

## 10 COMPLEMENTARY PROTECTION

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## INTRODUCTION

Section 36(2)(aa) of the *Migration Act 1958* (Cth) (the Act) provides that a criterion for a protection visa is that the applicant for the visa is:

a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.<sup>1</sup>

This criterion is subject to a number of qualifications. The types of harm that will amount to ‘significant harm’ are exhaustively defined in ss.36(2A) and 5(1) of the Act, and s.36(2B) sets out circumstances in which there is taken not to be a real risk that a non-citizen will suffer significant harm. Section 36(2C) further provides for circumstances in which a non-citizen is taken not to satisfy the criterion in s.36(2)(aa), and s.36(3) sets out circumstances in which Australia is taken not to have protection obligations in respect of a non-citizen.<sup>2</sup>

The criterion in s.36(2)(aa) was intended to introduce greater efficiency, transparency and accountability into Australia’s arrangements for adhering to its *non-refoulement* obligations under the *International Covenant on Civil and Political Rights* (ICCPR), *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty* (‘Second Optional Protocol’), *Convention on the Rights of the Child* (‘CROC’) and *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (‘CAT’).<sup>3</sup>

The criterion in s.36(2)(aa) is referred to as ‘complementary protection’, being additional to Australia’s obligations under the 1951 *Convention relating to the Status of Refugees* and 1967 *Protocol relating to the Status of Refugees* (together, the Refugees Convention). Section 36(2)(aa) applies only to a non-citizen in Australia *other than a non-citizen mentioned in paragraph (a)*. That is, it can only be met once the decision-maker is satisfied that the non-citizen is not a person in respect of whom Australia has protection obligations as a refugee in accordance with s.36(2)(a).<sup>4</sup>

<sup>1</sup> Section 36(2)(aa) was introduced by the *Migration Amendment (Complementary Protection) Act 2011* (No.121 of 2011), which commenced on 24 March 2012 and applied to applications not finally determined as at that date: s.2; Schedule 1, item 12, and Proclamation, *Migration Amendment (Complementary Protection) Act 2011* dated 21 March 2012 (FRLI F2012L00650) fixing date of commencement as 24 March 2012. That section, along with ss.36(2)(a) and (3), were later amended by the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* (No.113 of 2012) which came into effect on 18 August 2012: Schedule 1, item [7], to include the term ‘in respect of whom’ Australia has protection obligations in place of the previous ‘to whom’.

<sup>2</sup> See Chapter 9 of this Guide for discussion on s.36(3).

<sup>3</sup> Explanatory Memorandum to the *Migration Amendment (Complementary Protection) Bill 2011* at 1. Before the introduction of the criterion in s.36(2)(aa), protection on the basis of obligations arising from these instruments could only be granted under s.417 of the Act, pursuant to which the Minister may exercise a discretion to grant a visa to a non-citizen where the Minister considers it in the public interest to do so. However, that discretion can only be exercised by the Minister personally, and only after the non-citizen has been refused a protection visa by a delegate of the Minister and unsuccessfully sought review by the Tribunal.

<sup>4</sup> *MIAC v SZQRB* (2013) 210 FCR 505 per Lander and Gordon JJ at [71] (special leave to appeal from this judgment was refused: *MIAC v SZQRB* [2013] HCATrans 323, 13 December 2013). The wording of s.36(2)(a) applicable to an applicant depends upon the date the applicant applied for the visa. The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014* (SLI 2014, No. 135) amended s.36(2)(a) of the Act to remove reference

The various tests used in the complementary protection criterion in s.36(2)(aa) and related provisions draw, in part, on the language of the ICCPR, Second Optional Protocol and CAT, and on international jurisprudence applying and interpreting those instruments. However, s.36 does not purport to incorporate the *non-refoulement* obligations arising under those instruments; nor generally speaking do the terms of s.36 directly replicate the tests used in those instruments or the associated jurisprudence. In *MIAC v MZYYL* the Full Federal Court emphasised that while international interpretation of *non-refoulement* obligations arising from those instruments may be relevant and informative to the extent that those instruments contain similar terms to those in s.36, it is not necessary or useful to assess how those instruments would apply to the circumstances of a case.<sup>5</sup> Reference must be to the terms of s.36 itself. The terms of s.36(2)(aa) and its related provisions evidence that the complementary protection provisions were intended to give effect only to a subset of Australia's obligations under relevant international instruments, including CAT and the ICCPR.<sup>6</sup>

In addition, in accordance with Ministerial Direction No.56 – Consideration of Protection Visa applications, the Tribunal must take account of the Department of Home Affairs' 'Policy: Refugee and humanitarian – Complementary Protection Guidelines' (the Complementary Protection Guidelines) to the extent that they are relevant to the decision under consideration.<sup>7</sup> For further discussion see Chapter 12 of this Guide. This chapter will consider each of the elements in the s.36(2)(aa) criterion and related provisions in turn.

## ADDRESSING CLAIMS UNDER SECTION 36(2)(aa)

After considering an applicant's claims against the refugee criterion, the decision-maker must then consider those claims, and any of its own findings that leave alive a basis for

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to the Refugees Convention and instead refer to Australia having protection obligations in respect of a person because they are a 'refugee'. 'Refugee' is defined in s.5H, with related definitions and qualifications in ss.5(1) and 5J-5LA. These amendments commenced on 18 April 2015 and apply to protection visa applications made on or after 16 December 2014: table items 14 and 22 of s.2 and item 28 of Schedule 5; Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Commencement Proclamation dated 16 April 2015 (FRLI F2015L00543).

<sup>5</sup> *MIAC v MZYYL* (2012) 207 FCR 211 at [20]. The Court stressed that the complementary protection regime in the Act uses definitions and tests different from those referred to in the international human rights treaties and commentaries on those treaties: at [18]. Followed in *SZSPE v MIBP* [2014] FCA 267 (Yates J, 27 March 2014) at [41]-[43] and *SZTAL v MIBP* (2016) 243 FCR 556 at [60]-[65]. At first instance in *SZTAL v MIBP* [2015] FCCA 64 (Judge Driver, 24 February 2015) at [20] the Court, with reference to *MZYYL*, said that the meaning of the text may nonetheless legitimately be informed by the international obligations to which it gives effect. See also *MZZIA v MIBP* [2014] FCCA 717 (Judge Riethmuller, 16 April 2014), where the Court rejected a submission that the Tribunal was required to consider the terms of the CROC, and held it would be an error to do so as it was not expressly adopted in the Migration Act and this would effectively allow the Convention to override an express Australian legislative provision: at [39]. Similarly, the Federal Court in *AZAEH v MIBP* [2015] FCA 414 (Kenny J, 5 May 2015) confirmed that the 'best interests of the child' principle in CROC has no application to the determination of protection visas: at [31]-[33]. Further, in *SZTCU v MIBP* [2014] FCCA 1600 (Judge Cameron, 28 July 2014), the Court noted that while the Complementary Protection Guidelines (Department of Home Affairs, Policy – 'Refugee and humanitarian – Complementary Protection Guidelines') require the Tribunal to turn its mind to international jurisprudence it may discharge that obligation by considering the Guidelines themselves and need not look separately at international cases: at [42].

<sup>6</sup> *SZTAL v MIBP* (2016) 243 FCR 556 per Kenny and Nicholas JJ at [61]-[62] (undisturbed on appeal in *SZTAL v MIBP*; *SZTGM v MIBP* [2017] HCA 34 (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ, 6 September 2017). The Court was considering the meaning of 'intentionally inflicted' and 'intended to cause' in s.5(1).

<sup>7</sup> Ministerial Direction No.56 was made under s.499 of the Act on 21 June 2013 and has effect from 22 June 2013.

applying the complementary protection criterion, against the criterion in s.36(2)(aa).<sup>8</sup> Merely because material is put by an applicant as giving rise to a claim on Refugees Convention grounds, it does not automatically follow that the claim is required to be considered as a claim for complementary protection.<sup>9</sup> While there is no formula to assess whether the case put has sufficiently raised a claim for consideration under the complementary protection criterion, relevant matters to be taken into account are whether or not the claim for complementary protection clearly arises from the materials and, where the claimant is represented by professional advisors, whether the advisors have articulated the claim.<sup>10</sup>

The level of detail required when considering s.36(2)(aa) will depend upon the circumstances of the case and factors such as: the particular claims made by the applicant; whether the factual basis underlying the applicant's claims has been rejected; where it has been accepted that the applicant may face harm, why the applicant was nonetheless found not to meet the refugee criterion; and the ability of the applicant to understand why their application has been refused.<sup>11</sup> There will not necessarily be any error in the decision-maker referring to its earlier findings of fact, particularly where those findings leave no factual basis for the claims.<sup>12</sup> However, where the earlier findings reject claims for reasons specific to the refugee criterion, for instance because they do not involve serious harm or harm for a Convention reason, refusing claims under s.36(2)(aa) by reference to those findings may lead to error.<sup>13</sup> Ultimately, what is required in each case will depend on the particular facts and the reasoning of the decision-maker.<sup>14</sup>

<sup>8</sup> *SZRLK v MIAC* [2012] FMCA 1155 (Smith FM, 14 December 2012) at [44]. Note, however, that it may not always be strictly necessary for the Tribunal to structure its findings to consider s.36(2)(aa) only after first concluding that s.36(2)(a) is not met. In *MZZDC v MIMAC* [2013] FCCA 1395 (Judge Hartnett, 20 September 2013) the Tribunal's findings on complementary protection were concurrent with its refugee findings and the Court did not find any error in that approach: at [26].

<sup>9</sup> *SZSHK v MIBP* [2013] FCAFC 125 (Robertson, Griffiths and Perry JJ, 13 November 2013) at [37].

<sup>10</sup> *SZSHK v MIBP* [2013] FCAFC 125 (Robertson, Griffiths and Perry JJ, 13 November 2013) at [37]. See also *SZSLL v MIBP* [2013] FCCA 2017 (Judge Nicholls, 28 November 2013), where the Court found that a particular claim had not been made under s.36(2)(aa), having regard to the fact that the applicant was represented by an experienced migration lawyer who made detailed submissions, and that the applicant himself did not give evidence his 'refugee' claims also went to significant harm: at [66]-[67], [74]-[75] and [86]-[87]. However contrast *SZSRR v MIAC* [2013] FCCA 1712 (Judge Barnes, 25 October 2013) at [64] and [68]-[70] where the Court found that all of the applicant's claims, not only those made with specific reference to s.36(2)(aa), arose on the material for consideration under that criterion.

