not accept that there is a real chance that the applicant would face serious harm amounting to persecution.’ (para 58).</p> <p>‘The country information before the Tribunal indicates that a Taiwan national returned to the country after having served a sentence for [illegal goods] importation in a foreign prison could face further punishment, according to Taiwan’s criminal code. Taiwan’s criminal code applies to a range of [offences] committed overseas. According to Chapter 20 of the Code, this includes Taiwan nationals involved in [a range of illegal conduct]. [Sentence deleted].<sup>[3]</sup> The Tribunal, therefore, accepts that that there is a real chance that, if the applicant were to return to Taiwan, he could face further imprisonment for the [offences] he was convicted of in Australia. These laws, however, are also laws of general application. There is no evidence before the Tribunal that the laws referred to are discriminatory or that they will be enforced against him in a discriminatory manner. Whilst the Tribunal appreciates that these laws are perceived to be severe, non-discriminatory application of generally applicable laws does not constitute persecution.’ (para 59).</p> <p>‘According to the US Department of State’s 2016 Country Reports on Human Rights Practices in relation to Taiwan, whilst overcrowding was a problem, prison and detention centre conditions generally met international standards. The report also indicated that</p>
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			<p>there are no reports of political prisoners or incidents of torture by authorities and that Taiwan allows independent observers to inspect prison conditions.’ (para 60).</p> <p>‘On the basis of the evidence before it, the Tribunal does not accept that there is a real chance that the applicant would face serious harm amounting to persecution if he were to face further imprisonment in Taiwan for the offences he was convicted of and served a prison sentence in Australia. The applicant did not claim, and the Tribunal does not accept, that there is a real chance that the applicant would face serious harm amounting to persecution for any reason whilst serving a prison sentence in Taiwan.’ (para 61).</p> <p>‘With regard to complementary protection, the Tribunal accepts that, if convicted of the [other] charges [and] if he were to face further punishment for the [offences] committed in Australia, the applicant is likely to face imprisonment for a number of years.’ (para 62).</p> <p>‘Under the definitions in s.5(1) of the Act, torture, cruel or inhuman treatment or punishment and degrading treatment or punishment do not include an act or omission ‘arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.’ As such, an act or omission that arises from, is inherent in or incidental to a lawful sanction, where that sanction itself does not breach the</p>
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			<p>Articles of the International Covenant on Civil and Political Rights (ICCPR), will not amount to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment, even if it inflicts (severe) pain or suffering or extreme humiliation.’ (para 63).</p> <p>‘The Tribunal is satisfied that any imprisonment the applicant is likely to face in Taiwan is an act arising only from lawful sanctions. The issue is whether these sanctions are inconsistent with the Articles of the ICCPR. In making its assessment, the Tribunal has considered the applicant’s likely re-prosecution in Taiwan for offences he was convicted of in Australia, as well as any consequential imprisonment in relation to both the re-prosecution and prosecution in connection with the [other] [charges].’ (para 64).</p> <p>‘Article 14(7) of the ICCPR states:</p> <p>No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.’ (para 65).</p> <p>‘The language of the provision appears to suggest that the prohibition on double jeopardy applies only within ‘each’ state’s judicial system. Indeed, the Human Rights Committee, the authoritative UN body for interpreting the ICCPR, has clearly stated that the scope of Article 14(7)’s double jeopardy protection is limited</p>
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			<p>to multiple prosecutions by one state.’ (para 66).</p> <p>‘In A.P. v. Italy,<sup>161</sup> the Committee expressed the view that ‘article 14, paragraph 7, of the Covenant... does not guarantee <i>non bis in idem</i> with regard to the national jurisdictions of two or more States. The Committee observes that this provision prohibits double jeopardy only with regard to an offence adjudicated in a given State.’ Subsequently, the Human Rights Committee affirmed this interpretation in A.R.J. v. Australia, stating:</p> <p>The author has claimed a violation of article 14, paragraph 7, because he considers that a retrial in Iran in the event of his deportation to that country would expose him to the risk of double jeopardy. The Committee recalls that article 14, paragraph 7, of the Covenant does not guarantee <i>ne bis in idem</i> with respect to the national jurisdictions of two or more states - this provision only prohibits double jeopardy with regard to an offence adjudicated in a given State.’ (para 67).</p> <p>‘Therefore, the applicant’s prosecution and possible imprisonment arise only from and are incidental to lawful sanctions that are not inconsistent with the Articles of the ICCPR. When this was explained to the applicant at the hearing, he stated that he did not want protection and just wanted to return to China. The Tribunal finds that, if the applicant was removed from</p>
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			<p>Australia to Taiwan and faced prosecution for the offences he was convicted of in Australia, this does not breach Article 14(7) or any other Articles of the ICCPR.’ (para 68).</p> <p>‘The Tribunal accepts that the applicant is likely to face a relatively lengthy prison sentence in Taiwan as a consequence of any re-prosecution and any conviction in relation to the [other] [charges].’ (para 69).</p> <p>‘The Department’s PAM3 Refugee and Humanitarian - Complementary Protection Guidelines in relation to imprisonment/prison conditions note that detention itself is not a breach of Article 7. However, particularly harsh treatment in detention may constitute a violation of Article 7.<sup>[81]</sup> The Guidelines noted that ‘prison conditions may constitute cruel, inhuman or degrading treatment or punishment if they seriously or systematically deprive a detainee of human dignity’. It was further stated that in certain circumstances it may be appropriate to infer an intention to inflict pain or suffering or to cause extreme humiliation if it is evident that pain or suffering or extreme humiliation was or may be knowingly inflicted.’ (para 70).</p> <p>‘On the basis of the evidence before it, the Tribunal is not satisfied that prison conditions in Taiwan, including overcrowding, are so harsh as to constitute a violation of Article 7 of ICCPR. More importantly, the definition of ‘cruel or inhuman treatment or punishment’ in</p>
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			<p>subsection 5(1) of the Act requires that pain or suffering be ‘intentionally inflicted’ on a person and that the definition of ‘degrading treatment or punishment’ requires that the relevant act or omission be ‘intended to cause’ extreme humiliation. Intent, in this context, requires an actual, subjective, intention on the part of a person to bring about the suffering by their conduct.<sup>[11]</sup> In <i>SZTAL v MIBP</i>, a majority of the High Court rejected the contention that knowledge or foresight of a result establishes the necessary intention element of the definitions of torture, cruel or inhuman treatment or punishment and degrading treatment or punishment.’ (para 73).</p> <p>‘The Tribunal, on the evidence before it, does not not accept that the pain or suffering caused by any overcrowding and other problems in Taiwan prisons, combined with any term of imprisonment the applicant might face, is ‘intentionally inflicted’ on prisoners as required by the definition of ‘cruel or inhuman treatment or punishment’ in <a href="#">subsection 5(1)</a> of the <a href="#">Migration Act</a>. The Tribunal does not accept that any overcrowding and other problems in Taiwan prisons, combined with any term of imprisonment the applicant might face, are ‘intended to cause’ extreme humiliation as required by the definition of ‘degrading treatment or punishment’. The Tribunal does not accept, therefore, that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from</p>
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			Australia to Taiwan, there is a real risk that he will suffer significant harm.’ (para 74).
<a href="#">1720366 (Refugee) [2017] AATA 2671</a> (Unsuccessful)	7 November 2017	10-12, 32-34	<p>This case involved the consideration of economic harm as a form of ‘significant harm’. The Tribunal found that bankruptcy proceedings and related hardship did not meet the threshold in the Act, and that bankruptcy proceedings are considered to fall within the lawful sanction exception.</p> <p>‘The applicant declares that he is of Malay ethnicity and Muslim faith and his occupation is [Occupation 1]. He speaks, reads, writes Malay and English. His wife lives in Malaysia. Before he left Malaysia he lived in Pulau Pinang. Between 1996 and February 2017 he worked as [Occupation 2] in Malaysia. According to his protection visa application, he travelled to [Country 1] [in] March 2017 for a day trip.’ (para 10).</p> <p>‘In his protection visa application the applicant states that he left Malaysia because of a financial issue. He states that his problems started when he applied for a credit card in 2002. He was unable to settle his credit card debt of [amount] and the debt increased to [around double the original amount]. In 2017 the bank advised his that he need to pay [a much larger amount]. He was shocked as he thought the bank had terminated his credit card.’ (para 11).</p> <p>‘The applicant claims that he is not able to do anything</p>

			<p>and he is not allowed to leave the country. He claims his life is upside down and he is depressed. He is [age] and he wants to be happy. He is clueless and does not know who could help him. He claims he will not be able to travel to any other country as long as he has not settled his debt. He doesn't know if the authorities could protect him. He has no intention of relocating within Malaysia.' (para 12).</p> <p>'The Tribunal has considered whether the applicant is entitled to complementary protection. Section 36(2)(aa) refers to a 'real risk' of an applicant suffering significant harm. The 'real risk' test imposes the same standard as the 'real chance' test applicable to the assessment of 'well-founded fear' in the Refugee Convention definition: <i>MIAC v SZQRB</i>. <sup>[13]</sup> The Tribunal is not satisfied that there are substantial grounds for believing as a necessary or foreseeable consequence of the applicant being removed from Australia to Malaysia that there is a real risk he will suffer significant harm. The Tribunal accepts that there is a real risk that the applicant will be subject to bankruptcy proceedings if he returns to Malaysia. However, for the reasons given above, the Tribunal does not accept that there is a real risk that the applicant will be detained/jailed and nor does the Tribunal accept that there is a real risk that the applicant will be subject to significant harm by gangsters/debt collectors. Nor, having regard to the definition of significant harm in s.36(2A) and s 5(1) of the Act, is the Tribunal satisfied</p>
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			<p>on the evidence before it that the applicant will subject to significant economic hardship amounting to significant harm if he returns to Malaysia now or in the reasonably foreseeable future for any of the reasons claimed.’ (para 32).</p> <p>‘The Tribunal does not accept on the evidence before it that any of the consequences that may flow from bankruptcy proceedings being taken against the applicant (including the blacklisting of the applicant from obtaining further loans, the declaration of him as a bankrupt, and any requirement to repay his banks loan, or restriction on his capacity to travel for the period of his bankruptcy or operate a business, any requirement to repay his bank loans, or any economic hardship resulting from the applicant being declared bankrupt) would amount to significant harm as that term defined in s.36(2A) and s 5(1) of the Act. Specifically, as discussed with the applicant, it is not claimed and the Tribunal does not accept that the applicant will be arbitrarily deprived of his life or the death penalty will be carried out on him. Nor, on the evidence before it, does the Tribunal accept that there is a real risk that he will be subjected to torture or to cruel inhuman or degrading treatment or punishment if he is subject to bankruptcy proceedings or for any other reason. Furthermore, while the applicant may face bankruptcy if he returns to Malaysia, the Tribunal considers that any bankruptcy would arise from lawful sanctions that</p>
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			<p>are not inconsistent with the ICCPR.’ (para 33).</p> <p>‘Having considered all of the applicant’s claims and having regard to its findings of fact, the Tribunal is not satisfied that there is a real risk that the applicant will be arbitrarily deprived of life, or the death penalty will be carried out on him, or he will be subjected to cruel or inhuman treatment or punishment or he will be subjected to degrading treatment or punishment if he returns to Malaysia now or in the reasonably foreseeable future. Accordingly, the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Malaysia, there is a real risk that he will suffer significant harm as defined in s.36(2A) and s 5(1) of the Act. Therefore, the Tribunal finds that he does not satisfy the criterion in s.36(2)(aa) of the Act.’ (para 34).</p>
<p><a href="#">1516186 (Refugee) [2017] AATA 2086</a> (Unsuccessful)</p>	<p>1 November 2017</p>	<p>14-15, 47-49</p>	<p>This case involved a consideration of workplace harassment and denial of opportunity to upskill and found that this did not amount to significant harm. Nor did difficulty in finding future employment in the context of the slow Fijian economy.</p> <p>‘In a statement made in his support of his application for protection visa the applicant repeats his background details including the details of his education and his religion. He outlines his political affiliation to the political party Fiji First led by Hon Bainimarama who</p>

			<p>has been elected Prime Minister. He essentially states that after coming to Australia he was amazed at the difference between his country and [Australia] and decided to seek protection from the abuse and harassment and discrimination he suffered at his workplace and elsewhere in Fiji. He mentions that he was not given the chance to [be promoted] at his work. He states that there was “gross discrimination targeted at me”. He states that the authorities of his country cannot help him as they do not have the resources to assist him as they have many important matters to deal with.’ (para 14).</p> <p>‘The applicant claims that if he is returned to Fiji he will be “significantly harmed and arbitrarily deprived of my life and subjected to inhuman treatment”. He states that he fears persecution, abuse and injustice in Fiji.’ (para 15).</p> <p>‘The Tribunal accepts that the applicant suffered some harassment, abuse, unfairness and discrimination in his country as he describes prior to leaving Fiji including because of his Indo Fijian ethnicity. It accepts that in his work place he was verbally abused, pushed sometimes by fellow workers, given [the same] work [and] was not given the chance to do his job and to [upskill]. It accepts there were arguments and abuse at times in his work place including when he refused to bring food for some of the ethnic Fijians at his workplace as they requested. The applicant has</p>
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			<p>consistently made these claims. The Tribunal also accepts that the applicant suffered some societal discrimination against him outside of his work place including because he is Indo Fijian. This is supported by the DFAT country information available to the Tribunal (cited above). In his initial application for protection visa the applicant said that the national employment centre did not call him back after he did a training course there and they were not interested in his case; the Tribunal accepts this claim is true. The applicant has made no other specific claims of harassment, abuse and/or discrimination outside of his workplace. The Tribunal finds that the applicant will face similar difficulties if he returns to his country but the Tribunal finds that these difficulties, considered both separately and cumulatively, do not amount to serious harm for the purposes of the refugee criterion nor do they amount to significant harm for the purposes of the complementary protection criterion.’ (para 47).</p> <p>‘The Tribunal also accepts that the applicant will have difficulty finding employment if he is returned to Fiji because jobs are not readily available in Fiji; this is supported by independent country information about employment and the economic situation in Fiji namely at paragraphs 2.18 to 2.23 and 2.30 to 2.32 of <i>DFAT Country Information Report, Fiji, 27 September 2017</i>. The Tribunal does not accept however that the applicant will face severe poverty in Fiji as he claims; it does not accept that he will face significant economic</p>
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			<p>hardship so that his capacity to subsist will be threatened or that he will be denied the capacity to earn a livelihood of any kind. The Tribunal finds that the applicant's difficulty finding work in Fiji does not amount to serious harm for the purpose of the refugee criterion. The Tribunal also does not consider that the applicant's difficulty finding employment amounts to significant harm for the purposes of the complementary protection criterion. The applicant said that he himself worked [with his] family's [business] in [Town 1] before he came to Australia as well as working at [Workplace 1]. While he mentioned before the delegate that his uncle might take back his share of the [business] he told the Tribunal that his family with whom he had always lived in [Town 1] was still living on the [family's] [property], that his father was [in a certain role] and that his [sibling] was living there with his family and [works in a certain role]. The Tribunal finds that if the applicant is returned to Fiji he can return to live with his family who are still living and working there and he will have access to work [in] his family's [business] as he did before he left Fiji.' (para 48).</p> <p>'For the reasons given above the Tribunal does not accept the applicant's general claims that that he will be ill treated and suffer physical abuse in Fiji and that if he is returned to Fiji he will be significantly harmed and arbitrarily deprived of his life and subjected to inhuman</p>
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			treatment.’ (para 49).
<a href="#">1508305 (Refugee) [2017] AATA 2387</a> (Successful)	27 October 2017	43-45, 48, 52-53	<p>In this case the Tribunal considered that forced prostitution and family violence amounted to significant harm and that, in the applicant’s particular circumstances, there was no state protection available to her.</p> <p>‘Based on her evidence, the Tribunal is satisfied and finds that [Ms A] has a genuine fear of being persecuted if she returns to Thailand with the harm feared being domestic violence at the hands of her brother and forced prostitution by her brother.’ (para 43).</p> <p>‘The Tribunal is satisfied that [Ms A]’s brother has previously imposed similar harm upon [Ms A] in the past, as is supported by the circumstances of [Ms A]’s and [Mr B]’s meeting. The Tribunal is further satisfied that without continued financial support from [Mr B] to a necessary level, there is a real chance and real risk that if [Ms A] returns to The Tribunal in the reasonably foreseeable future, her brother will again force her to work in a brothel. The Tribunal is also satisfied that [Mr B]’s finances are such that if [Ms A] were to return to Thailand with [Master E], [Mr B] will not have sufficient finances to gift to [Ms A]’s brother. Further, the Tribunal is satisfied that it is not practical for [Master E] to remain in Australia without [Ms A] given [Mr B]’s medical issues and his inability to care for</p>

			<p>[Master E] by himself.’ (para 44).</p> <p>‘However, the Tribunal is not satisfied that if [Ms A] returns to Thailand she will suffer serious harm for a Convention reason. Rather, the Tribunal considers that the harm feared is because her brother is an abusive and controlling person and is directed at her personally.’ (para 45)</p> <p>‘The Tribunal has already found that it is satisfied that if [Ms A] returns to Thailand, without adequate money being provided to her brother (which the Tribunal has found will not be able to occur given [Mr B]’s circumstances), there is a real risk that she will again be forced to work in a brothel by her brother. The Tribunal is satisfied that this would amount to cruel or inhuman treatment or punishment and it would be intentionally inflicted and, therefore, falls within the definition of ‘significant harm’ as set out in <a href="#">s.36(2A)</a>. The Tribunal is also satisfied that this real risk is faced by [Ms A] personally and not by the population of Thailand generally.’ (para 48).</p> <p>‘The Tribunal also considered whether [Ms A] would be able to avail herself of protection from the authorities in Thailand to avoid the harm she fears. The Tribunal is satisfied, including based upon information from external sources<sup>[1]</sup>, that [Ms A]’s circumstances of being forced into prostitution by her family, meeting her Westerner husband and an expectation of “sharing</p>
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			<p>their wealth” is consistent with what is not an uncommon scenario for rural women from the northern area of Thailand. Independent country information includes that whilst women have the same legal rights as men in Thailand, they remain vulnerable to domestic abuse, rape and sex trafficking.<sup>[2]</sup> Further, although domestic violence is recognised as an offence in Thailand, domestic violence is frequently considered to be a private affair<sup>[3]</sup> and police are often reluctant to pursue reports of domestic violence<sup>[4]</sup>. Given [Ms A]’s particular circumstances, the Tribunal is satisfied that state protection would be unavailable to her and that the police would not interfere in a family situation of the nature she fears. The Tribunal therefore is not satisfied that [Ms A] can obtain protection by an authority of Thailand from her brother who has acted on his threats previously forcing [Ms A] to work in a [Location 1] brothel.’ (para 52).</p> <p>‘Accordingly, having considered all of the evidence, the Tribunal is satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of [Ms A] being removed from Australia to Thailand given her now current circumstances, that there is a real risk that she will suffer significant harm.’ (para 53).</p>
<a href="#">1509999 (Refugee) [2017] AATA 2139</a> (Unsuccessful)	17 October 2017	33, 55-60, 63-64	This case concerned psychological harm where the applicant was a child. The Tribunal found that the level of significant harm was not met; it did not appear to

			<p>consider whether the level of harm was different in the case of a child.</p> <p>‘Submissions made include as follows:</p> <p>(a) [Master A]’s biological mother is unable to be located and/or lacks the capacity to care for him, which places [Master A] in the category of Unaccompanied and Separated Children. Country information suggests that Unaccompanied and Separated Children (UASC) in Thailand may be at risk of harm.</p> <p>(b) The UN Committee on the Rights of the Child (the Committee) defines unaccompanied children (also called unaccompanied minors) as “<i>children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so</i>”.</p> <p>(c) [Master A] has been outside his country of habitual residence for the past five years and consequently the existing family and community connections that may have once provided ancillary care or support would be highly likely to be unavailable to him.</p> <p>(d) Given this context it is highly likely that [Master A] will need to be placed in Alternative care...’ (para 33).</p> <p>‘Having found that [Master A] would not be an Unaccompanied and Separated Child, or an</p>
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			<p>Unaccompanied and Separated Children or Unaccompanied Child not in the Care of Parents Subject to Institutionalisation, if he returned to Thailand, the Tribunal considered whether the other harm feared by [Master A] upon return to Thailand is significant harm.’ (para 55).</p> <p>‘Firstly, as already noted as regards [Master A]’s initial claim of fearing family violence at the hands of his father, the Tribunal is satisfied that there are no grounds for believing that, as a necessary and foreseeable consequence of [Master A] being removed from Australia to Thailand, that there is a real risk that he will suffer significant harm on this basis. It is not in dispute that [Master A]’s father passed away in [2016] and that no claim in this regard any longer exists. The Tribunal finds accordingly.’ (para 56).</p> <p>‘It is also submitted that [Master A] will suffer harm because he will find it difficult to assimilate back into the Thai community and/or a Thai school and might also be bullied or teased because he does not speak Thai.’ (para 57).</p> <p>‘The Tribunal accepts that [Master A] may experience teasing or some level of bullying if he returned to Thailand, either in the community or at school, and might find it difficult to assimilate and relearn the Thai language. The Tribunal accepts that this would be an</p>
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			<p>uncomfortable and undesirable experience.’ (para 58).</p> <p>‘The Tribunal has also considered [Master A]’s claim, that a [age] year old, having lived in Australia for nearly four years, he is used to life in Australia and it will be difficult for him to assimilate back in to Thailand. The Tribunal accepts that [Master A] is settled into his life in Australia and that living in Thailand would cause disruption for him. However, as already discussed, the Tribunal is satisfied that he would have the support of [Mr B], [Ms C] and [Mr D], in relation to any return to Thailand. The first [number] years of his life were in Thailand, and his sister [Ms G] is also in Thailand. Whilst it might at first be difficult to reassimilate, or relearn the Thai language, the Tribunal considers that he will be in a position to change, if necessary, albeit not desirably.’ (para 59).</p> <p>‘Having regard to the definition of significant harm in <a href="#">ss.5</a> and <a href="#">36(2A)</a> of the Act, the Tribunal does not accept that any of the above matters give rise to significant harm as defined in <a href="#">s.36(2A)</a>. These matters do not involve the arbitrary deprivation of life, the carrying out of the death penalty, torture, cruel or inhuman treatment or punishment or degrading treatment or punishment as defined in <a href="#">s.5(1)</a> of the Act. Further,. These matters do not constitute severe pain or suffering, whether physical or mental, or pain or suffering, whether physical or mental, that in all the circumstances could reasonably be regarded as cruel or</p>
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			<p>inhuman in nature. Nor do they involve extreme humiliation which is unreasonable.’ (para 60).</p> <p>‘The Tribunal accepts that being removed from Australia to Thailand, and attending boarding school or otherwise, may detrimentally impact [Master A]’s academic achievements but does not accept that that amounts to significant harm. It does not involve the arbitrary deprivation of life, the carrying out of the death penalty, torture, cruel or inhuman treatment or punishment or degrading treatment or punishment as defined in <a href="#">s.5(1)</a> of the Act. It would not constitute severe pain or suffering, whether physical or mental, or pain or suffering, whether physical or mental, that in all the circumstances could reasonably be regarded as cruel or inhuman in nature. Nor would it involve extreme humiliation which is unreasonable.’ (para 63).</p> <p>‘Having had regard to all of these matters, the Tribunal is not satisfied that the harm claimed by [Master A] amounts to significant harm as defined by <a href="#">s.36(2A)</a>, and finds accordingly.’ (para 64).</p>
<a href="#">1512002 (Refugee) [2017] AATA 1823</a> (Unsuccessful)	9 October 2017	2, 60, 69-71, 79-82	<p>This case involved a Palestinian gay man and the issue of discretion in the complementary protection context. The Tribunal sets out the case-law on this issue and states that it remains a ‘live issue’ whether the principle in the refugee law context, that a person should not be expected to modify certain kinds of conduct to avoid persecutory harm, extends to complementary protection</p>

			<p>assessments.</p> <p>‘Regarding the applicant’s country of reference, the delegate referred to <i>Tjhe Kwet Koe v MIEA</i><sup>[1]</sup> in which it was determined that the wording, ‘country of his former habitual residence’ as constructed in the Refugee Convention does not have to be a state. The delegate summarised the court’s decision as being that a territory may constitute a ‘country’ if it has a distinct area with identifiable borders, enjoys a degree of autonomy in relation to its administration and is considered a country as a matter of every day usage. Based upon this the delegate determined that the Palestinian Territories is the applicant’s country of reference for the purpose of assessing his claims under the Refugees Convention and that it is the applicant’s receiving country as defined in <a href="#">section 5</a> of the <a href="#">Migration Act</a> for the purpose of assessing the complementary protection criteria. I have reviewed the same material and concur with the delegate’s ultimate finding that the applicant has no nationality and therefore is stateless. As such I have considered the applicant’s country of former habitual residence, a term considered in <i>Tjhe Kwet Koe v MIEA</i> and found by Tamerlin J to not be restricted to independent sovereign states. As such I consider the Palestinian Territories as the applicant’s country of former habitual residence for the purpose of the Refugee Convention and receiving country for the purpose of complementary protection.’</p>
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			<p>(para 2).</p> <p>‘The applicant fears being identified as gay because they are harmed by religious fanatics and any action against them is met with silence by the authorities. He claims that there are no protections for gay people.’ (para 60).</p> <p>‘There remains a live question as to whether the principle discussed in the Refugees Convention context in <i>Appellant S395/2002 v MIMA</i>, namely, that a person should not be expected to modify certain kinds of conduct to avoid persecutory harm, extends to the assessment of complementary protection. In <i>SZSWB v MIBP</i>, the Federal Circuit Court held that the Tribunal was required to consider whether the applicant’s modified conduct was influenced by the threat of harm he faced, which was inconsistent with the International Covenant on Civil and Political Rights, before finding that he did not face a real risk of significant harm.<sup>[18]</sup> This was on the basis that there is no reason why the principle in <i>S395</i> should not apply to the Conventions which support the complementary protection provisions of the Act in the same way as it applies in the Refugees Convention context.<sup>[19]</sup> This reasoning was subsequently adopted in <i>MZAIIV v MIBP</i>.<sup>[20]</sup> However both of these judgments were overturned on appeal on different reasons without further consideration of this issue. Most recently in <i>BBS16 v MIBP</i> the judge found that the decision-</p>
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			<p>maker erred in failing to consider whether there was a relevant denial of rights under the ICCPR, and whether the applicant’s non-exercise of those rights was a consequence of the denial and the risk of harm resulting from an attempted exercise of them.<sup>[21]</sup> At the time of this decision <i>BBS16</i> was being appealed.’ (para 69).</p> <p>‘The representative argued by way of a post-hearing submission that Article 26 of the ICCPR sets out the grounds of discrimination as including race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. It was put to the Tribunal that ‘other status’ includes sexual orientation based upon the interpretation of the United Nations Human Rights Committee. I accept that sexual orientation can be a ground of discrimination in the ICCPR based upon the evidence compiled by the Australian Human Rights Commission.’ (para 70).</p> <p>‘In proceeding I will first consider whether the applicant faces a real risk of significant harm. If I find that he does I will then turn my mind to consider whether the ‘applicant’s non-exercise of those rights was a consequence of the denial and the risk of harm resulting from an attempted exercise of them’, an approach outlined by Driver J in <i>BBS16</i>.’ (para 71).</p> <p>‘The applicant claims that he is cautious of expressing his homosexuality because he is fearful that he will be identified and his family and others informed. This was</p>
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			<p>reinforced in his preference firstly for a female interpreter and secondly by his request for his name to be withheld from the phone interpreter. While I accept that the applicant's behaviour is influenced by fear of harm I also note that he has repeatedly been advised that he has nothing to fear in Australia. When I put to him DFAT information his response was dismissive of its accuracy and persisted to believe that all gay people were killed and none lived in Palestine. This divergence suggests a fear that may not be an objective fear of the actual circumstances in the Palestinian Territories but a subjective fear driven by other issues. I acknowledge that the applicant does not feel completely safe to pursue his sexuality while in Australia for the reason that he fears that he may be required to return and knowledge may spread of his sexual activities from Australia to Palestinian Territories. I place little weight on this argument as I find the opportunity to pursue a discrete lifestyle in Australia would lead to a negligible risk of people who know of him in the Palestinian Territories learning of his sexual activities yet he chose not to. The applicant did not enunciate but it could be a possibility that after the applicant had a homosexual relationship and acquired [Illness 1] he is afraid to engage in such behaviour again for fear of obtaining other diseases or spreading his own. Even given this to be the case the applicant's actions in Australia remain representative of those he would adopt were he to return as the psychological mindset would remain unchanged. I find that the applicant's three years in Australia to be</p>
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			<p>sufficiently expansive to allow someone to overcome their fear, change their behaviour and pursue a new lifestyle. For this reason I find that his behaviour in Australia is indicative to how he would live his life in the Palestinian Territories.’ (para 79).</p> <p>‘The applicant has lived in Australia for over three years. He has not found a partner, does not attend gay social venues, is not engaged with the gay community and has not told any friends that he is gay. That he hasn’t done any of these after three years in Australia leads me to conclude that free from fear he is a private person. I find that the applicant would continue to live his life in this manner in the Palestinian Territories into the reasonably foreseeable future were he to return and that his behaviour is not a consequence of the denial and the risk of harm resulting from an attempted exercise of his rights under the ICCPR.’ (para 80).</p> <p>‘Having determined that he has chosen to live a private homosexual lifestyle I apply this to the contextual country information of the circumstances for gay Palestinians alongside the applicant’s own personal experience and find that the applicant faces a remote risk of significant harm by state or non-state actors as a necessary and foreseeable consequence of removal from Australia to the Palestinian Territories. In making this finding I implicitly find that the applicant as a large and well-built young adult who has the capacity to live an independent life would not be assaulted by his father as</p>
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			<p>he had been in the past when he was a minor.’ (para 81).</p> <p>‘I have also considered whether the Israeli authorities would identify him as a homosexual and be able to leverage this in such a way so as to use him as a spy. While there are reports of this occurring there is limited information as to the extent. Based upon the applicant’s private lifestyle I find that the applicant will not be identified as homosexual by Israeli authorities. For this reason I find that the applicant does not face a real risk of significant harm for the reason of being blackmailed into acting as an Israeli spy.’ (para 82).</p>
<p><a href="#">QGMJ and Minister for Immigration and Border Protection (Migration) [2017] AATA 1537</a> (Unsuccessful)</p>	<p>22 September 2017</p>	<p>92-95, 101,</p>	<p>In this case the Tribunal refused to revoke the mandatory cancellation of the visa of a Kenyan national. In doing so, the Tribunal set out the current approach to non-refoulement obligations in cancellation cases following <i>BCR16 v Minister for Immigration and Border Protection</i> [2017] FCAFC 96 and considered that the applicant’s risk of harm following lack of treatment for his mental health condition was relevant harm.</p> <p>‘QGMJ has not previously had a visa refused or cancelled under <a href="#">section 501</a>, <a href="#">501A</a> or <a href="#">501B</a> of the <a href="#">Migration Act</a>. Nor is he subject to a <a href="#">section 48A</a> bar as he has never had a Protection visa refused or cancelled. He is accordingly entitled to apply for a</p>

