**COMPLEMENTARY PROTECTION IN AUSTRALIA**

**ADMINISTRATIVE APPEALS TRIBUNAL**

*Last updated 30 June 2020*

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

| Case | Decision date | Relevant paras | Comments |
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| ZLYD and Minister for Home Affairs (Migration) [2020] AATA 1737 (Successful) | 8 May 2020 | 55-62 | The Tribunal substituted a decision that a South-Sudanese applicant's visa not be cancelled, finding that *non-refoulement* obligations were owed to the applicant in respect of the harm that he may suffer as a person who is HIV-positive. |
| 1831953 (Refugee) [2020] AATA 1495 (Unsuccessful) | 1 May 2020 | 41, 61-65 | The Tribunal affirmed a decision not to grant a protection visa to a Turi, Shia Muslim applicant from Pakistan recognizing that he faced a real risk of harm from the Taliban, yet finding he could relocate.<br><br>"The applicant made extensive claims concerning the security situation in Parachinar and the former Kurram Agency. His evidence was that he observed first-hand the aftermath of terrorist attacks and that he considered that he and his family were being targeted by the Taliban. The delegate accepted the applicant's assertion that Turi Shias are targeted with harm by the Taliban and other armed Islamic extremist groups in Parachinar. The delegate therefore found that there was a factual basis to the applicant's fear of being subjected to severe forms of sectarian violence in Parachinar. This is consistent with current country information." (Para 41) |
| 1709004 (Refugee) [2020] AATA 1536 (Unsuccessful) | 28 April 2020 | 104-115 | The Tribunal affirmed a decision not to grant protection visas to Indian applicants. The Tribunal accepted there was a real risk of significant harm from the applicant husband's family, however, found relocation a viable option. |

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| 1716847 (Refugee) [2020] AATA 1545<br>(Successful) | 22 April 2020 | 108-112 | The Tribunal set aside a decision refusing to grant a Chinese, minor applicant a protection visa and remitted the matter with the direction that the applicant satisfies s.36(2)(a) and s.36(2)(aa), accepting a real risk of significant harm as a result of being born out of wedlock in breach of the Chinese Family Planning Laws. |
| 1619513 (Refugee) [2020] AATA 1543<br>(Unsuccessful) | 20 April 2020 | 35-51 | The Tribunal affirmed a decision not to grant protection visas to Indian applicants. The Tribunal accepted there was a real risk of significant harm to the applicants from family members related to an ongoing property dispute, however, found the risk was localized and that it was possible for the applicants to relocate. |
| 1713094 (Refugee) [2020] AATA 990<br>(Successful) | 27 March 2020 | 80-83 | In substituting a decision not to cancel a Christian Iraqi applicant's protection visa, the Tribunal found that Australia's *non-refoulement* obligations were a relevant consideration. |
| CYNQ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2020] AATA 545<br>(Successful) | 13 March 2020 | 148-172 | In substituting a decision to revoke the cancellation of a Kenyan applicant's Class XB Subclass 202 protection visa, including because there would be a real possibility that the applicant would suffer significant harm or hardship, the Tribunal also discussed conflicting authorities in the Federal Court on *non-refoulement*.<br><br>"As matters stand, there are currently conflicting authorities in the Federal Court as to whether it will be an error for a decision-maker not to make an assessment as to whether an Applicant is a person in respect of whom Australia has non-refoulement obligations in circumstances where it is open for an Applicant to apply for a Protection visa. It was thought that this issue |

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| | | | would be settled by a five-member bench of the appellate jurisdiction of the Federal Court in *Minister for Home Affairs v Omar* [2019] FCAFC 188 ("*Omar*")." (Para 149)<br><br>"Prolonged detention is however a real possibility for the current Applicant, and this would obviously result in significant harm or hardship to him. The Tribunal considers that that possible prolonged detention of the the Applicant, along with the other hardships that have been already identified in these reasons weigh significantly in the Applicant's favour." (Para 172) |
| MCCN and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2020] AATA 930<br>(Unsuccessful) | 3 March 2020 | 135-166 | The Tribunal affirmed a decision not to revoke the mandatory cancellation of an Iraqi applicant's visa but accepted that there is a real risk of serious harm to the applicant that rises to a level to trigger non-refoulement obligations.<br><br>"More particularly, the Tribunal is satisfied that the applicant's stated claims of harm relating to his membership of the Christian minority and as a consequence of the potential for him to be associated with perceived wealth, represent a risk of harm to a level covered by the Refugees Convention, the CAT and the ICCPR. The Tribunal is satisfied that these risks are substantial at the hands of criminal gangs, Islamic extremists and other non-state actors." (Para 161) |
| 1711438 (Refugee) [2020] AATA 789 | 27 February 2020 | 62-80 | The Tribunal remitted the application of an HIV-positive homosexual man from Fiji finding that the |

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| (Successful) | | | cumulative effects of envisaged harm satisfies the complementary protection criterion.<br><br>"The Tribunal finds that the applicant and as a consequence of his current medical condition – being a person who is HIV positive, if he were returned to Fiji in the reasonably foreseeable future will fall victim either to being subjected to cruel or inhuman treatment or punishment or be subject to degrading treatment or punishment committed upon him because he would be unable to receive, the proper counselling care and medical treatment he requires as a person having been diagnosed as HIV positive." (Para 66)<br><br>"The Tribunal finds that the applicant if he was returned to Fiji in the reasonably foreseeable future will fall victim to either arbitrarily being deprived of his life or subjected to cruel and inhuman treatment being committed upon him by the reality of the situation he would find himself in – in Fiji, where he would be singled out and mistreated by the general community because of his HIV positive chronic illness. He would not be able (due to the lack of) to engage with a range of support services to assist him in continuously dealing with his chronic illness and it changing challenges." (Para 70)<br><br>"It is clear to the Tribunal those members of the LGBTI community in Fiji if they are diagnosed as HIV positive there is some societal discrimination. It was noted by the Tribunal upon review of the available information on HIV treatment in Fiji, that though societal |

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| | | | discrimination was not systemic, it was present and persons like the applicant face societal discrimination and are viewed differently and have very little support within Fijian society and this 'HIV-positive stigma' would in the Tribunal's opinion amount to inhuman treatment or punishment, where acts or omissions by which severe pain or suffering, whether physical or mental, is intentionally inflicted on the applicant." (Para 75) |
| FRVT and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2020] AATA 294<br>(Successful) | 25 February 2020 | 244-313 | The Tribunal substituted a decision to revoke the cancellation of a Chinese applicant's protection visa and in doing extensively discussed non-refoulment obligations and authority, and considered there was a real risk that the applicant will be returned to China in breach of Australia's international non-refoulement obligations. The Tribunal also considered claims relating to coronavirus.<br><br>"First, the Tribunal considers that there is a real chance that the Applicant would be excluded from protection under the Refugees Convention at international law on account of Article 33(2) of the Refugees Convention (which, as mentioned previously is now mirrored in section 36(1C) of the Act). However this is uncertain as, while the Applicant has been convicted of a particularly serious crime, because the Tribunal has found that there is a low risk that he will reoffend, he may not present a danger to the Australian community." (Para 288)<br><br>"In any event, unlike the situation in the Refugees Convention, the non-refoulement obligation under the |

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| | | | ICCPR and the CAT are absolute and without exception." (Para 289)<br><br>"While the Tribunal does not consider that the Applicant's claims in relation to the coronavirus invoke Australia's international non-refoulement obligations, they still present risks of harm and hardship which the Tribunal has taken into account and ultimately weigh in the Applicant's favour." (Para 300)<br><br>"In those circumstances, the Tribunal considers that, in addition to a risk that he will be re-prosecuted for his Australian offences, there is a heightened and real risk that the Applicant will be prosecuted in China for serious drug related offences that relate to the territorial jurisdiction of China. From the material available, it appears that there is a real risk that the Applicant could receive the death sentence for such offences." (Para 308)<br><br>"As the Applicant cannot apply for another substantive visa in Australia, and it is highly unlikely that the Minister will exercise any discretion to allow him to remain here, the Tribunal considers that there is a real risk that the Applicant will be returned to China in breach of Australia's international non-refoulement obligations." (Para 312) |
| Hanna and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs | 25 February 2020 | 146-165 | In affirming a decision not to revoke the mandatory cancellation of an Iraqi applicant's Class XB Subclass 200 Refugee visa, the Tribunal discussed authority on non-refoulement. |