<sup>11</sup> See for example, *SZSGA v MIMAC* [2013] FCA 774 (Robertson J, 6 August 2013) at [55]-[56], *MZZDC v MIMAC* [2013] FCCA 1395 (Judge Hartnett, 20 September 2013) at [26], *SZSJJ v MIMAC* [2013] FCCA 1388 (Judge Raphael, 4 September 2013) at [8], *SZSQG v MIAC* [2013] FCCA 612 (Judge Barnes, 25 June 2013) at [100] and [102], *SZRXF v MIAC* [2013] FCCA 369 (Judge Emmett, 27 May 2013) at [49], *SZROW v MIAC* [2013] FMCA 219 (Raphael FM, 28 March 2013) at [17]-[19] (upheld on appeal: *SZROW v MIAC* [2013] FCA 487 (Barker J, 21 May 2013)), *SZRNO v MIAC* [2013] FMCA 167 (Raphael FM, 28 February 2013) at [11]-[14], and *SZRNX v MIAC* [2012] FMCA 1242 (Raphael FM, 18 December 2012) at [15]. In *MZZQE v MIBP* [2014] FCCA 1642 (Judge Burchardt, 19 August 2014), the Court held that the Tribunal had failed to address the complementary protection claim arising from the imprisonment that it accepted the applicant was likely to suffer: at [21]-[30].

<sup>12</sup> *SZSGA v MIMAC* [2013] FCA 774 (Robertson J, 6 August 2013) at [55]-[56]. See also *CDY15 v MIBP* [2018] FCA 175 (Derrington J, 28 February 2018), where the Court held that no error arose from the Tribunal's reliance upon its rejection of the claimed Convention-related motivation of the appellant's alleged attackers where the question of motivation was relevant to whether he would face significant harm in the future: at [37]-[39]. *CDY15* was followed in *AOS18 v MIBP* [2019] FCCA 327 (Judge Kendall, 15 February 2019). See also *SZTQP v MIBP* (2015) 232 FCR 452 at [36]; *BZAH0 v MIBP* [2014] FCCA 2981 (Judge Jarrett, 23 December 2014) at [27]-[28] and [33]-[34]; *MZZIA v MIBP* [2014] FCCA 717 (Judge Riethmuller, 16 April 2014) at [30]-[35]; *SZTFL v MIBP* [2014] FCCA 1620 (Judge Driver, 1 August 2014) at [29] and [41] (upheld on appeal in *SZTFL v MIBP* [2015] FCA 1323 (Jessup J, 25 November 2015)).

<sup>13</sup> *SZRLK v MIAC* [2012] FMCA 1155 (Smith FM, 14 December 2012) at [44] where the Court found that the Tribunal's own refusal to characterise any part of the past persecution of the applicant as Convention-related left alive a claim that the applicant would face significant harm, requiring consideration under s.36(2)(aa). Similarly, in *SZSFK v MIAC* [2013] FCCA 7

## RECEIVING COUNTRY

As with claims under the refugee criterion, the first issue to be determined for claims under s.36(2)(aa) will generally be the country of reference. The criterion in s.36(2)(aa) refers to a risk of harm as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a ‘receiving country’.

Receiving country is defined in s.5(1) of the Act as:

- (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- (b) if the non-citizen has no country of nationality – a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

For protection visa applications made before 16 December 2014, the wording of this definition was slightly different, particularly for stateless persons.<sup>15</sup>

The definition of ‘receiving country’ is discussed further in Chapter 2 of this Guide.

## ASSESSING THE RISK OF HARM

There are three elements that must be established for prospective harm to meet the criterion in s.36(2)(aa): the Minister (or the Tribunal on review) must have *substantial grounds for believing* that as a *necessary and foreseeable consequence* of the non-citizen being removed from Australia, there is a *real risk* that the non-citizen will suffer significant harm. The criterion contains similarities with, but does not precisely replicate, complementary protection tests used in other jurisdictions.<sup>16</sup>

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(Judge Driver, 16 May 2013) the Court held that given that the reviewer rejected certain claims under the Refugees Convention for reasons specific to the Convention, it was not open to the reviewer to say that the complementary protection claim was rejected for the same reasons: at [92]. The Court cautioned that the use of language drawn from the refugee criterion context (in that case, ‘systematic’) may suggest error if used in relation to the complementary protection criterion: at [97]. See also *SZTGN v MIBP* [2014] FCCA 1467 (Judge Driver, 3 October 2014) at [45]-[47]; *MZZQE v MIBP* [2014] FCCA 1642 (Judge Burchardt, 19 August 2014) at [21]-[30]; *SZURK v MIBP* [2015] FCCA 472 (Judge Driver, 29 April 2015) at [48]. Contrast *SZTBD v MIBP* [2013] FCCA 2182 (Judge Nicholls, 17 December 2013) at [40] where the Court found there was no error in the Tribunal referring in its consideration of complementary protection to factual findings set out earlier in the decision record where those factual findings were not ‘bound up’ with Refugees Convention-related thinking; and *SZUDL v MIBP* [2014] FCCA 2018 (Judge Nicholls, 4 September 2014), which distinguished *SZSFK* on the basis that the Tribunal’s findings of fact were not reliant on Refugees Convention concepts: at [71]-[97].

<sup>14</sup> *SZSHK v MIBP* [2013] FCAFC 125 (Robertson, Griffiths and Perry JJ, 13 November 2013) at [35]; *SZTQP v MIBP* (2015) 232 FCR 452 at [36]; *SZSGA v MIMAC* [2013] FCA 774 (Robertson J, 6 August 2013) at [57]; *SZSUV v MIBP* [2013] FCCA 2185 (Judge Cameron, 11 December 2013) at [22]; *SZUDL v MIBP* [2014] FCCA 2018 (Judge Nicholls, 4 September 2014) at [55]-[57].

<sup>15</sup> The definition was amended by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, to enable its application to the new statutory framework relating to refugees introduced by that Act (the definition was previously only relevant to questions of complementary protection): paragraph 1324 of the Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014. Before this amendment, ‘receiving country’ was defined in s.5(1) of the Act as follows:

- (a) a country of which the non-citizen is a national; or
- (b) if the non-citizen has no country of nationality – the country of which the non-citizen is a habitual resident; to be determined solely by reference to the law of the relevant country.

<sup>16</sup> Most particularly, the United Nations Human Rights Committee’s General Comment 31 is similarly expressed, stating that the ICCPR ‘entails an obligation not to ... remove a person from their territory, where there are substantial grounds for

While all three elements must be satisfied to meet the criterion, they may involve similar considerations, and findings applicable to one may inform the assessment of another. The interwoven nature of these elements is demonstrated by the statement in the Explanatory Memorandum that:

[a] real risk of significant harm is one where the harm is a necessary and foreseeable consequence of removal. The risk must be assessed on grounds that go beyond mere theory and suspicion but does not have to meet the test of being highly probable. The danger of harm must be personal and present.<sup>17</sup>

The test under s.36(2)(aa) is a forward-looking one of reasonable foreseeability and the preferable view appears to be that the act (from which the relevant harm arises, i.e. pain, suffering and/or humiliation) must occur in the future,<sup>18</sup> notwithstanding one authority to the contrary.<sup>19</sup> This issue may be the subject of further judicial consideration.

### Real risk

The threshold for the 'real risk' element in the complementary protection criterion in s.36(2)(aa) is the same as that for the 'real chance' test in the refugee criterion in s.36(2)(a).<sup>20</sup> A 'real chance' in the context of refugee assessment has been described by the High Court as a substantial chance, as distinct from a remote or far-fetched possibility; however, it may be well below a 50 per cent chance.<sup>21</sup> The principles relevant to the 'real

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believing that there is a real risk of irreparable harm': Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) at [12] (*General Comment 31*). In *MIAC v Anochie* (2012) 209 FCR 497 at [45] the Court stated that the Committee's interpretation of the ICCPR was admissible in the construction of that Covenant.

<sup>17</sup> Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [67]. Similarly, the Second Reading Speech on the introduction of the Bill stated '[a] real risk of significant harm has been found in instances where there is a personal or direct risk to the specific person': Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 24 February 2011, 1357 (Chris Bowen, Minister for Immigration and Citizenship).

<sup>18</sup> In *WZASD v MIBP* [2013] FCCA 1940 (Judge Lucev, 29 November 2013) at [30] the Court focused on the requirement for a real risk that an applicant 'will suffer' significant harm to reject that certain past events (and the fear arising from them) gave rise to a real risk of significant harm that should have been considered by the reviewer. Again in *SZTQP v MIBP* [2015] FCCA 423 (Judge Nicholls, 27 February 2015) at [16], the Court observed that, like that under the Refugees Convention, s.36(2)(aa) imposes a forward-looking test of reasonable foreseeability (although overturned on appeal, this aspect was not the subject of consideration: *SZTQP v MIBP* (2015) 232 FCR 452). The Complementary Protection Guidelines also interpret the test as a forward-looking one, stating that a real risk of significant harm will not arise from harm which has already taken place and has no prospect of re-occurring. They cite the example of harm such as forced sterilisation, which by its nature can only occur once: Department of Home Affairs, *Complementary Protection Guidelines*, section 35, as re-issued 21 May 2015.

<sup>19</sup> In *CKX16 v MIBP* (No. 2) [2018] FCCA 2894 (Judge Riley, 12 October 2018) the Court found that s.36(2)(aa) could be satisfied if a person suffers the consequences of the relevant act in the future (in this instance, mental suffering), even if the act itself occurred in the past (in this instance, witnessing a murder): at [32]-[33]. However, the Court did not consider *WZASD* or the Complementary Protection Guidelines, and did not explain its reasoning in detail. Further, this approach does not appear to be consistent with the plain wording of s.36(2)(aa), s.36(2A) and the definitions of significant harm contained in s.5(1), which together require the person to be at risk of suffering an act in the future as a consequence of being removed. Accordingly, it is recommended that this judgment be treated with caution.