			<p>Protection visa.’ (para 92).</p> <p>‘Until recently, the Tribunal would have found that, because of his ability to apply for a Protection visa, the Tribunal was not <i>required</i> to assess any non-refoulement obligations owed to QGMJ. It was generally accepted that because Direction 65 specifically states that it is not necessary to determine a non-refoulement issue in circumstances where an applicant can apply for a Protection visa, the Tribunal would normally rely on any non-refoulement assessment being made by another body specifically charged with determining the validity of a Protection visa claim.’ (para 93).</p> <p>‘That position is now disputed, however, because of the recent decision of the Federal Court in <i>BCR16 v Minister for Immigration and Border Protection</i> [2017] FCAFC 96 (“BCR16”). Following BCR16 (now on appeal to the High Court) the Tribunal is required to assess <i>any type of harm</i> that might arise should QGMJ be deported to Kenya. This is so regardless of whether an applicant specifically frames his risk of harm as a non-refoulement issue.’ (para 94).</p> <p>‘Here, QGMJ makes three claims in relation to the harms he believes he will face if he is returned to Kenya:</p> <ol style="list-style-type: none"> <li>1. QGMJ claims that he converted from</li> </ol>
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			<p>Christianity to Islam. As a result, he claims, he fears for his life if he is required to return to Kenya. In evidence before the Tribunal, QGMJ noted that he feared harm from his uncles who live in the Mombasa area (a primarily Muslim part of Kenya). It is implicit in this argument that QGMJ identifies as a member of a “particular social group” in need to protection (ie, a Muslim male who has converted to Christianity);</p> <ol style="list-style-type: none"> <li>2. QGMJ believes that, as a man who suffers from a serious mental health condition (paranoid schizophrenia), he will face systemic disability discrimination;</li> <li>3. QGMJ believes that he will not receive appropriate medical treatment in Kenya and will, accordingly, face significant harm because of the nature of his mental illness when left untreated.’ (para 95).</li> </ol> <p>‘Overall, QGMJ’s evidence struck the Tribunal as effusive and lacking in credibility. On this basis, the Tribunal does not find that QGMJ will face harm in Kenya on the basis of his alleged conversion to Christianity.’ (para 101).</p>
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			<p>‘In the circumstances, the Tribunal finds that that QGMJ risks facing harm if returned to Kenya because of his mental health condition. It is not disputed that QGMJ is a diagnosed paranoid schizophrenic whose health deteriorates rapidly without counseling and medication. On the evidence, neither will be readily available to him if he is deported to Kenya. This, in turn, places him at risk of harm – arguably even death given the consequences that flow from this mental disability if left untreated.’ (para 104).</p> <p>‘This finding weighs in favour of revoking the decision to cancel QGMJ’s visa. The question the Tribunal needs to ask, however, is whether this finding in relation to what is an “other” or secondary consideration outweighs the Tribunal’s findings in relation to the primary considerations detailed above. The Tribunal finds that it does not do so. The Tribunal has considerable sympathy for QGMJ and is quite concerned about his psychological safety should he return to Kenya – a country where, as noted above, the state of mental health care is described as “catastrophic”. The Tribunal needs to weigh these concerns, however, with the very strong concerns outlined above in relation to the seriousness of QGMJ’s crimes, the risk of further offending, what this would mean for his family and the Australian community and the safety concerns outlined in relation to his two minor children.’ (para 105).</p>
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			<p>‘Noting that the primary considerations in Direction No 65 are normally given greater weight than the other considerations and in light of the evidence before it, the Tribunal finds that the primary considerations here clearly outweigh this secondary consideration.’ (para 106).</p> <p>‘There are considerations that weigh in favour of revocation of the decision to cancel QGMJ’s visa. These include concerns in relation to Australia’s non-refoulement obligations. The Tribunal finds that that QGMJ will face harm if returned to Kenya because of his mental health condition. It is not disputed that he is a diagnosed schizophrenic whose health deteriorates rapidly without counseling and medication. On the evidence, neither will be readily available to him if he is deported to Kenya. This, in turn, places him at risk of physical harm.’ (para 130).</p> <p>‘Overall, the Tribunal finds that having regard to all of the primary considerations and other relevant considerations required to be taken into account by the Tribunal under Direction No. 65 the correct and preferable decision is to refuse to revoke the cancellation of QGMJ’s visa.’ (para 133).</p>
<a href="#">1517812 (Refugee) [2017] AATA 1530</a> (Unsuccessful)	5 September 2017	8-9, 20, 46-47	This case concerned a Fijian woman whose complementary protection claims related to economic and political circumstances and a natural disaster. The Tribunal applied s 36(2B)(c) in rejecting the claims.

			<p>‘The applicant is a [age] year old woman from [City 1] Fiji. She is an ethnic Fijian (‘South Pacific Islander’), speaks Fijian and English, and gives her religion as Pentecostal Christian.’ (para 8).</p> <p>‘The applicant has lived in various addresses in [City 1], prior to her most recent trip to Australia. In about 2004, she and her husband bought a duplex in [a town], just outside [City 1]. It was severely damaged during Tropical Cyclone Winston in early 2016, and her husband is trying to complete repairs.’ (para 9).</p> <p>‘In the present case, the applicant has indicated her overriding concerns about her family’s economic welfare in Fiji, particularly in the wake of Tropical Cyclone Winston and her husband’s unemployment. However, this does not necessarily rule out her need for Australia’s protection, so the Tribunal proceeds to assess this below.’ (para 20).</p> <p>‘The applicant’s evident concerns about her and her family’s welfare in Fiji relate in part to the country’s economy, the political environment and the impact that Tropical Storm Winston had in the local area. Under <a href="#">s.36(2B)(c)</a> of the Act, there is taken not to be a real risk that an applicant will suffer significant harm if the Tribunal is satisfied that the real risk is one faced by the population generally and is not faced by the applicant personally. The Tribunal is satisfied that these</p>
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			<p>general conditions affect all Fijians, and not the applicant personally. Accordingly, the Tribunal finds that there is no real risk that the applicant will suffer significant harm in Fiji as a result of general political or economic conditions, or the impact of natural disasters.’ (para 46)</p> <p>‘Accordingly the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Fiji, there is a real risk that she will suffer significant harm: <a href="#">s.36(2)(aa)</a>.’ (para 47).</p>
<p><a href="#">1705774 (Refugee) [2017] AATA 1443</a> (Unsuccessful)</p>	<p>25 August 2017</p>	<p>22-23, 51, 54,</p>	<p>This case concerned a Malaysian national who feared gang violence. The Tribunal gave some content to the definition of state protection in s 36(2B)(b) of the Act.</p> <p>‘According to the applicant, he had experienced while in Malaysia serious “...family problems”. He had a number of “disputes” with his family and in particular with his now former wife. This whole upset to the applicant’s life commenced with his wife having a relationship with a “...third party...” (description was provided by the applicant). The Tribunal was told that the “third party” was having a ‘long affair’ with the applicant’s wife.’ (para 22).</p> <p>‘This ‘third party’ the Tribunal was told was a “...gangster” and hence, the applicant had “...nowhere to</p>

			<p>go but to come to Australia” to be safe.’ (para 23).</p> <p>‘In relation to the overall effectiveness of the authorities in Malaysia, as noted earlier, the Tribunal has relied on the <i>country information</i> showing that Malaysia’s protection system consists of an appropriate criminal law, a reasonably effective police force and an impartial judicial system and measures have been put in place to address corruption. Police and indeed, the government, have been making a concerted effort since at least 2013 to combat organised gangs and crime syndicates and there is no evidence that the police would refuse the applicant any assistance, if he were to request it. The country information and media reports indicate the government has taken this issue seriously and has committed extensive resources to do so. This in the Tribunal’s view demonstrates that effective protection measures are available, namely that protection against serious or significant harm could be provided to the applicant by the Malaysian State, that protection is durable and the Malaysian State is willing and able to offer such protection.’ (para 51).</p> <p>‘Overall the Tribunal is satisfied that if in the future, the <i>gang members</i> threaten or attempt to harm the applicant, there are mechanisms in the Malaysian legal system, including a reasonably effective State police force (that country information demonstrates is active and committed to taking action in relation to the claimed fear) that means the applicant could obtain</p>
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			<p>protection sufficient to reduce the likelihood of harm to something less than a real risk in accordance with <a href="#">s.36(2B)(b)</a>. Therefore, the Tribunal finds that there are no substantial reasons for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Malaysia, there is a real risk he will suffer significant harm. The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under <a href="#">s.36(2)(aa)</a> of the Act.’ (para 54).</p>
<p><a href="#">Bui and Minister for Immigration and Border Protection (Migration)</a> [2017] AATA 1330 (Unsuccessful)</p>	<p>23 August 2017</p>	<p>1, 3, 8, 67-70, 89-90</p>	<p>The Tribunal revoked the mandatory cancellation of Mr Bui’s visa. Non-refoulement obligations were considered though the case was not successful on those grounds.</p> <p>‘Mr Bui is a citizen of Vietnam. He was granted a Class CA Subclass 143 Contributory Parent (Migrant) visa on 30 April 2012. On 20 July 2016 a delegate of the Minister for Immigration and Border Protection (the Minister) informed Mr Bui that his visa had been cancelled under <a href="#">s. 501(3A)</a> of the <a href="#">Migration Act 1958</a> (the <a href="#">Migration Act</a>).’ (para 1).</p> <p>‘On 12 November 2015 Mr Bui was sentenced to a term of imprisonment for a period of two and a half years, with a minimum term of 15 months. He did not pass the character test.’ (para 3).</p> <p>‘On 15 May 2015 Mr Bui was charged with two</p>

			<p>indictable offences: cultivating a narcotic plant, namely Cannabis L. in a quantity that was not less than a Commercial Quantity applicable to that narcotic plant; and possessing a drug of dependence namely Cannabis L.’ (para 8).</p> <p>‘Given the nature of the submissions which were made on behalf Mr Bui regarding this topic, it seems I should refer to how it is described in the Ministerial Direction. Paragraph 14.1 states:</p> <p><i>(1) A non-refoulement obligation is an obligation not to forcibly return, deport or expel a person to a place where they will be at risk of a specific type of harm. Australia has non-refoulement obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol (together called the Refugees Convention); the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (the CAT); and the International Covenant on Civil and Political Rights and its Second Optional Protocol (the ICCPR). The Act reflects Australia’s interpretation of those obligations and, where relevant, decision-makers should follow the tests enunciated in the Act.’ (para 67).</i></p> <p>‘According to Mr Melasecca, Mr Bui has said that if he were to return to Vietnam, given Vietnamese culture and being the head of the family, he will have lost face with his social group and can expect discrimination and</p>
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			<p>ridicule upon return to Vietnam. He is to be treated as if he has disgraced his family. His younger daughter's evidence was that people in the village would make life difficult for her parents on return to Vietnam and they would be subjected to ridicule, harassment and discrimination.' (para 68).</p> <p>'With respect to Mr Bui, the loss of face, discrimination and ridicule which he may be subjected to on his return to Vietnam does not fall within any of the conventions or protocols referred to above. On return to Vietnam he would not be subjected to torture or other cruel or inhumane treatment.' (para 69).</p> <p>'Furthermore, Mr Bui has not sought a protection visa. If he had non-refoulement concerns about returning to Vietnam, there is nothing to prevent him from making a valid application for such a visa if the mandatory cancellation decision is not revoked.' (para 70).</p> <p>'While I accept that Mr Bui's offending must be regarded as serious, I have found that the primary considerations weigh in favour of revocation of the Minister's decision to cancel Mr Bui's visa. The risk of Mr Bui reoffending is low. That is particularly so given his current age and expressed remorse, embarrassment and loss of face associated with his conviction. The best interests of his grandchildren, who are minors, would be met if Mr Bui were to remain in Australia. In the circumstances of Mr Bui's offending, I find that the</p>
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			<p>Australian community would be prepared to give Mr Bui a second chance.’ (para 89).</p> <p>‘Mr Bui’s strong ties to his family in Australia also support my finding that the Minister’s decision to cancel Mr Bui’s visa should be revoked. Those strong ties also go to supporting my finding regarding Mr Bui’s risk of recidivism.’ (para 90).</p>
<p><a href="#">1502530 (Refugee) [2017] AATA 1832</a> (Unsuccessful)</p>	23 August 2017	16-17, 52-53, 55-56	<p>This case concerned Sri Lankan nationals and the meaning of ‘extreme humiliation’ in section 5 of the Act.</p> <p>‘The applicant who was born in [year] in [City 1], Sri Lanka, is now [age] years old, Sinhalese and claims to have a real risk of significant harm from community discrimination and violence, and violence perpetrated by the military and police, on return to Sri Lanka because she is a single Sinhalese woman without male protection, and a convert from Buddhism to Islam.’ (para 16).</p> <p>‘The applicant’s son, who is [age] years old, makes no claims to have a real risk of significant harm on return to Sri Lanka. However, the applicant noted that he has been in Australia many years, speaks English and little Sinhalese or Tamil, and commented that adjustment to life in Sri Lanka would be difficult for him.’ (para 17).</p> <p>‘The Tribunal has considered the applicant’s claim at</p>

			<p>hearing that her major fear on return to Sri Lanka is living as a single woman. It was submitted that the applicant has a real risk of being subject to societal discrimination, harassment and violence, and that this risk is heightened because she will be identified as a convert to Islam. On the accepted circumstances above, the Tribunal accepts the applicant will live as a single woman separated from her husband with her [son] in Sri Lanka. The Tribunal also accepts the applicant is a convert to Islam and that there is a possibility that she will be identifiable in the community as a Muslim convert because she speaks Sinhalese but has a Muslim name and, as disced below, may be attired in dress typically associated with Muslims in Sri Lanka.’ (para 52).</p> <p>‘The applicant told the Tribunal that most people in Sri Lanka, even men, do not live single lives, and she believes that the community will regard her as strange and will not accept her when she is known to be a single parent living with her son. At hearing, the applicant could not provide any suggestions about how the claimed lack of acceptance may manifest itself, but her representative submitted she faces a real risk of discrimination and ostracism as a single woman, heightened because she is a convert to Islam, that amounts to degrading treatment as exhaustively defined in <a href="#">s.5(1)</a> of the Act.’ (para 53).</p> <p>‘In considering the applicant’s circumstances as a single</p>
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			<p>woman/ Sinhalese convert to Islam, the Tribunal has also taken into account country information above, discussed with the applicant, that Colombo is a populous, culturally and linguistically diverse, highly integrated multi-ethnic city of commercial and economic opportunity and mobility. On the country information before it, the Tribunal accepts that the applicant may not be accepted by some people in the community in Sri Lanka, may be viewed as an oddity and with suspicion, and may experience societal discrimination and ostracism by some members of the community as a single woman/Sinhalese convert to Islam. The Tribunal accepts that this may be uncomfortable and emotionally difficult for her to manage. However, on the basis of the country information before it and the applicant’s accepted circumstances, the Tribunal, does not accept that the discrimination and ostracism the applicant fears will be more than a moderate level.’ (para 55).</p> <p>‘The Tribunal has had regard to the definition of significant harm under <a href="#">s.36(2A)</a>, with particular consideration of <a href="#">s.36(2A)(e)</a>, that the non-citizen ‘will be subjected to degrading treatment or punishment’, and the definition of degrading treatment or punishment’ as exhaustively defined in <a href="#">s.5(1)</a> of the Act as an act or omission that causes, and is intended to cause, “extreme humiliation which is unreasonable.’ The Tribunal finds that while the applicant may experience at most a moderate level societal discrimination, including lack of</p>
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			acceptance, distrust and ostracism by some, this treatment does not rise to the level of degrading treatment or punishment as defined. The Tribunal does not accept the applicant has a real risk of significant harm on this basis.’ (para 56).
<a href="#">KRJF and Minister for Immigration and Border Protection (Migration) [2017] AATA 1223</a> (Unsuccessful)	4 August 2017	1, 11-12, 64-76, 92	<p>This is a visa refusal decision which incorporates the Federal Court’s recent decision in <i>BCR16 v Minister for Immigration and Border Protection</i> [2017] FCAFC 96 (see the Kaldor Centre’s table of Federal Court cases). In <i>BCR16</i>, the Full Federal Court (Bromberg and Mortimer JJ) held that non-refoulement obligations should be considered at the time of a revocation decision under s 501CA(4) because it was not certain that they would be considered in a protection visa application due to the fact that other considerations (such as the Public Interest Criteria) could be considered first and result in a refusal without a full consideration of claims. In this case, the Tribunal undertakes the assessment of non-refoulement obligations, though is not satisfied the applicant had provided sufficient evidence.</p> <p>‘KRJF, the applicant, is seeking the revocation of the mandatory cancellation of a Class WA Subclass 010 (Bridging A) visa (the <b>visa</b>). The visa was cancelled on 5 October 2016 pursuant to <a href="#">s 501(3A)</a> of the <a href="#">Migration Act 1958</a> (Cth) (<b>the Act</b>) as a consequence of the applicant’s conviction and sentence of imprisonment for</p>

			<p>six years.’ (para 1).</p> <p>‘The Tribunal infers that decision-makers found that the applicant was a refugee when he was granted the two TPVs in 2002 and 2006. He was born in Kurdistan in northern Iraq. The applicant claims that he will be killed by the family of his deceased fiancée (<b>the family</b>) who murdered her after the applicant and his fiancée “eloped” to Iran. They returned when reassured by the family that they could marry. He claimed that his parents, four sisters and two brothers had also fled Iraq because of that circumstance and now live in four different European countries. Further, he claimed that the authorities would not protect him.’ (para 64).</p> <p>‘During the hearing, the applicant said that that “all” of the family would kill him – her brother, her dad – he does not know who. He said that all the family lived in the one city in Kurdistan. When asked if he could relocate in Iraq, the applicant said that he cannot even go to Europe because it is too close to Iraq. He said that you never know these days who is going to tell who. It is easy for “them” to drive a couple of hours to find out where you are and kill you. He was going to go to Europe but his mother said to send him far away where people will not know where he is. There are too many refugees in Europe. They can find him there.’ (para 65).</p> <p>‘The applicant accepted that “technically” he may apply for a protection visa. That is, because neither of his</p>
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			<p>TPVs was cancelled. They both ceased.’ (para 66).</p> <p>‘In such a case it would appear that paragraph 14.1(4) would apply, that is, “it is unnecessary to determine whether non-refoulement obligations are owed to the non-citizen for the purpose of determining whether the cancellation of their visa should be revoked”.’ (para 67).</p> <p>‘The respondent provided comprehensive submissions on this issue addressing the recent Full Federal Court decision in <i>BCR16 v Minister for Immigration and Border Protection</i> [2017] FCAFC 96 (<i>BCR16</i>). On 11 July 2017, the respondent filed a special leave application in the High Court challenging that decision. The respondent submitted that for the present, <i>BCR16</i> must be followed and the Tribunal must consider the applicant’s claim summarised above.’ (para 68).</p> <p>‘The decision considered in <i>BCR16</i> was made by the Assistant Minister and Direction 65 did not apply. The majority of the court held that the Assistant Minister had erred in finding that it was unnecessary to determine whether non-refoulement obligations were owed to the appellant because he was not prevented from applying for a protection visa. The majority of the court held that the Assistant Minister had failed to carry out the task required by <a href="#">s 501CA(4)</a> of the Act in relation to the reasons for revocation that was included</p>
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		<p>in the applicant’s representations submitted pursuant to <a href="#">s 501CA(3)(b)</a> of the Act.’ (para 69).</p> <p>‘The Tribunal will not rely on paragraph 14.1(4) of Direction 65, and will consider Australia’s international non-refoulement obligations in respect of the applicant. The Tribunal accepts that the level of analysis required in assessing Australia’s non-refoulement obligations is less than would be required in assessing a claim for a protection visa.<sup>[1]</sup>’ (para 70).</p> <p>‘There is no corroborative or probative evidence before the Tribunal to support the applicant’s claims for protection, including where the members of the family are currently or whether they are alive. The Tribunal takes into account that two decision-makers have previously been satisfied that the applicant was a refugee and since those decisions, the Act has been extended in scope to include the complementary protection criterion (<a href="#">s 36(2)(aa)</a>). Those decisions are not before the Tribunal. It does not know what claims were made or the reasons for those decisions. In any event, this Tribunal is not bound by the earlier decisions and must consider the claims itself. More than 10 years have elapsed since the second of those decisions was made and it is more than 15 years since the applicant left Iraq. Further, the Tribunal found the applicant’s evidence unreliable.’ (para 71).</p> <p>‘The Tribunal finds that the applicant has provided no</p>
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			<p>probative evidence that there is a real chance that he will suffer serious harm or that there is a real risk that he will suffer significant harm, from the family if he returns to Iraq. It is unnecessary to consider those claims further.’ (para 72).</p> <p>‘The applicant also said that he could not return to Iraq because it is a war zone between Islamic State and the Kurds, and he will be killed. He said that he had lived in Sulaymaniyah in Kurdistan. There was no evidence before the Tribunal about conditions in Sulaymaniyah.’ (para 73).</p> <p>‘The mere fact that a person claims fear of persecution for a particular reason does not establish either the genuineness of the asserted fear or that it is ‘well-founded’ or that it is for the reason claimed. Similarly, that an applicant claims to face a real risk of significant harm does not establish that such a risk exists, or that the harm feared amounts to ‘significant harm’. It remains for the applicant to satisfy the Tribunal that all of the statutory elements are made out. A decision-maker is not required to make the applicant's case for him or her. It is the responsibility of the applicant to specify all particulars of the claim to be a person in respect of whom Australia has protection obligations and to provide sufficient evidence to establish the claim. The Tribunal does not have any responsibility or obligation to specify, or assist in specifying any particulars of the claim, or to establish or assist in</p>
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			<p>establishing the claim: <a href="#">s.5AAA</a>. Nor is the Tribunal required to accept uncritically any and all the allegations made by an applicant. (<i>MIEA v Guo</i> (1997) <a href="#">191 CLR 559</a> at 596, <i>Nagalingam v MILGEA</i> [1992] <a href="#">FCA 470</a>; (1992) <a href="#">38 FCR 191</a>, <i>Prasad v MIEA</i> (1985) 6 FCR 155 at 169-70.)’ (para 74).</p> <p>‘The Tribunal is not satisfied, on the evidence before it, that the applicant has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion. Nor is the Tribunal satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Iraq, there is a real risk that the applicant will suffer significant harm.’ (para 75).</p> <p>‘Given those findings and the fact that the applicant does have the right to apply for a protection visa, the Tribunal does not accept that the applicant will be exposed to indefinite administrative detention. In making that finding it has taken into account the submission that it is unclear whether the Act extends him a right to a bridging visa if he did lodge a protection application. That submission is unhelpful. It is a conclusion which was not supported by reference to relevant provisions of the Act or analysis. The Tribunal gives that submission no weight. Further, it is a matter for the applicant whether or not he lodges an application for a protection visa. Whether he will be</p>
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			<p>granted a bridging visa may be a matter he considers before making the application.’ (para 76).</p> <p>‘For the reasons set out above, the Tribunal finds that the considerations favouring revocation of the visa cancellation are strongly outweighed by the considerations against revocation of the visa cancellation. There is not another reason why the original decision should be revoked.’ (para 92).</p> <p>See also other cases where the Tribunal also makes assessments of non-refoulement obligations due to the <i>BCR</i> judgment: <i>Bristowe and Minister for Immigration and Border Protection (Migration)</i> [2017] AATA 1092 (14 July 2017) and <i>Deng Mabiior and Minister for Immigration and Border Protection (Migration)</i> [2017] AATA 1155 (26 July 2017).</p>
<a href="#">1516302 (Refugee) [2017] AATA 1381</a> (Unsuccessful)	25 July 2017	9, 14, 16-17, 62-65	<p>This case related to the consideration of generalized conditions under s36(2B)(c) of the Migration Act in relation to crime in South Africa. In this case, the Tribunal found that the applicants had no ‘distinguishing characteristic’ from the general population.</p> <p>‘The issue in this case is whether the applicants meet the refugee or complementary protection criteria because of:</p>

			<p>their race,</p> <p>generalised crime and violence in South Africa</p> <p>the difficulty securing employment in South Africa.’ (para 9).</p> <p>‘The applicants’ declared their Ethnic group to be coloured South African and their religion as Christian.’ (para 14).</p> <p>‘Their eldest son was robbed at gunpoint. They reported this to the police who attended the area and then left. Their youngest son was robbed of his cell phone on his way home from school. They did not report this to the police because nothing would have been done. Their car was broken into and the police took longer than 24 hours to respond.’ (para 16).</p> <p>‘The applicant fears their children will get involved or forced to be involved in drugs as there is a drug house around the corner where they live. The applicant fears his children will be forced into gangs. There is no one stopping the ‘drug lords’ in his area. The drug lords operate with impunity. The youngsters in the gangs are armed with firearms and have no regard for life. The police are ineffective, corrupt and understaffed. They respond to calls hours later and do nothing about the drug dens in the area. The police accept bribes. Nothing</p>
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			<p>is done about the corruption in the ruling party.’(para 17).</p> <p>‘As discussed during the hearing, corruption, random and generalised crime in South Africa in the form of theft, burglaries and similar crimes affects the population generally and is not faced by the applicants personally. Section 36(2B)(c) provides states that there is taken not to be a real risk that the non-citizen will suffer significant harm if the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally. The Tribunal finds, therefore, that the applicants are taken not to be at a real risk of generalised criminal violence in South Africa because of any characteristic which distinguishes them from the general population.’ (para 62).</p> <p>‘Having regard to the applicants’ profile and personal circumstances there is nothing in the evidence before the Tribunal to suggest that the applicants are personally at risk except insofar as the population of the South Africa generally faces a real risk of significant harm.’ (para 63).</p> <p>‘The Tribunal does not accept that there are substantial grounds for believing that as a necessary and foreseeable consequence of the applicants being removed to South Africa, there is a real risk they will suffer significant harm as defined in the Act for any</p>
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			<p>reason.’ (para 64).</p> <p>‘For the reasons given above the Tribunal is not satisfied that any of the applicants is a person in respect of whom Australia has protection obligations. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) or (aa) for a protection visa. It follows that they are also unable to satisfy the criterion set out in s.36(2)(b) or (c), and cannot be granted the visa.’ (para 65).</p>
<p><a href="#">1606160 (Refugee) [2017] AATA 1268</a> (Unsuccessful)</p>	<p>21 July 2017</p>	<p>10, 13, 39</p>	<p>In considering whether economic hardship amounted to ‘significant harm’, the Tribunal applied the requirement of intention to economic circumstances.</p> <p>‘The applicant claimed that he was born on [date] in the Malaysian state of Selangor and claimed to be a citizen of the Federation of Malaysia.’ (para 10).</p> <p>‘According to his 866C form submitted at the time of application, the applicant had submitted very limited written claims. The applicant claimed that he fears harm arising from a travel agent who he paid money to depart Australia for work purposes and will be looking for him on his return as well as fears arising from difficulties in finding employment, if he were to return to Malaysia.’ (para 13).</p> <p>‘The Tribunal has considered if there are any reasons to substantial reasons to believe, the applicant will face a</p>

			<p>real risk of <i>significant harm</i> arising from the applicant's economic and personal circumstances as contemplated by s.36(2)(aa). <i>Significant harm</i> is different from the concept of <i>serious harm</i> as required by 91R(1)(b) in the context of s.36(2)(a).<sup>121</sup> The Tribunal has already made a finding that the applicant has the capacity and inclination to find work anywhere in Malaysia and does not face a real chance of serious harm based on these specific claims. While the Tribunal acknowledges the applicant will face difficulties and challenges arising from finding work to support himself, his parents and his siblings as well as some medical expenses if removed from Australia, it does not accept the applicant will not be able to access paid employment anywhere in Malaysia, given his education and overall experience as a necessary and foreseeable consequence of being removed from Australia or that those challenges amount to significant harm as required by s36(2A). Furthermore the Tribunal finds there is no intention on the part of the governing of the Malaysian economy in combination of market forces to inflict significant harm, including subjecting the applicant to cruel or inhuman or degrading treatment or punishment, as a necessary and foreseeable consequence of being removed from Australia to the applicant's country of reference. The Tribunal, accordingly, does not have substantial reasons for believing the applicant faces a real risk of significant harm, as a necessary and foreseeable consequence of being removed from Australia for Malaysia, based on the applicant's familial and</p>
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			economic circumstances will amount to significant harm, including being subjected to cruel or inhuman treatment or punishment or being subject to degrading treatment or punishment.’ (para 39).
<a href="#">NHHV and Minister for Immigration and Border Protection (Migration) [2017] AATA 995</a> (Unsuccessful)	29 June 2017	1-2, 62, 64-66, 68-69, 71-74, 97-98	<p>This is a visa refusal decision which incorporates the Federal Court’s recent decision in <i>BCR16 v Minister for Immigration and Border Protection</i> [2017] FCAFC 96 (see the Kaldor Centre’s table of Federal Court cases) but appears to misunderstand its effect, see especially para 73 below. In <i>BCR16</i>, the Full Federal Court (Bromberg and Mortimer JJ) held that non-refoulement obligations should be considered at the time of a revocation decision under s 501CA(4) because it was not certain that they would be considered in a protection visa application due to the fact that other considerations (such as the Public Interest Criteria) could be considered first and result in a refusal without a full consideration of claims.</p> <p>‘The Applicant is a 24 year old national of Sudan. After spending some years in camps in Sudan and Egypt, on 2 May 2006, he was granted a Class XB (Subclass 200) Refugee and Humanitarian visa. On 15 February 2007, at age 12, he arrived in Australia with his mother and siblings.’ (para 1).</p> <p>‘From 2009, he commenced offending. He continued offending, and as an adult served a number of terms of imprisonment...’ (para 2).</p>