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| (Migration) [2020] AATA 293<br>(Unsuccessful) | | | "While I am satisfied that returning to Iraq would be difficult, and that Mr Hanna is factually in a category of persons who face more violence and discrimination, I accept the submissions of both Mr Aleksov and Mr Aviram that the Applicant would face a *moderate* risk of harm. While some of the evidence does not rise to the level of a substantial risk of harm which would invoke Australia's non-refoulement obligations, I am satisfied in this case that the Tribunal should, in the circumstances of the Applicant and those of his family who came to Australia, find that a case can be sustained where treaty-related or complementary protection may be owed." (Para 164) |
| 1823104 (Refugee) [2020] AATA 1926<br>(Unsuccessful) | 24 February 2020 | 56-80 | The Tribunal affirmed a decision to not grant protection visas to Pakistani applicants, one of Ahmadi heritage. The Tribunal accepted there was a real risk of significant harm from a criminal family group and associates and also potentially in the form of one applicant suffering deterioration of his mental health, however, the Tribunal found that the harm was localised and relocation was reasonable and practicable. |
| 1927623 (Refugee) [2020] AATA 403<br>(Successful) | 13 February 2020 | 73-83 | The Tribunal substituted a decision not to cancel a stateless Rohingya applicant's Subclass 785 (Temporary Protection) visa as it would breach *non-refoulement* obligations under ICCPR and CAT.<br><br>"The Tribunal has found that as a stateless Rohingya person there is a real chance the applicant will be seriously harmed in the event he is returned to |

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| | | | Myanmar. As such his removal for Australia to Myanmar would be in breach of the Refugee Convention the ICCPR and the CAT. In such circumstances the Tribunal is of the view the applicant would be held in detention for a prolonged period of time. Accordingly, the hardship suffered by the loss of his liberty for an extended period of time far outweighs the consideration in relation to the risk to the Australian community under on s.116(1)(e) of the ACT." (Para 78) |
| HSKJ and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2020] AATA 176<br>(Successful) | 12 February 2020 | 56-75 | The Tribunal substituted a decision to revoke the cancellation of an Iraqi homosexual applicant's Class XB Subclass 200 (Refugee) visa.<br><br>"Given that the legal consequence is that the applicant would be returned to Iraq, it is my assessment for the reasons set out above that there is a very real risk the applicant will suffer significant harm if the cancellation decision is not revoked. This factor weighs heavily in favour of revoking the cancellation decision. I accept that regardless of whether the applicant's claims are such as to engage non-refoulement obligations, the applicant would face significant hardship including a risk of violence in the event he were to return to Iraq." (Para 75) |
| GQVS and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2020] AATA 178 | 11 February 2020 | 113-170, 186-190 | The Tribunal substituted a decision to revoke the cancellation of a South Sudanese applicant's Class BA Subclass 200 Refugee visa and in doing so discussed authority on the duty to consider *non-refoulement* obligations. |

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| (Successful) | | | |
| QDQY and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2020] AATA 125 (Unsuccessful) | 31 January 2020 | 45-55 | The Tribunal affirmed a decision not to revoke the mandatory cancellation of an Iraqi applicant's visa, notwithstanding the finding that the applicant was owed *non-refoulement* obligations.<br><br>"Given that the legal consequence is that the applicant would be returned to Iraq, it is my assessment for the reasons set out above that there is a very real risk that the applicant will suffer significant harm if the cancellation decision is not revoked. This factor weighs heavily in favour of revoking the cancellation decision. I accept that regardless of whether the applicant's claims are such as to engage non-refoulement obligations, the applicant would face significant hardship including a risk of violence in the event that he were to return to Iraq." (Para 55) |
| 1703365 (Refugee) [2020] AATA 1354 (Successful) | 21 January 2020 | 60-69 | The Tribunal recognized the complementary protection claim of a Japanese mixed marriage victim of violence with mental illness who had been disowned by her family. |
| TNJG and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2020] AATA 10 (Successful) | 9 January 2020 | 64-77 | The Tribunal substituted a decision to revoke the mandatory cancellation of a Filipino applicant's Class BB (Subclass 155) Five Year Resident Return visa. The applicant was refused a protection visa based on character grounds, but it was accepted that the applicant was owed protection obligations under the relevant international instruments to which Australia is a party.<br><br>"In light of the operation of the Act as detailed above along with relevant authorities, I consider it likely that |

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| | | | the Applicant faces a prolonged period of detention whilst the Minister considers any "alternative management options". If the Minister decides to either not consider those options, or decides not to exercise those powers, then the Applicant faces the prospect of removal to the Philippines where he would be in grave danger of being harmed or killed due to his previous drug addiction. The Respondent agreed that he would be at such risk if he were to return." (Para 74)<br><br>"If the Applicant was required to remain in "indefinite" detention (in the sense described above by Gleeson J in *CWGF*), this would clearly be of concern. The Applicant has served periods of imprisonment and if his evidence is to be accepted is now committed to turning his life around. The Respondent's representative submitted that the "alternative management options" available to the Minister would mean that the Applicant would not be kept permanently in immigration detention, but rather would be detained while those options were being considered, when and if the Minister chose to do so. In other words, none of the Minister's powers in this regard are compellable and lie entirely within the Minister's discretion." (Para 75)<br><br>"The fact that if the Applicant were removed to the Philippines this would result in breach of Australia's non-refoulement obligations is also a matter to which I give significant weight." (Para 76) |
| 1713001 (Refugee) [2019] AATA 6855 | 13 December 2019 | 57-64 | The Tribunal affirmed a decision to refuse a protection visa to a Malaysian applicant, but in doing so accepted |

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| (Unsuccessful) | | | that there is a risk of significant harm to the applicant based on threats of harm by members of criminal organisations to whom the applicant owes money. However, the Tribunal found that the level of protection from State authorities would be adequate and effective. |
| HPZB and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2019] AATA 5402<br>(Successful) | 13 December 2019 | 113-116, 133 | The Tribunal remitted an Afghan claimant's application with the direction that a temporary protection visa not be refused, including because the applicant is owed *non-refoulement* obligations. |
| 1715048 (Refugee) [2019] AATA 6684 | 9 December 2019 | 94-102 | The Tribunal remitted the application of an Iranian applicant with the direction that the applicant satisfies s.36(2)(a) and s.36(2)(aa) and found in particular that there are substantial grounds for believing that, there is a real risk that the applicant will suffer significant harm from the Iranian authorities as a Christian convert from Islam. |
| SBTY and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2019] AATA 5609<br>(Successful) | 6 December 2019 | 109-133 | The Tribunal substituted a decision to revoke the mandatory cancellation of an Alevi Kurdish applicant's visa noting that Australia's non-refoulement obligations are engaged and that the claims of harm extend to harm covered by the Refugees Convention and also, potentially, the CAT and the ICCPR.<br><br>"On the basis of the evidence before it the Tribunal is satisfied the applicant is a member of the Alevi Kurdish minority and that as such if the applicant were to return to Turkey: |

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| | | | (a) there is a real chance the applicant would be subjected to state sanctioned discrimination which could extend to attempts to suppress his Kurdish identity or suppress Kurdish identity generally or other limitations on his rights as a Turkish citizen including severe restrictions on freedom of expression and freedom of movement. This could also extend to arbitrary arrest and detention or other forms of legal harassment;<br><br>(b) there is a real chance the applicant would be exposed to state sanctioned harm including potentially life-threatening harm, torture, excessive use of force, destruction of housing and prevention of access to emergency medical care and safe water; the Tribunal is satisfied that the risk of harm of this nature is heavily dependent on the specific circumstances and location within Turkey. The Tribunal is satisfied that the risk of this type of harm would be less should the applicant relocate to his home city in Aldana Province than if he were to relocate to a higher conflict zone in south-east Turkey. The risk would be less still if the applicant were to relocate into the western part of Turkey. In assessing this risk the Tribunal has been mindful of the applicant's evidence where he stated that he is less concerned about harm from the Turkish Government and more concerned about harm at the hands of local youth militants in his home Province;<br><br>(c) there is a real chance the applicant would be subjected to serious physical harm and potentially life-threatening harm by members from the local youth |

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| | | | militants associated with the PKK in retribution for his refusal to take up arms with the PKK when he last visited Turkey. The Tribunal acknowledges the respondent's submission that the risk of this type of harm should be considered to be less given that the applicant, having refused previously to take up arms with the PKK, continued to live in his home city for an extended period of time without any serious consequence. However, the Tribunal found the applicant's evidence in relation to this risk being ongoing to be consistent and compelling and is satisfied that it was truthful;<br><br>(d) there is a real chance the applicant would be subjected to pressure from local youth militants associated with the PKK to take up arms with the PKK again in the future, and should he refuse to do so, be subjected to serious physical harm and potentially life-threatening harm from such groups in retribution for such refusal. The Tribunal recognises that this risk is particularly heightened in certain parts of Turkey including the area surrounding the applicant's home town. The Tribunal is also mindful of the fact that given the volatility in relation to the conflict between the Turkish government and the PKK, a scenario where the applicant again comes under significant pressure to take up arms with the PKK is not mere speculation but rather has a real and substantive basis;<br><br>(e) there is a real chance the applicant would be subjected to discrimination in the practice of his religion in Adana Province. In reaching this conclusion the |