<sup>20</sup> *MIAC v SZQRB* (2013) 210 FCR 505 (special leave to appeal from this judgment was refused: *MIAC v SZQRB* [2013] HCATrans 323, 13 December 2013). The Court rejected the submission that 'real risk' was a higher threshold which required that the possibility of harm be more likely than not: per Lander and Gordon JJ at [246], Besanko and Jagot JJ at [297], Flick J at [342]; reflected in the Complementary Protection Guidelines: see Department of Home Affairs, *Complementary Protection Guidelines*, section 32, as re-issued 21 May 2015. The Court in *SZQRB* was considering an international treaties obligation assessment conducted by an officer of the Department which had applied a test of 'more likely than not' when assessing 'real risk'. Although that assessment did not directly apply s.36(2)(aa), the issue before the Court centred on the interpretation of 'real risk' for the purpose of the obligations codified in that provision. See also *MZYXS v MIAC* [2013] FMCA 13 (Riethmuller FM, 31 January 2013) (upheld on appeal in *MZYXS v MIAC* [2013] FCA 614 (Marshall J, 21 June 2013)) at [19] where the Court stated that the 'real risk' and 'real chance' tests appeared substantially the same.

<sup>21</sup> *Chan v MIEA* (1989) 169 CLR 379; *MIEA v Guo* (1997) 191 CLR 559.



chance' test are discussed in detail in Chapter 3 of this Guide, and apply equally in the complementary protection context. This includes the principles that the experience of the past may assist in an assessment of the likely risk of future harm,<sup>22</sup> and that if a decision-maker is unable to make a finding with sufficient confidence, they may need to consider the possibility that the finding is incorrect ('what if I am wrong?').<sup>23</sup> However, unlike the refugee criterion, s.36(2)(aa) does not require that an applicant hold a subjective fear.<sup>24</sup>

Depending upon the claims made, a decision-maker may be able to rely on a finding as to whether there is a real chance of harm to an applicant for the purpose of the refugee criterion when assessing the real risk of significant harm under s.36(2)(aa).<sup>25</sup> However, while the judgment of the Full Federal Court in *MIAC v SZQRB* has clarified the interpretation of 'real risk' in s.36(2)(aa), because the construction of that provision was not directly in issue, the judgment does not provide authority on its other elements, including the significance of the expressions 'substantial grounds for believing' and 'necessary and foreseeable consequence'. As the Federal Court has observed, the phrase 'real risk' should be read in context: the 'substantial grounds for believing' and 'will suffer' parts of the provision are not unimportant but, contextually, emphasise and reinforce the need to establish the substantive nature of the risk.<sup>26</sup>

Where a decision-maker finds that there is a real risk of harm based on their refugee criterion findings, they will need to go on to consider the other elements of s.36(2)(aa).<sup>27</sup> These are discussed below.

### Substantial grounds for believing

The requirement in s.36(2)(aa) that there be both 'substantial grounds' and 'a real risk' suggests that 'substantial grounds' imposes an evidentiary standard, and 'real risk' an

<sup>22</sup> See *MZAAD v MIBP* [2015] FCA 1031 (Beach J, 18 September 2015) at [41], referring to *MIEA v Guo* (1997) 191 CLR 559 at 574 and 575. The Court went on to say, however, that it would be inappropriate to confine the evaluative process in assessing 'real risk' to consideration of past events or a quantitative or statistical analysis: at [43].

<sup>23</sup> See Chapter 3 of this Guide under 'What if I am wrong?' and the cases referred to therein: *MIEA v Wu Shan Liang* (1996) 185 CLR 259; *MIEA v Guo* (1997) 191 CLR 559; *Abebe v The Commonwealth* (1999) 197 CLR 510; *MIMA v Rajalingam* (1999) 93 FCR 220. The application of this test in the complementary protection context was accepted by the Court in *SZSKC v MIBP* [2014] FCCA 938 (Judge Lloyd-Jones, 16 May 2014) at [83].

<sup>24</sup> *SZVVE v MIBP* [2015] FCA 837 (Perram J, 13 August 2015) at [21].

<sup>25</sup> In *MZYXS v MIAC* [2013] FCA 614 (Marshall J, 21 June 2013) at [31] the Court held that the Tribunal had been entitled to rely on its finding that there was no real chance of the relevant harm alleged for Refugee Convention purposes in assessing whether there was a real risk of significant harm for complementary protection purposes, in circumstances when the same essential claims and facts were being relied on in each aspect of the applicant's case before the Tribunal. See generally the discussion under 'Addressing claims under section 36(2)(AA)' above.

<sup>26</sup> *MZAAD v MIBP* [2015] FCA 1031 (Beach J, 18 September 2015) at [34].

<sup>27</sup> In *SZTWC v MIBP* [2014] FCCA 1347 (Judge Lloyd-Jones, 1 July 2014) the Court observed that the requirements concerning 'substantial grounds' and 'necessary and foreseeable consequence' are in addition to the 'real risk' requirement, and the complementary protection obligations and criteria differ in this regard from those derived from the Refugees Convention: at [41]-[42]. See also *SZSKC v MIBP* [2014] FCCA 938 (Judge Lloyd-Jones, 16 May 2014) at [72]-[73]. Contrast *SZTAL v MIBP* [2015] FCCA 64 (Judge Driver, 24 February 2015) at [21] where the Court appears to have taken a different view, saying that it was 'settled that the expressions "real risk" and "as a necessary and foreseeable consequence [of removal]" in s.36(2)(aa) together require nothing more nor less than the application of the same "real chance" test that is applied in respect of the refugee criterion', citing *SZQRB* as authority for this proposition (undisturbed on appeal in *SZTAL v MIBP* (2016) 243 FCR 556 and in *SZTAL v MIBP*; *SZTGM v MIBP* [2017] HCA 34 (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ, 6 September 2017)).

assessment of the probability of the applicant suffering significant harm. The Full Federal Court has stated that an applicant's credibility will be plainly relevant to the question of substantial grounds for believing there is a real risk.<sup>28</sup> The Complementary Protection Guidelines also view the 'substantial grounds' requirement in s.36(2)(aa) as directed to the evidentiary standard to be met.<sup>29</sup>

### A necessary and foreseeable consequence

The criterion in s.36(2)(aa) also requires that the risk of harm be a 'necessary and foreseeable consequence' of the applicant being removed from Australia to the receiving country.

In *SZSKC v MIBP*, the Court confirmed that the 'necessary and foreseeable consequence' element in s.36(2)(aa) attaches to the risk of harm, rather than the actual occurrence of harm, i.e. exposure to the risk (and not the harm itself) must be a necessary and foreseeable consequence of return.<sup>30</sup> The test is not applied by putting the applicant in a position where he or she must prove that he or she is in direct way of real harm before the real risk test is applied; nor is there a requirement on the applicant to prove that he or she will suffer harm, because that places the onus of proof in s.36(2)(aa) far too high.<sup>31</sup> A similar approach was taken in *MIAC v Anochie* to the interpretation of this phrase in considering Australia's *non-refoulement* obligation under the ICCPR.<sup>32</sup>

This element is in addition to the real risk test, so even where it is accepted that there is a risk of significant harm, the requirements of s.36(2)(aa) will not be satisfied until it is established that a necessary and foreseeable consequence of return is exposure to that risk.<sup>33</sup> The Complementary Protection Guidelines also treat this element of the test as an additional requirement, stating that it requires decision-makers to be satisfied that there is a

<sup>28</sup> *SZSHK v MIBP* [2013] FCAFC 125 (Robertson, Griffiths and Perry JJ, 13 November 2013) at [31]. In contrast, the Federal Court in *MIAC v Anochie* (2012) 209 FCR 497 at [67] opined that 'the superaddition of the words 'substantial grounds for believing' [in UN Human Rights Committee *General Comment 31* and subsequent jurisprudence of the Committee] do not add any additional requirements to the test'. However, the Court in that case was considering the *non-refoulement* obligation arising under the ICCPR by reference to jurisprudence of the Committee rather than the terms of a statutory provision such as s.36(2)(aa). On accepted principles of statutory construction, it would appear unlikely that a Court would infer that Parliament did not intend the 'substantial grounds' limb to have any operation (see Chapter 1 of this Guide for further discussion of interpretive principles).

<sup>29</sup> Department of Home Affairs, Complementary Protection Guidelines, section 36, as re-issued 21 May 2015.

<sup>30</sup> *SZSKC v MIBP* [2014] FCCA 938 (Judge Lloyd-Jones, 16 May 2014) at [71]-[73]. The Court found that the test is not whether the harm ('imprisonment') is a necessary or foreseeable consequence (i.e. 'inevitable'), but whether there is a real risk, as a necessary and foreseeable consequence of return, that the harm will be suffered: at [84].

<sup>31</sup> *SZSKC v MIBP* [2014] FCCA 938 (Judge Lloyd-Jones, 16 May 2014) at [84]-[85].

<sup>32</sup> *MIAC v Anochie* (2012) 209 FCR 497, where the court interpreted jurisprudence of the Human Rights Committee as saying that under the *non-refoulement* obligation in the ICCPR, it is the *risk* of harm which must be a necessary and foreseeable consequence of return, rather than the harm itself being a necessary and foreseeable consequence: at [66]. The Court also emphasised the high standard set by composite limbs of the phrase 'necessary and foreseeable consequence': at [62]. However, this case was interpreting Australia's *non-refoulement* obligations under the ICCPR (in relation to the review of a decision to cancel a visa under s.501 of the Migration Act), which differs from the interpretation of a provision of a domestic statute such as s.36(2)(aa): at [21] and [37].

<sup>33</sup> *SZSKC v MIBP* [2014] FCCA 938 (Judge Lloyd-Jones, 16 May 2014) at [72]-[73]. This is in contrast to the suggestion in the Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 that this element was intended to inform the determination of 'real risk' rather than impose an additional requirement, stating '[a] real risk of significant harm is one where the harm is a necessary and foreseeable consequence of removal': at [67].



real, as opposed to speculative, causal link between removal from Australia and exposure to the real risk of significant harm.<sup>34</sup> On a plain reading of the words in s.36(2)(aa) it appears that ‘necessary and foreseeable consequence’ imposes a causal and temporal requirement – there must be some link between the removal of the applicant from Australia to the receiving country, and the real risk of significant harm.<sup>35</sup>

### Sur place claims

As with the refugee criterion, the assessment of the complementary protection criterion is not restricted to events occurring in the applicant’s country of reference before their arrival in Australia. A risk of harm may arise as a result of actions or events which have occurred while an applicant is in Australia or elsewhere outside the receiving country. This may be due to changing circumstances in the receiving country, or the applicant’s own actions, or those of a third party. Unlike the criterion in s.36(2)(a), which is subject to s.5J(6) or s.91R(3) depending upon when the visa application was made, there is no ‘bad faith’ exception for the complementary protection criterion.<sup>36</sup> That is, even where the real risk of significant harm exists only because an applicant has deliberately engaged in conduct in Australia for the purpose of creating or strengthening a claim for protection, the applicant will not be precluded from meeting the criterion for a protection visa in s.36(2) if they satisfy the test in s.36(2)(aa) and other relevant requirements. Failing to consider conduct which has been disregarded under s.5J(6) or s.91R(3) when considering s.36(2)(aa) may amount to error, although this will depend upon the claims made by the applicant and the circumstances of the particular case.<sup>37</sup>

### Modified conduct to avoid threat of harm

There is a real question as to whether the principle discussed in the Refugees Convention context in *Appellant S395/2002 v MIMA*,<sup>38</sup> that a person should not be expected to modify certain kinds of conduct to avoid persecutory harm, extends to the assessment of

<sup>34</sup> Department of Home Affairs, Complementary Protection Guidelines, section 35, as re-issued 21 May 2015.