			<p>‘By email sent to the Tribunal after the hearing on 14 June 2017, the Applicant’s solicitor asked the Tribunal, in making its decision in the present application, to consider, the Full Federal Court’s in <i>BCR16 v Minister for Immigration and Border Protection</i> <a href="#">[2017] FCAFC 96</a> (<i>BCR16</i>) which had been delivered the previous day. The Respondent sought the opportunity to make urgent written submissions, and both parties were afforded this opportunity, although no further submissions were received on the Applicant’s behalf, apparently relying on the extensive earlier submissions.’ (para 62).</p> <p>‘The Minister submitted that <i>BCR16</i> was wrongly decided and informed the Tribunal that an application for special leave to appeal to the High Court of Australia is being considered. In the meantime, the Minister accepted that decision-makers, including the Tribunal, are bound by the decision.’ (para 64).</p> <p>‘For the purpose of the present matter, the Minister conceded that, in light of <i>BCR16</i>, the Tribunal is required to turn its mind to the claims made by the Applicant regarding the risk of harm to the Applicant in Sudan, both in written and oral submissions, and to give them such weight as the Tribunal considers appropriate. It was conceded that the Tribunal cannot decline to consider whether the Applicant’s claims about what would happen to him if sent back to Sudan would constitute “another reason” why the decision to cancel</p>
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			<p>his visa should be revoked: <i>BCR16</i> at [73].’ (para 65).</p> <p>‘It was submitted on the Applicant’s behalf that Australia’s non-refoulment obligations flow from various international conventions and covenants such as the United Nations High Commissioner for Refugees (UNHCR) <i>1951 Refugee Convention</i> and its Protocol, <i>International Covenant on Civil and Political Rights</i> (ICCPR), as well as <i>Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment</i> (CAT). It was submitted that removing the Applicant to Sudan will return him to a place where he faces real and significant harm...’ (para 66).</p> <p>‘The Respondent’s additional submissions, each of which is addressed below, were as follows:  <i>Firstly, the Minister maintains that in the present proceeding, the Tribunal is not required to conduct an extensive assessment of the applicant’s claims to fear harm in Sudan. In this context, it remains relevant to the Tribunal’s weighing exercise that the applicant is able to make an application for a protection visa and to have his claims assessed and tested under the protection visa regime.</i>  <i>Secondly, and in any event, the applicant has not advanced any evidence of probative value to support a finding that he faces a real risk of harm in Sudan. As the Minister submitted at the hearing of this matter, (a) the mere fact that the applicant was granted a refugee visa in 2006 does not speak to whether he now faces</i></p>
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			<p><i>harm in Sudan; (b) he has identified no clear basis for his claimed fear of harm; and (c) the oral evidence of the applicant's mother that she has spent extensive periods of time in Sudan since her arrival in Australia and the oral evidence of the applicant and his mother that in 2015, the applicant was considering a visit to Sudan to marry a Sudanese woman undermine the claim that the applicant would face harm in that country.</i></p> <p><i>Thirdly, and in any event, given the factors identified ... above, the Tribunal should give limited weight to the applicant's claim that he faces a risk of harm in Sudan. Fourthly, notwithstanding the weight that the Tribunal attributes to the applicant's claimed risk of harm in Sudan, in the circumstances of this case and given the applicant's offending history, the primary considerations of the protection of the Australian community and the expectations of the Australian community (as set out in [the Direction] outweigh any considerations in favour of revocation, including the claims concerning non-refoulement obligations owed to the applicant.</i></p> <p><i>Fifthly, it would not be the case that an application for a protection visa made by the applicant "may be required to be refused because of the non-satisfaction of character criteria, so that consideration of risk of harm might never be reached" (BCR16 at [68]). This is because the relevant policy guidance in the PAM makes it clear that an applicant for a protection visa will not have their application referred for possible refusal</i></p>
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			<p><i>under <a href="#">s. 501</a> on character grounds without having first had their protection claims assessed against the criteria in <a href="#">s. 36</a> of the Act. So it remains the case that the Tribunal can legitimately take the view that a full assessment of whether protection obligations are owed to the applicant would take place were he to make an application for a protection visa in the future.’ (para 68).</i></p> <p>‘The submission that I am not required to conduct an extensive assessment of the Applicant’s claims to fear harm in Sudan appeared somewhat at odds with the Respondent’s concession referred to above that, in accordance with <i>BCR16</i>, the Tribunal is required to turn its mind to the claims made by the Applicant regarding the risk of harm to him in Sudan.’ (para 69).</p> <p>‘I accept, albeit on the basis of this limited information, and the other references provided by the Applicant that Sudan is a dangerous place, especially for travellers.’ (para 71).</p> <p>‘I considered whether the Applicant had provided any probative evidence to support a finding that he faces a real risk of harm in Sudan. I did not find his evidence to articulate a clear basis as to any cause for belief he would be harmed, other than the general assertions referred to above. Although he, through his mother who had been the primary visa holder, was granted a refugee visa in 2006, I do not know on what basis and whether</p>
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			<p>he would now face similar or other harm in Sudan, or indeed harm at all, other than the deprivation reportedly experienced by some of the population. Furthermore, the evidence of his mother that she has returned to Sudan on several occasions since her arrival in Australia significantly militated against a contention that the Applicant would be harmed if he returned there. Although the Applicant denied there was a serious plan to visit Sudan to marry a Sudanese woman, the fact that his devoted mother even contemplated such an undertaking further weakens his claim that he would face harm if returned to Sudan.’ (para 72).</p> <p>‘There is no evidence that an application by the Applicant for a protection visa “may be required to be refused because of the non-satisfaction of character criteria, so that consideration of risk of harm might never be reached”’: <i>BCR16</i> at [68]. I am satisfied that a full assessment of whether protection obligations are owed to the Applicant would take place if he were to make an application for a protection visa in the future: <a href="#">s 36</a> of the Act.’ (para 73).</p> <p>‘As I have found, Sudan is currently a dangerous place. I have also found that the Applicant has not provided clear evidence as to why he believes he would be harmed if he returned there and whether the reasons he was granted a refugee visa in 2006, might continue. I have found that his mother’s evidence of her unrestricted travel to Sudan over the last few years and</p>
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			<p>her plans for the Applicant to travel there to marry a Sudanese woman significantly detract from his claim that he would be harmed if he returned there. A full assessment of whether protection obligations are owed to the Applicant will be undertaken if he were to make an application for a protection visa.’ (para 74).</p> <p>‘A decision under s 501CA(4) of the Act involves an assessment and evaluation of the factors for and against revoking the cancellation: <i>Gaspar v MIBP</i> [2016] FCA 1166.’ (para 97).</p> <p>‘I have already explained the first primary consideration weighs heavily against the Applicant, while the second primary consideration counts to some extent in his favour. The third primary consideration counts firmly against him. The other considerations, when taken together, do not weigh in the Applicant’s favour. Having regard to the considerations in the Direction, and weighing up those that point in favour of visa cancellation against those that point in the opposite direction, I conclude that the Applicant’s application should be refused. As a consequence, I affirm the decision under review.’ (para 98).</p>
<a href="#">1621961 (Refugee) [2017] AATA 1143</a> (Unsuccessful)	21 June 2017	15, 84-85	This case concerns whether being homeless and having financial difficulties amounts to ‘significant harm’ in relation to a Fijian applicant whose refugee claim was rejected due to lack of current well-founded fear.

			<p>‘The applicant claimed he was sexually abused as a child in Fiji by two former military officers and three current military officers. The applicant claimed that the military officers were assigned to a base protecting a [site] in the area. The applicant claimed that his father had a [business] close to the [site]. The applicant helped his father with the paperwork for the business. The military officers used [facilities] from his father’s base, which was about [distance] km from his home. The applicant said he was abused at times when he was alone at [his father's base]. The abuse began when he was [age] and continued until he was [age] and occurred on a weekly or fortnightly basis during this period. The applicant said he never reported the abuse as his assailants warned him not to tell any adults or he would be killed.’ (para 15).</p> <p>‘The applicant has additionally claimed that he is unwilling to return to Fiji as he would be homeless. The Tribunal accepts that the applicant’s family home may have been damaged or destroyed since his departure from Fiji. Whilst the applicant’s immediate family may not return to Fiji with him, the applicant did suggest at hearing that he had friends and other relatives he might stay with. The applicant is a young person of working age. The applicant has also commenced a trade qualification in Australia. The Tribunal is not satisfied that any financial or accommodation difficulties the applicant might experience upon return to Fiji amount to persecution for any of the five reasons set out in</p>
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			<p>s.5J(1)(a) for the purposes of s.36(2)(a). Nor is the Tribunal satisfied that there is a real risk that the applicant would experience any difficulties amounting to significant harm as defined for the purposes of s.36(2)(aa).’ (para 84).</p> <p>‘In his protection visa application, the applicant also asserted generally there was no safety in Fiji and that anarchy and restlessness were on the rise. The applicant said that the state did not have sufficient resources to cope with these problems. The applicant has not submitted independent country information in support of this claim and it does not find support in the country information generally available to the Tribunal and discussed with the applicant at hearing. In any event, the Tribunal is not satisfied on the evidence that any harm of this kind would involve systematic and discriminatory conduct in accordance with s.5J(4) for the purposes of s.36(2)(a). Nor is the Tribunal satisfied on the evidence that the applicant faces a real risk of criminal attack or violence that is not faced by the population of Fiji generally as required by s.36(2B)(c) for the purposes of s.36(2)(aa).’ (para 85).</p>
<a href="#">1518018 (Refugee) [2017] AATA 1047</a> (Unsuccessful)	20 June 2017	13, 43-45	This case concerns the standard poor socio-economic conditions must meet to be considered to be ‘significant harm’. The Tribunal applies the same standard as persecution and does not consider what may amount to ‘degrading’ in any detail in this context.

			<p>‘The applicant claims she fears to return to India as:</p> <ul style="list-style-type: none"> <li>• Society in India will tease her because she is divorced and as she had had a live-in relationship with a Muslim in Australia.</li> <li>• The parents will pressure her to have another arranged marriage.</li> <li>• If she goes to live away from the parents to another place in India she will appear to be a single woman living alone and so vulnerable to predatory men.’ (para 13).</li> </ul> <p>‘I considered whether on the evidence before me, there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to India, there is a real risk that she will suffer significant harm.’ (para 43).</p> <p>‘In light of the foregoing I do not accept that the applicant will be unable to return to her home area where she has family support. I reject her narrative and evidence that she is estranged from the parents. The applicant is not from a poor socio-economic background and the parents had in the past facilitated her travel to and study in Australia. I do not accept that the parents or anyone-else in India will seek to harm the applicant because of her friendship/relationship with [Mr B] in Australia. Nor do I accept that in India the parents or anyone-else will seek to dominate her and seek to force her to marry, whether or not in a traditional Hindu marriage. I reject her claim that if she</p>
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			<p>does not comply with the parents' wishes they will harm her or pay someone to harm her. I do not accept that in her home area or elsewhere in India the applicant will be vulnerable as a divorced woman to the extent that there is a real risk she will suffer significant harm now and in the reasonably foreseeable future. I do not accept that poor economic conditions or any other circumstances the applicant may face on her return to India will result in significant economic hardship that threatens her capacity to survive, or will deny her the capacity to earn a livelihood of any kind.' (para 44).</p> <p>'In sum, I find there is no real risk that she will be subjected to any form of harm which would be the result of an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on the applicant, such as to meet the definition of torture; or the definition of cruel or inhuman treatment or punishment; or the definition of degrading treatment or punishment. Nor am I satisfied that there is a real risk that she will suffer arbitrary deprivation of her life or the death penalty. I am not satisfied the applicant will be subject to significant harm for any reason if she is removed/returns to India.' (para 45).</p>
<a href="#">1619268 (Refugee) [2017] AATA 1131</a> (Unsuccessful)	14 June 2017	2-3, 67-70, 90, 92	This case concerned claims against the applicant's home state (Nigeria) and a third state he had the right to enter (Ghana, through ECOWAS) relating to health concerns.

			<p>‘The applicant who claims to be a citizen of Nigeria, applied for the visa [in] July 2013 and the delegate refused to grant the visa [in] September 2014.’ (para 2)</p> <p>‘A differently constituted Tribunal made a purported decision on 5 April 2016 affirming the decision of the delegate. [In] November 2016 the Federal Circuit Court of Australia remitted the case on the basis that the Tribunal had failed to properly consider the applicant's claim to fear harm in Ghana for reasons of his religion by reference to the relevant country information applicable to Ghana in the circumstances where it had accepted that the applicant will continue to practice and promote Christianity in Ghana.’ (para 3).</p> <p>‘At the hearing before this Tribunal the applicant was asked about his mental health. He said that he has been on medication for high blood pressure since February 2014 and he continues to take [medication] (he pulled out a small plastic bottle from his pocket).’ (para 67).</p> <p>‘When he went to the GP and was first prescribed blood pressure medication, he was referred to a psychologist for his mental health. Some months later he saw a mental health specialist and was prescribed [medication]. He said he did not remember the name of it. It has changed since 2014 when he obtained a letter which mentioned the medication he was on.’ (para 68).</p> <p>‘The applicant argued that high blood medication would</p>
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			<p>not be available in Ghana. The representative suggested that sending the applicant to Ghana would be a death sentence. The Tribunal suggested that [the] medication is available in Ghana. The representative made some rather confusing submissions in response. It seems that he was using the expression “death sentence” figuratively and not referring to an actual death sentence, nor to a likelihood that the applicant will die as a result of the lack of treatment. The representative also noted that fake medication is frequently sold in Africa. But ultimately he conceded that he was <i>not</i> submitting that the unavailability of quality health care in Ghana would amount to serious harm or significant harm.’ (para 69).</p> <p>‘The Tribunal suggested that even if the applicant is not able to access the same level of care as in Australia, Australia would still <i>not</i> have protection obligations unless there is a real chance of persecution for a Convention reason (i.e. the requisite Convention nexus would not be there). In so far as complementary protection and significant harm is concerned the Tribunal pointed out that torture, as well as cruel, inhuman and degrading treatment or punishment require an element of intent (intentional withholding of treatment).’ (para 70).</p> <p>‘In relation to medical treatment, the Tribunal has accessed Ghana’s “Standard Treatment Guidelines” and lists 8 categories of drugs prescribed for hypertension</p>
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			<p>(high blood pressure).<sup>[15]</sup> The Tribunal accepts that the applicant may not receive the same standard of treatment for his health problems in Ghana as he would continue to receive in Australia. He would also need to be careful when purchasing medication not to buy fake drugs. However, the lower standard of health services in Ghana compared to Australia does not constitute serious harm for a Convention reason, nor significant harm as defined in the Act.’ (para 90).</p> <p>‘Further, the Tribunal is not satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant availing himself of the right to enter and reside in Ghana, there would be a real risk that he will suffer significant harm in relation to that country.’ (para 92).</p>
<p><a href="#">QKJY and Minister for Immigration and Border Protection (Migration) [2017] AATA 820</a> (Unsuccessful)</p> <p>See also similar rulings in <i>Al Mansori and Minister for Immigration and Border Protection (Migration)</i> [2017] AATA 713 (19 May 2017); <i>BNVM and Minister for</i></p>	8 June 2017	1-4, 63-65,	<p>This case applies <i>Minister for Immigration and Border protection v Le</i> [2016] FCAFC 120 in finding that <i>non-refoulement</i> obligations do not need to be considered in visa cancellation cases of this type because an applicant may still apply for a protection visa under s 501 of the Migration Act. [But see <i>BCR16 v Minister for Immigration and Border Protection</i> [2017] FCAFC 96 in the Kaldor Centre table of Federal Court cases for a more recent decision distinguishing <i>Le</i> in the revocation context – the effect of which is yet to be considered by the AAT.]</p> <p>‘This is an application for review of the decision of a</p>

<p><i>Immigration and Border Protection (Migration)</i> [2017] AATA 621 (5 May 2017); <i>Dong (Migration)</i> [2017] AATA 668 (4 May 2017).</p>			<p>delegate of the Minister for Immigration and Border Protection (“the Minister” or “the Respondent”) not to revoke the mandatory cancellation (by virtue of s 501(3A) of the Migration Act (Cth) (“the Act”)) of the visa of the Applicant[1] pursuant to s 501CA(4) of the Act. Under s 500(1)(ba) of the Act, this Tribunal has jurisdiction to review the decision of the delegate.’ (para 1).</p> <p>‘The Applicant entered Australia as a UNHCR mandated refugee. He has remained in Australia on a Class XB Subclass 202 Global Special Humanitarian Visa.’ (para 2).</p> <p>‘This matter concerns the circumstances surrounding the cancellation of that visa on 1 May 2015, and the refusal of the Minister to revoke that cancellation.’ (para 3).</p> <p>‘The Applicant has a lengthy criminal history for offences committed in this jurisdiction since 2006...’ (para 4).</p> <p>‘The Applicant contends he is likely to be the subject of international non-refoulement obligations owed by Australia, should his visa not be reinstated. The Respondent drew my attention to paragraph 14.1(4) of the Direction. This paragraph is to the effect that, if the Applicant is able to make a valid application for another kind of visa should his current visa be revoked, then the</p>
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			<p>non-refoulement obligations are not to be considered in determining whether to revoke his visa.’ (para 63).</p> <p>‘The Applicant currently possesses a Class XB Subclass Global Special Humanitarian Visa. Section 501E(2) of the Act provides that someone whose visa has been cancelled under s 501 of the Act may still make a claim for a protection visa. These two visas are clearly different. Consequently, he will be able to make a valid claim for ‘a visa’ should his current one be revoked. I therefore consider that paragraph 14.1(4) of the Direction applies, and I do not need to further consider any non-refoulement obligations Australia may owe to him.’ (para 64).</p> <p>‘I respectfully note with approval that the reasoning for this provision has been previously explained by respective Deputy Presidents of the Tribunal in <i>NSWQ and Minister for Immigration and Border Protection</i> [2016] AATA 373, and <i>MKKR and Minister for Immigration and Border Protection</i> [2016] AATA 458. I further respectfully note with approval the recent decision of the Full Federal Court in this regard: <i>Minister for Immigration and Border Protection v Le</i> [2016] FCAFC 120.’ (para 65).</p>
<a href="#">NDFN and Minister for Immigration and Border Protection (Migration) [2017] AATA 892</a>	9 June 2017	2-3, 80-90, 98-99	This is an appeal of a visa refusal decision. It incorporates the Federal Court’s recent decision in <i>DMH16 v Minister for Immigration and Border Protection</i> [2017] FCA 448 (see the Kaldor Centre’s

(Successful)			<p>table of Federal Court cases) and reliance on <i>non-refoulement</i> obligations contributes to the decision not to refuse the visa in this case.</p> <p>‘NDFN is a citizen of Malaysia who first came to Australia in 2012 on a tourist visa. He was accompanied by his Malaysian girlfriend, who he married in Australia within four months of arrival. In 2014 they jointly applied to the Department of Immigration and Border Protection (the <b>Department</b>) for a Protection (Class XA) Visa.’ (para 2).</p> <p>‘On 12 December 2016, while his Protection Visa claims were being processed, the Department issued NDFN a <i>Notice of Intention to Consider Refusal</i> of his Protection Visa application under <a href="#">section 501(1)</a> of the Act. The Department said it held information about his criminal record, suggesting he may not pass the character test pursuant to <a href="#">section 501(6)</a> of the Act. After considering NDFN’s responses to the Notice, a delegate of the Minister refused his visa application on 20 March 2017. The delegate concluded that NDFN failed the character test because if allowed to remain in Australia, there was a risk he would engage in criminal conduct. NDFN’s Bridging Visa was cancelled and he was taken into immigration detention where he presently remains.’ (para 3).</p> <p>‘During opening submissions, however, counsel for the Respondent highlighted a recent development in the law</p>
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			<p>affecting non-refoulement and the meaning of indefinite detention. This results from the decision of North ACJ in <i>DMH16 v Minister for Immigration and Border Protection</i> [2017] FCA 448 (DMH16), and His Honour’s treatment of the meaning of section 197C of the Act. DMH16 has a number of features common to NDFN’s case as follows:</p> <ul style="list-style-type: none"> <li>(a) The applicant is someone in respect of whom Australia owes protection obligations;</li> <li>(b) The applicant will have no right to make a further application for a visa;</li> <li>(c) There is no evidence that removal to the country of nationality is not ‘<i>practicable</i>,’ and</li> <li>(d) A safe third country has not been identified.’ (para 80).</li> </ul> <p>‘In DMH16, the Minister had noted in his reasons for decision that he was:</p> <p><i>‘...aware that while [the applicant] will not be removed from Australia if his visa application is refused (notwithstanding section 197C of the Act), he may face the prospect of indefinite immigration detention because of the operation of s189 and s196 of the Migration Act.’</i> (para 81).</p> <p>‘The Minister had been advised by his Department that:</p> <p><i>‘...You should further note that s197C does not abrogate, for the purposes of Australia’s domestic laws, Australia’s non-refoulement obligations assumed under international law by subscription to the Refugees</i></p>
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			<p><i>Convention. In general terms, as noted in the explanatory memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, s197C was inserted into the <a href="#">Migration Act</a> with the intention of making it clear that the removal powers under <a href="#">s198</a> are separate from, unrelated and completely independent of, any provisions in the <a href="#">Migration Act</a> which might be interpreted as implementing Australia’s non-refoulement obligations.” (para 82).</i></p> <p><i>‘North ACJ held, at [26], that:  ‘The argument for the Minister only needs to be stated to expose its weakness. The reference to indefinite detention must be read in a very different way to the words used in order to have them mean that the detention would be limited to the time taken for the Minister to consider the alternative management options. The Minister’s reasons disclose that he understood that if the protection visa application was refused, the applicant could be detained in Australia for an indefinite period. In fact, by the operation of s 197C, if the protection visa was refused the applicant would either be removed to Syria immediately, or, if the Minister decided to consider alternative management options, be detained for a definite period, namely, until the Minister considered whether to exercise the power under 195A. Then if the Minister refused to exercise the power, the applicant would be removed to Syria.’ (para 83).</i></p>
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			<p>‘In essence, His Honour held that section 197C of the Act has the consequence of enlivening the obligation at <a href="#">section 198</a> to remove an unlawful citizen ‘<i>as soon as reasonably practicable,</i>’ regardless of Australia’s non-refoulement obligations. A decision by me, therefore, to affirm the refusal of NDFN’s visa would, unless the Minister had made a preliminary decision to consider the exercise of his non-compellable discretion, enliven the obligation to remove NDFN as soon as reasonably practicable. As Counsel for the Respondent pointed out during opening submissions, the legal consequences are potentially significant:</p> <p><i>‘...in circumstances where there’s no other safe third country to which the person can be removed, then the obligation would be to remove the person to the country in respect of which they fear harm.’</i>” (para 84).</p> <p>‘Counsel for the Respondent submits that the prospect of such an outcome is remote and a decision to affirm the refusal of NDFN’s visa does ‘<i>...not necessarily mean that Australia will...breach its non-refoulement obligations...</i>’ But that submission rests on an alternative management option being exercised by the Minister personally, particularly his power to grant a visa of any class under <a href="#">section 195A</a> of the Act, if he ‘<i>thinks that it is in the public interest to do so.</i>’ I am further invited to accept that while the Minister’s power to issue a visa in these circumstances is non-compellable, ‘<i>the Tribunal should assume that it will be</i></p>
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			<p><i>exercised whenever necessary to ensure that Australia does not breach its non-refoulement obligations.’ In relation to the specific circumstances of NDFN’s case, counsel for the Respondent submits it is appropriate that I proceed ‘...on the presumption that the Applicant will be neither refouled nor detained indefinitely, notwithstanding that the former is a theoretical possibility.’” (para 85).</i></p> <p>‘Counsel for the Respondent relies on that submission based on the Australian Government’s stated policy intent regarding non-refoulement obligations at section 197C of the Act, which was reiterated in the Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 [at 1142, 1144, and 1146]:</p> <p><i>[1142] Australia will continue to meet its non-refoulement obligations through other mechanisms and not through the removal powers in section 198 the <a href="#">Migration Act</a>. For example, Australia’s non-refoulement obligations will be met through the protection visa application process or the use of the Minister’s personal powers in the <a href="#">Migration Act</a>, including those under <a href="#">sections 46 a</a>, 195A or 417...</i></p> <p>...</p> <p><i>[1144] the Minister’s personal power under <a href="#">section 195A</a> provides that the Minister has a non-compellable power to grant a visa to a person who is in immigration detention where the Minister thinks that it is in the</i></p>
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			<p><i>public interest to do so. In the exercise of this power the Minister is not bound by the provisions of the <a href="#">Migration Act</a> or Migration Regulations governing application and grant requirements. The Minister has the flexibility to grant any visa that is appropriate to that individual's circumstances. In these circumstances, if the Minister thinks that it is in the public interest to do so, the Minister may grant a visa to a person to ensure that the person is not removed in breach of Australia's non-refoulement obligations.</i></p> <p>...</p> <p><i>[1146] The above mechanisms enable non-refoulement obligations to be addressed before a person becomes ready for removal. At the removal stage, an officer will not be bound to check whether or not the Minister has considered exercising his or her personal powers when assessing if a person is subject to removal under <a href="#">section 198</a> of the <a href="#">Migration Act</a>. If an unlawful non-citizen satisfies one of the conditions specified in <a href="#">section 198</a>, the officer must remove the unlawful non-citizen as soon as reasonably practicable and it is not open to the non-citizen to challenge their removal on the basis that there has been no assessment of protection obligations according to law or procedural fairness.' (para 86).</i></p> <p><i>'Counsel for the Respondent submits that even where removal is 'practicable,' the Applicant will not immediately be 'ready for removal,' because their actual removal from Australia necessarily depends on various checks and arrangements. Counsel contends</i></p>
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			<p>that this provides ample time for the Minister to make a preliminary decision to consider exercising his power under <a href="#">section 195A</a>, whereupon removal from Australia ceases to be ‘<i>practicable</i>’ until the statutory process has run its course.’ (para 87).</p> <p>‘Counsel for NDFN contends that because he is owed protection obligations and cannot be refouled to Malaysia, indefinite detention would constitute ‘<i>a breach of international human rights obligations, albeit one authorised by the Act, at least as long as the purpose of the detention is not punitive.</i>’ Counsel further submits that NDFN’s circumstances are such that continued detention with no possibility of removal is approaching ‘<i>punishment,</i>’ which is disproportionate ‘<i>to the nature of NDFN’s offending conduct, for which the Court imposed a CCO and not a custodial sentence.</i>’ (para 88).</p> <p>‘The choice before me in determining the weight I place on non-refoulement obligations, as applied to the specific circumstances of NDFN’s case, can only be based on the available evidence. During opening submissions, counsel for the Respondent advised he was seeking instructions on how the decision in DMH16 might translate into submissions regarding NDFN. He advised that these instructions included the question of ‘<i>...whether there is currently any consideration being given to the exercise of a non-compellable discretion, which would</i></p>
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			<p><i>take [NDFN's] case out of the space of an obligation to remove.'</i> On that basis I gave leave for written closing submissions to be provided by no later than 5pm on 7 June 2017. No advice was provided to me by that time, regarding any preliminary decision taken by the Minister in relation to NDFN, given the implications of North ACJ's judgment in DMH16.' (para 89).</p> <p>'I accept that the Australian Government's stated policy, as detailed in the relevant legislation, makes it a remote possibility at best that Australia's non-refoulement obligations would be breached, or that NDFN would be detained indefinitely if the decision of the Minister's delegate to refuse his Protection Visa was affirmed. But in the absence of specific evidence that the Minister intends to exercise his non-compellable discretion in that eventuality, I must afford greater weight to non-refoulement considerations when applied to the specific circumstances of NDFN's case. I therefore find that Australia's international non-refoulement obligations weigh in favour of not refusing NDFN's visa application.' (para 90).</p> <p>'After weighing up all of the evidence and the applicable law, I find that NDFN does not pass the character test as defined at <a href="#">section 501(6)</a> of the Act. In making a supervening determination regarding the discretion granted by <a href="#">section 501(1)</a> of the Act, I have had regard to the relevant considerations in the Direction and applied them to the specific</p>
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			<p>circumstances of NDFN’s case. The available evidence shows that NDFN has not been imprisoned, has not re-offended, has completed mandated rehabilitation courses, enjoys strong family support, makes a valued contribution as a healthcare worker, and is strengthened in his stated resolve to live a lawful life in the future by a number of supportive factors. The primary consideration of protecting the Australian community, coupled with Australia’s non-refoulement obligations and the impact of visa refusal on NDFN’s family, all weigh in favour of not refusing NDFN’s visa application, and outweigh any other considerations in this matter.’ (para 98).</p> <p>‘It therefore follows that the decision under review is set aside and in substitution, it is decided that NDFN’s Protection (Class XA) Visa application should not be refused under <a href="#">section 501(1)</a> of the Act.’ (para 99).</p>
<p><a href="#">NKWF and Minister for Immigration and Border Protection (Migration) [2017] AATA 813</a> (Unsuccessful)</p>	7 June 2017	3-4, 82-94	<p>This is a visa refusal decision which incorporates the Federal Court’s recent decision in <i>DMH16 v Minister for Immigration and Border Protection</i> [2017] FCA 448 (see the Kaldor Centre’s table of Federal Court cases) but appears to misunderstand its effect, see especially para 84 below. In <i>DMH16</i>, North J held that the legal consequence of refusing a visa is not indefinite detention but a requirement to remove the non-citizen (after the exhaustion of s 195A) because of the operation of section 197C.</p>