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| | | | Tribunal notes that the applicant's evidence was somewhat in conflict with the evidence in the DFAT Country Report in relation to this issue which suggested that the Alevi religion was now freely practised across Turkey. The Tribunal accepts that the level of discrimination in this respect may vary significantly depending on the location within the country;<br><br>(f) there is a real chance the applicant would be subjected to discrimination in seeking to obtain employment opportunities in Turkey; and<br><br>(g) there is a real chance the applicant would be subjected to potential harm due to the general security situation in Turkey." (Para 126)<br><br>"The Tribunal is otherwise satisfied that on the basis of the Tribunal's findings with respect to the applicant's claims of harm set out above, Australia's non-refoulement obligations are engaged in respect of the applicant. In particular, the Tribunal is satisfied that the applicant's claims of harm extend to harm covered by the Refugees Convention and also, potentially, the CAT and the ICCPR." (Para 130) |
| ZKFQ and Minister for Home Affairs (Migration) [2019] AATA 5168 (Successful) | 3 December 2019 | 52-55, 64 | The tribunal set aside a decision not to revoke the mandatory cancellation of an Iranian applicant's protection visa, including because he is owed *non-refoulement* obligations. He had made anti-Iran statements and a summons had been issued in his name. |
| CQBW and Minister for | 28 November | 190-224 | The Tribunal affirmed a decision to refuse a bridging |

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| Home Affairs (Migration) [2019] AATA 5177 (Unsuccessful) | 2019 | | visa to a Vietnamese applicant, but in doing so discussed the law on consideration of *non-refoulment* obligations. |
| KYMM and Minister for Home Affairs (Migration) [2019] AATA 5174 (Unsuccessful) | 28 November 2019 | 114-160 | The Tribunal affirmed a decision not to revoke the cancellation of a South Sudanese applicant's refugee and humanitarian visa. While *non-refoulement* obligations weighed in favour of revocation, it was open to the applicant to apply for a protection visa. |
| 1928362 (Refugee) [2019] AATA 6213 (Unsuccessful) | 22 November 2019 | 44-51 | The Tribunal affirmed a decision not to grant a Fijian applicant a protection visa, but in doing so considered whether lack of medical care resulting in could be considered an arbitrary deprivation of life.<br><br>"The Tribunal, having considered the country information about the medical and welfare systems in Fiji, is not satisfied that the applicant would be arbitrarily deprived of his life if he returned to Fiji because the Tribunal is satisfied that the applicant would receive reasonable medical treatment and assistance for his myriad health problems. Further, even if the applicant's medical conditions, particularly the [Physical health condition 1] was to result in [cancer] and result in his death (as claimed in the applicant's written submission), the applicant's death would in no sense be the type of arbitrary deprivation of life envisaged by the legislation." (Para 50) |
| 1906027 (Refugee) [2019] AATA 6729 (Successful) | 14 November 2019 | 172-187 | The Tribunal remitted the application of a victim of trafficking from Vietnam finding that there is "a real risk that the applicant may be arbitrarily deprived of life |

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| | | | at the hands of those who trafficked him, he will be subjected to cruel or inhuman treatment or punishment by those who trafficked him by reason of retribution or he will be subjected to degrading treatment or punishment by society or the authorities by reason of failure to support him as a victim of trafficking, if he returns to Vietnam now or in the reasonably foreseeable future." (Para 186) |
| 1806813 (Refugee) [2019] AATA 6786 (Successful) | 12 November 2019 | 26-38 | The Tribunal remitted the application of an Indian female divorcee from an inter-caste marriage finding that she "faces the real risk of significant harm personally from her ex-husband and his family (or people associated with them)." (Para 33) |
| QDWQ and Minister for Home Affairs (Migration) [2019] AATA 4622 (Unsuccessful) | 12 November 2019 | 84-103, 127-131 | The Tribunal affirmed a decision not to revoke the mandatory cancellation of an Afghan, Shia applicant of Hazara ethnicity. While Australia's *non-refoulement* obligations were engaged, they did not outweigh primary considerations. |
| 1605495 (Refugee) [2019] AATA 6815 (Successful) | 30 October 2019 | 55-75 | The Tribunal recognised the complementary protection claim of a divorced, female Kurdish applicant of Alevi Christian faith from Turkey.<br><br>"'*Significant harm*' for these purposes is exhaustively defined in s.36 (2A): s.5(1) of the Act. It includes a situation where a person will suffer significant harm if he or she will be subjected to inhuman treatment. The Tribunal finds that this provision is applicable here. The type of criminality and harm described above would be intentional and aimed at the applicant should it occur. It |

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| | | | is sufficiently prevalent in Turkey to pose a real risk and risk is exacerbated by the applicant's lack of societal influence, position and funds. The applicant's position is further exacerbated and made difficult by the fact that her former husband has the means and his disposal to locate and inflict his will upon the applicant. Serious assaults including grievous bodily harm are a possibility. Kidnapping of the applicant and holding her in captivity against her will is another possibility. The applicant might well – in a personal sense – be vulnerable to some or all of these crimes, and there is a real risk that she will suffer significant harm. This risk would exist in all the various areas of the country and because of the issues with the police, the Tribunal has outlined that the applicant could not obtain, from any authority of the country, protection such that there would not be a real risk that the person will suffer significant harm. The real risk is one faced by the applicant personally. The Tribunal also does not find that there is a possibility of avoiding the harm described by depending on family assistance." (Para 74) |
| WKMZ and Minister for Home Affairs (Migration) [2019] AATA 4381 (Unsuccessful) | 14 October 2019 | 160-274 | The Tribunal affirmed a decision not to revoke the mandatory cancellation of a South Sudanese applicant's visa under s.501(3A), notwithstanding finding that it is likely Australia owes international non-refoulement obligations to the applicant under the ICCPR and the CAT. The decision includes an extensive discussion of decision makers' duty to consider Australia's non-refoulment obligations, conflicting authorities and how the duty relates to *inter alia*, the ability of the applicant to apply for a protection visa. |

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| | | | "However, the Tribunal finds that it is likely that Australia owes international non-refoulement obligations to the Applicant under the ICCPR and the CAT." (Para 256)<br><br>"This is because, the Tribunal has found that there is a real risk that the Applicant will suffer significant harm if he is returned to South Sudan. As such, the Tribunal considers that the Applicant is likely to meet the complementary protection criteria in section 36(2)(aa)." (Para 257)<br><br>"However, the Tribunal considers that it is likely that the Applicant will be refused a Protection visa on the basis of complementary protection as he is unlikely to meet the criteria for a Protection visa under sections 36(1C) and 36(2C). As mentioned above, it is possible for a person to meet the criteria in section 36(2)(aa) and therefore be a person in respect of whom Australia owes international non-refoulement obligations, and yet be refused a Protection visa on the basis of failing to meet the criteria in 36(1C) and 36(2C) of the Act." (Para 258) |
| 1604355 (Refugee) [2019] AATA 6804<br>(Unsuccessful) | 24 September 2019 | 235-344 | In affirming a decision not to grant a South-African family a protection visa, the Tribunal discusses complementary protection extensively and considered claims relating to the father's (principal applicant) business, the high rates of crime and violence in South Africa and other claims, including those concerning the daughter's former partner, the mother's mental health and the impact of the potential separation of the |

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| | | | principal applicant and his wife on the daughter. The Tribunal also found that the applicants would not face a real change of harm on the bases of being white, Afrikaner, Christians, and membership of the particular social groups of a white male or white female facing workplace discrimination and of a white female facing sexualised violence |
| DFNM and Minister for Home Affairs (Migration) [2019] AATA 3769 (Successful) | 24 September 2019 | 83-138 | The Tribunal revoked the cancellation of a Lebanese applicant's partner residence visa. The Tribunal discussed whether and how Australia's *non-refoulement* obligations needed to be considered, recognizing that consideration of whether or not a person meets all the criteria for a protection visa does not extinguish separate *non-refoulement* obligations but was unsatisfied that *non-refoulement obligations* would arise under the ICCPR or CAT. |
| 1613414 (Refugee) [2019] AATA 6738 (Successful) | 20 September 2019 | 57-60, 62-62 | The Tribunal remitted the application of a Pakistani male applicant (and his partner) finding that there "is a real risk that the applicants will suffer significant harm as a result of identifying as a homosexual people and who are in a homosexual relationship to the extent that it constitutes degrading treatment or punishment pursuant to section 36(2A) of the Act." (Para 58) |
| 1613766 (Refugee) [2019] AATA 6379 (Successful) | 9 September 2019 | 39-64 | The Tribunal remitted the application of a Ugandan lesbian applicant with the direction that she satisfies s.36(2)(aa).<br><br>"The Tribunal therefore accepts that if the applicant returns to Uganda and lives openly as a lesbian, there is |

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| | | | a real risk she will be subjected to serious physical violence and high levels of discrimination which may deprive her of core human rights and deny her access to basic services." (Para 49)<br><br>"The Tribunal considers that this harm amounts to cruel or inhuman treatment or punishment and that it is significant harm." (Para 50) |
| 1832684 (Refugee) [2019] AATA 3744<br>(Unsuccessful) | 6 September 2019 | 86-113 | The Tribunal affirmed a decision not to grant a Fijian applicant a protection visa, but made a recommendation that consideration be given to referring the case to the Minister for intervention under s.417 on the basis that the case appears to raise unique or exceptional circumstances. The Tribunal considered whether the applicant would satisfy the complementary protection criteria, but found that psychological harm is not an "act" and to engage s.36(2)(aa) requires an act or omission taking place in the receiving country and this cannot be constituted by an act in the past or the future consequences of an act in the past.<br><br>'The applicant has lived in Australia since he was 14 years old. He experienced trauma in Fiji and on his return to Australia following this incident, the applicant appears to have gone off the rails. There is evidence that this related to his previous experience of trauma, for which he did not seek or receive treatment. The applicant did not raise these issues at the time his visa was cancelled. It is unclear to us how this matter proceeded as we were not provided with this information but it appears that the applicant lost a vital |