<sup>35</sup> However, as discussed below under ‘Perpetrator of the harm’, it does not appear intended that the harm could directly arise from the act of removal itself.

<sup>36</sup> *SZRQR v MIAC* [2013] FMCA 21 (Nicholls FM, 30 January 2013) at [13]. This is because s.91R(3) is expressed to refer directly to the Refugees Convention. See also *SZRSA v MIAC* [2012] FMCA 1187 (Smith FM, 7 December 2012) at [38], *SZSJC v MIBP* [2013] FCCA 1755 (Judge Nicholls, 31 October 2013) at [89], *SZSNY v MIMAC* [2013] FCCA 1465 (Judge Cameron, 27 September 2013) at [24], and *SZRLB v MIBP* [2014] FCCA 2851 (Judge Nicholls, 5 December 2014) at [47], [56] and [61]. For further discussion of the bad faith exception under s.91R(3) / s.5J(6) see Chapter 3 of this Guide.

<sup>37</sup> See, for example, *SZTDM v MIBP (No.2)* [2013] FCCA 2060 (Judge Barnes, 5 December 2013) at [70], *SZSJC v MIBP* [2013] FCCA 1755 (Judge Nicholls, 31 October 2013) at [89] and *SZSNY v MIMAC* [2013] FCCA 1465 (Judge Cameron, 27 September 2013) at [24]. In *SZTDM* the Court found that the applicant’s evidence focusing on his conduct in Australia gave rise to the claim that that conduct created or magnified a risk of being subject to significant harm (at [70]). Similarly, in *SZSNY* at [24] the Court found error on the basis of the Tribunal’s failure to consider whether any risk of significant harm to the applicant arose from his conduct in Australia, saying that that claim arose clearly from the materials. However, in *SZSJC* the court held that conduct disregarded for the purpose of s.36(2)(a) did not need to be explicitly considered under s.36(2)(aa) where the applicant had not claimed to fear significant harm as a result of those activities.

<sup>38</sup> *Appellant S395/2002 v MIMA* (2003) 216 CLR 473. For discussion of the principles in *S395* see Chapter 11 of this Guide. This principle is also partly codified in s.5J(3) of the Act, applicable to the refugee criterion for post 16 December 2014 protection visa applications. However, as s.5J(3) relates specifically to ‘well-founded fear of persecution’ it is not applicable

complementary protection. Different judges have approached this differently at first instance but none of those approaches have been clearly approved on appeal.

In *BBS16 v MIBP*, the Federal Circuit Court found that a decision-maker erred in failing to consider whether there was a relevant denial of rights under the International Covenant on Civil and Political Rights (ICCPR), and whether the applicant's non-exercise of those rights was a consequence of the denial and the risk of harm resulting from an attempted exercise of them.<sup>39</sup> In contrast, in *BPX17 v MIBP*, the Federal Circuit Court rejected a submission that S395 has direct application to suppression of an attribute (in this case religious practice) in the complementary protection context, referring to the fact that significant harm is defined in s.36(2A).<sup>40</sup>

On appeal in *MIBP v BBS16*, the Full Federal Court held that the primary judge erred in the emphasis that he gave to the ICCPR, and that this was inconsistent with several binding authorities which made it clear that the ICCPR has not been incorporated into domestic law in its entirety.<sup>41</sup> The Court held that the decision-maker did not need to consider whether the denial of the applicant's political, economic and cultural rights involved a relevant breach of the ICCPR.<sup>42</sup> The Minister's submissions highlighted that unlike s.36(2)(a), the complementary protection provision in s.36(2)(aa) does not operate by reference to the traits or characteristics of a particular person, and further, the real risk must arise as a necessary and foreseeable consequence of the applicant's removal from Australia, not from a person's own conduct and choice.<sup>43</sup> While the Court did not expressly address these submissions or whether the principles from S395 have any relevance to a complementary protection assessment, each of the authorities it referred to emphasised the importance of the terms of the legislation, particularly s.36(2)(aa), in considering a claim for complementary protection.<sup>44</sup>

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to assessment of s.36(2)(aa).

<sup>39</sup> *BBS16 v MIBP* [2017] FCCA 4 (Judge Driver, 1 February 2017) at [75]. This followed the Federal Circuit Court judgment in *SZSWB v MIBP* [2014] FCCA 765 (Judge Driver, 5 May 2014), where the Court held that there is no reason why the principle in S395 should not apply to the Conventions which support the complementary protection provisions of the Act in the same way as it applies in the Refugees Convention context: at [65] and [68]. This reasoning was subsequently adopted in *MZAI v MIBP* [2015] FCCA 2782 (Judge Harland, 13 October 2015) at [24]. However, both of these judgments were overturned on appeal for different reasons without clarifying this issue: *MIBP v SZSWB* [2014] FCAFC 106 (Gordon, Robertson and Griffiths JJ, 22 August 2014) at [42]-[43] (application for special leave refused: *SZSWB v MIBP* [2015] HCATrans 17 (French CJ and Gageler J, 13 February 2015)) and *MIBP v MZAI* [2016] FCA 251 (Mortimer J, 17 March 2016) at [41].

<sup>40</sup> *BPX17 v MIBP* [2017] FCCA 3047 (Judge Street, 7 December 2017) at [25] - [29]. The judgment ultimately turned on the Court's finding that the applicant had not made a claim that she wished to proselytise throughout India such that she would be suppressing her religious practice.

<sup>41</sup> *MIBP v BBS16* [2017] FCAFC 176 (Kenny, Tracey and Griffiths JJ, 10 November 2017) at [45] and [50].

<sup>42</sup> *MIBP v BBS16* [2017] FCAFC 176 (Kenny, Tracey and Griffiths JJ, 10 November 2017) at [44]. Nonetheless the Court went on to find that the decision-maker erred by failing to apply the principle from S395 in the context of the refugee criterion in s.36(2)(a): at [82]-[84].

<sup>43</sup> *MIBP v BBS16* [2017] FCAFC 176 (Kenny, Tracey and Griffiths JJ, 10 November 2017) at [23].

<sup>44</sup> *MIBP v BBS16* [2017] FCAFC 176 (Kenny, Tracey and Griffiths JJ, 10 November 2017) at [45]-[50], referring to *MIAC v MZYYL* (2012) 207 FCR 211, *MIBP v SZSWB* [2014] FCAFC 106 (Gordon, Robertson and Griffiths JJ, 22 August 2014), *SZTAL v MIBP* (2016) 243 FCR 556 and *SZTAL v MIBP*; *SZTGM v MIBP* [2017] HCA 34 (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ, 6 September 2017).

On appeal in *BPX17 v MIBP*, the Minister again made detailed submissions on this point, but the Federal Court found that the question of whether S395 applied to complementary protection did not need to be determined in this case.<sup>45</sup>

In light of the emphasis on the legislative text in judgments such as *MIBP v BBS16*, it is difficult to see how an applicant's self-suppression or modification of behaviour to avoid harm upon return can be imported into an assessment under s.36(2)(aa). However, it is likely that this question will be the subject of further judicial development.

## SIGNIFICANT HARM

The real risk contemplated by s.36(2)(aa) is '...a real risk that the non-citizen will suffer *significant harm*'. This is different from the concept of *serious harm* as required by ss.5J(4)(b)/91R(1)(b) (as applicable) in the context of s.36(2)(a).<sup>46</sup> The types of harm that will amount to 'significant harm' are exhaustively defined by s.36(2A).<sup>47</sup> Under this provision, a person will suffer significant harm if he or she will be arbitrarily deprived of his or her life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment.

'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act. The definitions of both 'torture' and 'cruel or inhuman treatment or punishment' refer to 'severe pain and suffering', although 'pain or suffering' can meet the definition of 'cruel or inhuman treatment or punishment' in some circumstances. By contrast, 'degrading treatment or punishment' is concerned with humiliation rather than pain and suffering as such.

The definitions of 'cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture' refer to 'an act or omission'. This means that only an action or a failure to act would fall within the definition, which may be distinguished from a consequence of an act or an omission.<sup>48</sup>

The requirement for 'an act or omission' is linked to the fact that torture, cruel or inhuman treatment or punishment and degrading treatment or punishment all require an element of

<sup>45</sup> *BPX17 v MIBP* [2018] FCA 763 (Barker J, 14 June 2018) at [116]. The Minister's submissions are set out at [63]-[66].

<sup>46</sup> In *MZZIA v MIBP* [2014] FCCA 717 (Judge Riethmuller, 16 April 2014) the Court observed that there is a significant overlap in the meaning of the two terms, e.g. a risk of being killed is sufficient to fulfil both: at [34]. See Chapter 4 of this Guide for discussion of 'serious harm'.

<sup>47</sup> *SZRTN v MIAC* [2013] FCCA 583 (Judge Nicholls, 21 June 2013) at [43] (upheld on appeal: *SZRTN v MIBP* [2013] FCA 1156 (Foster J, 6 November 2013)). The Court said (at [43]) that the 'technical' meanings of the different types of significant harm, derived from academic studies, do not assist in light of the definition of harm in the Act, and rejected the applicant's contention that the Tribunal ought to have had regard to external authorities (at [50]). See also *SZRSN v MIAC* [2013] FCA 751 (Mansfield J, 6 August 2013) at [24] where the Court stated that the definition of 'significant harm' in s.5(1) of the Act makes clear that the list of categories is an exhaustive one.