			<p>‘NKWF is a 34 year old male citizen of Afghanistan (G11 at 42). He arrived in Australia on 1 November 2012 as an Illegal Maritime Arrival (G15 at 82). On 25 June 2014 the Applicant was granted a Bridging (General) visa E (subclass 050), which ceased on 25 June 2015 (G27 at 268). He has remained in Australia since his arrival and unlawfully so since 26 June 2015.’ (para 3).</p> <p>‘On 1 February 2016, the Applicant was convicted of armed robbery in the Supreme Court of Western Australia and sentenced to 2 years and 3 months imprisonment fully suspended for a period of 15 months (G9 at 24 and G18 at 94). The offence giving rise to the conviction took place on 19 June 2015 (G27 at 268), when the Applicant robbed a taxi driver at knifepoint (G18 at 91).’ (para 4).</p> <p>‘In the present case, and as correctly outlined by the Minister, it is accepted that NKWF has been assessed to be a person to whom Australia has protection obligations with reference to Afghanistan (G28 at 275) and that a consequence of this is that he could not be returned to Afghanistan without breaching Australia’s non-refoulement obligations (G5 at 17).’ (para 82).</p> <p>‘The existence of a non-refoulement obligation does not preclude the refusal of a person’s visa application. This is because the Minister will not, as a consequence of</p>
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			<p>refusing their visa return a non-citizen to a country in circumstances where a non-refoulement obligation is owed. This is notwithstanding the provisions of section 197C of the Migration Act which provides that, for the purposes of section 198 of the Migration Act, it is irrelevant whether Australia has non-refoulement obligations in respect of an unlawful non-citizen and that an officer's duty to remove as soon as reasonably practicable arises irrespective of whether there has been an assessment, according to law, of Australia's non-refoulement obligations in respect of the non-citizen. Therefore, refusing NKWF's visa is not inconsistent with Australia's international obligations, even if he is owed protection.' (para 83).</p> <p>'As outlined by the Minister, section 197C of the Migration Act is relevant to the exercise of the removal powers in section 198 of the Migration Act but does not require removal to take place irrespective of Australia's non-refoulement obligations. It provides, in effect, that if and when the time comes for a removal decision to be made in respect of a non-citizen, it is irrelevant as a matter of domestic law whether non-refoulement obligations are owed. This means that the removal cannot be challenged under domestic law on the basis that the removal would be inconsistent with Australia's international non-refoulement obligations.' (para 84).</p> <p>'As the Explanatory Memorandum for the Bill that inserted section 197C of the Migration Act makes clear</p>
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			<p>(i.e., the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014), the Minister intends to continue to honour Australia’s non-refoulement obligations.’ (para 85).</p> <p>‘Until the recent decision of the Federal Court in <i>DMH16 v Minister for Immigration and Border Protection</i> [2017] FCA 448 (date of judgment 3 May 2017) (the DMH16 decision), it has also been accepted that one of the consequences of not returning a non-citizen to a country in circumstances where a non-refoulement obligation is owed is that the non-citizen could face an indefinite period of detention (because of the operation of section 189 and section 196 of the Migration Act).’ (para 86).</p> <p>‘The effect of the DMH16 decision is that the options for the Minister, in making a decision on whether to refuse or cancel an application for a visa, requires them to have regard to the consequences of doing so. In the DMH16 decision, His Honour Judge North, in considering those consequences, did not identify indefinite detention as one of those consequences. Rather, His Honour identified the following “alternative management options” that would be open to the Minister:(a) Returning the non-citizen’s to their country of origin. Where return to the country of origin is not possible;</p> <p>(b) Consider intervening under section 195A of the</p>
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			<p>Migration Act to grant a temporary visa. In this instance, the applicant would be detained for a definite period, namely, until the Minister considered whether to exercise the power under section 195A; or</p> <p>(c) Make a residency determination under section 197AB of the Migration Act.’ (para 87).</p> <p>‘The DMH16 decision gives an explanation of these non-conventional personal interventional powers of the Minister:</p> <p><i>9. Section 195A of the Act allows the Minister to grant a visa to a person who is in detention, whether or not the person had applied for the visa, if the Minister this is in the public interest to do so. The power must be exercised by the Minister personally (s195A(5)). The Minister is not obliged to consider whether to exercise the power (s195A(4)). 10. Section 197AB allows the Minister, if the Minister this it is in the public interest to do so, to make a residence determination to the effect that a person reside at a specified place instead of being held in immigration as defined by the Act. Again, the Minister is under no duty to consider making such a determination (s197AE). The Minister is, however, obliged to exercise the power personally (s197AF).’ (para 88).</i></p> <p>‘At hearing, in relation to this issue, the Minister submitted that the Explanatory Memorandum for the Bill that inserted section 197C of the Migration Act is</p>
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			<p>consistent with the approach identified in the DMH16 decision.’ (para 89).</p> <p>‘The Minister also submitted (and the Tribunal finds, in light of the DMH16 decision) that it is the three options outlined in the DMH16 decision that must be weighed against the seriousness of NKWF’s conduct in considering the international non-refoulement obligations owed to him in the context of the legal consequences of making a decision on whether to refuse NKWF’s visa.’ (para 90).</p> <p>‘The Tribunal accepts that there are non-refoulement obligations owed to NKWF. The Tribunal has carefully weighed those obligations and the prospects set out in the three management options identified in the DMH16 decision against the seriousness of the NKWF’s offending.’ (para 91).</p> <p>‘The Tribunal considers that NKWF’s offence of armed robbery involved a serious offence against a particularly vulnerable member of the community, which was punishable by a maximum term of life imprisonment. NKWF was sentenced to 2 years and 3 months imprisonment, which reflects the sentencing Judge’s remarks that armed robbery is a most serious offence, with a term of imprisonment ordinarily being the only appropriate sentence.’ (para 92).</p> <p>‘The Tribunal has expressed its concerns regarding</p>
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			<p>NKWF’s risk of reoffending, which arise from having no reassurance that NKWF has taken any steps to address his frustrations or any of the underlying factors which may have contributed to his offending behaviour. The Tribunal has also noted the difficulties it has accepting NKWF’s evidence regarding his failure to understand the nature and seriousness of his offence and his inability, even at hearing, to recognise the seriousness of his offending conduct.’ (para 93).</p> <p>‘After weighing all of these factors, the Tribunal considers that the seriousness of NKWF’s offending outweigh Australia’s non-refoulement obligations owed to him, including the prospects outlined in the DMH16 decision.’ (para 94).</p>
<p><a href="#">1511530 (Refugee) [2017] AATA 1009</a> (Unsuccessful)</p>	<p>6 June 2017</p>	<p>7, 71-73</p>	<p>This case related to the consideration of generalized conditions under s36(2B)(c) of the Migration Act.</p> <p>‘The applicant claims to a supporter of the opposition Bangladesh Nationalist Party (BNP) who operated a successful retail business. Members and supporters of the ruling Awami League (AL) tried to extort money from him. When he refused, they arranged for false criminal charges to be brought against him. The applicant fears that the Bangladesh authorities will arrest him on his return to Bangladesh (most likely at the airport), and imprison him and torture him, at the behest of his political enemies. He implicitly also claims that AL cadres will continue to target him, due</p>

			<p>to his support for the BNP and his refusal to make ‘donations’.’ (para 7).</p> <p>‘The Tribunal refers to the findings of fact above, its assessment of the applicant’s future conduct and its views of any associated risk. Having regard to his circumstances and relevant country information, the Tribunal is not satisfied that there are substantial grounds for believing that the applicant - as a Bangladeshi man who favours the BNP (but has no further involvement with the party), as a potential future business owner, or for any other reason - will face a real risk of being arbitrarily deprived of his life, that the death penalty would be carried out on him, that he will be subjected to torture, that he will be subjected to cruel or inhuman treatment or punishment; or that he will be subjected to degrading treatment or punishment.’ (para 71).</p> <p>‘Implicit in the applicant’s claims is a broader concern about Bangladesh’s political violence, poor governance and high levels of corruption. The Tribunal accepts that he considers that he and his family have better prospects in Australia compared to Bangladesh. However, the Tribunal is not satisfied that the differential in living conditions involves ‘significant harm’. Moreover, under <a href="#">s.36(2B)(c)</a> of the Act there is taken not to be a real risk that an applicant will suffer significant harm if the Tribunal is satisfied that the real risk is one faced by the population generally and is not</p>
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			<p>faced by the applicant personally. The Tribunal is satisfied that the applicant’s concerns relating to the general political and security environment, and general living conditions in Bangladesh, involve real risks that the population generally faces, rather than the applicant personally.’ (para 72)</p> <p>‘Accordingly, the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Bangladesh, there is a real risk that he will suffer significant harm: <a href="#">s.36(2)(aa)</a>.’ (para 73).</p>
<a href="#">1509131 (Refugee) [2017] AATA 989</a> (Unsuccessful)	29 May 2017	1, 58-61	<p>This case also related to the consideration of generalized conditions under s36(2B)(c) of the Migration Act.</p> <p>‘[The applicant] is a citizen of Lebanon. He arrived in Australia as a student in October 2009 and as referred to in the decision under review (a copy of which he provided to the Tribunal along with his application for review) he first applied for a protection visa [in] October 2010. In that application he claimed to be homosexual and in a relationship with another man from Lebanon who applied for a protection visa on the same day, [Mr A]. They said that Islam did not allow this kind of relationship and that they had decided to apply for protection because they would be facing all kinds of pressure, threats and punishment from their</p>

			<p>parents and the authorities in Lebanon. [The applicant]’s first application was refused by a delegate of the Minister and the Refugee Review Tribunal affirmed that decision. [In] November 2013 [the applicant] lodged his current application for a protection visa, saying that he relied on the complementary protection provisions. He also said that he feared suffering significant harm on the basis of the current political, economic, and social situation in Lebanon and that he feared Hezbollah and pro-Syrian forces because he was a Sunni Muslim.’ (para 1).</p> <p>‘Having regard to the problems which I have with the evidence of [the applicant] and [Mr A] about their relationship as outlined above, I do not accept that they are homosexual as they claim, nor that they are in a homosexual relationship with each other. I consider that they are simply two young men sharing a room. I do not accept that they have ever been regarded by their families or the wider community in Lebanon (or indeed the Lebanese community in Australia) as being homosexual or in a homosexual relationship with each other. I do not accept on the evidence before me that there are substantial grounds for believing that, as a necessary and foreseeable consequence of [the applicant] being removed from Australia to Lebanon, there is a real risk that he will be killed or that he will otherwise suffer significant harm because of his claimed homosexuality or because of any suspicion that he and [Mr A] are in a homosexual relationship with</p>
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			<p>each other.’ (para 58).</p> <p>‘As referred to above, in his current application [the applicant] said that he feared suffering significant harm on the basis of the current political, economic, and social situation in Lebanon and that he feared Hezbollah and pro-Syrian forces because he was a Sunni Muslim. When he was interviewed by the primary decision-maker [the applicant] said that Lebanon was a war zone, there was no work and all the Syrians were in Lebanon now. He said that people coming from Syria were getting the jobs because they were cheap labour. He said that his family’s situation was very difficult because of the arrival of the Syrians and the presence of Hezbollah. At the hearing before me, when I referred to the claims which [the applicant] had made about his fear of Hezbollah and the pro-Syrian forces, he said that the trouble had been going on at the same time as he had made his application. When I referred to his claims about the current political, economic, and social situation in Lebanon he said that Lebanon was a poor place but he emphasised that he was applying for protection on the basis that he was homosexual.’ (para 59).</p> <p>‘I accept that Akkar is on the border with Syria and that there is a low risk of Sunni communities close to the border being caught up in cross-border reprisal attacks by the Syrian authorities.<sup>[3]</sup> However I do not accept on the evidence before me that there are substantial</p>
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			<p>grounds for believing that, as a necessary and foreseeable consequence of [the applicant] being removed from Australia to Lebanon, there is a real risk that he will suffer significant harm because he is a Sunni Muslim if he returns to his home in [Village 1] in Akkar. So far as the current political, economic, and social situation in Lebanon (and in particular the influx of people from Syria) is concerned, I consider that the risks to [the applicant] in this context are risks faced by the population of Lebanon generally and not risks faced by him personally and that they are therefore excluded from consideration under the complementary protection criterion in accordance with paragraph 36(2B)(c) of the <a href="#">Migration Act</a>.’ (para 60).</p> <p>‘Both when he was interviewed by the primary decision-maker and at the hearing before me [the applicant] referred to the fact that his family had paid a lot of money for him to come here to study and that he had not been up to it. While I accept that his family will be disappointed in him, he did not suggest that this circumstance gave rise to any risk that something would happen to him if he went back to Lebanon. He referred once again to his fear based on his claim to be homosexual. Having regard to my findings of fact above, therefore, I do not accept on the evidence before me that there are substantial grounds for believing that, as a necessary and foreseeable consequence of [the applicant] being removed from Australia to Lebanon, there is a real risk that he will suffer ‘significant harm’</p>
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			as defined in <a href="#">subsection 36(2A)</a> of the <a href="#">Migration Act.</a> ' (para 61).
<a href="#">1502175 (Refugee) [2017]</a> <a href="#">AATA 1036</a> (Unsuccessful)	25 May 2017	1, 50-52	<p>This case related to the consideration of generalized conditions under s36(2B)(c) of the Migration Act.</p> <p>'[The applicant] is a citizen of Lebanon. He last arrived in Australia as a student in May 2008 and as referred to in the decision under review (a copy of which he provided to the Tribunal along with his application for review) he first applied for a protection visa in July 2010. In that application he claimed to be a convert to the Jehovah's Witness religion and he said that if people in his religion knew that he followed the Jehovah's Witnesses they would kill him. His first application was refused in February 2011 and the Refugee Review Tribunal affirmed that decision in August 2011. [In] November 2012 [the applicant] lodged his current application for a protection visa and along with that application he produced a copy of the same statement which he had submitted in support of his first application.' (para 1).</p> <p>'As I indicated to [the applicant], I accept that, as stated in the letters from the psychologist which were produced before and after the hearing, he is suffering from [conditions]. I also accept that he has had an [operation] in [Australia]. He said at the hearing before me that you had to pay for all medical treatment in Lebanon, it was very expensive and it was very difficult</p>

			<p>to get to. However, as I put to him, the fact that there is no equivalent of Medicare in Lebanon is not the issue for the purposes of the complementary protection criterion. I do not accept on the evidence before me that the Government of Lebanon will arbitrarily refuse [the applicant] medical care nor that it has arbitrarily restricted care for people in his situation such that it could be said that there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Lebanon, there is a real risk that he will be arbitrarily deprived of his life. The definitions of ‘torture’ and ‘cruel or inhuman treatment or punishment’ in <a href="#">subsection 5(1)</a> of the <a href="#">Migration Act 1958</a> require that pain or suffering be ‘intentionally inflicted’ on a person and the definition of ‘degrading treatment or punishment’ requires that the relevant act or omission be ‘intended to cause’ extreme humiliation. I do not accept on the evidence before me that there is the requisite intention to inflict pain or suffering or to cause extreme humiliation to people in [the applicant]’s situation. I do not accept on the evidence before me, therefore, that there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Lebanon, there is a real risk that he will suffer significant harm as defined in <a href="#">subsection 36(2A)</a> of the Act as a result of his medical problems.’ (para 50).</p> <p>‘At the hearing before the Refugee Review Tribunal in</p>
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			<p>July 2011 [the applicant] said that the political and social situation in Lebanon was confused and at the hearing before me he said that at the time he had completed his studies in Australia in 2010 there had been lots of trouble and friction in Lebanon. He said that the situation in Lebanon, politically and socially, had not encouraged him to go back. He said that it had not been safe for him to go back: it had not been safe for the normal people there. He said subsequently that back in Lebanon it was not as easy as you might think. There were lots of issues going on, especially in the government. He said that just the day before the hearing a problem had arisen in his area of Lebanon and three people had been killed. He said that the cause had been hunting. He said that if he had been there he would have been killed as well and they would have said that he had been in that conflict. He said that there were many people dying in Lebanon and nobody cared. I consider that the risks associated with the general situation in Lebanon are ones faced by the population of the country generally and not by [the applicant] personally and that they are therefore excluded from the complementary protection criterion in accordance with paragraph 36(2B)(c) of the <a href="#">Migration Act</a>.’ (para 51).</p> <p>‘Having regard to my findings of fact above, therefore, I do not accept on the evidence before me that there are substantial grounds for believing that, as a necessary and foreseeable consequence of [the applicant] being removed from Australia to Lebanon, there is a real risk</p>
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			that he will suffer ‘significant harm’ as defined in <a href="#">subsection 36(2A)</a> of the <a href="#">Migration Act</a> .’ (para 52).
<a href="#">1508583 (Refugee) [2017] AATA 952</a> (Unsuccessful)	11 May 2017	11-12, 49-52	<p>The Tribunal considered Ukraine’s military service conditions and found that poor supply of provisions during service did not amount to ‘significant harm’.</p> <p>‘When asked what he fears about returning to the Ukraine, he said that he is afraid that if he goes back he will be conscripted into the army and he is afraid of killing peaceful civilians. He is not afraid of going into the army and fighting but this war is against Russia and a lot of peaceful civilians are being killed. He does not want to kill civilians. There is no other reason.’ (para 11).</p> <p>‘The applicant confirmed that he has not been conscripted yet. He had previously received a white ticket that meant that he was found unfit for military service as he had a minor problem with his [body part]. But things are changing, as he is physically fit and as his previous medical problem was minor, he thinks his current status would change. He said that he would go into the army but he does not want to kill.’ (para 12).</p> <p>‘I have considered whether there is a real risk that he will face significant harm if he is required to complete his military service obligation. Reuters<sup>[7]</sup> reports</p> <p>“There's been negative publicity from the conflict zone</p>

			<p>... There were problems with nutrition, medicines and the winter uniform. Patriotism is falling.... Poroshenko's government has also taken steps to improve conditions for those sent to the front. Last year it spent 5 percent of Ukraine's gross domestic product on the military, enabling the army to revamp its creaking Soviet-era hardware...Scandals over corruption and incompetence in the military are now less frequently splashed across the media, but have not disappeared.”” (para 49).</p> <p>‘The US Department of State country report on human rights practice Ukraine covering events in 2016, stated that:</p> <p>‘There were reports of hazing in the military. On August 4 [2016], the country’s human rights ombudsman sent a letter to the Prosecutor General’s Office and the Ministry of Defense expressing concern about military hazing following the suicide of Vlad Khaisuk, a young soldier serving in a unit stationed in Stanytsia Luhanska. After Khaisuk’s suicide, his parents found videos on Khaisuk’s smartphone of him being hazed and humiliated by other soldiers. The Luhansk Department of the Military Prosecutor’s Office investigated and found no signs of military hazing. At year’s end, however, police in Stanytsia Luhanska were investigating the accident as a homicide.’”(para 50).</p> <p>‘I accept that there were problems with nutrition, medicines and winter uniform for those serving in the</p>
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			<p>military and that an incident of hazing occurred which is being investigated. The constitution provides for a human rights ombudsman, officially designated as parliamentary commissioner on human rights. A variety of domestic and international human rights groups generally operated without government restriction, investigating and publishing their findings on human rights cases. Government officials were cooperative and responsive to their views. The Human Rights Ombudsman's Office frequently collaborated with NGOs through civic advisory councils on various projects for monitoring human rights practices in prisons and other government institutions<sup>[8]</sup>. On the evidence before me and having regard to the available country information, I find remote the risk that the applicant as a military conscript will be arbitrarily deprived of his life, that the death penalty will be carried out on him, that he will be subjected to torture, that he will be subjected to cruel or inhuman treatment or punishment or he will be subjected to degrading treatment or punishment by the Ukrainian authorities. I therefore find that there are no substantial grounds for believing that there is a real risk that the applicant will be subject to significant harm completing military service on his return to the Ukraine. Having considered the applicant's claims singularly and cumulatively, I find that the applicant does not face a real risk of 'significant harm' in Ukraine.' (para 51).</p> <p>'Therefore I do not accept that there are substantial</p>
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			grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Ukraine, that there is a real risk that he will be arbitrarily deprived of his life, that the death penalty will be carried out on him, that he will be subjected to torture, that he will be subjected to cruel or inhuman treatment or punishment or that he will be subjected to degrading treatment or punishment. The applicant does not satisfy the criteria in <a href="#">s.36(2)(aa)</a> .’ (para 52).
<a href="#">1605592 (Refugee) [2017] AATA 914</a> (Unsuccessful)	8 May 2017	5, 96, 133, 154-155, 157, 161-165	<p>The Tribunal considered whether psychological harm, including psychological harm attendant upon the separation of the applicant from family members, amounted to ‘significant harm’. The case contains detailed analysis of higher court cases on psychological harm accompanying family separation, see paras 146-153.</p> <p>‘In summary, the applicant claims Australia has protection obligations to him as a refugee under the Refugee Convention or, alternatively, under the complementary protection grounds set out in the Act. He claims he has a well-founded fear of persecution because of his religion as a Catholic, his imputed political opinion as being opposed to the Vietnamese government and his membership of a particular social group, namely being part of a religious minority in Vietnam and a failed asylum seeker from a western country. The latter claim about being a failed asylum</p>

			<p>seeker was contained in written submissions made to the delegate in 2013 and the claim about his membership of a religious minority was contained in written submission made to this Tribunal in November 2016. It should also be noted that this claim was the subject of the consent remittal. We have considered both claims. The applicant also claims that if he is removed from Australia and returned to Vietnam he will suffer significant harm, being serious psychological harm, if he is separated from his wife and [child]. As such, it is asserted by the applicant that even if he is not entitled to a protection visa as a refugee, he satisfies the criteria for complementary protection.’ (para 5).</p> <p>‘The applicant provided the second submissions following the hearing, through his representative, which can be summarised as follows:</p> <ul style="list-style-type: none"> <li>• (1) The circumstances in the present case can be distinguished from the applicants in <i>SZRSN</i> and <i>MZAEN</i> because the applicant suffered persecution and therefore physical harm in Vietnam.</li> <li>• (2) The facts of the case rest on the serious psychological harm the applicant would suffer if he were returned to Vietnam and that this arises from the harassment and discrimination experienced prior to the applicant’s departure from Vietnam. However, the submission is two-fold: the applicant’s psychology reports support the claim that the</li> </ul>
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			<p>applicant is suffering [a specified condition], and the prospect of indefinite separation from his wife and child will contribute to further serious psychological harm and that this is a necessary and foreseeable consequence of the applicant being removed to Vietnam...’ (para 96).</p> <p>‘As already noted, we accept that the applicant has anxiety and depression and this may be exacerbated if he is forced to return to Vietnam, particularly if he is separated from his wife and child. We also accept the submission that he has made a life in Australia over the past four and a half years.’ (para 133).</p> <p>‘We are bound by the authority in <i>SZRSN</i> and while <i>MZAEN</i> questioned this authority (at [50]) by referring to the psychological harm that would be suffered by the second and third applicants in their receiving countries as a consequence of the separation, this finding is inconsistent with <i>SZRSN</i>. The decision in <i>SZRSN</i> makes it plain that “significant harm” (and in particular the definition for “cruel and inhuman treatment” and “degrading treatment”) requires an act or omission where there is intent to cause the harm. It does not include a consequence of an act or omission. The fact that a person may suffer severe psychological pain or suffering in the receiving country is not the determinative factor. The issue is whether the harm suffered is “significant harm” within the meaning of s</p>
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			<p>36(2A) as further informed by the relevant definitions in s 5(1). As observed by Driver FM, as he then was, and accepted by Mansfield J in <i>SZRSN</i>, separation from one’s family is a consequence of the removal and while this may lead to psychological harm this is not a consequence of the removal <i>to the receiving country</i> nor, relevantly, does this constitute “degrading treatment” or “cruel and inhuman treatment”. If removal of itself by the Australian government was sufficient to engage the complementary protection provisions of the Act, every time a failed asylum seeker was refused protection and thereby removed from Australia to their country of nationality, there would be the potential for Australia to have protection obligations. The potential for psychological harm, especially if the visa applicant had spent many years in Australia and established significant community connections and lifestyle opportunities that were more favourable than the environment in their country of origin, would be significant.’ (para 154).</p> <p>‘We therefore reject the applicant’s submissions on the meaning and scope of s 36(2)(aa) in respect of the potential separation of the applicant from his family and do not accept that this of itself would be capable of satisfying the complementary protection criteria.’ (para 155).</p> <p>‘A further issue to consider, accepting the applicant’s mental health issues, is whether he will face significant</p>
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			<p>harm in Vietnam because of his mental health issues.’ (para 157).</p> <p>‘In the present case, the applicant has not provided any evidence, other than an assertion in the submissions, that the applicant would be unable to assess mental health care services or that any available services will be inadequate. The country information from DFAT suggests health care would be available to the applicant but we accept that there may be some doubt as to whether such care would be available to support the applicant’s stated needs or that it would be similar to that available to the applicant in Australia given the level of health care in Vietnam is described on the DFAT Report as “basic”. While this is likely to be a matter that is capable of being ascertained, we do not accept this is a matter that could be easily ascertained by the Tribunal. The applicant bears an obligation to provide evidence to support his claims for protection (refer s 5AAA of the Act).’ (para 161).</p> <p>‘Notwithstanding the paucity of the evidence, this would not be determinative of the applicant’s claim for protection in any event.’ (para 162).</p> <p>‘In <i>BZG15 v Minister for Immigration</i> <a href="#">[2016] FCCA 2538</a> the Court considered an application for review where it was claimed the Tribunal had committed jurisdictional error in rejecting the applicant’s claim for protection. The Tribunal found that any failure to</p>
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			<p>provide the applicant with mental health care treatment or support was due to the size and development of the Bangladeshi economy rather than any intentional act or omission and therefore this did not constitute “significant harm” within the meaning of the complementary protection provisions. The Tribunal further found that the risk of harm due to inadequate health care services, especially mental health care services in Bangladesh, was faced by the population in general. The applicant sought review of this decision to the Federal Circuit Court of Australia. The Court dismissed the appeal. Relevantly, the Court found that the ground could not succeed in the face of the decision of Full Court of the Federal Court in <i>SZTAL v Minister for Immigration</i> [2016] FCAFC 69. In short, the Court accepted that any inadequacy in mental health care services was not an intentional act or omission within the meaning of s 36(2)(aa) of the Act.’ (para 163).</p> <p>‘Accordingly, based on the available evidence and the authorities of <i>BZG15</i> and <i>SZTAL</i>, if the applicant is separated from his family and thereby experiences continuing or increasing serious mental health issues but does not receive the level of care he needs that may have received in Australia, this would not be sufficient to engage the complementary protection provisions of the Act. There is no evidence to support a claim that the applicant would not receive health care, but rather a claim that the care and support he would receive in Australia would be better. This may be correct.</p>
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			<p>However, the critical issue is that there is no evidence that any inadequacy in mental health care services, which has not been particularised or established by the applicant in any event, could be characterised as an intentional act of omission.’ (para 164).</p> <p>‘The Tribunal is therefore not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).’ (para 165).</p>
<p><a href="#">1505506 (Refugee) [2017] AATA 795</a> (Successful)</p>	<p>26 April 2017</p>	<p>14, 49-54,</p>	<p>This case related to s 36(2B)(b) of the Migration Act (state protection) and demonstrates that the state protection must be such that it reduces the applicant’s individual risk in <i>their particular circumstances</i> below that of a real risk.</p> <p>‘The applicants’ claims for protection, as detailed in the principal applicant’s Form 866C<sup>[4]</sup>, are summarised as follows:</p> <ul style="list-style-type: none"> <li>• They left Malaysia due to a family problem because of their love marriage.</li> <li>• After their marriage was registered, his wife’s father attacked him to make him forget about and leave his wife.</li> <li>• He fears that if they return to Malaysia his wife’s father and ‘the gang’ will attack them, threatening their lives and preventing them from living together as husband and wife.</li> <li>• His father-in-law said he will kill the principal applicant if he sees him together with</li> </ul>

			<p>his wife.</p> <ul style="list-style-type: none"> <li>• No-one is able to help or protect them.’ (para 14).</li> </ul> <p>‘The Tribunal has considered if the applicants could obtain from the Malaysian authorities protection such that there would not be a real risk that they would suffer significant harm as referred to under s.36(2B)(b).’ (para 49).</p> <p>‘According to the Department of Foreign Affairs and Trade’s (DFAT) most recent country information report on Malaysia, law enforcement entities operate at both federal and state level<sup>[17]</sup>. According to the United States Department of State’s Country Report on Human Rights Practices for 2015, Malaysia has a functioning legal system and the “approximately 102,000-member Royal Malaysia Police force reports to the home affairs minister”<sup>[18]</sup>. Such country information indicates that there are general measures of state protection in place in Malaysia and generally functioning laws. Nonetheless, the Tribunal notes that in order to satisfy s.36(2B)(b), court authority requires that the level of protection offered by the receiving country must reduce the risk of significant harm to something less than a real one: see <i>MIAC v MZYLL</i><sup>[19]</sup>. The Tribunal also notes the Department’s Complementary Protection guidelines relevantly state:</p> <p>The fact that a receiving state has generally functioning</p>
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			<p>laws and standard protections in place that are available to the general community is one element that may be taken into account in determining whether a person faces a real and personal risk of significant harm. Nevertheless, an individual may still face a real risk of significant harm even where a receiving state has a functional system of state protection in place.<sup>[20]</sup> (para 50).</p> <p>‘In this regard DFAT notes in its report that whilst credible local and international sources consider the Royal Malaysian Police (RMP) to be a professional and effective police force, the quality of their responses varies depending on levels of training, capacity or engagement in corruption. It is also noted that RMP officers receive limited training, particularly on domestic violence; police officers are paid one of the lowest wages in the Malaysian civil service; and corruption has been recognised as a concern.<sup>[21]</sup> In relation to domestic violence the report indicates that while Malaysian law prohibits domestic violence and conviction rates have increased over the past decade, domestic violence against woman is a serious problem in Malaysia. The report comments that overall DFAT assesses that women in Malaysia face a high risk of societal and official discrimination and violence, particularly domestic or intimate partner violence. While DFAT indicates that it cannot confirm if ‘honour killings’ performed to punish individuals who are perceived to have brought shame upon their family members or communities, occur, DFAT notes that</p>
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			<p>deaths related to domestic violence do occur in Malaysia. DFAT assesses that while the situation is improving, confusion between federal and state laws and a lack of capacity within the police and judiciary, make it difficult for women to gain adequate state protection and to safely leave violent relationships<sup>[22]</sup>.’ (para 51).</p> <p>‘Freedom House also reported in 2015 that government and law enforcement bodies in Malaysia have suffered a series of corruption scandals in recent years.<sup>[23]</sup> According to a 2012 Freedom House report, ‘Malaysia’s police effectiveness has been compromised by low salaries and endemic corruption’<sup>[24]</sup>.’ (para 52).</p> <p>‘On the basis of this country information, in particular the concerns in relation to corruption, the involvement of the secondary applicant’s father with a notorious and violent criminal gang, and the relationship between the secondary applicant’s father and a local police [senior officer], the Tribunal is not satisfied that the general measure of state protection in Malaysia is sufficient in the applicants’ particular circumstances to remove the real risk of significant harm that they face. The Tribunal finds that, for the purposes of s.36(2B)(b) of the Act, the applicants could not obtain, from an authority in Malaysia, protection such that there would not be a real risk that they will suffer significant harm.’ (para 53).</p> <p>‘The Tribunal finds therefore that there are substantial</p>
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			grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to Malaysia, there is a real risk that they will suffer significant harm.’ (para 54).
<a href="#">1619684 (Refugee) [2017] AATA 681</a> (Unsuccessful)	26 April 2017	24, 32, 109-112	<p>The Tribunal considered China’s family planning laws and found that the imposition of a social compensation fee did not amount to ‘significant harm’. See also <i>1504818 (Refugee) [2017] AATA 278</i> below.</p> <p>‘The applicant and the applicant wife came to Australia in July 2008. They were practitioners of Falun Gong who were persecuted, intimidated and discriminated against. Their land was taken away by the government. Since arrival in Australia they have continued to study and practice Falun Gong.’ (para 24).</p> <p>‘In the Tribunal hearing held on 5 November 2015, in respect of the first Tribunal decision, claims were made by virtue of the fact that the applicant and the applicant wife have two children and the implications of that, given family planning laws in China. It was indicated that they had not been given permission to give birth and that they would become a ‘black household’. The Tribunal, in that hearing, made reference to information concerning family planning laws indicating, that in certain circumstances, permission may be given for a second child. The Tribunal indicated that, depending on a couple’s circumstances, a family may have to pay a social compensation fee for a second child. The</p>