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| | | | opportunity, albeit from his own actions, in putting forward his case. His family resides in Australia and he has now spent over four years in detention. There is evidence that the applicant's mental health issues will be exacerbated by returning to Fiji and that the facilities available may be inadequate. His family, who are permanent Australian residents, will face hardship. These are matters that may make the applicant's case unique and may raise compassionate and compelling reasons for intervention in accordance with the Guidelines.' (Para 134)<br><br>'We accept the applicant's evidence that he was threatened. We accept the threat was open-ended and could have been construed to be continuing. We also accept the applicant has a long held and fear of returning to Fiji and he may face further psychological harm if he returns. There is evidence the applicant, who was young and inexperienced, was understandably traumatised by the incident and, critically, did not obtain any treatment or counselling for this until later in his later years. We accept this as had an impact on his return to Fiji is likely to have a further impact on his mental health.' (Para 94).<br><br>'The difficult question is whether previous threats and trauma which manifest in psychological harm both in Australia and, more particularly, in the receiving country engages complementary protection.' (Para 95)<br><br>'The harm that must be suffered is "significant harm" which, as her Honour recognises, requires that a |

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| | | | claimant "will be subjected to... an act or omission": refer at [30] – [32]. Psychological harm which is a consequence of a previous act cannot be an "act or omission" as contemplated by s.36(2A) because the definition requires that the act or omission take place in the future. In our view the words in s.36(2A), as informed by the definitions in s.5(1), are clear.' (Para 99)<br><br>'Thus, as Riley J observes in CKX16 the question is whether a person will be subjected to an act in the future if the person suffers the consequences of the act in the future, even if the act itself is in the past. While her Honour concludes that this would engage s.36(2A) and therefore s.36(2)(aa), we prefer the authority of Mansfield J in SZSRN where his Honour made an important distinction between an act and the consequence of an act: at [47]. We also note that when s.36(2A) is read with s.5(1) the clear meaning is that the non-citizen will be subjected to an act where suffering is intentionally inflicted. This is inconsistent with suffering harm from a previous act.' (Para 110)<br><br>'We also reject any suggestion that the principles in Project Blue Sky would be authority for such a broad interpretation. The process of construing s.36(2)(aa) begins with the statutory text and the text must be considered in its context. Objective discernment of the context may be made through extrinsic material, the legislative history and the purpose and policy of the legislation However, extrinsic material cannot be relied upon to displace the clear meaning of the text. In our |

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| | | | view, ss.36(2A) and 5(1) are clear in their terms. To engage s.36(2)(aa) an applicant must satisfy the Tribunal that there is a real risk he or she will suffer significant harm in the receiving country and this means an act or omission taking place in the receiving country. This cannot be constituted by an act in the past or the future consequence of an act in the past. Psychological harm is a mental state and is not an "act" but rather an illness which is manifest, in this case, by reason of a previous act.' (Para 111)<br><br>'The contention that the threat made to the applicant 17 years ago is a continuing act which, in effect, will come to fruition when the applicant returns to the place of the original trauma, is novel. The act must be the physical act, in this case being the threat made 17 years ago. In our view, the mental health issues that arise from the threat are a consequence of the act. Any harm arising in Fiji is a consequence of the trauma from the act. A psychological response to being returned to the location where the traumatic event occurred is not an act in itself. As stated by Reeves J in CHB16 (agreeing with Collier J in CSV15 v Minister for Immigration and Border Protection [2018] FCA 699) at [65] to [68], the harm described in s.36(2A) is a harm perpetrated "by others".' (Para 112)<br><br>'Accordingly, we reject the submission that the psychological harm, which we accept may be suffered by the applicant because of his subjective fear of returning to Fiji, engages s.36(2)(aa) of the Act.' (Para 113) |

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| 1619551 (Refugee) [2019] AATA 5306<br>(Successful) | 5 September 2019 | 59-62 | The Tribunal remitted a Pakistani, homosexual applicant's claim for reconsideration with the direction that the applicant satisfies both the refugee and complementary protection criteria. |
| DARYAB (Migration) [2019] AATA 4492<br>(Unsuccessful) | 4 September 2019 | 56-60 | The Tribunal affirmed a decision to cancel a Hazara applicant's Subclass 202 (Global Special Humanitarian) visa, while recognizing that Australia may owe protection obligations towards the applicant and that Australia's international obligations may be engaged.<br><br>"The Tribunal is prepared to accept, for the purpose of this review only, that it would be difficult for the applicant to live on her own in Pakistan without much family support. The Tribunal accepts that the situation in Pakistan may be unsafe and that the applicant would be recognised as a Hazara and a single woman. Although the Tribunal is mindful that the applicant is eligible to seek a protection visa in the future, for the purpose of this review, the Tribunal accepts that Australia may owe protection obligations towards the applicant and that Australia's international obligations may be engaged in relation to the applicant." (Para 60) |
| 1729652 (Refugee) [2019] AATA 6484<br>(Successful) | 12 August 2019 | 96-119 | The Tribunal remitted the application of a Nigerian child applicant with the direction that the applicant satisfies s.36(2)(aa) and family members satisfy s.36(2)(c)(i).<br><br>"The types of harm that will amount to 'significant harm' are exhaustively defined in ss.36(2A) and 5(1) of |

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| | | | the Act. Although each form of harm has a discrete identity, there may be some overlap between the different types of significant harm such that some forms of ill-treatment may fall within more than one of these definitions. I consider that kidnapping of children would constitute cruel or inhuman treatment or punishment and in some circumstances may lead to the arbitrary deprivation of life." (Para 106) |
| 1725683 (Refugee) [2019] AATA 6214 (Successful) | 12 August 2019 | 51-59 | The Tribunal sets aside the decision under review and substitutes a decision not to cancel A Pakistani Hazara applicant's Subclass 866 (Protection) visa finding *non-refoulement* obligations would be breached if compelled to return.<br><br>"Under these circumstances, the Tribunal accepts that the life of the visa holder would be considerably diminished were he to return to Pakistan, so much so that there is a real chance he may face serious harm due to the targeting of Hazaras in Pakistan over the years, and the limitations on their freedom of movement. The Tribunal places significant weight on the circumstances the visa holder would face on return to Pakistan and considers that such circumstances would mean that Australia's *non-refoulement* obligations would be breached if the visa holder were compelled to return there. It is not fanciful or remote that the visa holder and his family could be subject of acts of terror or other attacks on the basis of his ethnicity and that he is particularly vulnerable given his profile as an older, |

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| | | | unwell man." (Para 57)<br><br>"Even if the Tribunal were to make a finding that he does not meet the relevant criteria for the grant of a protection visa on the basis of his Hazara ethnicity in Pakistan, the Tribunal finds that at its lowest, the visa holder would face danger such that there is a real risk that he will be subjected to degrading treatment or punishment as per Australia's complementary protection regime. The Tribunal considers that this matter is overwhelming in its considerations, above and beyond whether the visa holder intended to mislead the immigration authorities." (Para 58) |
| 1516248 (Refugee) [2019] AATA 4304<br>(Unsuccessful) | 9 August 2019 | 103-164, 166 | The Tribunal affirmed a decision not to grant a Lebanese applicant a protection visa and in doing so considered the meaning of intention in the context of s.5(1).<br><br>"We accept the contentions of the applicant's representative to the effect that Lebanon lacks suitable qualified mental health specialists; that specialised mental health services are generally very limited; access to mental health services is expensive; and there is societal stigma associated with mental health issues." (135)<br><br>"First, it is clear from reading the judgment that the High Court considered the definition in its entirety and considered the meaning of intention in the context of s.5(1) and the meaning of *intentionally inflicted* for the purposes of s.36(2A)(d) and "intentionally causing" for |

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| | | | the purposes of s.36(2A)(e) of the Act. The plurality found that subjective intention to cause harm was required to establish significant harm and, in so finding, rejected the notion that foresight of the consequences of an act or omission in the ordinary course of events would be sufficient to establish intention (being the approach that found favour with Gageler J and for which the applicant's representative contends)." (Para 147)<br><br>"Secondly, the contention that s.5(1)(b) should be construed to provide that pain or suffering is taken to be intentionally inflicted in certain circumstances is not supported by the plain reading of the subsection. It is clear the definition addresses two scenarios. The first is where the applicant has established that there is *serious* pain and suffering that is intentionally inflicted and the second is where the pain and suffering that is intentionally inflicted is not severe but could reasonably be regarded as inhuman or cruel by its nature." (Para 148) |
| Abas (Migration) [2019] AATA 4505 (Successful)<br><br>See also related (Sanaee (Migration) [2019] AATA 4502; Sanaee (Migration) [2019] AATA 4504; and Sanaee (Migration) [2019] AATA 4506) | 9 August 2019 | 42-52, 57, 60 | The Tribunal substituted a decision not to cancel a Shia Hazara applicant's Subclass (155) (Five Year Resident Return) visa placing weight on Australia's non-refoulement obligations.<br><br>"The Tribunal has carefully weighed the adverse information against the evidence under r.2.41. The Tribunal has found, however, that in view of members of the Hazara community having a long history of being displaced and subject of war, both in Afghanistan and |