<sup>48</sup> *SZRSN v MIAC* [2013] FCA 751 (Mansfield J, 6 August 2013) at [47]; *SZTAL v MIBP* [2015] FCCA 64 (Judge Driver, 24 February 2015) at [41] (undisturbed on appeal in *SZTAL v MIBP* (2016) 243 FCR 556 and in *SZTAL v MIBP*; *SZTGM v MIBP* [2017] HCA 34 (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ, 6 September 2017). See also *SZSNX v MIBP* [2015] FCCA 2271 (Judge Driver, 30 September 2015).

intention. The definition of torture also requires that the harm be inflicted for a particular purpose. There are exceptions in each of these definitions for harm that arises pursuant to lawful sanctions not inconsistent with the Articles of the ICCPR, and in the case of cruel or inhuman treatment or punishment and degrading treatment or punishment, there is also an exception for harm that is not inconsistent with Article 7 of the ICCPR.

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.<sup>49</sup> It may not be necessary for a decision-maker to address each form of harm individually.<sup>50</sup> Nor would every form of harm claimed need to be assessed against the definitions, where the harm could not meet any of the definitions.<sup>51</sup> Whether a particular harm falls within the definitions is largely a question of fact.<sup>52</sup>

While some of the definitions incorporate a notion of physical harm, it is apparent that other kinds of harm such as mental suffering are also contemplated by some of the definitions. A threat could amount to significant harm in circumstances where it meets one of the statutory definitions.<sup>53</sup>

Each type of significant harm is considered in turn below, followed by consideration of the common element of 'lawful sanctions' and of who can perpetrate significant harm.

<sup>49</sup> In other jurisdictions, the terms are not separated. Thus, the approach in considering claims based on instruments which contain similar protections has been to find that particular ill-treatment amounts to one of these types of harm, rather than identifying precisely which: Jane McAdam, 'Australian Complementary Protection: A Step-By-Step Approach' (2011) 33 *Sydney Law Review* 687 ('Australian Complementary Protection') at 702. However, consideration under s.36(2)(aa) will require a decision-maker to be satisfied that the harm meets at least one of the harms in s.36(2A), with regard to the further definitions in s.5(1). The Complementary Protection Guidelines require that where an applicant claims they will suffer torture, decision-makers should assess the claimed harm against that definition before assessing whether it meets the definition of one of the other types of harm, as under the CAT, certain consequences flow from a finding of torture: Department of Home Affairs, Complementary Protection Guidelines, section 15, as re-issued 21 May 2015.

<sup>50</sup> In *SZSYP v MIBP* [2014] FCCA 7 (Judge Driver, 31 January 2014), the Court accepted that the Tribunal was aware of the definitions of the different forms of significant harm, and accepted the tribunal's 'rolled up' conclusion that the likely period of time that the applicant would be held in prison and the known conditions of that detention were not such as to satisfy the test for significant harm: at [44]. The Court was somewhat critical of the reasoning, however, noting that the reasons 'could have been more fulsomely expressed': at [47]. In *SZTBW v MIBP* [2014] FCCA 1809, the Court followed the approach in *SZSYP v MIBP*, observing that a qualitative assessment of the accepted harm was a question of fact, and it was a finding of fact and degree for the decision-maker whether, for a brief period on remand in prison in the conditions as found, such experience fell within the forms of harm in the definition of 'significant harm': at [39]-[40], [55]-[58] (appeal dismissed although this aspect of the reasoning was not considered: *SZTBW v MIBP* [2014] FCCA 1277 (Perry J, 25 November 2014).

<sup>51</sup> *SZSRX v MIBP* [2014] FCCA 2447 (Judge Manousaridis, 24 October 2014). In that case, the Court held that there was no error in the Reviewer failing to specifically address whether the applicant's inability to obtain a government job was significant harm, because such discrimination could not reasonably be interpreted as constituting significant harm as defined: at [49].

<sup>52</sup> *SZTAL v MIBP* [2015] FCCA 64 (Judge Driver, 24 February 2015) at [42] (undisturbed on appeal in *SZTAL v MIBP* (2016) 243 FCR 556 and in *SZTAL v MIBP*; *SZTGM v MIBP* [2017] HCA 34 (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ, 6 September 2017).

<sup>53</sup> In *MZZES v MIBP* [2014] FCCA 758 (Judge O'Dwyer, 17 April 2014) the Court observed in *obiter* that there are circumstances where a threat of itself could constitute significant harm – there must be an immediacy in the threat (for it to cause mental anguish that might amount to significant harm) and no other factor in the victim's knowledge that would militate against the likelihood of the threat being carried out: at [26], [29]. Although the judgment was overturned on appeal, this aspect of the reasoning was upheld: *MZZES v MIBP* [2015] FCA 397 (North J, 29 April 2015) at [44].

## Arbitrary deprivation of life

Under s.36(2A)(a), a person will suffer significant harm if that person will be arbitrarily deprived of his or her life. This harm is not further defined by the Act but the words ‘arbitrarily deprived’ are to be given their ordinary meaning.<sup>54</sup> While there is no restriction as to who must inflict the harm (apart from it needing to be a party other than the applicant)<sup>55</sup> or why, judicial comments in Australia have suggested that this kind of harm concerns such things as extrajudicial killing and the excessive use of police force, and does not concern the consequences of scarce medical resources in developing countries.<sup>56</sup>

While there is no express requirement that the arbitrary deprivation of life be intentional or arise from an intentional act or omission, it has been read into the definition. In *EZC18 v MHA* the Court upheld the Tribunal’s finding that the risk of suicide upon return to the UK did not amount to a real risk of the applicant being arbitrarily deprived of his life.<sup>57</sup> Having regard to the dictionary definitions of ‘arbitrary’ and ‘deprive’, the ICCPR, the second reading speech for the bill that introduced the complementary protection provisions and the intentionality requirement in the other types of significant harm under s.36(2A), the Court held that a decision-maker must be satisfied that another actor is intent on dispossessing another person of their life in a despotic or tyrannical fashion or otherwise subject to whim or caprice.<sup>58</sup>

Only *conduct* which is arbitrary in nature will meet the definition of arbitrary deprivation of life. In *SZDCD v MIBP* the Tribunal found that the appellant would not be arbitrarily deprived of his life based on his claim that he suffered from a life threatening medical condition and would not receive the care he needed if he was returned to Bangladesh. In upholding the Tribunal’s decision, the Federal Court held that although the appellant may lose his life as a result of losing access to medical treatment available in Australia, the Australian government’s removal of the appellant will not arbitrarily deprive him of his life. The act would be deliberate, would presumably be effected lawfully and had no quality of

<sup>54</sup> *MZAAJ v MIBP* [2015] FCA 478 (Pagone J, 18 May 2015) at [6].

<sup>55</sup> See *EZC18 v MHA* [2019] FCCA 464 (Judge Brown, 1 March 2019) at [73].

<sup>56</sup> *MZAAJ v MIBP* [2015] FCCA 151 (Judge Riley, 4 February 2015) in *obiter dicta* comments at [42]. In this case, the applicant claimed the Tribunal failed to consider that he might face arbitrary deprivation of life because of the prospect that he might die as a result of his inability to access dialysis in Sri Lanka. The Court held that the Tribunal, which had considered the claim against the definitions of cruel/inhuman/degrading treatment or punishment, had implicitly found that this did not fall within the concept of arbitrary deprivation of life, and was correct in so concluding: at [40]-[41] (upheld on appeal: *MZAAJ v MIBP* [2015] FCA 478 (Pagone J, 18 May 2015); special leave application dismissed: *MZAAJ v MIBP* [2015] HCATrans 238, (Gordon J, 15 September 2015). See also *SZDCD v MIBP* [2019] FCA 326 (Gleeson J, 13 March 2019).

<sup>57</sup> *EZC18 v MHA* [2019] FCCA 464 (Judge Brown, 1 March 2019). In reaching this finding, the Court noted that there was no suggestion of any direct act or omission attributable to any Australian or UK government agency regarding the applicant’s potential self-harm, and found that the Tribunal’s approach was consistent with the principles in *MZAAJ*: see [78]-[88].

<sup>58</sup> *EZC18 v MHA* [2019] FCCA 464 (Judge Brown, 1 March 2019) at [74]. However, the Department’s Complementary Protection Guidelines, issued prior to the judgment in *EZC18*, state that although intention can be a relevant indicator of arbitrary deprivation of life, it is not a necessary element: Department of Home Affairs, Complementary Protection Guidelines, section 12.1, as re-issued 21 May 2015.

randomness. Further, it would not deprive him of his life, rather it would deprive him of his present access to medical treatment.<sup>59</sup>

Having regard to the dictionary definitions of 'arbitrary' and 'deprive', and the fact that ss.36(2A)(b) to (e) are directed to 'serious forms of human rights abuses', the Court held - similarly to *EZC18* - that a non-citizen may be 'arbitrarily deprived of his or her life' by lawful or unlawful action that is demonstrated to have elements of capriciousness, inappropriateness, injustice or lack of predictability. It held that the words 'arbitrarily deprived' imply conduct which is responsible for the deprivation of a person's life, and that the requirement of arbitrariness operates to characterise the conduct by which a person is deprived of their life.<sup>60</sup>

The Complementary Protection Guidelines refer to arbitrary deprivation of life as also involving elements of injustice, lack of predictability, or lack of proportionality and say that the concept of arbitrariness is broader than unlawfulness.<sup>61</sup> The Guidelines provide various examples of circumstances in which potential harm may or may not be characterised as 'arbitrary deprivation of life', but emphasise that there must be a real and personal risk to the individual, saying that where the threat is from non-state actors, decision-makers should be satisfied that there are 'extremely widespread conditions of violence and systematic breakdown of law enforcement, coupled with a particular risk to the individual in question' before reaching a conclusion that there is a real risk that an applicant will be arbitrarily deprived of his or her life.<sup>62</sup>

Section 36(2A)(a) derives from Articles 2 and 6 of the ICCPR.<sup>63</sup> Article 6 states that every human being has the inherent right to life and that no one shall be arbitrarily deprived of their life. However, it should be noted that Article 6 of the ICCPR includes an express protection of the *right* to life, whereas significant harm within the meaning of s.36(2A)(a) is directed only at the *arbitrary deprivation* of life. As such, case law from other jurisdictions considering a positive right to life (such as the provision of medical treatment or measures to increase life expectancy or reduce mortality) is unlikely to be directly applicable to the interpretation of s.36(2A)(a), particularly in light of the judgment in *SZDCD* (discussed above).

<sup>59</sup> *SZDCD v MIBP* [2019] FCA 326 (Gleeson J, 13 March 2019) at [48].

<sup>60</sup> *SZDCD v MIBP* [2019] FCA 326 (Gleeson J, 13 March 2019) at [40]-[44] and [48].

