COMPLEMENTARY PROTECTION IN AUSTRALIA

ADMINISTRATIVE APPEALS TRIBUNAL

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

Case	Decision date	Relevant paras	Comments
HPZB and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration) [2019] AATA 5402	13 December 2019	113-116, 133	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.
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 Home Affairs (Migration) [2019] AATA 5177 (Unsuccessful)	28 November 2019	190-224	The Tribunal affirmed a decision to refuse a bridging visa to a Vietnamese applicant, but in doing so discusses the states of law on consideration of non-refoulment obligations.
KYMM and Minister for Home Affairs (Migration) [2019] AATA 5174 (Unsuccessful)	28 November 2019	114-160	The Tribunal affirmed a decision not to revoke the 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.
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.
WKMZ and Minister for Home Affairs (Migration) [2019] AATA 4381	14 October 2019	160-274	The Tribunal affirmed a decision not to revoke the mandatory cancellation of a South Sudanese applicant's visa under s.501(3A), notwithstanding finding that it is

(Unsuccessful)			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. "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) "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) "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)
DFNM and Minister for	24 September	83-138	The Tribunal revoked the cancellation of a Lebanese

Home Affairs (Migration) [2019] AATA 3769 (Successful)	2019		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.
1832684 (Refugee) [2019] AATA 3744 (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. '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

			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) '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). '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) 'The harm that must be suffered is "significant harm" which, as her Honour recognises, requires that a

			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) '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) '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

			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) '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) '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)

1619551 (Refugee) [2019] AATA 5306 (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 (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. "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)
1516248 (Refugee) [2019] AATA 4304 (Unsuccessful)	9 August 2019	103-164, 166	The Tribunal affirmed a decision not to grant a Lebanese applicant a protection visa and in doing so considered the meaning of intention in the context of s.5(1). "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) "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 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) "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) 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. "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 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)
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 treatment was rejected. 'In his Protection visa application form, the applicant made the following claims: 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. ii. If he returns to Mauritius the change in environment and degrading treatment will cause a great impact on his life. He did not want to be locked up in a small room in a mental hospital. Mental illness is treated poorly by the medical system in Mauritius and his uncle experienced this, as he was locked up on and off since he was [age] years old. His uncle lost his life in 2013. Going back may cause another serious episode of his illness which might damage his brain. iii. Mentally ill people were not welcomed in society in Mauritius. He will suffer harm because of lack of community support and poor medical treatment.' (Para 6). '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). '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 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). '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). 'The Tribunal does not accept on the evidence before it, therefore, that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Mauritius, there is a real risk that he will suffer significant harm, as defined, as a result of his mental health condition.' (Para 45).
1515288 (Refugee) [2019] AATA 4066 (Successful)	9 June 2019	107-129, 131	The Tribunal remitted the matter with the direction that the applicant, a Nepali, divorced single female with a child satisfied the complementary protection. The

			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) "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 harassment in seeking and/or maintaining employment." (Para 115) "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 (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) [2019] AATA 4055 (Unsuccessful)	7 June 2019	171-197	The Tribunal affirms a decision not to revoke the mandatory cancellation of an Indian applicant's partner 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)
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 (Unsuccessful)	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 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]	22 February 2019	33-35, 38-44, 48	The Tribunal remitted for reconsideration a Mongolian

AATA 3430 (Successful)			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. '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). '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 physical harm suffered by the applicant as a result of his sexuality.' (Para 34). '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) '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) '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) 'Given the existence of these laws, for the purpose of this decision only, and acknowledging that the extent to 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) '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) '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 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) '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) '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) '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 (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. 'The applicant fears that he will suffer deterioration in 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). '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). '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 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). '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). '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 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'. '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). '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 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). '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 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). '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] AATA 223 (Unsuccessful)	25 January 2019	21, 86, 140-143, 173, 175	In this case the Tribunal considered the claims of an Iranian man who, inter alia, feared being punished for transgressions of the dress code. The Tribunal found that he was at risk of reprimands, fines and warnings and that this did not amount to significant harm. '*Summary of claims:* The applicant claims that he and

			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 supporter of Mousavi and the Green Movement, and because he has an adverse political profile with the Iranian government.' (Para 21). '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). '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 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).

			‘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). ‘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). ‘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). ‘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). '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) 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. '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). '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 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).

			‘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). ‘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). '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). '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). '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). '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).