			<p>Tribunal also made reference to the fact that there had been a relaxation in China recently allowing couples to have two children. The applicant indicated that they would not be given permission to have two children because of the association of he and his wife with Falun Gong.’ (para 32).</p> <p>‘For those reasons, in relation to the applicant wife, the Tribunal is not satisfied that any such fine would involve discriminatory conduct and therefore does not satisfy s.91R(1)(c) of the Act as a requirement of persecution for the purpose of the Refugees Conventin criterion.’ (sic) (para 109).</p> <p>‘In relation to the applicant and the applicant wife, the social compensation fee is linked to average income and can be paid in instalments. The Tribunal has no evidence before it that the fines are so exorbitant that they would fall within any definition of significant harm, such as cruel or inhuman treatment or punishment or degrading treatment or punishment.’ (para 110).</p> <p>‘The Tribunal is not satisfied that any fine that the applicant and the applicant wife may need to pay for breaching family planning laws in China would constitute significant harm for the purpose of the complementary protection criterion.’ (para 111).</p> <p>‘A claim has been made that the applicant and applicant</p>
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			wife would not be given permission to have two children because of their involvement with Falun Gong. There is no independent evidence before the Tribunal to indicate any link between family planning laws and involvement in Falun Gong. The Tribunal is not satisfied that there would be any connection between claimed Falun Gong activities of the applicant and the applicant wife and family planning laws.’ (para 112).
<a href="#">1513666 (Refugee) [2017] AATA 676</a> (Successful)	19 April 2017	13, 33, 50, 55-65	<p>The Tribunal in this case accepted that the applicant’s fears of again experiencing domestic abuse amounted to significant harm and that there was a real risk of it occurring again.</p> <p>‘The applicant indicates she has experienced harm in her country and states that she was married for [number] years and has [children] from the marriage. During this time she faced abuse, violence, and inhumane treatment. She feels she has been punished continually by her former husband, who is the father of her children. The applicant states she has been hospitalised twice by her former husband, and all [the] children have been traumatised because of the abuse and violent acts of her former husband towards her.’ (para 13).</p> <p>‘During the hearing the applicant told the Tribunal she continued to fear returning to Fiji because she believed her former husband would find her and harm her. She told the Tribunal he continues to ask family and friends</p>

			<p>about her whereabouts, and she believes he remains angry and jealous and will harm her if she returns.’ (para 33).</p> <p>‘While the Tribunal accepts the applicant’s former husband may have abused a number of his partners, and the Tribunal accepts there is a real chance the applicant’s former husband will try to harm her again in the future, the Tribunal is not satisfied the applicant’s former husband’s reason for wanting to harming the applicant are for the reasons of race, nationality, membership of a particular social group or political opinion. Therefore the Tribunal is not satisfied there is a real chance that if the applicant returned to Fiji, she would be persecuted for one of more of the reasons mentioned in s.5J(1)(a) of the Act.’ (para 50).</p> <p>‘While the Tribunal accepts the occurrences of physical abuse lessened over time, especially after the applicant separated from her former husband, the Tribunal also accepts the abuse did not cease and the applicant’s former husband continued to telephone her and harass her and threaten her with harm. The Tribunal also accepts the applicant’s former husband continues to contact family members and friends seeking the applicant’s whereabouts.’ (para 55).</p> <p>‘Given the Tribunal accepts the applicant’s former husband has abused and assaulted and threatened the applicant over a number of years, and continues to seek</p>
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			<p>information about her whereabouts, the Tribunal also accepts there is a real risk the applicant’s former husband will try to harm her again in the future.’ (para 56).</p> <p>‘The Tribunal accepts the applicant has suffered significant harm in the past, including when the applicant was hospitalised after a serious assault in 2012. The Tribunal accepts the feared harm is significant harm, as it includes intentionally inflicting sever pain and suffering.’ (sic) (para 57).</p> <p>‘During the hearing the Tribunal discussed with the applicant whether it would be reasonable for her to relocate to an area of Fiji where there would not be a real risk that the applicant will suffer significant harm.’ (para 58).</p> <p>‘The applicant told the Tribunal Fiji is a small country and she fears her former husband will find her anywhere she goes in the country. She told the Tribunal she had lived in Suva all her life and all her family live in Suva, including her children. She also told the Tribunal her former husband’s family members have reported on her movements to her former husband in the past.’ (para 59).</p> <p>‘The Tribunal accepts Fiji is a relatively small country with a relatively small population. The Tribunal accepts the applicant has lived her whole life in Suva and does</p>
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			<p>not have any family connections outside that city. The Tribunal also accepts the applicant’s children live with their [relative] in Suva and have some contact with their father. The Tribunal also accepts the authorities in Fiji have failed to protect the applicant from her former husband in the past.’ (para 60).</p> <p>‘As noted above, the Tribunal accepts the applicant’s former husband continues to seek information about her whereabouts, and the Tribunal accepts there is a real risk the applicant’s former husband will try to harm her again in the future, wherever she is in Fiji.’ (para 61).</p> <p>‘Given the above, the Tribunal is not satisfied there is an area of the country where there would not be a real risk that the applicant will suffer significant harm.’ (para 62).</p> <p>‘The Tribunal also accepts the authorities in Fiji have failed to protect the applicant from her former husband in the past, and the Tribunal accepts that she could not obtain such protection that there would not be a real risk that she would suffer significant harm in the future.’ (para 63).</p> <p>‘The Tribunal also accepts that the real risk is faced by the applicant personally and is not one faced by the population of Fiji generally.’ (para 64).</p> <p>‘For the reasons given above, the Tribunal accepts that</p>
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			there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that she will suffer significant harm.’ (para 65).
<a href="#">1504584 (Refugee) [2017] AATA 650</a> (Unsuccessful)	4 April 2017	24, 31-32, 62-65	<p>This case is an example of the application of s 36(2B)(c), that a risk faced by the population generally and not by a non-citizen personally is taken not to be a real risk.</p> <p>‘The Tribunal finds that the applicant is a stateless person, and that his country of former habitual residence is the OPT (West Bank). The OPT is therefore the country of reference for the purpose of assessing his refugee claims, and the receiving country for the purpose of assessing his eligibility for complementary protection.’ (para 24).</p> <p>‘The applicant description of his life in [Town 1] and [Location 1] suggested that he experienced the kind of problems facing West Bank residents, such as restrictions on movement (including into Israel and Israeli-controlled areas, as well as [Country 1]), and some ongoing security concerns. He intimated that these were part of daily life, and hence, tolerable. The applicant did not claim or imply that they interfered significantly with his education, employment or his overall welfare. It was against this background, he claimed, that he and his then-girlfriend had applied for a</p>

			<p>[Country 2] visa in May 2014. He said that wanted to go there, just for ‘tourism’. There are few details about the applicant’s [Country 2] visa application in mid-2014. But the Tribunal does not accept at face value that he was planning to stay there for only a brief period, before returning to the OPT. Even so, the overall picture to emerge is that at least to mid-2014, the applicant did not experience harm (including discrimination or intimidation), threats of violence (either directed at him personally or more general security problems), or other detriment that amounted to serious harm or significant harm.’ (para 31).</p> <p>‘The applicant claimed that his situation changed dramatically in mid-2014 when the suspected Palestinian militants approached him – and that the overall deteriorating security situation has added to the risks he faces on his return.’ (para 32).</p> <p>‘The Tribunal has considered, but not accepted, the applicant’s claim that Palestinian men targeted him, trying to forcibly recruit him, force him into performing terrorist acts, threatening to declare him a collaborator, and otherwise harm or kill him. It follows that the Tribunal has rejected all the associated claims, such as the risk of Palestinian residents mistreating him as a suspected Israeli collaborator, the Palestinian Authorities imposing the death penalty, and the PA and/or Israeli security forces detaining, interrogating and perhaps mistreating him.’ (para 62).</p>
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			<p>‘The Tribunal accepts that the applicant is concerned about the West Bank’s security environment, in particular due to sporadic violence carried out by Palestinian militants and Israeli settlers, and the uncertain political outlook. Under <a href="#">s.36(2B)(c)</a> of the Act, there is taken not to be a real risk that an applicant will suffer significant harm if the Tribunal is satisfied that the real risk is one faced by the population generally and is not faced by the applicant personally. As noted above, the Tribunal accepts that the applicant may personally face some additional risk factors – as a Palestinian male, and a former (and perhaps future) employee of an Israeli [settlement]. However, the Tribunal is not satisfied that these factors, even cumulatively, establish a real risk of the applicant being subject to significant harm if he returns.’ (para 63).</p> <p>‘Looking ahead to the reasonably foreseeable future, the Tribunal is not satisfied that that there are substantial grounds for believing that the applicant will face a real risk of being arbitrarily deprived of his life, that the death penalty would be carried out on him, that he will be subjected to torture, that he will be subjected to cruel or inhuman treatment or punishment; or that he will be subjected to degrading treatment or punishment.’ (para 64).</p> <p>‘Accordingly the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary</p>
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			and foreseeable consequence of the applicant being removed from Australia to the OPT, there is a real risk that he will suffer significant harm: <a href="#">s.36(2)(aa)</a> .’ (para 65).
<a href="#">1505502 (Refugee) [2017] AATA 800</a> (Unsuccessful)	31 March 2017	1, 38-41	<p>This case related to the definition of ‘significant harm’. The Tribunal found that the definition is not satisfied by a level of medical care of a lesser standard than that of Australia and nor is it satisfied by harm arising from the act of removal such as ‘fear and pressure’ upon return to an applicant’s home country.</p> <p>‘The applicants are a wife, her husband and their [children]. They are all citizens of Sri Lanka. The applicant wife and husband and [one child] came to Australia as [temporary entrants] in September 2013 and [another child] was born here in [year]. The applicants belong to the Sinhalese ethnic group. Only the applicant wife has made claims for protection... She has said that on the last occasion on which her husband left Sri Lanka in April 2011 the owner of [a certain] company [drove] them himself. She has said that this was a man named [Mr A] who has political connections and is involved in underworld activities. She has said that because he knew that her husband was overseas he came to her home and [assaulted] her. She has said that her husband does not know about this but she fears that he will come to know if they return to Sri Lanka or that [Mr A] will come and trouble her again. She and her husband also have health problems and she has said that</p>

			<p>they will not receive the treatment which they are receiving here if they return to Sri Lanka.’ (para 1).</p> <p>‘Having regard to my findings of fact above I do not accept on the evidence before me that that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant wife being removed from Australia to Sri Lanka, there is a real risk that she will be [assaulted] or troubled or that she will otherwise suffer significant harm at the hands of [Mr A] and his friends or associates. Having regard to my findings of fact above I do not accept on the evidence before me that that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to Sri Lanka, there is a real risk that they will suffer significant harm because the applicant husband will come to know that [Mr A] [assaulted] the applicant wife while her husband was working overseas.’ (para 38).</p> <p>‘I accept that the applicant wife is suffering from [medical conditions] for which she is receiving treatment in Australia and that her husband has [medical conditions]. As I indicated to the applicant wife, I accept that the medical care which she and her husband can access in Sri Lanka may not be of the same standard as the care they are receiving in Australia. However there is no suggestion that the Government of Sri Lanka will arbitrarily refuse the applicants medical</p>
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			<p>treatment or that it has arbitrarily limited treatment for people with the sort of problems which they have such that it could be said that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to Sri Lanka, there is a real risk that they will be arbitrarily deprived of their lives.’ (para 39).</p> <p>‘The definitions of ‘torture’ and ‘cruel or inhuman treatment or punishment’ in <a href="#">subsection 5(1)</a> of the <a href="#">Migration Act</a> require that pain or suffering be ‘intentionally inflicted’ on a person and the definition of ‘degrading treatment or punishment’ requires that the relevant act or omission be ‘intended to cause’ extreme humiliation. I do not accept on the evidence before me that there is the requisite intention to inflict pain or suffering or to cause extreme humiliation to people suffering from the sort of medical problems which the applicants have. I do not accept on the evidence before me, therefore, that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to Sri Lanka, there is a real risk that they will suffer significant harm as defined as a result of their medical problems.’ (para 40).</p> <p>‘In her statutory declaration made on 12 October 2016 the applicant wife said that she would not be able to cope with the fear and pressure if she had to return to Sri Lanka. However I do not accept that the fear and</p>
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			<p>pressure which she may feel if she were to be removed from Australia to Sri Lanka brings her within the complementary protection criterion: it is well-established that harm arising from the act of removal itself will not meet the definition of ‘significant harm’ in <a href="#">subsection 36(2A)</a> of the <a href="#">Migration Act</a>.<sup>[2]</sup> At the hearing before me the applicant wife said that her [child] was receiving a good education here and was learning well and she produced a folder containing documents relating to her [child]’s educational achievements and the like. However such matters which may be regarded loosely as compassionate circumstances do not bring her family’s situation within the complementary protection criterion. I do not accept on the evidence before me that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to Sri Lanka, there is a real risk that they will suffer significant harm as defined in <a href="#">subsection 36(2A)</a> of the <a href="#">Migration Act</a>.’ (para 41).</p>
<p><a href="#">1505482 (Refugee) [2017] AATA 674</a> (Unsuccessful)</p>	<p>29 March 2017</p>	<p>2, 63-64, 65-66</p>	<p>This case is an example of the application of s 36(2B)(c), that a risk faced by the population generally and not by a non-citizen personally is taken not to be a real risk.</p> <p>‘The applicant is [age] and a citizen of Lebanon. He is a Sunni Muslim from [town], North Lebanon. He arrived in Australia [in] November 2013 on a [temporary] visa. He applied for a protection visa [in] December 2013.’</p>

			<p>(para 2).</p> <p>‘The Tribunal finds that the applicant has manufactured his evidence in relation to why he had departed Lebanon. The Tribunal, therefore, does not accept that the applicant was a member of the [Organisation 1]. The Tribunal does not accept that he had worked with the [Organisation 1] in any capacity. The Tribunal does not accept that he was a member or supporter of the Future Movement. The Tribunal does not accept that he was a member of any council or committee associated with the Future Movement. The Tribunal does not accept that he had carried out any activities for or on behalf of the [Organisation 1] or the Future Movement. The Tribunal does not accept that he had provided any form of assistance to Syrian refugees in Lebanon or to children of Palestinian refugees in [a] refugee camp. The Tribunal does not accept that he had provided any form of assistance to the Syrian rebels or the Free Syrian Army. The Tribunal does not accept that he had smuggled Syrian rebels across the border. The Tribunal does not accept that he had introduced rebels to UN agencies in Lebanon or that he had assisted some in travelling outside of Lebanon. The Tribunal does not accept that he had provided financial assistance to the families of the rebels he had helped cross the border. The Tribunal does not accept that he was perceived by Hezbollah or anyone else to have been involved in providing assistance to the Syrian rebels. The Tribunal does not accept that he is imputed with an anti-Syrian</p>
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			<p>regime opinion. The Tribunal does not accept that the applicant had participated in any anti-Syrian regime demonstrations or any other demonstrations in Lebanon. The Tribunal does not accept that he had played any role in organising any demonstrations in Lebanon. The Tribunal does not accept that he had invited others to participate in demonstrations in Lebanon. The Tribunal does not accept that he had made demands, by any means, that the Lebanese government to take more control of Hezbollah's weapons. The Tribunal does not accept that the applicant was targeted and/or harmed by Hezbollah, the Syrian National Party, any other member of the March 8 Coalition or anyone else in 2008. The Tribunal does not accept that the applicant's friends or associates were targeted, attacked, harmed or killed on 2008, 2013 or at any other time. The Tribunal does not accept that the applicant had spent any period of time in hiding in [suburb] or anywhere else in Lebanon. The Tribunal does not accept that the applicant was attacked and/or seriously injured in 2012 or at any other time. The Tribunal does not accept that the applicant was threatened by anyone in Lebanon. The Tribunal does not accept that the applicant had changed his telephone number in Lebanon in order to avoid receiving threatening phone calls. The Tribunal does not accept that the applicant's business was attacked or damaged in Lebanon. The Tribunal does not accept that his father and [sibling] were detained and/or questioned at any point in time. The Tribunal does not accept that his</p>
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			<p>[sibling] was [shot]’ (para 63).</p> <p>‘The Tribunal does not accept that the applicant has been harmed in the past by anyone or that there is a real chance that he will be subjected to serious harm for the reason of his political opinion, religion, membership of the particular social group of his family or any other social group apparent on the face of the evidence, or any other Convention reason...’ (para 64).</p> <p>‘The applicant’s evidence indicates that he is concerned about general violence, political conflict and tension in Lebanon. However, there is no persuasive evidence before the Tribunal to suggest that the tensions, lack of general security and any instability the applicant may be concerned about is faced by him personally. The Tribunal is not satisfied that the general security situation in Lebanon would expose the applicant to a real chance of persecution for a Convention reason.’ (para 65).</p> <p>‘Under s.36(2B)(c) of the Act there is taken not to be a real risk that an applicant will suffer significant harm if the Tribunal is satisfied that the real risk is one faced by the population generally and is not faced by the applicant personally. The Tribunal is satisfied that the tensions, lack of general security and the instability the applicant fears are faced by the population generally and not by him personally. The Tribunal finds that there is no real risk that the applicant will suffer significant</p>
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			harm in Lebanon as a result of lack of general security and instability.’ (para 66).
<a href="#">Saleh and Minister for Immigration and Border Protection (Migration) [2017] AATA 367</a> (Unsuccessful)	24 March 2017	2, 3, 8, 10, 93-97, 99	<p>This case related to the Tribunal’s decision whether to exercise its discretion under section 501CA(4) of the Migration Act to revoke an earlier decision to cancel a visa. The applicant was owed <i>non-refoulement</i> obligations and challenged previous case authority that the Minister was not bound to consider those or the prospect of indefinite detention because the applicant could apply for a protection visa (see eg <i>Minister for Immigration and Border protection v Le</i> [2016] FCAFC 120). He argued that the Tribunal was bound to consider Australia’s <i>non-refoulement</i> obligations, but this was rejected because the Tribunal followed the decision of the Full Federal Court in <i>Minister of Immigration and Border Protection v Le</i>.</p> <p>‘Mr Saleh is 33 years old. He is a citizen of Lebanon and was raised in a Shia Muslim family. He arrived in Australia in 2007 and was granted a Prospective Marriage (Temporary) visa. Mr Saleh was granted a Class BS Subclass 801 Partner (residence) visa (the “visa”) on 18 July 2011.’ (para 2).</p> <p>‘Mr Saleh was married to his first wife, an Australian citizen, in early 2008. She was the niece of the wife of Mr Saleh’s uncle, who also lives in Australia. The marriage ended and Mr Saleh was granted a permanent spouse visa on the basis that he had experienced family</p>

			<p>violence.’ (para 3).</p> <p>‘Mr Saleh converted to Christianity in mid-2012.’ (para 8).</p> <p>‘In February 2014, Mr Saleh pleaded guilty to and was convicted of a series of criminal charges including:</p> <ul style="list-style-type: none"> <li>• Make Threat to Kill (2 charges);</li> <li>• Threat to Destroy/Damage Property (3 charges);</li> <li>• Burglary (three counts);</li> <li>• Theft (2 charges); and</li> <li>• Intentionally Damage Property; and</li> <li>• Intentionally Destroy Property (ST5 at 204).’ (para 10).</li> </ul> <p>Applicant’s argument: ‘With consideration to all of the above we reiterate that the Applicant cannot be returned to Lebanon without breach of Australia’s non-refoulement obligations and without engendering serious harm to the Applicant. We submit that the Tribunal has the discretion to consider non-refoulement and, in light of the Applicant’s circumstances, ought to do so, particularly having regard to the Tribunal’s objectives set out at <a href="#">s.2A</a> of the <a href="#">Administrative Appeals Tribunal Act 1975</a> of providing a mechanism of review that is fair, just and proportionate.’ (para 93).</p> <p>‘In oral submissions counsel for Mr Saleh further argued that, in effect, the language in Direction 65 does</p>
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			<p>not preclude the Tribunal from making an assessment of any non-refoulement obligations owed to Mr Saleh. Rather, it is permissive and, in the circumstances of this case, the Tribunal is morally obliged to do so, despite any protection visa protections that might arise at a later date and as assessed elsewhere. In effect, counsel contended that the Tribunal was <i>required</i> to assess any non-refoulement obligations that arise in relation to Mr Saleh because Mr Saleh had specifically raised this as an issue and risked permanent detention. Hence, a failure to address this would amount to jurisdictional error on the part of the Tribunal and a failure to provide natural justice (citing <i>Dranichnikov v Minister for Immigration and Multicultural Affairs</i> (2003) 197 ALR 389 at [94]).’ (para 94).</p> <p>‘In analysing this issue, the Tribunal pays particular attention to and is guided by the decision of the Full Federal Court in <i>Minister of Immigration and Border Protection v Le</i> [2016] FCAFC 12 (Allsop CJ, Griffiths and Wigney JJ).’ (para 95).</p> <p>‘The central issue on appeal in <i>Le</i> was whether the primary judge erred in finding that Australia’s non-refoulement obligations to Mrs Le were a mandatory consideration in exercising the Minister’s power under <a href="#">s 501(2)</a> of the <a href="#">Migration Act</a> to cancel her visa.’ (para 96).</p> <p>[...] [Quoting Le]: <i>For these reasons, the primary judge</i></p>
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			<p><i>erred in concluding, in the particular circumstances relating to Ms Le, that Australia's non-refoulement obligations were a mandatory consideration in the exercise of the Minister's power under <a href="#">s 501(2)</a>. That is because it was open to Ms Le to apply for a protection visa and to put before the Minister any material relating to whether Australia owed protection obligations to her, whether her removal to Vietnam would be in breach of Australia's non-refoulement obligations or whether there was some other reason personal to her as to why there was a real possibility that she might be held in immigration detention indefinitely.</i></p> <p>'Given the significance of this decision, it is helpful to quote from it at length. <i>Le</i> stands as the lead authority in relation to this issue and the Tribunal is bound by what it says about the obligation of the Tribunal to consider any non-refoulement obligations now that Mr Saleh has raised this as a concern.' (para 97).</p> <p>'The Tribunal has reviewed the evidence before it in relation to any refoulment obligations owed to Mr Saleh. Mr Saleh claims that he will be harmed if he is returned to Lebanon because of his conversion to Christianity and because of discrimination against persons with disabilities. This may well be the case. Unfortunately, the evidence before the Tribunal is far from complete. It is noted, in particular, that no International Treaty Obligations Assessment has been</p>
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			<p>conducted. An assessment of that sort will be conducted if Mr Saleh applies for a protection visa. He is entitled to do so. In these circumstances, recognising paragraph 14.1(4) of Direction No 65 and the decision in <i>Le</i>, it is unnecessary for the Tribunal to determine whether any international non-refoulement obligations are owed to Mr Saleh for the purposes of determining whether the cancellation of his visa should be revoked. Nor is it desirable to do so here given the lack of evidence available to the Tribunal. The Full Court has now made clear the importance of the statutory scheme which, in the case of a person like Mr Saleh, separates the consideration of cancelling his visa under <a href="#">s 501</a> from the possible future exercises of other statutory powers, including those relating to the determination of a valid application for a protection visa – at which point the Minister will be obliged to consider any non-refoulement obligations owed to Mr Saleh, as well as the prospect of indefinite detention should it arise in the context of that protection visa application.’ (para 99).</p>
<p><a href="#">1517181 (Refugee) [2017] AATA 544</a> (Unsuccessful)</p>	21 March 2017	24, 62-63, 79-81	<p>This case relates to the definition of ‘significant harm’. The Tribunal finds that discrimination in employment, including earning a reduced income does not amount to significant harm.</p> <p>‘The applicant claims and the Tribunal is satisfied on the basis of the personal details provided, that he is a Nepalese national. Nepal is therefore the receiving country for the purpose of assessing the applicant’s claim for protection.’ (para 24).</p>

			<p>‘The primary issue in this case is whether Australia does not owe protection obligations to the applicant because he has a right to enter and reside in India within the meaning of <a href="#">s.36(3)</a>. There is no suggestion that the applicant has a right to enter and reside in a third country other than India.’ (para 62).</p> <p>‘The matters which must be considered by the Tribunal in determining whether third country protection is available to the applicant are:</p> <ul style="list-style-type: none"> <li>○ whether the applicant, a citizen of Nepal, has a right to enter and reside in India (<a href="#">s.36(3)</a>);</li> <li>○ whether he is at risk of Convention-related persecution or ‘significant harm’ in India (<a href="#">s.36(4)</a>);</li> <li>○ whether the Indian authorities might return him to Nepal or another country where he is at risk of Convention-related persecution or ‘significant harm’ (<a href="#">s.36(5)</a> and <a href="#">s.36(5A)</a>); and</li> <li>○ if he has a right to enter and reside in India, whether he has taken all possible steps to avail himself of that right.’ (para 63).</li> </ul> <p>‘The applicant also claimed that he would not have ‘his people’ in India, he would find it difficult to get work,</p>
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			<p>Indians would dominate and discriminate against Nepalese and he would earn less than Indians.’ (para 79).</p> <p>‘While there is some evidence of discrimination and hardship which may be faced by Nepalese migrants in India, particularly those who do not have identity cards and are in low paid jobs,<sup>[17]</sup> the Tribunal has found no reports that Nepalese in India are the subject of systematic discrimination or hardship that can be characterised as serious or significant harm. According to a 2011 report, Nepalese resident in India have established institutions and socio-cultural practices<sup>[18]</sup>. Taking the country information as a whole, the Tribunal does not accept that the treatment of Nepalese in India is such that the mere fact of being a Nepali citizen in that country gives rise to a well-founded fear of persecution for a Convention reason, or a real risk of significant harm.’ (para 80).</p> <p>‘The Tribunal notes the applicant’s claim of discrimination in relation to the income-earning ability of Nepalese in India compared to Indians. While the applicant may earn a reduced income in India, the Tribunal still considers the cumulative weight of country information set out above, including that millions of Nepalis are living and working in India and there are no restrictions on their ability to do so, to be persuasive. Therefore, the Tribunal is not satisfied that any reduced income the applicant may comparatively</p>
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			experience in India amounts to a real chance of significant economic hardship that threatens a person's capacity to subsist or a denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist. In addition, the Tribunal is not satisfied that any reduced income the applicant may comparatively experience in India amounts to a real risk of cruel or inhuman treatment or punishment.' (81).
<a href="#">1513679 (Refugee) [2017] AATA 543</a> (Unsuccessful)	21 March 2017	2-3, 31-33	<p>This case is an example of the application of s 36(2B)(c), that a risk faced by the population generally and not by a non-citizen personally is taken not to be a real risk.</p> <p>'The applicant, a citizen of Lebanon and a Sunni Muslim, arrived in Australia [in] March 2014 on a [temporary] visa. He applied for a protection visa [in] April 2014. In his protection visa application, the applicant made the following claims:' (para 2).</p> <p>'He left Lebanon due to the 'ongoing threats emanating from Islamic radicals such as the Salafysts and takfiris'. These groups have been 'brainwashing [his] people and committing various offences'. He had made a 'complaint' to the authorities about their activities, which resulted in a number of them being detained and their operations uncovered. Consequently, his life was threatened by Takfiris. He has not experienced harm in the past, but 'Islamic radicals...have vowed to avenge [his] action of informing the authorities about their</p>

			<p>illegal activities’. He fears being hunted down and killed by these groups.’ (para 3).</p> <p>‘The applicant also referred to the sectarian conflict between Sunnis and Alawis in the Tripoli suburbs of Tabbaneh and Jabal Mohsen, stating that, when travelling sometimes, he was unable to ‘pass’. In her post- hearing submission, the applicant’s representative contended that ‘the conflict between the Shia and Sunni Muslims and other sectarian groups operating throughout Lebanon is a political and religious problem that has been ongoing for many years and has continued to increase in recent years’. According to DFAT, limited instances of possible sectarian violence have been reported in Akkar and sectarian violence within Tripoli has historically been limited to the two suburbs of Bab al-Tabbaneh and Jabal Mohsen.<sup>[3]</sup> Again, the applicant did not claim to have been subjected to harm, let alone serious or significant harm, as a result of any sectarian clashes, whether in Akkar or Tripoli. The Tribunal is not satisfied that there is a real chance or a real risk that the applicant would be subjected to serious or significant harm for the reason of, or arising from, sectarian violence in Lebanon.’ (para 31).</p> <p>‘The Tribunal appreciates that the applicant is concerned about general violence, political conflict and tension in Lebanon. However, there is no persuasive evidence before the Tribunal to suggest that the tensions, lack of general security and any instability the</p>
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			<p>applicant may be concerned about is faced by him personally. The Tribunal is not satisfied that the general security situation in Lebanon would expose the applicant to a real chance of persecution for a Convention reason.’ (para 32).</p> <p>‘Under s.36(2B)(c) of the Act there is taken not to be a real risk that an applicant will suffer significant harm if the Tribunal is satisfied that the real risk is one faced by the population generally and is not faced by the applicant personally. The Tribunal is satisfied that the tensions, lack of general security and the instability the applicant fears are faced by the population generally and not by him personally. The Tribunal finds that there is no real risk that the applicant will suffer significant harm in Lebanon as a result of lack of general security and instability.’ (para 33).</p>
<p><a href="#">1515436 (Refugee) [2017] AATA 524</a> (Unsuccessful)</p>	<p>16 March 2017</p>	<p>22, 24, 27, 59-61,</p>	<p>This case related to the definition of ‘significant harm’. The Tribunal found that the definition is not satisfied by minor harassment. The Tribunal also found that medical problems caused by that harassment could not amount to significant harm in the absence of a specific intention to cause the medical issues on the part of the harassers.</p> <p>‘The applicant claims to be a citizen of Pakistan who was born on [date] in Nowshera, in Pakistan. According to her protection visa application, she resided in [named village and town], in Khyber Pakhtunkhwa (KPK) from July 2004 to July 2014. The applicant completed</p>