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| | | | then Pakistan, the Tribunal has decided that no good purpose would be served by uprooting contributing members of the community who have lived here for a significant period and returning them to a country (Pakistan) where they would essentially be required to live in segregation and under constant threat of attack by extremists; an action that would be in breach of Australia's *non-refoulement* obligations." (Para 57) |
| 1729305 (Refugee) [2019] AATA 6331 (Successful) | 31 July 2019 | 47-61 | The Tribunal remitted a Sri Lankan Tamil applicant's application with remits with the direction that the applicant satisfies s.36(2)(aa).<br><br>"On the evidence before it, the Tribunal is satisfied that although the applicant has a limited adverse profile, his own personal circumstances namely his psychological vulnerabilities mean that there is a real risk of significant harm occurring to the applicant if he were to be returned to Sri Lanka. The Tribunal is satisfied on the evidence that the applicant will suffer significant harm as defined in s.36(2A). The Tribunal is satisfied that in the applicant's case and because of his psychological vulnerabilities, being questioned, interviewed, or detained, or imprisoned by the Sri Lankan authorities amounts to significant harm as contemplated by the Act. The Tribunal is persuaded by the submissions that as the perpetrators of the harm feared by the applicant are the Sri Lankan authorities, the Tribunal finds that state protection would not be available to the applicant and relocating internally within Sri Lanka would not remove the threat of harm." (Para 59) |

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| 1811868 (Refugee) [2019] AATA 6013<br>(Successful) | 23 July 2019 | 70-75 | The Tribunal substituted a decision not to cancel an Iraqi applicant's Subclass 866 (Protection) visa and found he was owed *non-refoulement* obligations.<br><br>"An International Treaties Obligations Assessment (ITOA) was undertaken by the ITOA delegate on 9 August 2017. It noted that despite earlier reports suggesting Sunnis could return to Iraq, the ITOA delegate gave significant weight to the current DFAT report that indicated that conditions for Sunnis had deteriorated since the applicant's return to Iraq in 2013, particularly in non-Sunni dominated areas like Southern Iraq. The ITOA delegate also noted that as a [age]-year-old male of fighting age, he would be at risk of being imputed with Islamic State sympathies if he came into contact with the Iraqi Security Forces (ISF) or Popular Mobilisation Units (PSU). The ITOA delegate accepted that relocation was not reasonable for the applicant and the ITOA delegate was not satisfied he could safely return to central or northern Iraq. He concluded that there was a real chance that if returned to Iraq, the applicant would face persecution for reasons of his religion. He also found there to be substantial grounds for believing that as a necessary and foreseeable consequence of the applicant's removal from Australia to Iraq, the applicant faced a real risk of significant harm. The ITOA delegate concluded that the applicant is a person to whom has Australia has *non-refoulement* obligations." (Para 71)<br><br>"In light of the above information, I see no reason to |

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| | | | depart from the ITOA's conclusion that the applicant faces a real chance of serious harm and a real risk of significant harm if returned to Iraq, now or in the reasonably foreseeable future." (Para 75) |
| 1731415 (Refugee) [2019] AATA 5962 (Successful) | 26 June 2019 | 108-121 | The Tribunal substituted a decision not to revoke an Iraqi applicant's Subclass 866 (Protection) visa and gave weight to *non-refoulement* obligations.<br><br>"Considering this information collectively, the Tribunal notes that the threat to the applicant as a person who worked with coalition forces is far less than it once was, however significant anti-American sentiment exists, particularly in Basra. The Tribunal is satisfied, on the basis of the IPAO decision, his evidence to the Tribunal and country information on anti-Western sentiment, that he may still be known to extremists in his area as claimed and there are those who blame him for going to prison, and that the chance of serious harm may still exist. There is also the risk of moderate discrimination for reasons of his Sunni religion and Bidoon origins which could exacerbate the chance of harm. There is no doubt that sectarian tensions persist in Iraq, and that Sunnis continue to face a degree of harassment and discrimination.[22] In this regard, the Tribunal has taken into account the fact that, notwithstanding his visits to Iraq, he attempted to relocate his family to [Country 1] as he was concerned for their safety. The security situation in general is identified as precarious and the crime rate high." (Para 117) |
| 1613224 (Refugee) [2019] | 24 June 2019 | 30-37 | The Tribunal remitted the application of a Filipino |

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| AATA 5826<br>(Successful) | | | woman who feared serious physical harm from her former de facto partner with the direction that she (and her children) satisfies the satisfies the criterion set out in s.36(2)(aa).<br><br>"However, I am satisfied that there is a real risk that she would suffer cruel or inhuman treatment in the form of serious physical harm intentionally inflicted by her husband or people associated with him. Furthermore, while it appears that the authorities in the Philippines seek to provide some degree of assistance to victims of domestic violence, this appears to be relatively limited and in my view the applicant would not be able to obtain protection from the authorities such that there would not be a real risk that she would suffer that harm. I am therefore satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to the Philippines, there is a real risk that she will suffer significant harm." (Para 37) |
| 1606188 (Refugee) [2019] AATA 5876<br>(Successful) | 20 June 2019 | 117-135 | The Tribunal remitted the application of a ex-Gazan Palestinian from Jordan finding that the applicant and as a consequence *his family* will fall victim to either being arbitrarily deprived of their life, subjected to torture, cruel and inhuman punishment committed upon them by the applicant's estrange father-in-law and father of his Jordanian wife.<br><br>"'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1) of the Act. It includes a situation where a person will suffer significant harm if |

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| | | | he or she will be subjected to inhuman treatment. I find that provision applies here. The type of criminality and harm, described above would be intentional and aimed at the applicant and his family should it occur. It is sufficiently prevalent in Jordan to pose a real risk and the risk is exacerbated by the applicants' lack of societal influence position and funds. The applicant's situation is further exacerbated and made difficult by the fact that his father-in-law has the means, societal influences, criminal connections and monetary resources to locate and inflict his will upon the applicant, his wife and children. Kidnapping of children and of other family members are one form of serious crime. These are all crimes or harms intended to cause severe pain and suffering to the victim. Serious assaults including grievous bodily harm are another possibility. The applicants might well – in a personal sense – be vulnerable to some or all of these crimes, and there is a real risk that they will suffer significant harm. This risk would exist in all the various areas of the country and because of the issues with the police and authorities the Tribunal outlined that the applicants could not obtain, from an authority of the country, protection such that there would not be a real risk that the person will suffer significant harm. The real risk is one faced by the applicants personally. The Tribunal also does not find that there is a possibility of avoiding the harm described by depending on family assistance." (Para 134) |
| 1610842 (Refugee) [2019] AATA 1418 (Unsuccessful) | 12 June 2019 | 6, 42-45 | In this case the Tribunal considered the claims of a man from Mauritius with mental health issues. His claim that a lack of treatment for his condition amounted to cruel |

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| | | | treatment was rejected.<br><br>'In his Protection visa application form, the applicant made the following claims:<br><br>i. He nearly lost his life in Mauritius in [year]; he started getting depressed as he missed his parents in Australia. He tried to commit suicide by taking an overdose of medication, and his condition became worse due to a lack of proper mental care. When he arrived in Australia his condition escalated and he became violent with his parents. Australian medical intervention has been of great help and he is obtaining continuous medical and social support which could never be found in Mauritius.<br><br>ii. If he returns to Mauritius the change in environment and degrading treatment will cause a great impact on his life. He did not want to be locked up in a small room in a mental hospital. Mental illness is treated poorly by the medical system in Mauritius and his uncle experienced this, as he was locked up on and off since he was [age] years old. His uncle lost his life in 2013. Going back may cause another serious episode of his illness which might damage his brain.<br><br>iii. Mentally ill people were not welcomed in society in Mauritius. He will suffer harm because of lack of community support and poor |

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| | | | medical treatment.' (Para 6).<br><br>'The Tribunal has also considered the claims of the applicant under the complementary protection provisions of the Act. The definition in s.36(2A) is framed in terms of harm suffered because of the acts of other persons. As discussed above, the Tribunal accepts that the mental health care available in Mauritius is not the same standard as in Australia, but finds that care is available via the public system and privately. Additionally, the Tribunal is satisfied that the applicant will not be without a means of support as he can return to the family home, will be supported by his family and he is able to access social security.' (Para 42).<br><br>'The Tribunal accepts the submission of the applicant representative that the applicant has had a difficult journey with his mental health. It is not accepted that societal discrimination in Mauritius will impact upon the applicant seeking treatment if he was to return or that for this reason the applicant will be subject to significant harm. It is also not accepted that the government of Mauritius is culpable if the applicant could not obtain appropriate treatment. There is nothing in the evidence to suggest that the government of Mauritius has limited treatment for people with mental health conditions, such as the applicant, to the extent 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 Mauritius, there is a real risk that he will be arbitrarily deprived of his life. The definitions of torture, cruel or |