<sup>61</sup> Department of Home Affairs, Complementary Protection Guidelines, section 12.1, as re-issued 21 May 2015.

<sup>62</sup> Department of Home Affairs, Complementary Protection Guidelines, sections 12.1 and 33, as re-issued 21 May 2015. Note, however, that to the extent this guidance requires satisfaction of a 'systematic breakdown of law enforcement' it is inconsistent with *MIAC v MZYLL* (2012) 207 FCR 211 which establishes that, for the purpose of s.36(2)(aa) and s.36(2B)(b), a decision-maker may be satisfied that there is a real risk in circumstances where the level of protection is insufficient to reduce that risk to something less than 'real', rather than an absence of any protection as the Guidelines suggest here.

<sup>63</sup> Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [75].



## The death penalty will be carried out

The second type of significant harm identified in s.36(2A) is that ‘the death penalty will be carried out on the non-citizen’: s.36(2A)(b). As with arbitrary deprivation of life this type of harm is not further defined or explained in the Act. The obligation not to *refouler* a person at risk of having the death penalty carried out on them derives from Articles 2 and 6 of the ICCPR and from the Second Optional Protocol.<sup>64</sup>

Unlike some other types of significant harm, there is no ‘lawful sanctions’ exception applicable to s.36(2A)(b). The death penalty, where it will be carried out, will amount to significant harm regardless of the nature or seriousness of the crime of which the applicant is accused (although in such cases, the exclusion criteria in s.36(2C) may be in issue).<sup>65</sup>

It will not be sufficient that a person has committed a crime punishable by the death penalty, or even that they have had the death penalty imposed as a sentence – when considered with s.36(2)(aa), s.36(2A)(b) requires that there be a real risk that the death sentence *will be carried out*. In *MZYXS v MIAC* the Federal Magistrates Court stated that it appears that the wording of s.36(2A)(b) was intended to avoid the consequence that the imposition of the death penalty (even if it would not be carried out) would be considered to be ‘significant harm’.<sup>66</sup> This is also made clear in the Explanatory Memorandum which lists examples of circumstances where a death penalty may be imposed but not actually carried out as including where actual executions are rare in the particular country, where a sentence is likely to be commuted, or where Australia obtains a reliable undertaking that the death penalty will not be carried out.<sup>67</sup> Similarly, if a person has committed a crime punishable by death, but there is no real risk that they will ever be prosecuted or that the death penalty will be imposed as a sentence, then there may not be a real risk of significant harm within the meaning of s.36(2A)(b). Ultimately, whether there is a real risk that the death penalty will be carried out is a question of fact for the decision-maker. Any reason or justification for imposition of the death penalty (such as the nature of the crime) is not necessarily relevant to that question.<sup>68</sup>

<sup>64</sup> Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [76].

<sup>65</sup> Note that the Complementary Protection Guidelines characterise the carrying out of the death penalty for crimes that are not ‘the most serious crimes’, or otherwise than after the final decision of a competent court in accordance with law, as falling within the meaning of ‘arbitrary deprivation of life’ under s.36(2A)(a) rather than ‘the death penalty’ under s.36(2A)(b): Department of Home Affairs, Complementary Protection Guidelines, section 13, as re-issued 21 May 2015.

<sup>66</sup> *MZYXS v MIAC* [2013] FMCA 13 (Riethmuller FM, 31 January 2013) at [31], upheld on appeal in *MZYXS v MIAC* [2013] FCA 614 (Marshall J, 21 June 2013). The Court rejected an argument that this different wording meant that, where a law of a country would result in a type of harm in s.36(2A) other than the death penalty, then whether or not that law would be carried out is irrelevant, saying that was an improper reading of s.36(2A) (at [30]).

<sup>67</sup> Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [77]-[79]. See also the examples of where a death penalty may be imposed but not carried out in McAdam, ‘Australian Complementary Protection’, above n 49 at 696.

<sup>68</sup> Although the nature of the crime may be relevant to exclusion under s.36(2C), discussed below.

## Torture

The third type of significant harm identified in s.36(2A) is that the non-citizen 'will be subjected to torture': s.36(2A)(c). 'Torture' is exhaustively defined in s.5(1) of the Act as:

an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person:

- (a) for the purpose of obtaining from the person or from a third person information or a confession; or
- (b) for the purpose of punishing the person for an act which that person or a third person has committed or is suspected of having committed; or
- (c) for the purpose of intimidating or coercing the person or a third person; or
- (d) for a purpose related to a purpose mentioned in paragraph (a), (b) or (c); or
- (e) for any reason based on discrimination that is inconsistent with the Articles of the [ICCPR].

but does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the [ICCPR].<sup>69</sup>

This definition contains a number of different elements which must be satisfied in order for the harm to be characterised as 'torture'. The harm must be caused by an act or omission, involve 'severe pain or suffering', which can be either physical or mental, and there are also intention and purpose requirements. Although the ill-treatment must be inflicted for a specified purpose, it is not dependent upon being inflicted on a discriminatory ground.<sup>70</sup> In addition, torture 'does not include an act or omission arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.' Each of these elements of the definition is discussed further below.

The definition of torture in the Act is said to derive from the *non-refoulement* obligations in Article 3 of CAT and Articles 2 and 7 of the ICCPR.<sup>71</sup> However, there are material differences between the Australian and international definitions. For example, in contrast to the definition of 'torture' in Article 1 of CAT, there is no requirement in s.36(2A)(c) or in the definition in s.5(1) that the harm be committed by a person who is a public official or acting in an official capacity.<sup>72</sup> As such, caution should be exercised when relying upon any international jurisprudence in this area when considering the definition of 'torture' in s.5(1).

<sup>69</sup> There is a different definition of torture in the *Criminal Code Act 1995* which does not require the harm to be intentionally inflicted, but that is in a different context and does not affect the meaning of torture in s.5(1): see *SZTAL v MIBP*; *SZTGM v MIBP* [2017] HCA 34 (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ, 6 September 2017) at [20]-[25] and [89]-[91] and *SZTAL v MIBP* (2016) 243 FCR 556 per Kenny and Nicholas JJ at [67]. For further discussion, see McAdam, 'Australian Complementary Protection', above n 49 at 697.

<sup>70</sup> See also *Nagaratnam v MIMA* (1999) 84 FCR 569 per Lee and Katz JJ at [32], considering the similarly worded Article 3(1) of CAT.

<sup>71</sup> Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [51].

<sup>72</sup> *BPF15 v MIBP* [2018] FCA 964 (Beach J, 26 June 2018) at [72], referring to the Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [52]. Article 1 of CAT defines torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person' for specified non-exhaustive purposes, 'when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. Furthermore, as Article 7 of the ICCPR and Article 3 of the ECHR both contain prohibitions on other forms of ill-treatment in addition to torture, a finding of a breach of those Articles may not necessarily be on the basis that such treatment is 'torture': see McAdam, 'Australian Complementary Protection', above n 49 at 702-703.

### ***An act or omission***

Although the definition of torture refers to ‘an act or omission’, this should not be taken to exclude multiple acts or omissions. Section 23(b) of the *Acts Interpretation Act 1901* provides that words in the singular number include the plural and words in the plural number include the singular. As such, it appears that a number of acts or omissions intentionally inflicted for one or more of the purposes could cumulatively amount to torture within the meaning of the s.5(1) definition where, when taken together, the pain or suffering rises to the level of ‘severe’.

### ***Severe pain or suffering, whether physical or mental***

To amount to torture, an act or omission must cause ‘severe pain or suffering’, which can be either physical or mental. Whether pain or suffering is ‘severe’ will be a question for the decision-maker in each case. The requirement of the severity is linked to the pain or suffering, rather than the nature of the act or omission which causes it. Consistently with this, the Complementary Protection Guidelines refer to consideration of factors such as the circumstances and particular characteristics of the victim, in combination with the nature and context of the treatment, its duration and its effects, when determining whether physical or mental pain or suffering meets the severity threshold in the definition of ‘torture’.<sup>73</sup> The Guidelines also contain examples of treatment that may or may not amount to torture.<sup>74</sup>

### ***Intentionally inflicted***

The definition of torture requires an element of intent. It is ‘an act or omission by which severe pain or suffering ... is *intentionally* inflicted on a person’ for a specified purpose or reason. There are similar requirements of intention in the definitions of ‘cruel or inhuman treatment or punishment’ and ‘degrading treatment or punishment’.

Intent, in this context, requires an actual, subjective, intention on the part of a person to bring about the suffering by their conduct.<sup>75</sup> In *SZTAL v MIBP*, a majority of the High Court rejected the contention that knowledge or foresight of a result establishes the necessary intention element of the definitions of torture, cruel or inhuman treatment or punishment and degrading treatment or punishment.<sup>76</sup> While evidence of foresight of the risk of pain,

<sup>73</sup> Department of Home Affairs, Complementary Protection Guidelines, section 17, as re-issued 21 May 2015.

<sup>74</sup> Department of Home Affairs, Complementary Protection Guidelines, section 17, as re-issued 21 May 2015.

<sup>75</sup> *SZTAL v MIBP*; *SZTGM v MIBP* [2017] HCA 34 (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ, 6 September 2017) at [26]-[27] and [114]. This upheld the Full Federal Court judgment in *SZTAL v MIBP* (2016) 243 FCR 556.

<sup>76</sup> *SZTAL v MIBP*; *SZTGM v MIBP* [2017] HCA 34 (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ, 6 September 2017) per Kiefel CJ, Nettle, Gordon and Edelman JJ (Gageler J dissenting). Their Honours found no error in the Tribunal’s conclusion that while the applicants would likely be remanded in a prison for a short period, the evidence did not support that any pain or suffering as a consequence would be by an intentionally inflicted act or omission, as the poor prison conditions were due to a lack of resources rather than any intention by the Sri Lankan government to inflict such harm.

suffering or humiliation may support an inference of intention (and in some cases may render the inference compelling), foresight of a result is of evidential significance only.<sup>77</sup>

Mere negligence, without more, will also not establish the necessary intention element of any of the relevant definitions in s.5.<sup>78</sup> Establishing the necessary intention also likely requires identification of the individual(s) who will carry out the act or omission.<sup>79</sup>

### **Purpose**

To amount to torture under ss.36(2A)(c) and 5(1) of the Act, an act or omission by which severe pain or suffering is intentionally inflicted on a person must be inflicted for one of the five specified purposes. These purposes are exhaustive and an act or omission intended to inflict severe pain or suffering for a different purpose will not amount to torture (although it may potentially amount to another type of significant harm). Both the Act and the Explanatory Memorandum are silent as to whether the purpose must be the *sole* purpose for the infliction of severe pain or suffering.