			<p>[number] years education and has a [qualification] which she completed in [year]. She is fluent in Urdu and English. The applicant described her occupation before coming to Australia as [occupation 1]. She worked at [an employer] in Nowsehra from [year] to July 2014. The applicant departed Pakistan legally [in] July 2014. Present in Australia and included in the application are the applicant's spouse, [children] and her mother.' (para 22).</p> <p>'The applicant claimed in her protection visa application that her [Relative A, named], was brutally murdered along with his [family] about a year ago in Islamabad. They were tortured and killed in their house and their bodies dumped in the bush around town...' (para 24).</p> <p>'The applicant claimed that they have managed to keep the killers in custody through various means so far but there is a clear bias among many officials who are helping the killers because of their contacts and paying bribes to the corrupt officials. She fears that the killers could be out soon because of the collusion of certain government officials who also see them as the 'odd' ones. The alleged killers have strong supporters with a will and ability to harm her and her children and they have explicitly shown their intentions through the threats they have received. She claimed her mother, who is included in the application, is an old woman with a heavy heart and not much to live for. She does</p>
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			<p>not want to see more of her children and grandchildren murdered by those who hate them for being more affluent and different.’ (para 27).</p> <p>‘Having regard to the definition of significant harm in <a href="#">s.36(2A)</a> of the Act as set out under the heading ‘relevant law’ above, and the findings of the Tribunal above, the Tribunal does not accept that what the applicants might experience upon return to their home in Pakistan will involve a real risk of being arbitrarily deprived of their life; having the death penalty carried out on them; being subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. As discussed above, although the Tribunal accepts that the applicant may have been approached by the family of [Mr A] and the others accused of murdering her [Relative A] and his family, in attempts to have the sixth named applicant pardon the perpetrators of this crime, the Tribunal does not accept that the applicant, the sixth named applicant, the applicant’s [Relative C] or anyone else has been threatened by the families of the accused or subjected to constant intimidation and harassment either in Pakistan or since their arrival in Australia. The Tribunal also does not accept the applicant’s claim in her statutory declaration that the killers themselves are threatening to kill her and the rest of her family. Nor does the Tribunal accept on the evidence before it that there has been any contact from the two accused who the applicant claimed were released on bail. The Tribunal has considered</p>
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			<p>whether the applicants would be subjected to extreme pressure in the form of constant threats, intimidation and harassment from the families, to drop the charges against those accused of killing the applicant's [Relative A] and his family, on their return to Pakistan. However, based on the findings and reasons discussed above, the Tribunal does not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to Pakistan, there is a real risk that the applicants would be exposed to such treatment or to significant harm as defined in <a href="#">subsection 36(2A)</a> of the Act from the families of either [Mr A] or the other accused men or anyone associated with them. The Tribunal accepts that upon return to Pakistan, the applicant and possibly the sixth named applicant, may be again approached by the family of [Mr A] and/or the families of the other accused, in an effort to have the charges against them withdrawn. However, the Tribunal does not accept that such contact constitutes significant harm as defined in <a href="#">subsection 36(2A)(1)</a>.' (para 59).</p> <p>'The Tribunal has taken into consideration the submissions of the applicant's adviser that due to the sixth named applicant's health condition, threats and pressure applied to her to grant mercy to those accused of killing her son and his family, could result in her suffering a [medical episode], which clearly is significant harm. The Tribunal accepts on the medical evidence before it, and the applicant's evidence in the</p>
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			<p>hearing, that the sixth named applicant suffers from a number of health conditions including [two conditions mentioned]. The applicant claimed that the sixth named applicant had suffered from [medical] problems since six or seven years ago and had two to three [medical episodes] in Pakistan, which she received treatment for. She stated that the sixth named applicant’s [medical condition] was being managed in Pakistan and there was no issue regarding whether she would receive medical treatment in Pakistan as it was always available there and the doctors were good. The Tribunal notes in the letter from [Doctor A], the sixth named applicant’s [specialist], dated [in] November 2016, it was stated that it would be best the sixth named applicant not be subjected to stress as it may aggravate her [medical condition] and her overall health. The adviser submitted in the hearing that if the sixth named applicant was subjected at minimum to harassment and threats, given her serious [condition] and other medical complaints, the threats could be fatal to her.’ (para 60).</p> <p>‘The Tribunal finds that any health problems the sixth named applicant may experience as a result of any contact she, or the applicant, may have on their return to Pakistan with the families of [Mr A] or the other accused men seeking their pardon does not constitute significant harm on the basis that there is no intention by the families to cause significant harm as defined in <a href="#">s.36(2A)</a>. There must be an actual, subjective, intention on the part of [Mr A] and the other accused’s</p>
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			<p>family members to bring about the harm by their conduct, which in this case is to cause her a [medical episode] which may be fatal to her. The Tribunal has found there have been only a few occasions in the past where the applicant, as opposed to the sixth named applicant, has been approached in a non-threatening way, by the families of the accused, seeking their pardon and does not accept if this were to happen on their return to Pakistan this would necessarily result in a [medical episode] or worsening of the sixth named applicant’s medical condition. Further, the Tribunal does not accept on the evidence before it that there is any intention on the part of those seeking the sixth named applicant’s pardon to intentionally cause her significant harm as defined in <a href="#">s.36(2A)</a>, including the arbitrary deprivation of life.’ (para 61).</p>
<p><a href="#">1607141 (Refugee) [2017] AATA 514</a> (Unsuccessful)</p>	<p>8 March 2017</p>	<p>48, 51, 110, 117, 119-125</p>	<p>The applicant was a Thai monk who had been accused of misappropriating funds in Australia. This was his second Tribunal decision. The case related to the lawful sanctions exception to the definition of ‘significant harm’ in s 5(1)(b) of the Migration Act (see para 119 below).</p> <p>‘The applicant said he was fearful of the influence the inner committee of the Sangha Council. He thought they would disrobe him and strip him of his title. According to the Sangha Act if a person is suspected of improper behaviour he is disrobed and stood down. If he is found not guilty then he is restored to the</p>

			<p>monkhood. It would be very humiliating for the applicant to be disrobed in Thailand as he has a good reputation. The Tribunal put to him that he said to the previous Tribunal that he had evidence he had not misappropriated funds, the allegations were without substance and he had been found guilty without evidence and there was no justice. The applicant responded stating that he does not have specific evidence that he has not misappropriated funds but there is also no evidence that he did so.’ (para 48).</p> <p>‘The Tribunal asked the applicant why he thought he in particular would be targeted for imprisonment and possible harm. He said that there are various cases of monks who have worked overseas being targeted by the Committee on their return to Thailand. These happen every year. His case is very similar to their situations. They are doing it all over the world to other monks.’ (para 51).</p> <p>As discussed above, the Tribunal accepts that allegations of misconduct have been made in respect of the applicant to the Sangha Council in Thailand and that consequently, it is likely he will have to answer these allegations. Given the administrative procedures in the Sangha Act, it is possible the applicant may be temporarily disrobed or defrocked and stood down whilst he undergoes such process.’ (para 110).</p> <p>‘As discussed above, the Tribunal accepts that the</p>
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			<p>applicant will suffer psychologically if he is disrobed and stood down even if this is only on a temporary basis, and that this would be humiliating for him.’ (para 117).</p> <p>‘S.5(1) defines degrading treatment or punishment as follows:  <a href="#">degrading treatment or punishment</a> means an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:</p> <p>(a) that is not inconsistent with Article 7 of the <a href="#">Covenant</a>; or</p> <p>(b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the <a href="#">Covenant</a>.’ (para 119).</p> <p>‘Based on the above evidence, the Tribunal is not satisfied that the applicant will suffer significant physical harm or arbitrary deprivation of his life or torture, or cruel or inhuman treatment or punishment from the police, military or members of the Sangha Council or members of the Buddhist monkhood if he returns to Thailand now or in the foreseeable future.’ (para 120).</p> <p>‘The Tribunal considers that the</p>
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			<p>emotional/psychological harm to the applicant that may arise as a result of what he considers to be degrading treatment or punishment by the Sangha Council would fall within the qualifications set out in s.5(1) above. The Tribunal is satisfied that the initial act of defrocking or disrobing and standing the applicant down from the Buddhist monkhood while any charges against him were investigated would arise only from lawful sanctions that are not inconsistent with the Articles of the Covenant.’ (para 121).</p> <p>‘The Tribunal is not satisfied that any lack of due process by the Sangha Council would fall within the above definition of significant harm. The Tribunal is not satisfied that any lack of due process such that the process may not meet Australian standards of law or procedural fairness in law would operate with the specific intention to cause extreme humiliation which is unreasonable such that it would fall within the above definition of degrading treatment or punishment.’ (para 122).</p> <p>‘The Tribunal accepts that the applicant has a number of health conditions including [medical condition] which may be exacerbated under conditions of extreme stress, and therefore potentially exacerbated by a process of defrocking or disrobing him as a Buddhist monk. However, the Tribunal does not accept that any exacerbation of his medical conditions would be intentionally inflicted or that any process undertaken by</p>
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			<p>the Sangha Council in respect to the allegations against the applicant would be intended to cause exacerbation of his medical conditions. The Tribunal is therefore not satisfied that any exacerbation of the applicant's medical conditions falls within the definition of significant harm, or degrading treatment or punishment as qualified in s.5(1)(b) above.' (para 123).</p> <p>'The Tribunal is not satisfied that the applicant would be unable to obtain appropriate medical care or prevented from obtaining appropriate medical care for his health conditions in Thailand, should they be exacerbated by the psychological and emotional stress of being disrobed.' (para 124).</p> <p>'Based on the above findings both individually and cumulatively, the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of being removed from Australia to Thailand, there is a real risk the applicant was suffer significant harm (having regard to the exhaustive definitions in s.36(2A) and s.5(1) of the Act).' (para 125).</p>
<a href="#">1701026 (Refugee) [2017] AATA 372</a> (Successful)	6 March 2017	47, 51-53, 65-68	This case related to the cancellation of a visa under section 116(1AA) of the Migration Act (identity). The Tribunal did not cancel the visa because the applicant was owed <i>non-refoulement</i> obligations which his removal from Australia would breach. The Tribunal also commented that the Department of Immigration's

			<p>failure to carry out a mandatory International Treaty Obligations Assessment (ITOA) prior to cancellation would have constituted a breach of procedural fairness.</p> <p>‘However it is clear that the delegate has not turned his mind to this in this decision, relying on the post cancellation processes that exist as the explanation for his failure to do so. This pre-removal assessment is not part of the cancellation decision itself, and should not be used as a de-facto arrangement to avoid a proper consideration of this aspect as to whether to cancel the visa. The Tribunal is very concerned by this failure by the delegate to consider the international obligations that would be breached as a result of the cancellation of the visa. The delegate’s determination that an ITOA could be completed after the cancellation of the visa is not a consideration of this discretionary factor...’ (para 47).</p> <p>‘The Tribunal considers that by failing to request an ITOA and consider the outcome of that assessment the delegate has abrogated the required procedural fairness that is inherent in assessing whether there are international obligations that would be breached by the cancellation of the visa.’ (para 51).</p> <p>‘There is another aspect of the failure to request and conduct an ITOA prior to cancelling the visa, the Tribunal itself does not have the advantage of considering the information an ITOA could have</p>
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			<p>provided. The applicant has identity issues, which go to a significant aspect of his protection claim, that he is a Hazara from the Jaghori region of Afghanistan. An ITOA could have explored the applicant’s knowledge and understanding of this location in Afghanistan, and provided some guidance as to the applicant’s identity arising from his responses to questions of this nature. The ITOA could have made findings that would have been useful to the delegate and the Tribunal, including making possible findings that the applicant is not a Hazara and/or from Jaghori, Afghanistan. This was not done. It should have been.’ (para 52).</p> <p>‘The Tribunal’s review of this visa cancellation does not include a protection visa eligibility assessment. The Tribunal’s does not have a responsibility in this process to make a further assessment of Australia’s protection obligations for the applicant, that is what the ITOA process has been created for...’ (para 53).</p> <p>‘The Tribunal considers that the integrity of the visa grant process is founded on the premise of being able to rely upon the information being provided for the assessment, and circumstances which demonstrate that such information has questionable authenticity or is incorrect has a detrimental effect on this process. The information is relevant to the application of Australia’s law with respect to permission to enter and reside in the Australian community. Departure from those laws must be taken seriously in any consideration as to whether a</p>
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			<p>visa holder should be entitled to continue to hold that visa, and deliberate breaches of the law should be given significant scrutiny in determining whether the visa should remain.’ (para 65).</p> <p>‘However, the Tribunal is conscious that to cancel a visa is also a serious decision to be made and one that is not done without serious consideration of all the factors, as detailed above. As discussed with the applicant, the Tribunal considers the cancellation of a protection visa one of the most serious matters that could come before it, given that it involves the cancellation of a permanent visa and would be returned to the country where he states he will face serious harm. This was originally accepted in a protection assessment, and the applicant and his wife have established their family and settled in Australia.’ (para 66).</p> <p>‘The Tribunal has considered the international obligations that arise in this instance, as detailed above. The Tribunal considers in these circumstances to be highly relevant in a consideration of a matter like this, and as detailed, have not been properly considered until this determination. The legal consequences of a decision of this nature are a high priority in matters like this, as rightfully recognised by the drafters of the PAM3. No ITOA has been completed that establishes a contrary position to the applicant’s circumstances to that as found by the RSA delegate in the first instance, he is owed protection. From a very preliminary view of</p>
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			<p>the country information, he still is. Australia will breach its legal obligations if the applicant was removed from Australia to Afghanistan.’ (para 67).</p> <p>‘Having weighed up the circumstances as to whether the visa should be cancelled, the Tribunal considers on the present information that it should not be. Considering the circumstances as a whole, the Tribunal concludes that the visa should not be cancelled.’ (para 68).</p>
<p><a href="#">1616481 (Refugee) [2017] AATA 380</a> (Successful)</p>	28 February 2017	2, 49-53	<p>This case related to a visa cancellation under section 101(b) of the Migration Act. The Tribunal did not cancel the visa because the applicant was owed <i>non-refoulement</i> obligations which his removal from Australia would breach.</p> <p>‘The applicant made an application for a protection visa [in] May 2010 and was granted the visa on the same day. [In] September 2016 the delegate cancelled the visa on the basis that there had been non-compliance under <a href="#">s.101(b)</a> of the Act in that the applicant had given incorrect answers on his protection visa application form. The applicant provided a copy of that decision to the tribunal. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.’ (para 2).</p> <p>‘The tribunal has considered Australia’s international obligations, specifically whether the cancellation would lead to the applicant’s removal in breach of Australia’s</p>

			<p>non-refoulement obligations.’ (para 49).</p> <p>‘The tribunal notes that the ITOA undertaken by the department (dated [in] September 2016 did not accept that the applicant fled Iraqi in 2009 because he had been discriminatorily targeted by Sunni Wahabis, nor did it accept that the applicant faced either a real chance of persecution or real risk of significant harm due to the applicant’s Faili Kurdish ethnicity. The ITOA decision maker did, however, find that the applicant was owed non-refoulement obligations by Australia under the complementary protection provisions because he faced a real risk of significant harm from Sunni extremists, in particular the so-called Islamic State, as a Shia Muslim, would not be able to reasonably relocate and would not be able to obtain protection from Iraqi authorities such that a real risk of significant harm would not arise.’ (para 50).</p> <p>‘Having considered the country information before it and contained in the ITOA decision, the tribunal agrees with this assessment. It places great weight on the department’s own assessment that the applicant is owed non-refoulement obligations by Australia and that the applicant’s removal from Australia, which would be a consequence of his visa cancellation, would be in breach of those obligations.’ (para 51).</p> <p>‘The tribunal further notes that the [date] September 2016 letter received by the applicant from the</p>
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			<p>department regarding his ITOA (provided by the applicant to the tribunal) advises that the applicant will not be asked to leave Australia and that the department will not make arrangements to remove him while he continues to engage Australia's non-refoulement obligations. It appears from departmental records that the applicant does not currently hold a bridging visa after his protection visa was cancelled. The applicant will then be subject to detention, subject to any arrangements made by the department. As the holder of a visa that has been cancelled, the applicant will be barred from applying for any further visas onshore, apart from a very limited range of visas, by operation of <a href="#">s.48</a> of the Act. Given that the department has stated it will not make arrangements to remove him while he continues to engage Australia's international obligations, there is a real possibility that the applicant may be subject to detention and that it may be indefinite. The tribunal gives this consideration appropriate weight.' (para 52).</p> <p>'While the tribunal acknowledges that the applicant knowingly provided incorrect answers in relation to his citizenship status and that of his family members as well as in relation to claims of being unable to obtain identity documents and other rights/services resulting from their statelessness, the decision records before it indicate that the decision to grant the applicant a protection visa was not based wholly or in part on the incorrect information. Moreover, the tribunal places</p>
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			<p>significant weight on the department's own assessment that the applicant is owed non-refoulement obligations, which his removal from Australia would breach, and on the mandatory legal consequences of potentially indefinite detention if his visa was cancelled. While the tribunal also holds concerns regarding the applicant's current unlawful status since the cancellation of his visa, given the above factors, the tribunal finds that the applicant's visa should not be cancelled.' (para 53).</p>
<p><a href="#">1506832 (Refugee) [2017] AATA 500</a> (Unsuccessful)</p>	<p>2 March 2017</p>	<p>2, 44, 49, 51, 59-64</p>	<p>This case related to the definition of 'significant harm'. The Tribunal found that discrimination in the form of lack of access to higher education, state healthcare, and employment in the formal sector did not amount to 'significant harm'. Nor did harassment to join Hezbollah or to change religion, or statelessness alone reach this standard.</p> <p>'The second named applicant (the applicant son) and the third named applicant (the applicant daughter) are the children of the first named applicant (the applicant). The applicant is a national of Lebanon. The applicant daughter and the applicant son are stateless and former residents of Lebanon.' (para 2).</p> <p>'The Tribunal accepts that the applicant son was subjected to mocking and low level verbal harassment at school. The Tribunal also accepts that he was subjected to peer pressure to join Hezbollah, carry weapons or participate in armed conflict. The Tribunal appreciates that he had found these experiences</p>

			<p>annoying, upsetting and hurtful. However, he was not subjected to any other harm. He had faced no retaliation for refusing to go along with his peers' wishes, he was not 'forced' to join Hezbollah, he was not 'forced' to change his religion. The Tribunal is not satisfied that the applicant son's past experiences amount to serious or significant harm. The Tribunal is not satisfied that, if the applicant son were to experience similar treatment in Lebanon, this would amount to serious or significant harm.' (para 44).</p> <p>'The Tribunal accepts that the applicant daughter was subjected to mocking and low level verbal harassment at school. The Tribunal also accepts that she had to attend religious classes at school and she was subjected to peer pressure to wear a veil, to convert to Islam and to marry a Muslim man. The Tribunal appreciates that she had found these experiences upsetting and hurtful, particularly as a child. However, she was not subjected to any other harm. She was not 'forced' to wear the veil or convert to Islam. There is no persuasive information before the Tribunal to suggest that Hezbollah members and supporters force female adherents of other religions to wear the veil, convert to Islam or marry Muslim men. The Tribunal is not satisfied that, if the applicant daughter were to return to Lebanon, she would be forced to change her religion, wear the veil or marry a Muslim man. The Tribunal finds that there is no real chance or real risk that the applicant daughter will face serious or significant harm at the hands of Hezbollah in</p>
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			<p>Lebanon.’ (para 49).</p> <p>‘The Tribunal accepts that applicant’s husband was a Palestinian. Therefore, it accepts that the applicant son and the applicant daughter are considered Palestinian and stateless. As it was put to the applicant son and the applicant daughter at the hearing, statelessness alone is not sufficient to attract refugee status or complementary protection...’ (para 51).</p> <p>‘The country information before the Tribunal clearly demonstrates that Palestinian refugees in Lebanon live in appalling circumstances. The Tribunal accepts that the applicant son and the applicant daughter will be subjected to discrimination in Lebanon for the reason of their Palestinian ethnicity. The Tribunal has no doubt that they will face hardship and many challenges upon their return to Lebanon. In taking evidence from both, the Tribunal found them to be highly intelligent, resilient and ambitious. Their record of success and academic achievement in Australia is testimony to their potential, hopes, aspirations and strong desire to remain in this country. The Tribunal understands their concerns and anxieties when confronted with the prospect of having to return to an uncertain future. Whilst sympathetic to their concerns for their prospects and future in Lebanon, on the evidence before it, the Tribunal is not satisfied that the discrimination they are likely to face amounts to serious harm or significant harm.’ (para 59).</p>
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			<p>‘The applicant son has completed his secondary schooling in Australia and the Tribunal accepts that his goal is to complete his tertiary studies. Whilst the Tribunal also accepts that he will have limited access to higher education in Lebanon due to the associated financial costs for Palestinian refugees in general, the Tribunal does not consider this limitation to amount to serious harm, including denial of access to basic services, where such denial threatens his capacity to subsist.’ (para 60).</p> <p>‘The applicant daughter has completed year [number] in Australia and the Tribunal accepts that, like her brother, she would like to continue her education in Australia. The applicant daughter attended school in Lebanon before coming to Australia and the Tribunal Is not satisfied that she would be prevented from completing her schooling in Lebanon. As noted in relation to the applicant son, the Tribunal does not consider any limitations she may encounter in accessing tertiary education in Lebanon to amount to serious harm, including denial of access to basic services, where such denial threatens her capacity to subsist.’ (para 61).</p> <p>‘The Tribunal appreciates that the applicant son and the applicant daughter do not have the right to own property in Lebanon and that their access to health care is limited to what is offered by non-profit organisations, such as UNRWA. Again, the Tribunal is not satisfied</p>
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			<p>that this discrimination is at a level that amounts to serious harm, including denial of access to basic services, where such denial threatens their capacity to subsist.’ (para 62).</p> <p>The Tribunal further appreciates that both the applicant son and the applicant daughter will have severely limited access to a number of liberal or syndicated professions, effectively forcing them to seek employment in the informal sector. This is clearly neither reasonable nor desirable. Nevertheless, the Tribunal is not satisfied that the discrimination they are likely to face in accessing employment in Lebanon would result in significant economic hardship or denial of capacity to earn a livelihood, where such hardship or denial threatens their capacity to subsist.’ (para 63).</p> <p>The Tribunal is not satisfied that the discrimination the applicant son and the applicant daughter may be subjected to, either individually or cumulatively, in Lebanon amounts to serious harm for a Convention reason. The Tribunal is not satisfied that the discrimination the applicant son and the applicant daughter may be subjected to amounts to any form of significant harm as contemplated by s.36(2A). The Tribunal is not satisfied that the applicant son and the applicant daughter face a real risk of being significantly harmed by the authorities, Hezbollah, any other groups or anyone else due to their race, religion, imputed political opinion or familial links. The Tribunal is not</p>
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			satisfied that the applicant son and the applicant daughter will suffer significant harm arising from any limitations on access to services, restrictions on employment or economic conditions related to their ethnicity or ‘status’ in Lebanon.’ (para 64).
<a href="#">1603185 (Refugee) [2017] AATA 381</a> (Unsuccessful)	24 February 2017	21, 86, 87	<p>The Tribunal considered whether fear of retribution by someone who had left the Sri Lankan air force would amount to ‘significant harm’.</p> <p>‘The applicant made the following claims with his application. He was a deserter from the Sri Lankan air force. He was ordered to do wrong things and did not do what he was told to do. He had no option but to leave the air force. He came to Australia in 2008 as a dependent on his wife’s student visa. He returned to Sri Lanka in 2010 but the situation was not good. People who desert the army are taken to prison. There are examples of army deserters who are held in the Welikada prison being harmed. The authorities will put him in prison and there is no control in these prisons, they are controlled by underworld thugs. The authorities are corrupt. His human rights will be violated and he will not get justice.’ (para 21).</p> <p>‘The Tribunal noted the country that information the military prosecuted a very small number of deserters, those who had been involved in criminal acts or took weapons, such as rifles, when they deserted. The applicant confirmed he had not been involved in any</p>

			<p>criminal acts or taken a weapon when he left. The Tribunal does not accept, based on the country information and the applicant's evidence, that the applicant will be imprisoned for leaving the air force in 2001, on his return to Sri Lanka. The Tribunal noted that the country information demonstrated that those people who had had a significant period of absence, such as the applicant, were discharged from the military, off the military books after investigations. The Tribunal does not accept that the authorities would seek to prosecute him for deserting the air force in the circumstances he has described 16 years ago.' (para 86).</p> <p>'The Tribunal considers that should the applicant come to the attention of the authorities because of his desertion, he will not face a court martial, but will be discharged from the military. The Tribunal does not consider that the discharge of the applicant from his military obligations, as is detailed above constitutes serious or significant harm. The Tribunal considers that the applicant will be viewed by the people of his village, after the discharge, not as a deserter, but as someone who has been discharged from the service. The Tribunal does not consider that he will face serious or significant harm from anyone because he has been discharged from the air force.' (para 87).</p>
<a href="#">1506015 (Refugee) [2017] AATA 454</a> (Unsuccessful)	23 February 2017	2, 15-17, 81, 84-86, 88	The Tribunal considered whether psychological harm as a result of returning to China where the applicant had suffered past harm met the definition of 'significant harm'. It did not because it lacked the requisite element

			<p>of intention to harm.</p> <p>‘The applicant, who the Tribunal accepts is a citizen of China, applied for the visa [in] December 2013 and the delegate refused to grant the visa [in] April 2015.’ (para 2).</p> <p>‘The applicant claimed that she was born in a small and poor village. Her father died when she was [very young] and her mother remarried. The applicant’s stepfather was very strict and harsh. He verbally and physically abused the applicant, did not allow her to eat, locked her out of the house and deprived her of sleep.’ (para 15).</p> <p>‘When the applicant was studying in [early] high school, her stepfather raped her. The applicant was afraid to tell anyone or the police. The applicant was also afraid that her stepfather would take revenge against her and her mother. The applicant’s stepfather took the applicant’s silence as encouragement and he would severely beat her if she resisted his advances.’ (para 16).</p> <p>‘The applicant left home and went out to look for a job but her stepfather followed her wherever she went. He made many attempts to rape her and demanded that she give him her savings. The applicant’s stepfather had a lot of addictions, including an addiction to gambling. The applicant’s stepfather threatened to kill all of the</p>
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		<p>applicant's family. The applicant went to Beijing and Guangdong but was still unable to escape her stepfather.' (para 17).</p> <p>'Against this, the Tribunal notes that much of the applicant's evidence has remained consistent over time. The applicant's emotional demeanor at the hearing was consistent with her claimed experiences. As a consequence, the Tribunal is prepared to accept that the applicant has a troubled relationship with her stepfather and that she may have been verbally, physically or sexually assaulted by him in the past. For the reasons given above, however, the Tribunal is not satisfied that the applicant has provided truthful evidence regarding the extent of her father stepfather's abuse or the frequency or period over which this abuse took place. Nor is the Tribunal satisfied that the applicant has provided truthful evidence with regard to her fears about his future behavior. The Tribunal is not satisfied that the applicant had a genuine fear of harm from her stepfather from the time she moved to [Country 1] or that she has a genuine fear of harm from him at the time of this decision.' (para 81).</p> <p>'The applicant has additionally claimed that she fears psychological harm, should she return to China arising from her past experiences. The Tribunal has some difficulty reconciling this claim with the evidence of the applicant's return visits to China after relocating to [Country 1]. However, as the Tribunal has accepted that</p>
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			<p>the applicant may have been verbally, physically or sexually assaulted by her stepfather in the past, it also accepts that this would understandably be traumatic and may lead the applicant to be unwilling to return. The concepts of persecution and “significant harm”, however, require an intentional or discriminatory act or omission by the perpetrator of the harm. The ongoing effects of past conduct are insufficient to meet the criteria for the visa. As indicated above, the Tribunal is not satisfied that there is a real chance or risk of the applicant’s stepfather acting in a way that amounts to serious or significant harm now, or in the reasonably foreseeable future.’ (para 84).</p> <p>‘For similar reasons, the Tribunal is not satisfied that any inability on the applicant’s part to find a suitable partner for marriage or a stable job, if she returns to China, constitutes persecution or “significant harm”.’ (para 85).</p> <p>‘The applicant has not claimed to fear harm in China on any other grounds.’ (para 86).</p> <p>‘Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).’ (para 88).</p>
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<p><a href="#">1503079 (Refugee) [2017] AATA 320</a> (Unsuccessful)</p>	<p>20 February 2017</p>	<p>2, 5, 8, 51-55,</p>	<p>This case involved an application of section 36(2B)(c). The Tribunal found that poor detention conditions arose out of a law of general application and that overcrowding and poor sanitary conditions fell short of the level of ‘significant harm’ as well as lacking intent. The general insecurity and violence in Lebanon was also excluded by s 36(2B)(c).</p> <p>‘The applicant, a Sunni Muslim, is [age] years old and a citizen of Lebanon. He arrived in Australia [in] January 2014 on a [temporary] visa. [In] February 2014, he married [Ms A], an Australian citizen. [In] May 2014, the applicant applied for a protection visa.’ (para 2).</p> <p>‘He is fearful of his ex-father-in-law, [Mr B], who is ‘very well connected’ in Lebanon. [Mr B] is the owner of a successful [company] and some of his ‘partners’ are from the Palestine Liberation Organisation (PLO). He is also associated with [an official] of the Arabic Democratic Party (ADP) in Jabal Mohsen. The PLO was persuaded by [Mr B] to demand extortion from the applicant. He was left with no option but to declare himself bankrupt, which was a direct consequence of being forced to sell his [business] to finance the PLO. His ‘bankruptcy’ was not the result of his commercial failure.’ (para 5).</p> <p>‘He is a Sunni Muslim, but his ‘political choices’ are very different to the majority of the population in Tripoli. He is a supporter of the Arab Liberation Party</p>
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			<p>(ALP) and its leader, Faisal Karami. He is close to [key party supporters]. This has put his life in danger. The ALP, which is based in Tripoli, is part of the March 8 Coalition and it is opposed to the March 14 Coalition. The party is aligned with Hezbollah and the Free Patriotic Movement (FPM).’ (para 8).</p> <p>‘The Tribunal accepts that prison conditions in Lebanon may be poor. However, there is no evidence before the Tribunal to suggest that the applicant would be regarded as an extremist, as a person suspected of involvement in sectarian violence or as a refugee. The evidence before the Tribunal does not establish, and the Tribunal is not satisfied, that the applicant will be singled out for torture or mistreatment, that he will be subjected to excessive punishment or that he will be treated any differently for any Convention reason. The Tribunal finds that the applicant’s detention in Lebanon, albeit in poor conditions, is the result of the non-discriminatory enforcement of a law of general application. The Tribunal is not satisfied that there is a real risk that the applicant will be subjected to torture, or any other form of, mistreatment amounting to significant harm as a consequence of being detained or during any period which he may spend in prison upon his return. The Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Lebanon, there is a real risk that he will suffer significant harm during any period</p>
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			<p>which he may spend in prison.’ (para 51).</p> <p>‘The Tribunal has considered the department’s PAM3 Refugee and humanitarian - Complementary Protection Guidelines in relation to imprisonment/prison conditions. However, the Tribunal is not satisfied that the detention conditions the applicant would most likely face, including overcrowding and poor sanitary conditions, amount to any form of significant harm as contemplated by s.36(2A). In addition, there is no evidence before the Tribunal to suggest that there is any intention to cause the applicant suffering by virtue of those conditions. The Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Lebanon, there is a real risk that he will suffer significant harm as a consequence of the poor conditions in prisons during any period which he may spend in detention on remand.’ (para 52).</p> <p>‘The Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Lebanon, there is a real risk that he will be subjected to any form of harm that would be the result of an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on the applicant for the reasons specified in paragraphs (a)-(e) of the definition of torture in s.5(1). The Tribunal is not satisfied that there are substantial</p>
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			<p>grounds for believing that there is a real risk that the applicant will suffer harm that would involve the intentional infliction of severe pain or suffering or pain or suffering, either physical or mental, such as to meet the definition of cruel or inhuman treatment or punishment in s.5(1). Nor is it satisfied that it has substantial grounds for believing that there is a real risk that he will suffer such harm as to meet the definition of degrading treatment or punishment in s.5(1) which refers to an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable. The Tribunal is not satisfied that it has substantial grounds for believing that there is a real risk that the applicant will suffer arbitrary deprivation of his life or the death penalty.’ (para 53).</p> <p>‘In his evidence, the applicant referred to general violence, religious conflict and political tension in Lebanon. However, there is no persuasive evidence before the Tribunal to suggest that the tensions, lack of general security and any instability the applicant may be concerned about is faced by him personally. The Tribunal is not satisfied that the general security situation in Lebanon would expose the applicant to a real chance of persecution for a Convention reason.’ (para 54).</p> <p>‘Under s.36(2B)(c) of the Act there is taken not to be a real risk that an applicant will suffer significant harm if the Tribunal is satisfied that the real risk is one faced by</p>
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			the population generally and is not faced by the applicant personally. The Tribunal is satisfied that the tensions, lack of general security and the instability the applicant fears are faced by the population generally and not by him personally. The Tribunal finds that there is no real risk that the applicant will suffer significant harm in Lebanon as a result of lack of general security and instability.’ (para 55).
<a href="#">1621213 (Refugee) [2017] AATA 360</a> (Unsuccessful)	17 February 2017	1, 23, 59-62,	<p>This case involved an application of section 36(2B)(c). The Tribunal found that the enforcement of a prison sentence for violating parole conditions applied to the population generally as a law of general application, and that lack of access to healthcare in the country of origin did not amount to ‘significant harm’ as defined by section 5 of the Migration Act because it lacked the element of intention.</p> <p>‘[The applicant] is a citizen of New Zealand. He is aged in his [age range]. He became involved with gangs from an early age in New Zealand and he has a lengthy criminal record, having been in and out of gaol between [specified year] and [year]. He was the victim of a serious assault [in] November 2005 and he came to Australia in March 2006. His mother and all his [siblings] live in Australia and he has [number of children] here as well as [number] grandchildren. He has worked in Australia as [two occupations] in [industry 1] but in 2015 he was sentenced to a term of imprisonment in Australia.’ (para 1).</p>