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| | | | inhuman treatment or punishment in 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. As discussed with the applicant and his representative at the hearing, the Tribunal is not satisfied on the evidence before it that there is an intention to inflict pain or suffering or to cause extreme humiliation to people suffering the sort of health problems it is accepted that the applicant has.' (Para 43).<br><br>'The Tribunal has also considered the submission that it will be Australia who will be intending to inflicting cruel or inhuman treatment or punishment or degrading treatment or punishment, if the application is refused and he is required to return to Mauritius. In *SZRSN v MIAC,* where it was claimed significant harm would arise from separating the applicant from his Australian children, the Federal Court found that harm arising from the act of removal itself will not meet the definitions of 'significant harm' in s.36(2A).[20]Australia's obligations to afford protection referred to in s.36(2)(aa) arise from the harm faced by a non-citizen in the receiving country, rather than the country in which protection is sought.[21] As the harm under s.36(2)(aa) must arise as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, s.36(2)(aa) will not be engaged by harm inflicted by the act of removal itself.' (Para 44).<br><br>'The Tribunal does not accept on the evidence before it, |

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| | | | therefore, that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Mauritius, there is a real risk that he will suffer significant harm, as defined, as a result of his mental health condition.' (Para 45). |
| 1515288 (Refugee) [2019] AATA 4066<br>(Successful) | 9 June 2019 | 107-129, 131 | The Tribunal remitted the matter with the direction that the applicant, a Nepali, divorced single female with a child satisfied the complementary protection. The Tribunal accepted that "she will be perceived as a divorced single female with a child and that there is some stigma associated with this. It is when considering a combination of the applicant's profile with her current vulnerabilities that the Tribunal cannot discount that the applicant may face a small but real risk of degrading treatment in Nepal in the reasonably foreseeable future." (Para 114)<br><br>"The Tribunal notes that there remains systemic discrimination in employment against women, but that the applicant will need to find employment. When her vulnerabilities are taken into account the Tribunal considers it unlikely that she will obtain work in the formal sector; the Tribunal notes that the current DFAT Report states that women who work in the informal sector are particularly vulnerable to sexual harassment, and the Tribunal cannot discount that the applicant, in a more vulnerable situation because of her experiences with her third husband and a need to obtain employment in order to provide for her traumatised child, may face a real risk of degrading treatment in the form of sexual |

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| | | | harassment in seeking and/or maintaining employment." (Para 115)<br><br>"The Tribunal is thus prepared to accept that the applicant in her particular circumstances may face a small but real risk of being subjected to ongoing instances of sexual harassment which could also lead to instances of sexual violence. In all the circumstances the Tribunal considers that this constitutes degrading treatment including extreme humiliation, which is not reasonable and not covered by the lawful sanctions exception. The Tribunal is thus satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Nepal, there is a real risk that she will suffer significant harm." (Para 116) |
| 1910307 (Refugee) [2019] AATA 4673<br>(Unsuccessful) | 8 July 2019 | 133-143, 145 | The Tribunal affirmed a decision not to grant a protection visa to a South Sudanese applicant of Dinka ethnicity, explaining that the "fact that a person may enjoy less favourable social, economic or cultural rights in another country does not, of itself, give rise to a non-refoulement obligation. It may lead to a degrading condition of existence, but that does not constitute degrading treatment for the purposes of the Act. "Treatment" does not cover degrading situations arising from socio-economic conditions. "Treatment" must represent an act or an omission of an individual or one that can at least be attributed to him or her." (Para 141) |
| MBJY and Minister for Home Affairs (Migration) | 7 June 2019 | 171-197 | The Tribunal affirms a decision not to revoke the mandatory cancellation of an Indian applicant's partner |

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| [2019] AATA 4055<br>(Unsuccessful) | | | visa. In doing so, the Tribunal considers Australia's non-refoulement obligations noting that "the Tribunal did not accept the Respondent's submission that it was sufficient for the Tribunal to find that it was unnecessary to determine whether non-refoulement obligations were owed because the Applicant has the ability to make a valid application for a protection visa, the Tribunal accepts the Respondent's submission that the evidence provided to support the claim that a non-refoulement obligations arise with respect to the Applicant was not sufficiently probative for the Tribunal to make a finding in the Applicant's favour." (Para 192) |
| 1606699 (Refugee) [2019] AATA 5839<br>(Successful) | 9 May 2019 | 21-42, 45-48 | The Tribunal remitted the application from a Bangladeshi applicant from who regarded himself as a "Christian Humanist" with the direction that the applicant satisfies s.36(2)(aa) as there are substantial grounds for believing that there is a real risk that the applicant will suffer significant harm because of his on line blogging in Australia.<br><br>"The Tribunal has found above that the applicant started and operated a blog in Australia from around the time of his application for protection visa, that is from January 2014, and that the applicant's blog contains material that is critical of, and at times ridicules, Islamic beliefs. The Tribunal accepts that the applicant's blog has been publicly available on line from around January 2014, although it is clear that the applicant has closed/restricted the blog from general viewing from time to time. The Tribunal must consider this conduct |

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| | | | for the purposes of deciding whether the applicant satisfies the complementary protection criterion; it is clear that subsection 91R(3) of the Act does not apply to a consideration of the complementary protection criterion so that the conduct can be disregarded. This is the case even though the Tribunal is satisfied that the applicant's purpose in commencing and operating his blog was to strengthen his claim to be a refugee." (Para 46) |
| 1713572 (Refugee) [2019] AATA 2305 (Unsuccessful) | 12 April 2019 | 23, 40, 62-70 | The Tribunal concluded that an Indian applicant might face a real chance of persecution from a specific individual (with whose wife the applicant had had an affair), his family, associates and agents if retuned to Punjab state but found it was reasonable for the applicant to relocate within India and affirmed a decision to not grant a protection visa. |
| 1613287 (Refugee) [2019] AATA 5262 | 9 April 2019 | 23-41 | The Tribunal remitted an Indian applicant's claim with the direction that she satisfies the complementary protection criteria due to circumstances pertaining to her former relationships, which included domestic violence, divorce and an inter-caste marriage. |
| 1513428 (Refugee) [2019] AATA 5172 (Successful) | 31 March 2019 | 39-54 | The Tribunal remitted a Nepali applicant's claim with the direction that she satisfies the complementary protection criteria due to the cumulative effect of factors specific to her, including as a single, uneducated, HIV-affected, inter-caste divorcee. |
| 1616860 (Refugee) [2019] AATA 3417 | 4 March 2019 | 51-73, 75 | The Tribunal accepted that there is a real risk that an Indian applicant will suffer significant harm in India by |

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| (Unsuccessful) | | | reason that he will be the victim of an honour killing, but affirmed the decision to refuse the applicant a protection visa because it was reasonable for him to relocate to another area within India. |
| 1602065 (Refugee) [2019] AATA 3430<br>(Successful) | 22 February 2019 | 33-35, 38-44, 48 | The Tribunal remitted for reconsideration a Mongolian homosexual applicant's application for review with the direction that he satisfies s.36(2)(aa) as he faces a real risk of significant harm in Mongolia for reasons of his homosexuality.<br><br>'The Tribunal takes into account the applicant's oral evidence to both the delegate and in the Tribunal hearing in relation to claims of harm in Mongolia. Notwithstanding the fact of the applicant providing fraudulent documents to support his claims, based on the applicant's oral evidence, the Tribunal is satisfied that there have been at least some occasions on which the applicant has been harassed and physically assaulted in Mongolia based on his sexuality. The Tribunal is also satisfied that vindictive individuals utilised information on the applicant's smart phone relating to his sexuality which they posted on social media to embarrass the applicant. The Tribunal also accepts that there were instances where police acted in an unhelpful and intimidating way towards the applicant.' (Para 33).<br><br>'Whilst the Tribunal is not satisfied as to the extent of attacks and physical harm against the applicant as he has detailed in his written claims and indicated in supporting documents, the Tribunal accepts that there have been at least some instances of intimidation and |

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| | | | physical harm suffered by the applicant as a result of his sexuality.' (Para 34).<br><br>'The Tribunal notes that a negative attitude by authorities in Mongolia to the applicant's sexuality and intimidation and physical harm from society in general is not inconsistent with independent information as to the treatment of homosexuals in Mongolia, albeit that there have been some steps by the government to improve the situation for homosexuals.' (Para 35)<br><br>'Given the negative attitudes towards homosexuality in Mongolia, the Tribunal is satisfied that the applicant faces a real chance of both serious and significant harm, as defined in the Act. Harm would include the real chance of physical harm, as the Tribunal accepts that he has in the past.' (Para 38)<br><br>'In terms of considering the applicability of the refugee criterion, the Tribunal notes s.5J(2) of the Act indicating that a person does not have a well-founded fear of persecution if effective protection measures are available to the person in the relevant country. Section 5LA further defines 'effective protection measures'. The Tribunal notes that the independent information contained in this decision could suggest that the legal framework recently introduced in Mongolia in relation to homosexuality offers adequate protection to the LGBTI community.' (Para 39)<br><br>'Given the existence of these laws, for the purpose of this decision only, and acknowledging that the extent to |