The Complementary Protection Guidelines state that ‘the essential characteristic linking these purposes is that the victim is in a situation of powerlessness (usually where the person is held in detention) which the perpetrator exploits to achieve a particular end’.<sup>80</sup> The Guidelines draw a distinction between this and the use of severe force by public officials in other contexts where the person is not under their direct power or control which, according to the Guidelines, would not amount to torture (although it may amount to a different type of ‘significant harm’).<sup>81</sup> However, given that the s.5(1) definition of torture does not include any requirement of power or control, the Guidelines would appear to impose a more limited meaning of ‘torture’ than the definition in the Act.

<sup>77</sup> *SZTAL v MIBP; SZTGM v MIBP* [2017] HCA 34 (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ, 6 September 2017) at [27], [29] and [99]-[100].

<sup>78</sup> See *SZSPE v MIBP* [2013] FCCA 1989 (Judge Emmett, 27 November 2013) at [68] and [72] (upheld on appeal *SZSPE v MIBP* [2014] FCA 267 (Yates J, 27 March 2014)) and *SZTUL v MIBP* [2014] FCCA 1985 (Judge Driver, 29 August 2014) at [31]-[32] (leave to appeal this judgment was dismissed: *SZTUL v MIBP* [2014] FCA 1427 (Logan J, 26 November 2014)).

<sup>79</sup> While not considered on appeal by the Full Federal Court in *SZTAL v MIBP* (2016) 243 FCR 556 or the High Court in *SZTAL v MIBP; SZTGM v MIBP* [2017] HCA 34 (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ, 6 September 2017), the reasoning in *SZTAL v MIBP* [2015] FCCA 64 (Judge Driver, 24 February 2015) and a number of subsequent cases suggests that the question of intention requires identification of the relevant individual(s) who will carry out the act or omission. For example, in *SZWDK v MIBP* [2015] FCCA 2164 (Judge Smith, 14 August 2015) at [17] the Court, following *SZTAL* at first instance, rejected an argument that the Tribunal ought to have considered whether placing the applicant in an overcrowded jail would be intentionally inflicted given the authorities would know of the prison conditions. In the Court’s view, the applicant’s argument overlooked the question of whose intention was in issue (upheld on appeal *SZWDK v MIBP* [2016] FCA 979 (Wigney J, 16 August 2016)). In *AGH15 v MIBP* [2015] FCCA 1797 (Judge Smith, 11 June 2015) the Court considered an argument that the intention to cause extreme humiliation could arise from the law itself (which in that case imposed penalties for illegal departure). The Court observed, in *obiter*, that what was required was a subjective intention, and in circumstances where the harm was said to arise by operation of law, it was unclear whose intention would be relevant (for example, whether it would be the entire Parliament, or a majority of the Parliament). The Court also considered the nature of the penalties (a fine and possible brief period of detention) to point against any intention to cause extreme humiliation: at [50], [56]. This judgment was upheld on appeal in *AGH15 v MIBP* [2015] FCA 1181 (Perry J, 4 November 2015), where the Court found it unnecessary to determine, but expressed doubt that the complementary protection criterion could be met by the enactment of a law without consideration of how that law would be applied to an applicant: at [31].

<sup>80</sup> Department of Home Affairs, Complementary Protection Guidelines, section 19, as re-issued 21 May 2015.

<sup>81</sup> Department of Home Affairs, Complementary Protection Guidelines, section 19, as re-issued 21 May 2015.

Determining the purpose for which the pain or suffering is inflicted will ultimately be a finding of fact for the decision-maker on the available evidence. With the exception of the fifth purpose, which is based on discrimination, the other purposes in the definition are aimed at achieving a specific outcome: obtaining information or a confession, punishment, intimidation or coercion, or a purpose related to those things. Although evidence as to the purpose of future harm may not always be available, the evidentiary basis for a conclusion that there is a real risk of harm may also point to the purpose of the harm.

While the purposes are drawn in part from the definition of 'torture' in Article 1 of CAT, there are some distinct differences between the purposes in CAT and those in the Act. As such, international jurisprudence will be of limited value to the interpretation of the definition of torture in s.5(1) where it relates to harm inflicted for a purpose other than those listed in the Act.<sup>82</sup>

#### Obtaining information or a confession, punishing, or intimidating or coercing

The first three purposes listed in the definition of torture encompass severe pain or suffering being inflicted on an applicant for two objectives. Firstly, those purposes contemplate severe pain or suffering being inflicted on an applicant for the purpose of obtaining from the applicant information or a confession, punishing the applicant for an act which they have committed or are suspected of having committed, or intimidating or coercing the applicant. Secondly, they envisage severe pain or suffering being inflicted on an applicant for the purpose of obtaining information or a confession *from a third person*, punishing the applicant for an act which has been committed or is suspected of having been committed *by a third person* or inflicting severe pain or suffering on the applicant for the purpose of intimidating or coercing *a third person*.

#### A related purpose

The fourth purpose - any purpose related to a purpose mentioned in (a), (b) or (c) - contemplates that severe pain or suffering may amount to torture where it is not inflicted directly for the purpose of obtaining from the person or from a third person information or a confession; punishing the person for an act which that person or a third person has committed or is suspected of having committed; or intimidating or coercing the person or a third person, but is inflicted for a purpose relating to one of those purposes. Whether a purpose is 'related to' obtaining information or a confession, punishment, or intimidation or coercion in respect of an applicant or a third person will be a question of fact.

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<sup>82</sup> The purposes in Article 1 of CAT are not exhaustive, whereas those in the Act are. Further, CAT does not contain an equivalent of the fourth purpose in the Act (a purpose related to any of the first three purposes).

Any reason based on discrimination that is inconsistent with the Articles of the ICCPR

Finally, an act or omission by which severe pain or suffering is intentionally inflicted on a person may amount to torture if inflicted for any reason based on discrimination that is inconsistent with the Articles of the ICCPR. Article 2 of the ICCPR refers to ‘distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.<sup>83</sup>

Depending on the circumstances, ‘severe pain or suffering’ which is intentionally inflicted for a discriminatory reason may also meet the threshold of ‘serious harm’ for one of the Convention or statutory reasons for the purpose of the criterion in s.36(2)(a) and, provided the other requirements of that criterion are met, in those circumstances it will not arise for consideration under s.36(2)(aa).

**Cruel or inhuman treatment or punishment**

The fourth type of ‘significant harm’ is that the non-citizen ‘will be subjected to cruel or inhuman treatment or punishment’: s.36(2A)(d). ‘Cruel or inhuman treatment or punishment’ is defined in s.5(1) of the Act as

an act or omission by which:

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature; but does not include an act or omission:
- (c) that is not inconsistent with Article 7 of the [ICCPR]; or
- (d) arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the [ICCPR].

As with ‘torture’, this definition is intended to be exhaustive.<sup>84</sup> The purpose of including an exhaustive definition was to confine the meaning of ‘cruel or inhuman treatment or punishment’ to circumstances that engage a *non-refoulement* obligation. A *non-refoulement* obligation is implied under Articles 2 and 7 of the ICCPR.<sup>85</sup>

Also in common with the definition of ‘torture’, cruel or inhuman treatment or punishment contains an intent requirement. A significant distinction, however, is that it does not require that the pain or suffering be inflicted for any particular purpose. The Explanatory Memorandum states that the first type of cruel or inhuman treatment or punishment, an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person, refers to an act or omission which would normally constitute torture, but

<sup>83</sup> Note that while this element of the definition varies from Article 1 of CAT, which refers to ‘any reason based on discrimination of any kind’, there is unlikely to be any practical difference given the broad prohibition on discrimination in the ICCPR.

<sup>84</sup> Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [15].

<sup>85</sup> Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [19]-[20].



which is not inflicted for one of the purposes or reasons under the definition of ‘torture’.<sup>86</sup> The intent requirement is discussed further below. As with torture, there is no requirement that the harm be inflicted by a person acting in an official capacity.<sup>87</sup>

The definition does not require the decision-maker to specify which element of ‘cruel or inhuman treatment or punishment’ is satisfied. It will therefore not be necessary to determine whether it is ‘cruel’ or ‘inhuman’, or whether it arises from ‘treatment’ or ‘punishment’ so long as the definition as a whole is met, which would appear consistent with the approach in other jurisdictions.<sup>88</sup>

Under the definition in s.5(1) and common to the definitions of ‘torture’ and ‘degrading treatment or punishment’, cruel or inhuman treatment or punishment does not include an act or omission ‘arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the [ICCPR].’ This qualification, and the other elements of the definition, are discussed further below.

Article 7 of the ICCPR prohibits torture and cruel, inhuman or degrading treatment or punishment but does not further define those terms. Instruments in other jurisdictions similarly provide protection to persons at risk of inhuman or degrading treatment or punishment.<sup>89</sup> However, that article, and similar provisions used in other jurisdictions, bundle the different types of harm within the one phrase. As such there are limits to the reliance which can be placed upon the international jurisprudence when considering the interpretation of ‘cruel or inhuman treatment or punishment’ under the Act. For these purposes, regard must be had to the definition in s.5(1) of the Act.

### ***An act or omission***

Although the definition of cruel or inhuman treatment or punishment refers to ‘*an act or omission*’, pursuant to s.23(b) of the *Acts Interpretation Act 1901* which provides that words in the singular number include the plural and words in the plural number include the singular, it appears that a number of acts or omissions intentionally inflicted could cumulatively amount to cruel or inhuman treatment or punishment where, when taken together, those acts or omissions would inflict severe pain or suffering or pain or suffering which could reasonably be regarded as cruel or inhuman in nature.

<sup>86</sup> Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [16].

<sup>87</sup> *BPF15 v MIBP* [2018] FCA 964 (Beach J, 26 June 2018) at [76] and [79].

<sup>88</sup> See McAdam, ‘Australian Complementary Protection’, above n 49 at 724.

<sup>89</sup> For example, article 16(1) of CAT, article 3 of the European Convention on Human Rights, article 15 of the EU Qualification Directive (although neither of the latter two include the word ‘cruel’).