			<p>‘[The applicant] said that when he had come to Australia he had been on parole in New Zealand and he had breached his parole. He said that he had done a year and he had still had another year to run so if he went back to New Zealand he would be going straight to prison because he had breached his parole. He said that his mother had visited him in hospital after the attack and had told him that he needed to come to Australia. He said that God had given him a second chance when he had come to Australia and he wanted to stay here for his children. He said that he had no family back in New Zealand. He said that if he went back to New Zealand he might end up killing someone or someone might kill him. He said that he faced either death or gaol. He said that relocation was not possible as these gangs ran New Zealand-wide.’ (para 23).</p> <p>‘I accept that, as [the applicant] said, he may be imprisoned on his return to New Zealand because he was still on parole at the time he came to Australia but I consider that this is a consequence of the enforcement of a law which applies to the population of New Zealand generally and I do not accept on the evidence before me that the law will be applied differently to [the applicant] for any reason personal to him. I consider that the consequences of the breach of his parole therefore come within the exception in paragraph 36(2B)(c) of the <a href="#">Migration Act</a> in that the risk is one faced by the population of New Zealand generally and</p>
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			<p>not by [the applicant] personally.<sup>[9]</sup> Having regard to my findings of fact above, I do not accept that [the applicant] has been labelled as a police witness or a police informant as a result of his having come to Australia and I do not accept on the evidence before me that there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to New Zealand, there is a real risk that he will suffer significant harm for this reason.’ (para 59).</p> <p>‘As I noted in the course of the hearing before me, [the applicant’s] mother and his [Relative A] said that he would be homeless if he returned to New Zealand but, as I put to him, on the evidence before me he has skills which have enabled him to obtain employment in Australia in [industry 1] and this suggests that he would be able to obtain similar employment in New Zealand. [The applicant] agreed that he had these skills which he had learned in Australia but he said that he would not be able to work if he went back to New Zealand and that he would not be able to lead a normal life because he would be watching his back as a result of the threat he claims to face from the gang members. Having regard to my findings of fact above I consider that the risk that he will face harm from gang members or criminals is remote and I consider that he will therefore be able to lead a normal life and to earn a living in New Zealand as he was doing in Australia prior to his most recent term of imprisonment. I do not accept on the</p>
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			<p>evidence before me that there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to New Zealand, there is a real risk that he will suffer significant harm because he will end up being homeless or destitute.’ (para 60).</p> <p>‘[The applicant] also produced evidence that he had been getting some counselling while he had been in [his present location] but, as I put to him, there is nothing in the information available to me to suggest that he will not be able to obtain similar services in New Zealand. As I put to him, as a New Zealand citizen he will be able to access publicly funded health and disability services<sup>[10]</sup>. [The applicant] agreed but he repeated that he would be watching his back all the time. He said that to this day he was dealing with nightmares and flashbacks and not sleeping well as a result of what had happened to him in 2005. There is nothing in the evidence before me to indicate that the New Zealand Government will arbitrarily refuse [the applicant] medical treatment or that it has arbitrarily limited treatment for people with the sort of problems he has such that it could be said that there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to New Zealand, there is a real risk that he will be arbitrarily deprived of his life.’ (para 61).</p> <p>The definitions of ‘torture’ and ‘cruel or inhuman</p>
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			<p>treatment or punishment’ in <a href="#">subsection 5(1)</a> of the <a href="#">Migration Act</a> require that pain or suffering be ‘intentionally inflicted’ on a person and the definition of ‘degrading treatment or punishment’ requires that the relevant act or omission be ‘intended to cause’ extreme humiliation. I do not accept on the evidence before me that there is the requisite intention to inflict pain or suffering or to cause extreme humiliation to people suffering from the sort of problems which [the applicant] has. I do not accept on the evidence before me, therefore, that there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to New Zealand, there is a real risk that he will suffer significant harm as defined as a result of these problems.’ (para 62).</p>
<p><a href="#">1507135 (Refugee) [2017] AATA 276</a> (Unsuccessful)</p>	<p>15 February 2017</p>	<p>1, 2, 16, 45, 68-69, 74-76, 78-79, and 87-92</p>	<p>The Tribunal considered whether the separation of the applicant from family members amounted to ‘significant harm’.</p> <p>‘This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicants Protection visas under s.65 of the Migration Act 1958 (the Act).’ (para 1).</p> <p>‘The first named applicant (‘the applicant’) and second named applicant, who claim to be citizens of Nigeria and China, respectively, applied for the visas [in] April 2014 and the delegate refused to grant the visas [in] May 2015.’ (para 2).</p>

			<p>‘The current application is allowed as a result of the Federal Court decision of <i>SZGIZ v MIAC</i> [2013] FCAFC 71; (2013) 212 FCR 235, dated 3 July 2013. This allows a further protection visa application to be made before 28 May 2014 under the complementary protection criterion in a situation whereby the person’s prior protection visa application was made and refused prior to the commencement of the complementary protection criterion on 24 March 2012. This means that the Refugee Convention aspect of the applicant’s claims has been determined and the matter before the Tribunal relates only to complementary protection criterion (section 36(2)(aa) of the Act).’ (para 16).</p> <p>‘During the course of the hearing the applicant referred to his fear in returning to Nigeria being based on issues involving a cult and the potential for double jeopardy under Decree 33 as a result of his drug conviction in Australia. The Tribunal asked the applicant if there were any other issues creating a fear in returning to Nigeria. The applicant said that that was enough.’ (para 45).</p> <p>‘The cumulative impact of these three credibility issues result in the Tribunal disbelieving the applicant’s claims that he was asked to join a cult that his father was involved in. The Tribunal is not satisfied that this is the case. The Tribunal is not satisfied that any cult members harmed or threatened the applicant as a result</p>
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			<p>of him indicating that he would not join. The Tribunal is not satisfied that there are cult members in Nigeria who have a desire to harm the applicant as result of him refusing to join their cult.’ (para 68).</p> <p>‘As the independent information in this decision makes clear, the Ogboni cult does exist in Nigeria. There is limited evidence that family members could be pressured to join cults. Notwithstanding that this might happen in Nigeria, the Tribunal does not believe the applicant’s claims concerning a cult wishing to harm him, for the reasons given.’ (para 69).</p> <p>‘The Tribunal does not accept that there would not be knowledge by independent observers if Decree 33 is being enforced. The Tribunal accepts independent evidence that the law has not been enforced since 2005. Whilst the Tribunal acknowledges that the continued existence of the law means that it could be enforced, the Tribunal notes the indication by the Ministry of Justice that it does not intend to enforce the law until it is repealed.’ (para 74).</p> <p>‘The Tribunal considers that the combination of the fact that the law has not been enforced since 2005 and that Nigerian authorities positively stating that they have no intention to enforce the law results in there not being a real risk of the law being enforced. The Tribunal therefore considers that the applicant does not face a real risk of significant harm by virtue of being charged,</p>
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			<p>convicted and punished pursuant to Decree 33.’ (para 75).</p> <p>‘The applicant has previously indicated that he could be harmed extra-judicially as a result of his drug conviction in Australia. No independent evidence has been provided to the Tribunal that would suggest that Nigerian authorities act extra-judicially to harm those convicted of drug offences in other countries. In the absence of any independent information before the Tribunal, the Tribunal is not satisfied that there is a real risk of significant harm to the applicant on this basis.’ (para 76).</p> <p>‘The applicant has referred to the harm to him in being separated from his family in Australia if returned to Nigeria. The Tribunal accepts that the applicant is married to a Chinese citizen, who lives with him in Australia. The Tribunal clarified with the applicant that the two children from that relationship, [Child 2] and [Child 3], are both Australian citizens. The applicant indicated that [Child 3] was granted a Protection visa following on from the Protection visa granted to [Child 2], on the basis that [Child 3] will face similar harm in Nigeria to that of [the sibling]. The applicant’s other child, [Child 1], from an earlier relationship with an Australian citizen, is an Australian citizen. The applicant indicated that he has not seen [Child 1] for two years as [Child 1] lives with [the] mother interstate, but he did used to have access to [Child 1].’ (para 78).</p>
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			<p>‘The Tribunal accepts that if the applicant is returned to Nigeria then the second named applicant and the two children, who are part of his current family unit, are unlikely to follow. This is because the children face a real chance of serious harm in Nigeria on the basis of their mixed heritage as found by the Tribunal considering [Child 2]’s Protection visa application.’ (para 79).</p> <p>‘In <i>SZRSN v MIAC</i> the Federal Court confirmed that harm arising from the act of removal itself will not meet the definitions of ‘significant harm’ in s.36(2A). The Court upheld the reasoning of the Federal Magistrate at first instance, which turned on the relationship between various aspects of the complementary protection provisions. Firstly, the Court had regard to the reference in s.36(2)(aa) to Australia’s ‘protection obligations’ as referring to the obligation to afford protection to a non-citizen where the harm faced arises in the receiving country, rather than in the State where protection is sought. Secondly, the Court reasoned that the qualifications in s.36(2B) expressly refer to harm ‘in a country’ which is necessarily the receiving country if the circumstances of ss.36(2B)(a) (relocation) and 36(2B)(b) (protection from an authority) are to have any application.’ (para 87).</p> <p>‘Further, the Court noted the circularity in the operation of s.36(2)(aa) were harm to arise from the actual act of</p>
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			<p>removal itself. Section 36(2)(aa) requires that the real risk of significant harm must arise ‘as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country’. The Court stated that the fact that the significant harm must be a consequence of the removal strongly suggests that the removal itself cannot be the significant harm.’ (para 88).</p> <p>‘Lastly, the Court in <i>SZRSN v MIAC</i> had regard to the ‘intention’ requirements in the s.5(1) definition of degrading treatment or punishment. The Court reasoned that separation from family (in that case, children) is the consequence of removal, and a consequence cannot be said to have an ‘intention’, so the act of removal itself cannot be said to be perpetrated by the State with the intention to cause extreme humiliation that is unreasonable.’ (para 89).</p> <p>‘Although the Court in <i>SZRSN</i> was largely focusing on degrading treatment or punishment, by implication its reasoning is equally applicable to the other types of significant harm in s.36(2A). As such, it appears that although the risk of significant harm envisaged by s.36(2)(aa) must arise as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, s.36(2)(aa) will not be engaged by harm inflicted by the act of removal itself.’ (para 90).</p>
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			<p>‘In the hearing, the applicant did not take issue with the fact that removal from Australia and the family being split up would not constitute significant harm for the purpose of the complementary protection criterion.’ (para 91).</p> <p>‘For the reasons given, the Tribunal is not satisfied that the applicant faces a real risk of significant harm for the purpose of the complementary protection criterion as a result of being separated from his wife and children, if he were to return to Nigeria.’ (para 92).</p>
<a href="#">1504818 (Refugee) [2017] AATA 278</a> (Unsuccessful)	8 February 2017	1, 15, 24-25, 28-29, and 35-36	<p>The Tribunal considered the China family planning laws (including recent softening of the law) and found that the imposition of a social compensation fee did not amount to ‘significant harm’.</p> <p>‘The first named applicant (the applicant) is [an age] year old male child, who was born in Australia on [date]. Also included in his application as a member of his family, is his [age] year old mother, the second named applicant, who acts on behalf of the applicant. Both applicants claim to be citizens of China.’ (para 1).</p> <p>‘The applicant’s written claims, as set out in a statement signed on the applicant’s behalf by his mother [in] January 2014, are that he fears persecution, discrimination and the abuse of his human rights if he returns to China due to its one child Family Planning</p>

			<p>Law. As his mother has violated this law, she will face a heavy fine, which as a single mother with three children, she cannot afford to pay. Consequently, the applicant will be unable to be registered for residency (<i>'hukou'</i>) and will be a 'black child', ineligible to receive education and social welfare and face discrimination in all aspects of social life. His mother fears forced sterilisation by the government. She claims she was punished by the family planning authority when she gave birth to her [earlier] child; was harmed physically and mentally and had to hide to avoid further persecutions. The applicant's parents are separated. Contact with his father was lost when he disappeared out of fear of being deported after his own refugee application failed.' (para 15).</p> <p>'The applicants' claims are inconsistent with country information regarding recent changes to China's family planning laws, including implementation of a two-child policy and the cancellation of forced contraception, with effect from 1 January 2016<sup>[1]</sup>, as well as earlier changes to regulations in Fujian province.' (para 24).</p> <p>'With regard to the claim that he will be a 'black child', unable to obtain a 'hukou' and access to education and social services, it is significant that in August 2015, the Fujian Public Security Department implemented a new 'Household Registration Management System' directing local authorities to not treat the payment of social compensation fees as a prerequisite for accepting</p>
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			<p>an application for household registration. The Tribunal has had regard to the applicant's mother's claim at paragraph 11.b and at hearing that she does not believe this will happen and that her father told her she would have to pay at least 100,000 RMB to get a hukou for her son, but does not find this persuasive, especially as Fujian province has long been assessed by DFAT as having one of the least coercive family planning regimes in China. The Tribunal is aware that a child born out of wedlock to a young single mother in China may experience social stigmatisation. As discussed with the applicant's mother at hearing, it does not find that the applicant, a child of married parents, who will be able to obtain a hukou and have access to education and other services, will face a similar situation; and notes that separation and even divorce are increasingly common in China. Even if the applicant were to encounter people in the countryside who might call him 'a wild child' growing up without a father, as his mother claimed at hearing, the Tribunal does not accept that this would amount to significant harm.' (para 25).</p> <p>'As the applicant's mother has not been living in China since 2006, she has not been served with a notification that she must pay a social compensation fee for allegedly having three children. In light of the above, if the applicant's mother returns to China now, she may have to pay a social compensation fee. However, as discussed at hearing, this would only be for one additional child. As she comes from a rural area, it</p>
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			<p>would amount to 2-3 times the average annual net income or her actual income; and be payable in instalments. The applicant's mother has not claimed and, on the evidence before it, the Tribunal does not accept that she will suffer significant harm because she is unable to pay the social compensation fee. While the Tribunal accepts that having to pay a fee may cause the applicant's mother some financial hardship, it is not satisfied that this would amount to significant harm as defined in the Act.' (para 28).</p> <p>'Nor does the Tribunal accept that, if they returned to China, the applicant would be left without any support to the extent that he would suffer significant harm as defined in the Act, because his mother suffers from [Condition 1]. The Tribunal accepts that payments from [Organisation 1] and other refugee services have assisted the mother in looking after her son in Australia as a young child. However, as her son is now [a specified age range] and will be eligible for free education and other social services in China, the Tribunal does not accept that her alleged [Condition 1] will prevent her from doing any work at all while he is at school. Moreover, by her evidence, her son has both maternal and paternal grandparents in China, who have been supporting his two [siblings] to attend school and university since their parents have been in Australia. While she has claimed that her husband has not provided support for her son, whom he did not want to be born, as discussed at hearing, given her evidence that</p>
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			<p>her husband threatened to take his son away from her several years ago because she could not look after him, the Tribunal does not accept that he would disregard his son's welfare should she be unable to support him.' (para 29).</p> <p>'Having considered the totality of the evidence, for the reasons set out above, the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to China, there is a real risk that they will suffer significant harm. The Tribunal does not accept that on return to China the applicant will be a 'black child', denied household registration/'hukou', free education or other social services; face discrimination in all aspects of social life or that any difficulties the applicant might encounter as a child of a single mother would amount to significant harm for the purposes of the complementary protection criteria. Nor does the Tribunal accept that his mother will be forcibly sterilised by the government. While the Tribunal acknowledges that the applicant's mother may be required to pay a social compensation fee for having a single out of plan child, it does not accept that her son will be denied a hukou if his mother is unable to pay this fee or that the imposition upon her of such a fee amounts to significant harm. Furthermore, the Tribunal is not satisfied that any financial hardship that the applicant's mother may experience upon her return to China will amount to significant harm as defined in</p>
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			<p>s36(2A) and <a href="#">s 5(1)</a> of the <a href="#">Migration Act</a>.’ (para 35).</p> <p>‘Accordingly, the Tribunal is not satisfied that there is a real risk that either of the applicants will be arbitrarily deprived of their life; the death penalty will be carried out on them; or will be subjected to cruel or inhuman treatment or punishment; or will be subjected to degrading treatment or punishment. The Tribunal finds, therefore, that the applicants do not satisfy the criterion set out in <a href="#">s.36(2)(aa)</a>.’ (para 36).</p> <p>See also <i>1619684 (Refugee)</i> [2017] AATA 681 above.</p>
<p><a href="#">1606177 (Refugee) [2017] AATA 274</a> (Unsuccessful)</p>	<p>8 February 2017</p>	<p>1, and 61-64</p>	<p>This case related to the Sri Lankan legislation imposing a period of detention for citizens who left illegally. This penalty did not amount to ‘significant harm’ because it was a law that applied to the population generally (s 36(2B)(c)).</p> <p>The applicant was a Sri Lankan citizen of Tamil ethnicity (para 1).</p> <p>‘Having regard to my findings of fact above, I do not accept that [the applicant] received weapons training from the LTTE and fought with them for over a year before fleeing a few months before the war ended and joining his family, as he has claimed. I do not accept that, as he has also claimed, one of his [relatives] was a [senior official] in the Sea Tigers nor that [the applicant] himself previously helped the Sea Tigers on a</p>

			<p>voluntary basis. I do not accept that [the applicant] was stopped, questioned, required to report to an army camp, accused of being an LTTE member and threatened in the months before he left Sri Lanka in July 2012. I do not accept that whenever he went outside his village he was followed by army soldiers or that he was scared that he would be abducted by the army. I do not accept that on other occasions the authorities came to his home looking for him nor that since he has left Sri Lanka the authorities have asked his parents or his friends where he is, nor that his mother has been required to report to an army camp, nor that his [brother] has left home because the authorities were causing him problems. I do not accept on the evidence before me that either [the applicant] himself or any other member of his family has been of any interest to the Sri Lankan authorities since the end of the civil war.’ (para 61).</p> <p>‘I accept that [the applicant’s] [Relative 1] was in the LTTE and was killed in 2001, that he himself underwent training with the LTTE for eight to ten days in 2008 and that he and his family lived in an area that was under the control of the LTTE during the war. However, as I put to him, the Australian Department of Foreign Affairs and Trade has advised that all Tamils in areas affected by the civil war in Sri Lanka are likely to have provided a low level of material support to the LTTE and that there is a low risk of Tamils in this situation being detained or prosecuted.<sup>1331</sup> I do not</p>
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			<p>accept on the evidence before me that there are substantial grounds for believing that, as a necessary and foreseeable consequence of [the applicant] being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm because his [Relative 1] was in the LTTE and was killed in 2001, because he himself underwent training with the LTTE for eight to ten days in 2008 or because he and his family lived in an area that was under the control of the LTTE during the war.’ (para 62).</p> <p>‘Having regard to my findings of fact above, I do not accept that there are substantial grounds for believing that, as a necessary and foreseeable consequence of [the applicant] being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm because he is a Tamil, because he is a Hindu, because he will be returning to Sri Lanka as a failed asylum-seeker from Australia or because of any perception that he holds a political opinion in support of the LTTE or opposed to the Sri Lankan Government. As I have indicated above, I accept that [the applicant] will also be charged under the Immigrants and Emigrants Act of Sri Lanka because he left Sri Lanka illegally. As I put to him, this is a law which applies to everyone in Sri Lanka and I do not accept on the evidence before me that there is a real risk that it will be applied any differently to him, for reasons personal to him, from anyone else who may have broken this law. I consider that the risks referred to by his representative that he</p>
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			<p>will be imprisoned in a prison system which does not meet international standards, or that he will be subjected to torture in this context, fall within the exception in paragraph 36(2B)(c) of the <a href="#">Migration Act</a> in that they are the consequences of his having broken a law which applies to the population of Sri Lanka generally and this law will not, on the evidence before me, be applied to him in a discriminatory manner for reasons personal to him.<sup>[34]</sup> I therefore find that the consequences of [the applicant's] breach of the Immigrants and Emigrants Act by departing Sri Lanka illegally fall within the exception in paragraph 36(2B)(c) of the <a href="#">Migration Act</a>.' (para 63).</p> <p>'I have considered the totality of [the applicant's] circumstances as a Tamil and a Hindu who left Sri Lanka illegally and who will be returning to Sri Lanka from Australia as a failed asylum-seeker. However, even taking into account the cumulative effect of these circumstances, I do not accept, having regard to my findings of fact above, that there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to Sri Lanka, there is a real risk that he will be arbitrarily deprived of his life, that the death penalty will be carried out on him, that he will be subjected to torture, that he will be subjected to cruel or inhuman treatment or punishment or that he will be subjected to degrading treatment or punishment as defined. Accordingly I do not accept that there are substantial grounds for</p>
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			believing that, as a necessary and foreseeable consequence of [the applicant] being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm as defined in <a href="#">subsection 36(2A)</a> of the <a href="#">Migration Act</a> .’ (para 64).
<a href="#">1504928 (Refugee) [2017] AATA 225</a> (Unsuccessful)	7 February 2017	19, 25, and 31-35	<p>Consideration of whether threats alone amounts to ‘significant harm’; in this case an isolated, single threat did not meet the threshold.</p> <p><i>‘Summary of Applicant’s Submissions:</i> The applicant, a [age] Indonesian man, claims to have established a business building houses in the Indonesian province of North Sulawesi. He entered into an agreement with a local businessman to borrow money to fund the construction of up to [number] houses. Following the completion of his first batch of houses he was unable to sell them and as a result he was unable to make repayment on the loan. This led to him being threatened and forced to flee to Jakarta where he received a further threat. As a result he fled to Australia.’ (para 19).</p> <p>‘The applicant claims that he was first threatened by the lender in October 2010. At the beginning it was through a number of phone calls that the lender demanded to be repaid and threatened him by saying that he would kill him. As a result the applicant claims that he fled to Jakarta in February 2011. He claims that he received a call threatening him again in March 2011 saying that if</p>

			<p>he did not pay \$[amount] he would be killed. This was the last threat he received. I accept that the applicant received the threats as described above and I accept the claimed dates of his movement.’ (para 25).</p> <p>‘The applicant claims that he fears harm from a lender to whom he owes at least \$[amount]. I have accepted that this lender has made threats to his life. I have also accepted that for a period between October 2010 and February 2011 no harm befell him despite this being the period in which the threats were made. I also accepted that after he travelled to Jakarta and another threat was made to him in March 2011 no harm befell him for a further five months until he left for Australia.’ (para 31).</p> <p>I note that in <i>MIMIA v VBAO</i><sup>[41]</sup>, Marshall J held that threats in the form of declarations of intent cannot <i>prima facie</i> on their own constitute ‘serious harm’ within the meaning of s.91R. His Honour held at [41] that ‘serious harm’ contemplates that a person’s livelihood or well-being will be jeopardised in a material way, adding that ‘this is not to deny that threats in the form of declarations of intent can never constitute serious harm, but they do not of themselves automatically qualify for that description.’ (para 32).</p> <p>‘Considering that the applicant encountered no harm while in his home town or in Jakarta and that over a period of six years since the applicant entered into the</p>
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			<p>loan his former wife has not faced any harm even though she continues to live in the same area and noting that once the applicant fled to Jakarta over a period of seven months he received only one phone call from the lender I find that the applicant does not face a real chance of serious harm for Refugee Convention reasons or a real risk of significant harm as a necessary and foreseeable consequence of his return to Indonesia.’ (para 33).</p> <p>‘For the reasons given above, the Tribunal <b>is not</b> satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant <b>does not satisfy</b> the criterion set out in s.36(2)(a).’ (para 34).</p> <p>‘Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal <b>is not</b>satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).’ (para 35).</p>
<a href="#">1504204 (Refugee) [2017] AATA 220</a> (Unsuccessful)	3 February 2017	2, 3, 13-14, 22-23, 30-31, and 35-36	<p>The Tribunal considered a healthcare based complementary protection claim and found that the provision of medical care of a standard below Australia’s did not qualify as ‘significant harm’.</p> <p>The applicant was a citizen of China (para 2).</p>

			<p>‘The applicant claims to fear persecution in China, claiming to have been a Falun Gong follower in China, a Christian who is baptised and a member of [a church] Community in [City 1]. He also claims to be a member of a particular social group, wealthy Chinese businessmen. He claims that he was forced to flee China due to extortion by the police forcing him to sell his [business], for which he owed a significant sum in taxes that he could not pay. The applicant also believes he will not receive adequate psychological and medical care in China. He had [Medical procedure 1] in 2005. He also [had a Medical condition 1] in 2013 and has [Medical condition 2].’ (para 3).</p> <p>‘The Tribunal has considered all of the applicant’s evidence regarding his Falun Gong claims. It has taken into account the applicant’s medical conditions and the difficulties in giving evidence in a hearing setting. However the Tribunal finds the inconsistencies in the applicant’s evidence regarding his Falun Gong claims to be highly concerning and indicative of fabrication. The applicant’s evidence regarding the frequency of his practice and the location of his arrest, and his knowledge of the Chinese authorities’ views about Falun Gong cast significant doubt on the reliability of his evidence. The Tribunal also notes that when it asked the applicant about his reasons for not wanting to return to China he did not mention a history of Falun Gong practice. It also notes that despite his claims to have been known to the authorities because of his Falun</p>
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			<p>Gong practice he had no difficulty in departing China or having his passport renewed. Overall, because of these inconsistencies and the unpersuasive nature of his evidence regarding these claims the Tribunal does not accept the applicant has been a Falun Gong practitioner in the past or currently. It does not accept that he was arrested, detained and tortured for 5 days because of his involvement in Falun Gong. It does not accept that difficulties arising from Falun Gong practice led to his fear and decision to leave China. It has formed the view that he manufactured the claim that, because of his Falun Gong practice, after he arrived in Australia, his wife told him the police were looking for him and warned him not to return or he would be arrested.’ (para 13).</p> <p>‘As the Tribunal is not satisfied the applicant has ever practised Falun Gong it is not satisfied he would practise Falun Gong if he were to return to China. In view of these findings, the Tribunal is not satisfied that there substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to China, that there is a real risk he will suffer significant harm as defined in the Act, because of Falun Gong practice.’ (para 14).</p> <p>‘Overall the Tribunal is satisfied the applicant has been part of a Christian community in Australia since about 2013. It accepts that he was baptised in 2013. However, while it accepts the applicant may enjoy comfort from</p>
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			<p>praying, the Tribunal is not satisfied the applicant would continue to be part of a Christian community if he were to return to China. He was given opportunities during the hearing to describe his Christian practice if he were to return to China and essentially he indicated he would continue to pray, even if it was by himself. The Tribunal is not satisfied that such practice would draw the attention of the authorities. The Tribunal is therefore not satisfied that he would come to the adverse attention of the Chinese authorities in China for these reasons.’ (para 22).</p> <p>‘In view of these findings, the Tribunal is not satisfied that there substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to China, that there is a real risk he will suffer significant harm, because of his Christian practice.’ (para 23).</p> <p>‘Overall the Tribunal is not satisfied the applicant was a failed wealthy businessman in China. It accepts he might have had a [business] which he sold before he departed China but it is not satisfied he came to the attention of the authorities because of any financial difficulties he had. It has formed the view that he has fabricated evidence that he owed a large sum of tax or a debt to a real estate company because he left China without difficulty and it does not accept a travel agency associated with one of his creditors would have facilitated his departure.’ (para 30).</p>
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			<p>‘As the Tribunal does not accept that the applicant suffered harm in China because of financial difficulties, or that he had to pay the police bribes, or that he has significant tax debts it is satisfied he will not suffer any harm because of his financial history if he were to return to China in the reasonably foreseeable future. Given these findings the Tribunal is not satisfied there is a real risk that the applicant will suffer significant harm from creditors, the police or other authorities if he is returned to China because of financial difficulties or debts or tax owed.’ (para 31).</p> <p>‘The Tribunal accepts that the applicant required [Medical procedure 1] in 2005, and that he had a [Medical condition 1] in 2013. It also accepts he required medical treatment after a fall in June 2016. It accepts he suffers from [Medical condition 2] and has [symptoms] associated with [this certain condition] however he has told the Tribunal that he has [experienced some improvement with this condition]. His most recent medical evidence suggests his conditions are stable and managed with [medications]. The Tribunal notes that his treating doctors believe he will not receive optimum medical care in China. The delegate however included in her decision record country information indicating that Chinese citizens, when they are old, ill or disabled, have the right to material assistance from the state. That information also indicates that about 90% of emergency and inpatient</p>
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			<p>services are provided by the public system and that the government was in the process of improving the accessibility, quality and efficiency of the health care system. The applicant has not provided country information demonstrating that he will not have access to medical care if he were to return to China because of his particular conditions. The Tribunal accepts that it may be the case that China's public health care system is not at the same standard as that of Australia. However it is not satisfied that any inadequacy of China's health care system or difficulty in obtaining medication meets the definition of significant harm. There is nothing in the evidence to indicate that the Chinese Government will arbitrarily refuse him medical treatment or that it has arbitrarily limited treatment for people with his medical conditions, such that it could be said that there are substantial grounds for believing that, as a necessary and foreseeable consequence of his being removed from Australia to China there is a real risk that he will be arbitrarily deprived of his life. The definitions of 'torture' and 'cruel or inhuman treatment or punishment' in <a href="#">s.5(1)</a> of the Act require that pain or suffering be 'intentionally inflicted' on a person and the definition of 'degrading treatment or punishment' requires that the relevant act or omission be 'intended to cause' extreme humiliation. The Tribunal does not accept on the evidence before it that there is the intention to inflict pain or suffering or to cause extreme humiliation to people suffering from his medical conditions. The Tribunal does not accept on the</p>
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			<p>evidence before it that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to China, there is a real risk that he will suffer significant harm as defined as a result of his medical conditions.’ (para 35).</p> <p>‘The applicant told the Tribunal that he could not return to China because he does not have relatives to support him and he has no money for food or medication. However when asked at other times during the hearing he indicated he continues to be in contact with his elderly mother who lives in Guangdong city. He also stated that his friends in China made contact with his son to let him know about his [medical procedure]. He admitted to the Tribunal that he continues to have contact with his friends in China. The Tribunal notes that he described his relationship status as ‘married’ in his visa application, to a woman who resides in China. His psychologist reports that his marriage broke down before he left China. He told the Tribunal the marriage has ended. The Tribunal is mindful that the applicant has been in Australia for 17 years now and it is satisfied that, if his relationship with his wife had not ended before he left China, it is unlikely that the parties will have maintained a spouse relationship by distance since 2000. His visa application also includes particulars of his [siblings] in China. The Tribunal has concerns that the applicant has not been honest in his oral evidence at the hearing about his contact with relatives and friends</p>
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			<p>in China. It raised its concern about his credibility at various times. It is concerned his evidence that he has no relatives in China to support him is embellished and self-serving. It is satisfied he remains in contact with some relatives and friends in China and that he will not be destitute if he were to return in the foreseeable future. It also notes the applicant has significant support here in Australia including from [Ms A] and if has formed the view that support will continue in some form even if he were returned to China. The Tribunal is not satisfied the applicant will be arbitrarily deprived of his life as a consequence of being removed from Australia to China. The Tribunal is not satisfied there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to China, there is a real risk that he will suffer significant harm because of a lack of support or financial resources.’ (para 36).</p>
<p><a href="#">1503666 (Refugee) [2017] AATA 198</a> (Unsuccessful)</p>	<p>2 February 2017</p>	<p>13, 64, 65, and 66-69</p>	<p>Imposition of a social compensation fee according to Chinese family planning laws did not amount to ‘significant harm’.</p> <p>The applicants were a de facto couple, both of Chinese nationality. (para 13).</p> <p>‘Having considered the totality of the evidence, the Tribunal is not satisfied that the applicant and second applicant are Christians. The Tribunal is not satisfied that the applicant has suffered any harm in the past as a</p>