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| | | | which there is practical adequate enforcement of those laws is not yet clear, the Tribunal would find that there are effective protection measures available to the applicant in relation to his sexuality and therefore he is not taken to have a well-founded fear of persecution. The Tribunal notes that under the definition of effective protection measures, police need to provide, not perfect protection, but reasonably effective protection.' (Para 40)<br><br>'This is not a finding that is determinative of the outcome in this matter because, in any event, the applicant would satisfy the complementary protection criterion, in the Tribunal's view. This is because a different and stricter test applies in relation to effective protection as set out in s.36(2B)(b) of the Act. Under that section, protection must reduce the risk of harm to less than a real risk for the purpose of the complementary protection criterion. This is a more stringent test than s.5LA(2)(c)' (Para 41)<br><br>'The Tribunal is not satisfied on the evidence, given attitudes towards homosexuality in Mongolia, consistent with the applicant's past experiences as accepted by the Tribunal, that the legal framework and police protection would reduce the risk of significant harm to the applicant based on his sexuality to less than a real risk. This is because there is the potential for the applicant to face physical harm before the involvement of police, who would be likely involved after the harm has occurred, or due to the operation of the legal system, which would not operate until after the harm had |

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| | | | occurred. The Tribunal finds that the applicant would face a real risk of degrading treatment or punishment as well as cruel or inhuman treatment or punishment within the terms in s.36(2A) of the Act.' (Para 42)<br><br>'The Tribunal does not consider that the applicant can escape a real risk of harm by relocating because the risk of harm would be prevalent throughout Mongolia, and therefore s.36(2B)(a) does not apply.' (Para 43)<br><br>'The Tribunal considers that the risk to the applicant is based on a particular characteristic, his homosexuality, and therefore the risk to him is not a risk faced by the population generally rather than the applicant personally, and therefore s.36(2B)(c) does not apply.' (Para 44)<br><br>'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 satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).' (Para 48) |
| 1800173 (Refugee) [2019] AATA 2122<br>(Unsuccessful) | 5 February 2019 | 47-48, 51-53 | The Tribunal considered the claims of a Pakistani man, whose feared deterioration of mental health was not regarded as inflicted and whose fears of falling victim to a general act of terrorism throughout Pakistan due to the general security situation was considered to be one faced by the population of the country generally.<br><br>'The applicant fears that he will suffer deterioration in |

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| | | | his mental health of a severe nature as a necessary and foreseeable consequence of his being returned to Pakistan. The applicant also fears that he will be killed or assaulted by extremists who will target him because he is opposed to their ideology, or that he will be killed or assaulted in a general act of terrorism if he is returned to Pakistan' (Para 47).<br><br>'Based on the applicant's past experience of suffering a psychosis and requiring hospitalisation in [State 1], I accept that the applicant is potentially vulnerable to a relapse or worsening of his mental health condition if he is returned to Pakistan, particularly given his experience on his return in 2014, where he immediately felt 'watched' after he was attacked.' (Para 48).<br><br>'In relation to his fear of mental health deterioration, whilst there *is* such a risk of that deterioration, and that it may be severe, the information and evidence before me does not suggest that any severe deterioration in his mental health would be inflicted on the applicant by any person or group. S.5(1) of the act provides definitions of torture, cruel or inhuman treatment or punishment or degrading treatment or punishment. In each case, the elements of the definitions require an act or omission by which severe pain, pain or suffering or extreme humiliation is *intentionally inflicted* on the person. In the applicant's case, deterioration of his mental health may arise due to the change in his environment and any potential lapse in treatment, but the applicant's evidence does not suggest intentional infliction of such (nor indeed, the intentional withholding of treatment for any |

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| | | | reason by any person). I consider that the possible deterioration in the applicant's mental health does not meet the necessary criteria within the definitions of 'significant harm' outlined in s.5(1) for each of 'torture', 'cruel or inhuman treatment or punishment' or 'degrading treatment or punishment.' That harm would not be 'inflicted' or 'caused' by any act or omission of any person which intended to cause that harm.' (Para 51).<br><br>'The applicant also fears falling victim to a general act or terrorism throughout Pakistan due to the general security situation. The country information discussed above generally acknowledges that such attacks can and do happen without warning throughout Pakistan, targeting various groups or persons in authority, despite some reduction in the number of attacks over recent years. There is some risk therefore, that the the applicant may fall victim to a random attack as an innocent bystander, wherever he is in Pakistan. However, I consider that any such risk is not one faced by the applicant personally but is one faced by the population of the country generally. Applying s.36(2B)(c), there is therefore taken not to be a real risk that the applicant will suffer significant harm from falling victim to a general act of terrorism.' (Para 52).<br><br>'The evidence before me did not raise any other grounds for believing that the applicant would suffer harm (significant or otherwise) as a necessary and foreseeable consequence of his returning to Pakistan. After weighing my findings, I conclude that there are not |

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| | | | substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Pakistan, there is a real risk that the applicant will suffer significant harm.' (Para 53). |
| 1820814 (Refugee) [2019] AATA 1632 (Unsuccessful) | 29 January 2019 | 10, 14, 57-58, | The Tribunal considered the claims of a Pakistani man who feared societal discrimination on the basis of his Ahmadi faith. The treatment he feared, including harassment and vilification and sporadic incidents of hate speech and abusive writing on external walls of his home did not reach the threshold for 'severe pain or suffering' or 'extreme humiliation'.<br><br>'The issues in this case are whether the applicant has a well-founded fear of being persecuted for one or more of the five reasons set out in s.5J(1) and if not, whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of him being removed from Australia to Pakistan, there is a real risk that he will suffer significant harm.' (Para 10).<br><br>'The applicant's claims are that in Golarchi, he and his children have faced constant insults, social exclusion, threats of harm and death and abuse (including throughout the education system), simply due to their Ahmadi religion over many years. At hearing, the applicant described delays in registering his children for school, teachers who openly viewed Ahmadi students as inferior, throwing of rubbish at their home, and bullying of his children by other school children. The applicant also described abusive messages written on the walls of |

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| | | | their home, calling them Kafirs, and calling for them to be killed. He said that there have been occasions when members of the Sunni community have gathered outside Ahmadi homes in their town and hurled abuse and stones. He said this had happened a number times over the years. He also said that in the past on one occasion in Golarchi, water rights to one property they were farming had been impeded, causing them hardship. The applicant gave evidence that when that happened, he was helped by members of his community to resolve the problem.' (Para 14).<br><br>'I refer to my findings above in considering the real chance test. I am not satisfied that the applicant has established that there is a real risk that he will arbitrarily deprived of his life as a necessary and foreseeable consequence of him being returned to Pakistan. I have found that the applicant has established that he has experienced and would continue to face some entrenched discrimination, harassment and societal vilification if he was to return to Pakistan. However, as noted above, in the particular circumstances of this applicant's long term and accepted experience in Golarchi, I consider that the level of discrimination, harassment and vilification he has faced and would be likely to face if he returns to his home is moderate, in the form of some social discrimination, harassment and vilification and sporadic incidents of hate speech and abusive writing on external walls of his home. I have considered the applicant's evidence and my findings, and I do not consider that the level of discrimination, harassment and vilification which he will encounter in |

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| | | | the future is properly considered as causing and intending to cause the applicant 'severe' pain or suffering, whether physical or mental, that will be intentionally inflicted on the applicant, or that they are at a level such that they cause him extreme humiliation. I acknowledge that the experiences of discrimination, vilification and harassment have caused and will cause the applicant some mental and physical distress and humiliation. I consider that the moderate discrimination, harassment and vilification faced by the applicant if he is returned to Pakistan would be at a level which he has faced throughout his life, and despite which he has prospered. Bearing in mind his own evidence, and taking into account his physical location in Pakistan, his established standing within his community and his lifetime experience, I am not satisfied that the level of pain or suffering the applicant will face (as he has in the past) is at a level which could be regarded as cruel or inhuman in nature, or as cruel or inhuman or degrading treatment or punishment causing or intended to cause severe pain or suffering or extreme humiliation, even when considered cumulatively.' (Para 57).<br><br>'I am not satisfied that there are substantial grounds for believing that there is a real risk that the applicant will suffer significant harm (including being arbitrarily deprived of his life or subjected to cruel or inhuman or degrading treatment or punishment), as a necessary and foreseeable consequence of him being returned to Pakistan.' (Para 58). |
| 1712068 (Refugee) [2019] | 25 January 2019 | 21, 86, 140-143, 173, | In this case the Tribunal considered the claims of an |

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| AATA 223 (Unsuccessful) | | 175 | Iranian man who, inter alia, feared being punished for transgressions of the dress code. The Tribunal found that he was at risk of reprimands, fines and warnings and that this did not amount to significant harm.<br><br>'*Summary of claims:* The applicant claims that he and his family were discriminated against in Iran due to their association with, and assistance provided to, the applicant's [relative] who was executed for being a follower of the Baha'i faith. He claims that he was subjected to abuse while serving in the military because he openly supported Mousavi and the Green Movement and due to his Baha'i association. He claims that he has been caught breaking strict morality codes including for transporting alcohol, not complying with Islamic dress codes, and walking with a girlfriend in public. He claims that he was wrongly accused in Iran of [a crime]. For these reasons he claims that he has an adverse profile and the Basij have a file on him. He claims that he and his mother were beaten by the authorities during Iranian New Year festivities. He claims that while living in Australia he has converted to the Christian faith and has attended four to five events in support of refugees and one protest opposing the Iranian government. He claims to drink beer and wine. The applicant claims to have a well-founded fear of harm on the basis of his Christian beliefs and being an apostate and infidel, his family connection to the Baha'i faith, returning to Iran as a failed asylum seeker, being a returnee from Australia, being a Westernised Iranian, being a suspected spy for Western governments, being against the Iranian moral codes and anti-Sharia law, being a |

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| | | | supporter of Mousavi and the Green Movement, and because he has an adverse political profile with the Iranian government.' (Para 21).<br><br>'I accept that the applicant was detained and fined by the Basij for violating Islamic dress code, detained, fined and had his motorbike confiscated for transporting alcohol and fined and warned for walking in public with his girlfriend as these claims have been consistent across the years of engagement with the Australian government and they are consistent with country information. As for the applicant's narrative at the hearing about being beaten, kicked and spat at during his detention, it is new information that has not been provided before and I have serious concerns about the applicant's credibility, in particular his willingness to amend his narrative. As such I do not accept that he was treated in the way he claimed at the hearing to have been treated.' (Para 86).<br><br>'I accept that the applicant having done so in the past would once again in the reasonably foreseeable future find himself in some manner transgressing the moral code in Iranian society. Specifically I accept that the situation the applicant would return to is culturally different to Australia with a different emphasis on the type of music someone can listen to or the dress men wear and that this would lead to the applicant being stopped and reprimanded but based upon country information I do not accept that such harassment amounts to serious or significant harm. I note also the country information on the extent of alcohol being |

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| | | | procured in Iran. Despite the applicant having once been stopped randomly and found to be transporting alcohol and as a result had his motorbike detained I find that he does not face a real chance or a real risk of it occurring again in the reasonably foreseeable future.' (Para 140).<br><br>'Even taking his past transgressions into account which I find would not increase his risk of being caught but may increase the severity of his punishment I find that was the applicant to return to Iran and dress in a Western manner, seek to procure and drink alcohol and listen to Western music he would not face a real chance of serious harm or a real risk of significant harm.' (Para 141).<br><br>'I note that the applicant had in the past been harassed for walking with his then girlfriend in public. The applicant has an Australian girlfriend. Was the applicant's girlfriend to visit him in Iran and were they found to be walking in public together he would face a real chance of being approached by the authorities. If that were to occur I find that he would face the same harm as he experienced before, namely being fined and warned. I find that such action would not amount to serious or significant harm.' (Para 142).<br><br>'I accept that the applicant had been detained wrongly for [a crime] and then released. I find that this would not compound his circumstances nor is there a real chance of serious harm or a real risk of significant harm arising from this past experience.' (Para 143). |

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| | | | 'In *MILGEA v Che Guang Xiang* the Court required that to establish a real chance of serious harm it is necessary to look at the totality of circumstances.[25] As such I turn my mind to considering the cumulative impact upon the applicant's profile. The applicant's fears are detailed above and based upon my findings of fact the harm he faces can be summarised as arising from being a Mousavi supporter in the past with Western habits including dressing in Western clothes, drinking alcohol and singing and dancing to Western music, opposing the regime in the future at moments of widespread general uprisings, being a failed asylum seeker, showing public affection to his girlfriend and having nominally converted to Christianity while in Australia but remaining a non-practising Muslim as described above along with other particular circumstances as noted under the heading 'Other Circumstances'. In addition the applicant has PTSD and would have some access to psychological treatment. I have considered how each of the circumstances discussed above could impact collectively other elements such as whether having converted nominally to Christianity would raise the risk of being harassed for wearing Western clothes, or if he were to participate in a mass protest whether his prior support for Mousavi would make him face an increased amount of harm. In all permutations I find that considered cumulatively the applicant does not face a real chance of serious harm or a real risk of significant harm.' (Para 173).<br><br>'Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has |

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| | | | considered the alternative criterion in s.36(2)(aa) of the Act. 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 175). |
| 1704947 (Refugee) [2019] AATA 1349 (Unsuccessful) | 11 January 2019 | 13, 96-102 | In considering the claims of a Sri Lankan Tamil, the Tribunal held that the questioning he would face on return for his unlawful departure from Sri Lanka would not amount to 'significant harm', even taking into account his particular circumstances, including blood pressure issues.<br><br>'The applicant – a [age] year old married man from Batticaloa district in eastern Sri Lanka – claims to fear serious harm from the authorities on return to Sri Lanka on imputed (pro-Liberation Tigers of Tamil Eelam (LTTE)/anti-government) political opinion grounds and as a young Tamil. He also fears serious harm as a failed asylum seeker, as a Christian and because he departed Sri Lanka illegally.' (Para 13).<br><br>'Furthermore, based on the country information and the Tribunal's earlier reasoning, the Tribunal does not accept that the process of questioning amounts to arbitrary deprivation of life, being subject to the death penalty, torture, cruel or inhuman treatment or punishment or degrading treatment or punishment. The Tribunal also is not satisfied the process of questioning itself would constitute significant harm, even when taking into account the applicant's blood pressure issues. The Tribunal is therefore not satisfied that as a |

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| | | | necessary and foreseeable consequence of the applicant's return to Sri Lanka, there is a real risk he would suffer significant harm at the hands of the Sri Lankan authorities as part of a process of questioning to which he may be subject.' (Para 96).<br><br>'For the reasons set out above, the Tribunal has accepted that the applicant will be questioned at the airport upon his return to Sri Lanka, that he will likely be charged with departing Sri Lanka illegally and that he could be held on remand for a brief period while awaiting a bail hearing. The Tribunal does not accept that the applicant is of ongoing adverse interest to the authorities. Based on the Tribunal's earlier reasoning on this matter, it does not accept on the information before it there to be a real risk that the applicant will face torture, or other types of significant harm as set out in s.36(2A) of the Act, either during his questioning at the airport or during any period he spends on remand. The Tribunal considers, if convicted of charges under Sri Lanka's *I&E Act*, he will likely face a fine and if a family member is required to act as a guarantor, accepts on his evidence that his wife will be able to help him out in this regard. The Tribunal does not accept on the evidence before it that there is a real risk the applicant would be subjected to treatment constituting significant harm as that term is exhaustively defined in section 36(2A), either during his questioning at the airport or during the short period that he may spend on remand awaiting a bail hearing, or when he returns to his home area.' (Para 97). |

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| | | | 'In regard to the penalty the applicant may face, based on the information cited above, the Tribunal does not accept that this will manifest itself in the mandatory imposition of a term of imprisonment or that the applicant would not be able to pay any fine that may be imposed on him as he would have the assistance of his wife – who is financially supported by her wealthy brother – in Sri Lanka to meet such a financial penalty.' (Para 98).<br><br>'The Tribunal accepts that prison conditions in Sri Lanka are generally poor and do not meet international standards. However, if the applicant is remanded in prison for a short period, the evidence does not support that any pain or suffering as a consequence would be by an intentionally inflicted act or omission, as the poor prison conditions are due to a lack of resources (as indicated in the DFAT report, cited above) rather than any intention on the Sri Lankan government to inflict such harm,[30] and therefore do not amount to significant harm.' (Para 99).<br><br>'Similarly the Tribunal is not satisfied on the evidence before it that the process of questioning, the imposition of a fine as punishment and the applicant's charge and conviction under the *I&E Act* amounts to significant harm because there is no intention on the part of the Sri Lankan authorities to inflict pain, suffering or extreme humiliation in relation to these matters, but to provide a modest punishment and possible deterrence for departing the country illegally.' (Para 100). |

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| | | | ‘For the reasons above, the Tribunal does not accept that the applicant was of any adverse interest to the Sri Lankan authorities in the past for any reason and would not be on return. Further, the Tribunal finds on the country information cited above, that any treatment the applicant may face upon return to Sri Lanka, including questioning, a fine and detention and poor prison conditions, would not amount to significant harm as this would apply to every person in Sri Lanka who breached the illegal departure law. As this is a real risk faced by the population generally and not the applicant personally, under s.36(2B)(c) there is taken not to be a real risk that the applicant will suffer significant harm.’ (Para 101).<br><br>‘Having considered the applicant’s claims individually and cumulatively, for these reasons the Tribunal is not satisfied that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant’s removal from Australia to Sri Lanka, there is a real risk that he will suffer significant harm. Therefore the applicant does not satisfy the criterion set out in s.36(2)(aa).’ (Para 102). |