			<p>consequence of her or her family’s attendance Christian gatherings. The Tribunal is not satisfied that the applicant has sent Christian materials to China. The Tribunal is not satisfied that there is a real risk that the applicant would attend Christian gatherings should she return to China in the reasonably foreseeable future. Nor is the Tribunal satisfied that there is a real risk that the applicant would be perceived as a Christian or suffer any form of harm as a consequence of such a perception.’ (para 64).</p> <p>‘The Tribunal is satisfied that the applicant has now resiled from the claims made in her written application that her family’s farmland has been divided and shared amongst villagers, that she would assert her rights to her father’s property and may suffer harm as a consequence. The applicant indicated at hearing that she had no awareness of the fact that these claims had been made nor did she have any knowledge about her father’s property. The Tribunal is not satisfied that there is a real risk of the applicant suffering any harm related to her father’s property.’ (para 65).</p> <p>‘The remaining issue for the Tribunal to decide is whether there is a real risk of the applicant suffering significant harm as a consequence of any breach of China’s family planning regulations. As put to the applicant at hearing, the country information set out above indicates that the applicant would be subject to the new family planning regulations implemented in</p>
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			<p>Fujian province in February 2016, as she has not been issued with a notice of breach under the previous regulations. Under the new regulations, the applicants are permitted to have two children. The country information before the Tribunal indicates, however, that a prohibition on giving birth out of wedlock continues to apply.’ (para 66).</p> <p>‘The Tribunal accepts having regard to the birth certificates on file that the applicant’s children were born out of wedlock, although the applicant and her husband expressed an interest in getting married should they return to China. The country information indicates that the penalty for a breach of the regulations of this nature would be the imposition of a social compensation fee of 4 to 6 times the average annual net income for rural residents or the applicant’s actual income. The country information indicates that local authorities have considerable discretion in charging social compensation fees. As such, the actual amount of any social compensation fee that would be imposed, if any, is difficult to discern. The country information indicates, however, that a social compensation fee of up to RMB 90,000 per child could potentially be imposed. Whilst Tribunal has considerable doubt that a fee of this magnitude would be imposed in fact, the Tribunal has considered the applicant’s position should this occur.’ (para 67).</p> <p>‘The country information indicates that social</p>
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			<p>compensation fees are able to be paid in instalments and children are not denied household registration in Fujian whilst any fee remains unpaid. The measures used to secure payment include personal pressure through personal phone calls and visits. The country information also suggests that legal proceedings may be implemented in order to secure payment. The DFAT Thematic Report on Fujian specifically indicates that the remedial measures reportedly used under the previous regulations, including forced sterilisation, no longer apply and are unlikely to be used in Fujian province. Accordingly, the Tribunal is not satisfied that there is a real risk of such measures being taken against the applicant.’ (para 68).</p> <p>‘The applicants are both of a young age, are educated and have Australian work experience. There is no evidence before the Tribunal to suggest that they would not be able to work and earn an income permitting them to repay any social compensation fee, in instalments, if necessary. The applicant has the support of her mother and her parents-in-law in China. In all the circumstances, the Tribunal is not satisfied that the imposition of a social compensation fee would involve significant harm. Nor is the Tribunal satisfied that there is a real risk of the applicant suffering significant harm as a consequence of any attempt by the authorities to enforce payment of the fee.’ (para 69).</p>
<a href="#">1613923 (Refugee) [2017]</a>	22 January 2017	16-18, 22 and 26-27	Consideration of whether societal discrimination

<p><a href="#">AATA 172</a> (Unsuccessful)</p>			<p>reached the threshold of ‘significant harm’; in this case discriminatory attitudes, gossip and negative comment did not meet that threshold.</p> <p>‘The Applicant’s evidence was, in summary: She left Nepal because she is a lesbian. Everyone, including her parents and members of society, was against her and she came to Australia because of their bad attitude to her. Asked what she had feared would happen to her she said the father and [brothers] of her partner [Ms A] had said they intended to murder her. They had killed their own daughter and they were threatening to kill her as well. The people in the village are farmers and they have very old-fashioned views. Asked when it was that these people killed their own daughter she said it was a long time ago. Asked again she said she was not aware of the date but thought it happened in 2006. As to why these people would wish to kill her as well as their daughter she said she had been in a lesbian relationship with [Ms A] and these kinds of relationship are not permitted.’ (para 16).</p> <p>‘On the basis of her passport, which she submitted at the hearing before me, I accept that the Applicant is a citizen of Nepal and that her identity is as she claims it to be.’ (para 17).</p> <p>‘The Applicant claims to fear harm in Nepal at the hands of family members of her murdered partner and from social attitudes opposed to her lesbian sexual</p>
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			<p>orientation. She has not specifically articulated a Convention ground for this fear but I accept that it can be seen as arising for reason of her membership of the particular social group consisting of ‘lesbians in Nepal.’ I accept that such an entity can be said to exist as a particular social group, in the sense that it is sufficiently identifiable by characteristics or attributes common to all its members, other than a shared fear of persecution, which distinguish it from society at large. Given all the information before the Tribunal I am also prepared to accept that the Applicant is, in fact, lesbian in her sexual orientation and that if she were to return to Nepal she would be a member of this particular social group.’ (para 18).</p> <p>‘As also put to the Applicant at the hearing the country information before the Tribunal indicates that while there is some residual level of discrimination against lesbians in Nepal the situation has improved significantly in recent years, even if all the reforms urged on the government by the Supreme Court have yet to be put in place. Considering this information together with the country information submitted by the Applicant I accept that people in her village and elsewhere in Nepal might well disapprove of her sexual orientation, and that she might be subjected to what she described at a number of points as back-biting or gossip. It is possible that these attitudes might be expressed in the form of negative comments or insults. Such reactions would naturally be unwelcome and</p>
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			<p>upsetting for her but I am not satisfied they could reasonably be seen as rising to the level of serious harm. Nor am I satisfied there is any evidence to support her claim that they would cause her to fall into depression of a kind which would lead her to take her life.’ (para 22).</p> <p>‘As noted, on the basis of the country information before the Tribunal I accept that in Nepal the Applicant might encounter discriminatory attitudes toward her lesbian sexual orientation from other members of society, both within her village and elsewhere in the country. I also accept that this might be expressed in the form of gossip or negative comment. However, even taking these reactions at their highest I am not satisfied they could reasonably be seen as amounting to significant harm of a kind which would engage Australia’s complementary protection obligations to her.’ (para 26).</p> <p>‘Having considered all the Applicant’s claims, individually and cumulatively, I am not satisfied there are substantial grounds to believe that, as a necessary and foreseeable consequence of her being removed from Australia to Nepal, there would be a real risk that she would suffer harm which would amount to significant harm in terms of s.36(2)(aa) of the Act, specifically that there is a real risk she would be arbitrarily deprived of her life, the death penalty would be imposed on her, she would be subjected to torture, or</p>
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			she would be subjected to cruel or inhuman treatment or punishment or degrading treatment or punishment.’ (para 27).
<a href="#">1605114 (Refugee) [2017] AATA 98</a> (Unsuccessful)	12 January 2017	10, 16, 17, 18, 20, 91, 105, 119, 121, 122, and 123	<p>This case related to the requirement of intention in the definition of ‘significant harm’ in the Migration Act and considered whether knowledge of poor conditions was sufficient to deem intention.</p> <p>The applicant was a citizen of Sri Lanka (para 10).</p> <p>‘The applicant claimed to have been consistently persecuted by the Sri Lankan Army and other authorities. In 1995, when he was [age] years old, an aeroplane dropped a bomb which completely destroyed his family home. The applicant sustained scars on [himself] and other members of his family sustained injuries as a result of the bombing.’ (para 16).</p> <p>‘The applicant estimated that the Sri Lankan authorities visited his home once a month between 2000 and 2008 due to their perception that the applicant’s family was associated with the LTTE because they were Tamil. The Army would knock on the door, enter the home and check their bags for weapons. The family would be sent out of the house to a field and made to stand there for a whole day under the sun. The applicant stated that he last recalled being forced out of his home in this way in 2006.’ (para 17).</p>

			<p>‘In 2005, a curfew was in place. As a result, Tamils were not allowed outside after 6 PM. At around 7 PM one day, the applicant left his home in breach of the curfew to go to the grocery shop because the family needed food. The applicant was about a 10 minute walk from home when he was apprehended by a Sri Lankan soldier and taken to an army camp. The applicant was interrogated about why he was outside his home and his scars. The applicant was beaten by a soldier and detained until 10 AM the following morning. The applicant’s mother came and secured his release.’ (para 18).</p> <p>‘The applicant stated that there had been a conflict between the Army and police in Sri Lanka. Due to the escalation of the conflict in 2012 and his past experiences, the applicant fled to Australia to seek protection.’ (para 20).</p> <p>‘On 26 September 2016, the Tribunal received additional written submissions from the applicant’s representative containing detailed country information and analysis. The applicant representative’s submission summarised the applicant’s claims as involving a fear of persecution by the Sri Lankan authorities on the grounds of his actual or imputed political opinion as a supporter and sympathiser of the LTTE; as a person who has applied for asylum in Australia; as a consequence of his ethnicity as a young Tamil from the North; and owing to his illegal departure from Sri</p>
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			<p>Lanka.’ (para 91).</p> <p>‘The Tribunal is not satisfied that the applicant had a profile that was of any interest or that had caused him to be genuinely imputed with LTTE connections at the time he left Sri Lanka. For the reasons given above, the Tribunal is also not satisfied that the applicant has a profile which would give rise to a real chance or a real risk of him being imputed with LTTE connections should he return to Sri Lanka now, or in the reasonably foreseeable future.’ (para 105).</p> <p>‘The Tribunal accepts that there is a low, albeit real, chance or risk that the applicant may spend a brief period in remand until a magistrate is available, in prison conditions which may be cramped, uncomfortable and unsanitary[15]. The evidence indicates that this situation applies to all persons who have left Sri Lanka illegally, regardless of their background.’ (para 119).</p> <p>‘In considering whether there is a real risk of the applicant experiencing treatment involving “significant harm” for the purposes of s.36(2)(aa), the Tribunal is not satisfied on the evidence in this case that during a brief period in remand there is a real risk that the applicant will suffer intentionally inflicted torture, the death penalty or arbitrary deprivation of life. The Tribunal has carefully considered whether he would experience treatment amounting to cruel or inhuman</p>
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			<p>treatment or punishment or degrading treatment or punishment. The Tribunal has had regard to the PAM3: Refugee and Humanitarian Complementary Protection Guidelines which state that in certain circumstances it may be appropriate to infer an intention to inflict pain or suffering or to cause extreme humiliation if it is evident that pain or suffering or extreme humiliation was or may be knowingly inflicted. The Tribunal does not accept that such an inference can be drawn in the applicant's circumstances. The Tribunal is not satisfied that any pain or suffering caused by severe overcrowding and poor and unsanitary conditions, should the applicant be remanded in custody, would be intentionally inflicted on the applicant as required by the definition of cruel or inhuman treatment or punishment. Nor does the Tribunal accept that severe overcrowding and poor conditions would be intended to cause extreme humiliation as required by the definition of 'degrading treatment or punishment'. The Tribunal is not satisfied that there is a real risk that any element in the process the applicant is likely to face upon return would involve "significant harm" as defined.' (para 121).</p> <p>'Having considered the applicant's claims individually and cumulatively, the Tribunal is not satisfied that the applicant has a well-founded fear of being persecuted in Sri Lanka. For this reason, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees</p>
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			<p>Convention. The applicant does not satisfy the criterion set out in s.36(2)(a).’ (para 122).</p> <p>‘The Tribunal further finds that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Sri Lanka, there is a real risk that he will suffer significant harm. The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).’ (para 123).</p>
<p><a href="#">1505109 (Refugee) [2017] AATA 157</a> (Unsuccessful)</p>	<p>12 January 2017</p>	<p>2-3, 34-35 and 65-71</p>	<p>The Tribunal discussed psychological illness and whether any consequences of this (iedisbility discrimination) could amount to qualifying harm. In this case it did not due to lack of intent.</p> <p>‘The second named applicant (the applicant daughter) and the third named applicant (the applicant son) are the children of the first named applicant (the applicant mother). They are nationals of Jordan. They arrived in Australia [in] June 2012 and applied for the protection visa under review [in] May 2014. All three applicants have made specific claims for protection.’ (para 2).</p> <p>‘The applicants had previously applied for protection visas [in] August 2012 as members of the family unit of [Mr A]. [Mr A] had claimed fear of persecution in Jordan due to his homosexuality. They did not make specific claims for protection in that application, relying on their membership of [Mr A]’s family. That</p>

			<p>application was refused by the Department [in] December 2012. The then Refugee Review Tribunal (RRT) affirmed the delegate’s decision on 13 September 2013. [Mr A] applied for a review of that decision to the Federal Circuit Court of Australia and the Court remitted the matter to the Tribunal for reconsideration.’ (para 3).</p> <p>‘The Tribunal did not find the applicant mother to be a credible and truthful witness and has concluded that the decision under review should be affirmed. In reaching this conclusion, the Tribunal has had regard to the reasons detailed below.’ (para 34).</p> <p>‘First, the applicant mother provided inconsistent and unpersuasive evidence in relation to her claimed separation from [Mr A] and the knowledge of other family members about [Mr A]’s alleged homosexuality.’ (para 35).</p> <p>‘The applicant son did not attend the Departmental interview or the Tribunal hearing. In his written claims, he stated that he would be seriously harmed by his family and the society. He did not provide any reasons for his claimed fear. In so far as these claims may relate to what has been claimed on his behalf with regard to [Mr A]’s claimed sexuality or sexual orientation, the Tribunal has rejected these claims.’ (para 65).</p> <p>‘[Dr D]’s letters were authored in 2013. The letters indicated that at that time the applicant son had been</p>
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			<p>prescribed [medication], medication used to treat [medical condition], and that he suffered from ‘stresses and anxieties and insecurities’. No other evidence or information was submitted to support the applicant’s mother’s general claims that the applicant son is vulnerable to bullying. No further recent medical information was submitted in relation to the applicant’s son’s current state of mental well-being. The applicant son is now [age] and an adult. On the basis of the evidence before it, the Tribunal is not satisfied that the applicant son will be bullied because he is emotionally weak and sensitive. The Tribunal is not satisfied that there is a real risk or a real chance that the applicant son will be subjected to serious or significant harm on account of his personal attributes or his current state of mental well-being.’ (para 66).</p> <p>‘The Tribunal is not satisfied that if any of the applicants, upon being removed to Jordan, were to continue to suffer from any form of psychological illness, there are substantial grounds for believing that, as a necessary and foreseeable consequence of their removal, there is a real risk that they will be subjected to any form of harm, including disability related discrimination, that would be the result of an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on them for the reasons specified in paragraphs (a)-(e) of the definition of torture in s.5(1) of the Act. The Tribunal is not satisfied that that there are substantial grounds for</p>
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			<p>believing that there is a real risk that they will suffer harm from the authorities that would involve the infliction of severe pain or suffering, either physical or mental, such as to meet the definition of cruel or inhuman treatment or punishment in s.5(1). Nor is it satisfied that it has substantial grounds for believing that there is a real risk that they will suffer such harm as to meet the definition of degrading treatment or punishment in s.5(1) which refers to an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable. The Tribunal is not satisfied that it has substantial grounds for believing that there is a real risk that they will suffer arbitrary deprivation of life or the death penalty. The Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicants being removed from Australia to Jordan, there is a real risk that they will be subjected to significant harm arising from any psychological issues.’ (para 67).</p> <p>‘At the departmental interview, the applicant mother and the applicant daughter claimed to fear harm from Islamic State (ISIS) in Jordan. The applicant daughter did not attend the hearing and the applicant mother did not pursue this claim at the hearing.’ (para 68).</p> <p>‘The Tribunal appreciates that the applicants may be concerned about general lack of security in Jordan, some of which attributable to ISIS. However, there is</p>
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			<p>no persuasive evidence before the Tribunal to suggest that the lack of general security the applicants may be concerned about or any security related dangers posed by ISIS is faced by each of them personally. Indeed, compared to all of Jordan's neighbours, attacks by ISIS inside Jordan have been rare.<sup>[1]</sup> The Tribunal is not satisfied that the presence of ISIS in Jordan or lack of general security situation in the country would expose the applicants to a real chance of persecution for a Convention reason.' (para 69).</p> <p>'Under s.36(2B)(c) of the Act there is taken not to be a real risk that an applicant will suffer significant harm if the Tribunal is satisfied that the real risk is one faced by the population generally and is not faced by the applicant personally. The Tribunal is satisfied that the lack of general security and the instability the applicants fears are faced by the population generally and not by them personally. The Tribunal finds that there is no real risk that the applicants will suffer significant harm in Jordan as a result of lack of general security and instability.' (para 70).</p> <p>'For the reasons given above the Tribunal is not satisfied that any of the applicants is a person in respect of whom Australia has protection obligations. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) or (aa) for a protection visa. It follows that they are also unable to satisfy the criterion set out in s.36(2)(b) or (c). As they do not satisfy the criteria for a</p>
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			protection visa, they cannot be granted the visa.’ (para 71).
<a href="#">LQVM and Minister for Immigration and Border Protection (Migration) [2017] AATA 7</a> (Successful)	9 January 2017	1, 61, 62, 65, 66 and 71-78	<p>This case involved a discussion of the weight of non-refoulement obligations in visa refusal/cancellation cases. Although they are no longer one of the primary considerations, they are still important and play a particularly important role when the application is for a protection visa.</p> <p>‘LQVM is a citizen of Vietnam. She first arrived in Australia on 25 February 2006 on a tourist visa. Since that first arrival, LQVM has left Australia and re-entered on several occasions. Her most recent arrival in Australia was on 26 July 2012 as the holder of a Student Guardian (Class TU) visa. She remained on that visa until it was cancelled on 8 July 2013 on character grounds following her conviction and imprisonment for drug related crimes.’ (para 1).</p> <p>‘LQVM is a citizen of Vietnam who has been found to be a person who merits Australia’s protection and therefore meets the relevant criteria, apart from character and any other outstanding criteria, for a protection visa. The Tribunal is bound by the MRD’s decision and is not entitled to revisit the decision in order to determine whether it would come to the same conclusion as its colleague. The international non-refoulement obligations are therefore relevant in this case.’ (para 61).</p>

			<p>‘The MRD’s decision dated 11 January 2016 was worded as follows:  <i>The Tribunal remits the matter for reconsideration and directs that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm.</i>’ (para 62).</p> <p>‘LQVM’s legal team submitted that the most likely outcome of LQVM being refused the protection visa in the circumstances where Australia would not return her to Vietnam was indefinite detention. They pointed to assessments of LQVM’s mental health in the medical records provided to the Tribunal which provided her medical history whilst in detention. They pointed to deterioration in LQVM’s mental state where she was rated as well on a relevant psychological test in the early parts of her stay to being severely affected by mental health issues in December 2016.’ (para 65).</p> <p>‘In a report dated 24 November 2016, a counsellor and psychologist at Foundation House reported that LQVM had been referred for trauma counselling by a mental health nurse and had been seen twice during October 2016. The counsellor stated that LQVM suffers symptoms of chronic depression and anxiety. She stated that:  ... [LQVM] ruminates constantly about decisions she</p>
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			<p>has made in Australia leading to her incarceration. She suffers high anxiety about whether she will be returned to Vietnam. Her fear of being significantly harmed is extremely high....</p> <p>...She shows extreme fear of return to Vietnam because of reprisals from the “black society”.’ (para 66).</p> <p>‘The primary consideration regarding protection of the Australian community from criminal or other serious conduct, which weighs in favour of refusal of the visa, should be given quite a deal of weight due to the nature of LQVM’s offences. The expectations of members of the Australian community, as described in Direction 65, would also weigh in favour of refusing the visa given the crimes of which LQVM has been convicted.’ (para 71).</p> <p>‘On the other hand, the primary consideration regarding LQVM’s grand-daughter and the impact on her son and his wife, should also be given some weight in favour of the grant of the visa.’ (para 72).</p> <p>‘The non-refoulement provisions weigh in favour of the grant of the visa.’ (para 73).</p> <p>‘The balancing act in cases such as this one is difficult. In this case, in particular, the decision that LQVM warrants the issue of a protection visa given her risk of significant harm were she to return to her country of citizenship puts a different perspective on whether the discretion to set aside the refusal than it would for any</p>
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			<p>other type of visa. If the Tribunal was considering a different class of visa, such as a partner visa, skilled visa or indeed a parent guardian visa such as that previously held by LQVM, the Tribunal may well have affirmed the delegate's decision to refuse the visa on character grounds.' (para 74)</p> <p>'Whilst international non-refoulement obligations are no longer one of the three primary considerations as they had been under previous superseded Ministerial directions, they still have an important place in determining whether to set aside the refusal decision.' (para 75)</p> <p>'The Tribunal accepts that there may be a risk that someone who has committed offences of the nature of those undertaken by LQVM will again choose to take them up again and thereby harm the Australian community. However, in this case, the Tribunal is of the view that LQVM has served her time and is remorseful for what she did.' (para 76).</p> <p>'Based on evidence from the community, prison and parole officials, psychologists and others who have assessed LQVM and that of her elder son and her own evidence about her plans to re-establish herself, the Tribunal is of the view that the appropriate action in this case is not to refuse the visa on character grounds. The Australian community has little to gain by keeping her in indefinite detention, which would appear to be the</p>
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			<p>likely outcome of a refusal. As stated earlier, the non-refoulement considerations enlivened by the fact that it is a protection visa that is involved in this matter has led to a different outcome to that were a different type of visa under consideration.’ (para 77).</p> <p>‘Having regard, in particular, to the principles referred to in Direction 65 and the findings made in relation to those principles, the Tribunal concludes that the preferable decision in this case is that the application for the visa not be refused.’ (para 78).</p>
<p><a href="#">1515645 (Refugee) [2017] AATA 20</a> (Unsuccessful)</p>	<p>6 January 2017</p>	<p>10, 25, 27, 28, 29, 30, 31, and 32</p>	<p>The Tribunal rejected that the harm of feeling traumatised by being returned to the country where the applicant suffered past harm fell within the definition of ‘significant harm’.</p> <p>The applicant was a citizen of Vietnam (para 10).</p> <p>‘For these reasons, whilst the Tribunal accepts the applicant is a Catholic who was detained and mistreated by police after attending a protest in 2004, the Tribunal does not accept she has a profile such that she would be of interest to the authorities should she return. The Tribunal finds she is an ordinary Catholic who attended one protest, and who would be able to practice her religion as she has done in the past. The Tribunal finds her fear of again suffering sexual assault in Vietnam is mere speculation, and does not accept the police officer who previously assaulted her has an ongoing interest in</p>

			<p>finding her. The Tribunal finds she does not have a well-founded fear of persecution for reason of her religion or actual or imputed political opinion, should she return to Vietnam in the reasonably foreseeable future.’ (para 25).</p> <p>‘The applicant claimed to fear imprisonment in her written claims. For the reasons given above, the Tribunal does not accept the applicant is of adverse interest to the Vietnamese authorities, and finds the risk of her being imprisoned for protest activity or failing to attend a re-education class in 2004 is too farfetched to amount to a real risk. The Tribunal makes this finding based on the lack of follow up by the authorities when she stopped attending the re-education classes, her ability to relocate in Vietnam when she married without adverse attention from local authorities, her ability to apply for a passport and depart Vietnam, and her having left Vietnam legally such that she will not be under any extra scrutiny upon return.’ (para 27).</p> <p>‘The applicant spoke at the hearing of fearing returning to Vietnam not only because she feared being the victim of sexual assault again, but because she feared being traumatised by returning to a country where she had previously suffered assault.’ (para 28).</p> <p>‘In relation to the applicant’s first fear, of again suffering sexual assault, the Tribunal finds this is mere speculation and finds there are not substantial grounds</p>
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			<p>for believing there is a real risk of such harm should the applicant be returned to Vietnam.’ (para 29).</p> <p>‘In relation to her second fear, the harm of feeling traumatised by being returned to the country where she suffered past harm, the Tribunal finds such harm does not fall within the definition of ‘significant harm’.</p> <p>‘Significant harm’ is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. ‘Cruel or inhuman treatment or punishment’, ‘degrading treatment or punishment’, and ‘torture’, are further defined in s.5(1) of the Act. These definitions include an element of intention: it must be an act or omission which causes and is intended to cause harm,’ (para 30).</p> <p>‘The harm the applicant fears is psychological harm caused by being returned from Australia to Vietnam. The Tribunal does not accept the act in returning the applicant to Vietnam will satisfy the definition of ‘cruel or inhuman treatment or punishment’ or ‘degrading treatment or punishment’, or ‘torture’. The Federal Court found that harm arising from the act of removal itself will not meet the definitions of ‘significant harm’ in s.36(2A).[2]’ (para 31).</p> <p>‘The Tribunal is not satisfied there are substantial</p>
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			grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Vietnam, there is a real risk she will suffer significant harm. The Tribunal finds the applicant does not meet the criterion for complementary protection set out in s.36(2)(aa).’ (para 32).
<a href="#">1417564 (Refugee) [2017] AATA 129</a> (Unsuccessful)	4 January 2017	81, 93, 96 and 99-101,	<p>In this case the Tribunal assessed whether generalized insecurity qualified as significant harm, finding that it did not due to the operation of s.36(2B)(c) (that the risk was faced by all of the population generally).</p> <p>The Tribunal did not accept the applicants claims based on their Alevi faith and claimed past political activity. (paras 81, 93, and 96).</p> <p>‘The Tribunal acknowledges that the applicants raised concerns about the security situation in Turkey. . [The applicant wife] said that there was no personal security and she was concerned about her personal safety and that of her family. The Tribunal acknowledges that there have been a number of recent terrorist attacks in Turkey, including in Istanbul, and at the hearing the Tribunal discussed with the applicants country information concerning the security situation in Turkey. In its most recent report DFAT acknowledges that :</p> <p>Turkey’s security situation has deteriorated markedly since the previous DFAT Country Information Report was published in June 2014. This is due to external security threats related to the war in Syria and Iraq</p>

			<p>(which share borders with southeast Turkey), as well as internal security threats resulting from the civil conflict between Government forces and the PKK in the southeast. Terrorist threats and attacks, including by the Islamic State of Iraq and the Levant (ISIL aka Daesh) and from the Kurdistan Freedom Falcons (TAK), have also increased. The International Crisis Group has listed Turkey as one of ‘Ten Conflicts to watch in 2016’.’ (para 99).</p> <p>‘However, as the Tribunal discussed with the applicants, the security situation in Turkey appears to be a problem faced by the population in Turkey generally and not the applicants personally. Furthermore, as I put to the applicants, while the security situation has deteriorated in recent years, the country information does not indicate that there is a real chance that the applicants would be harmed as a result of this situation; while security incidents are more frequent in recent years, I consider that it is speculative to suggest that the applicants, who have identified Istanbul as their home area, will be harmed as a result; that is there is no real chance that the applicants will be harmed as a consequence of security situation in Turkey.’ (para 100).</p> <p>‘In any event, with regard to the general issues of the security situation in Turkey, these are problems that affect the entire Turkey population and, on the evidence before it, the Tribunal is not satisfied that any</p>
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			<p>difficulties the applicants might experience because of the security situation in Turkey would be for the essential and significant reason of one or more of the Convention reasons. Accordingly, with respect any difficulties the applicants may experience because of the incidence of security situation in Turkey generally, the Tribunal is not satisfied that the applicants have a well-founded fear of Convention related persecution if they return to Turkey. Nor, on the evidence before it, can the Tribunal be satisfied that any problems the applicants may experience upon return as a result of security situation constitutes significant harm under <a href="#">s.36(2B)(c)</a> of the Act as the real risk is one faced by the population of Turkey generally and is not faced by the applicants personally.’ (para 101).</p>
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