***(Severe) pain or suffering***

To amount to cruel or inhuman treatment or punishment, an act or omission must cause either ‘pain or suffering’ or ‘severe pain or suffering’, which can be either physical or mental. Whether an act or omission will cause pain or suffering, and whether such pain or suffering will be ‘severe’ will be a question for the decision-maker in each case. The structure of the definition suggests that the requirement of severity is linked to the pain or suffering, rather than the nature of the act or omission which causes it. Consistently with this, the Complementary Protection Guidelines refer to consideration of factors such as the circumstances and particular characteristics of the victim when determining whether physical or mental pain or suffering amounts to cruel or inhuman treatment or punishment.<sup>90</sup>

***An act or omission which... could reasonably be regarded as cruel or inhuman in nature***

An act or omission which causes pain or suffering, but which does not rise to the level of ‘severe’ may nonetheless amount to cruel or inhuman treatment or punishment so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature. Although this aspect of the definition does not refer directly to the ICCPR, the use of the more general ‘cruel or inhuman in nature’ may invite consideration of international jurisprudence as to what may be regarded as cruel or inhuman.

The Complementary Protection Guidelines direct decision-makers to interpret this part of the definition by reference to international jurisprudence on Article 7 of the ICCPR<sup>91</sup> and contain examples of treatment which has or has not been found to breach that Article.<sup>92</sup> In international jurisprudence, ‘inhuman treatment’ has been said to include such treatment that ‘deliberately causes severe suffering ... which, in the particular situation, is *unjustifiable*’.<sup>93</sup>

In considering whether suffering inflicted in the context of law enforcement would point to inhuman treatment or punishment, international jurisprudence has held that the level of suffering must go beyond that ‘inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment’.<sup>94</sup> Such treatment may also fall within the ‘lawful sanctions’ qualification, discussed below.

Note that to amount to ‘cruel or inhuman treatment or punishment’ an act or omission which can reasonably be regarded as ‘cruel or inhuman in nature’ must also cause pain or suffering which is intentionally inflicted<sup>95</sup> and must not fall within either of the exceptions in

<sup>90</sup> Department of Home Affairs, Complementary Protection Guidelines, section 22, as re-issued 21 May 2015.

<sup>91</sup> Department of Home Affairs, Complementary Protection Guidelines, section 22, as re-issued 21 May 2015.

<sup>92</sup> Department of Home Affairs, Complementary Protection Guidelines, sections 27 and 28, as re-issued 21 May 2015.

<sup>93</sup> *Greek case*, European Commission on Human Rights, Application Nos 3321/67, 3322/67, 3323/67, 3344/67 (18 November 1969), 12 *Yearbook of the European Convention on Human Rights* 170, 186, cited in Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007) at 141.

<sup>94</sup> *Labita v Italy*, European Court of Human Rights, Application No 26772/95 (6 April 2000) at [120].

<sup>95</sup> If having regard to international jurisprudence, decision-makers should bear in mind that other jurisdictions have not

(c) or (d). There is no requirement to consider whether an act or omission falls within parts (a) and (b) of the definition before considering whether one of the exceptions in parts (c) or (d) applies.<sup>96</sup>

### **Intention**

The definition of cruel or inhuman treatment or punishment in s.5(1) requires an element of intent. It is an act or omission by which severe pain or suffering, or pain or suffering, 'is *intentionally* inflicted on a person'. Whether this requirement is met will involve similar considerations to those in relation to torture – see the discussion of '[Intentionally Inflicted](#)' under 'Torture' above.

### **Act or omission not inconsistent with Article 7**

Cruel or inhuman treatment or punishment does not include an act or omission that is not inconsistent with Article 7 of the ICCPR: s.5(1). Article 7 provides that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation'. Although it appears somewhat circular, the purpose of this exception is to confine the meaning of cruel or inhuman treatment or punishment to circumstances that engage a *non-refoulement* obligation.<sup>97</sup> As such, this requirement may be regarded as informing the meaning of 'cruel or inhuman treatment or punishment' in that an act or omission which is of a level which would *not* breach Article 7 will not suffice, even if it satisfies other elements of the definition, thereby imposing a basic threshold of treatment or punishment which would fall within the definition in s.5(1). When determining whether or not an act or omission is not inconsistent with Article 7, regard may be had to international jurisprudence interpreting that Article.

The Complementary Protection Guidelines refer to certain circumstances which will generally not be considered inconsistent with Article 7. These include general socio-economic conditions, breach of social and economic rights, absence or inadequacy of medical treatment or imposition of treatment without consent, where that treatment is a medical or therapeutic necessity.<sup>98</sup> However, the Federal Circuit Court has said that while circumstances where such things may amount to significant harm may be few, they need to be determined with actual reference to an applicant's circumstances rather than in the

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necessarily interpreted 'cruel or inhuman treatment or punishment' as involving an intent requirement: see McAdam, 'Australian Complementary Protection', above n 49 at 698-699. On the contrary, the lack of intent has been identified as a means of distinguishing cruel or inhuman treatment or punishment from torture, whereas under the s.5(1) definitions, the key feature distinguishing torture from cruel or inhuman treatment or punishment is the 'purpose' requirement.

<sup>96</sup> *SZUQE v MIBP* [2016] FCCA 2052 (Judge Nicholls, 11 August 2016) at [26].

<sup>97</sup> Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [19].

<sup>98</sup> Department of Home Affairs, Complementary Protection Guidelines, section 27, as re-issued 21 May 2015. The Guidelines go on to state that certain circumstances of extreme deprivation may violate Article 7, particularly if the person is in a position of vulnerability vis-à-vis the State.

abstract.<sup>99</sup> The Complementary Protection Guidelines also provide examples of treatment which are ‘very likely’ to constitute breaches of Article 7, including rape, female genital mutilation, forced abortion and forced sterilisation and, in some cases, circumstances arising from a forced marriage.<sup>100</sup>

### Degrading treatment or punishment

The fifth and final type of significant harm under s.36(2A) is that the non-citizen ‘will be subjected to degrading treatment or punishment’: s.36(2A)(e). ‘Degrading treatment or punishment’ is again exhaustively defined in s.5(1) of the Act and means:

an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable, but does not include an act or omission:

- (a) that is not inconsistent with Article 7 of the [ICCPR], or
- (b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the [ICCPR].

This definition derives from the *non-refoulement* obligation implied under Articles 2 and 7 of the ICCPR and is intended to cover acts or omissions which, when carried out, would violate Article 7 of the ICCPR.<sup>101</sup> As with the definition of ‘cruel or degrading treatment or punishment’, there is no requirement that the harm be inflicted by a person acting in an official capacity or for a particular purpose.<sup>102</sup> While there is no requirement for the treatment to be discriminatory, in some circumstances discrimination (e.g. on a racial basis) might render treatment that was otherwise bearable inherently degrading.<sup>103</sup>

As with the definitions of ‘torture’ and ‘cruel or inhuman treatment or punishment’, under the definition in s.5(1), degrading treatment or punishment does not include an act or omission ‘that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the [ICCPR].’ This qualification, and the other elements of the definition, are discussed further below.

### An act or omission

As discussed above in relation to the definitions of torture and cruel or inhuman treatment or punishment, although the definition of degrading treatment or punishment refers to ‘an act or omission’, pursuant to s.23(b) of the *Acts Interpretation Act 1901* which provides that words

<sup>99</sup> *SZSMQ v MIBP* [2013] FCCA 1768 (Judge Nicholls, 31 October 2013) at [114]. The Court referred to circumstances such as payment for medical expenses and inability to attain employment.

<sup>100</sup> Department of Home Affairs, Complementary Protection Guidelines, section 27, as re-issued 21 May 2015.

<sup>101</sup> Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [23]-[24].

<sup>102</sup> In *BPF15 v MIBP* [2018] FCA 964 (Beach J, 26 June 2018), the Court held that there is no requirement that ‘cruel or inhuman treatment or punishment’ or ‘degrading treatment or punishment’ be carried out in an official capacity: at [76] and [79].

<sup>103</sup> In *SZSVT v MIBP* [2014] FCCA 768 (Judge Barnes, 17 April 2014), the Court indicated in *obiter dicta* comments that it was prepared to accept that the racial nature of differential treatment could render it inherently degrading in certain circumstances, however it was unnecessary to decide that question as no such claim was squarely raised before the Tribunal: at [62], [80]-[82].

in the singular number include the plural and words in the plural number include the singular, it appears that a number of acts or omissions could cumulatively amount to degrading treatment or punishment where, when those acts are taken together, the level of humiliation rises to extreme humiliation which is unreasonable.

### **Extreme humiliation which is unreasonable**

The definition of degrading treatment or punishment in s.5(1) is specific as to the level of humiliation which must be evoked by the particular act or omission. It requires 'extreme humiliation which is unreasonable'.<sup>104</sup> Whether or not humiliation is 'reasonable' will be a question to be determined with regard to the particular circumstances of the case. For example, in *SZRSN v MIAC* the Federal Magistrates Court found that forced separation of an applicant from his children would not meet the high threshold of 'extreme humiliation' which is unreasonable.<sup>105</sup> Similarly, in *SZSFX v MIBP* the Federal Circuit Court considered that exposure to pollution does not of itself amount to 'degrading treatment' for the purposes of s.36(2)(aa) of the Migration Act.<sup>106</sup> That Court has also rejected that a fine and brief period of detention pending bail could amount to 'extreme humiliation'.<sup>107</sup>

The Complementary Protection Guidelines direct decision-makers to apply the principle of proportionality, in light of the specific circumstances of each case, when determining whether the treatment is unreasonable.<sup>108</sup> Those Guidelines describe degrading treatment as treatment

such as to arouse in the person subjected to it feelings of fear, anguish and inferiority capable of humiliating and debasing the person and possibly breaking their physical or moral resistance. Treatment may also be said to be degrading if it grossly humiliates a person in front of others or drives the person to act against their will or conscience.

Whether the treatment or punishment is performed in public or not may be a relevant factor in determining whether it causes extreme humiliation, although the failure to publicise particular treatment or punishment will not prevent it from being characterised as degrading.<sup>109</sup>

<sup>104</sup> Jurisprudence in other jurisdictions refers to 'gross humiliation' (see *Greek case*, European Commission on Human Rights, Application Nos 3321/67, 3322/67, 3323/67, 3344/67 (18 November 1969), 12 *Yearbook of the European Convention on Human Rights* 170, 186; *East African Asians v United Kingdom* (1973) 3 EHRR 76, [189], [195] cited in McAdam, *Complementary Protection in International Refugee Law*, above n 93 at 141-142) and has also characterised degrading treatment as occurring 'where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish, or inferiority capable of breaking an individual's moral and physical resistance': *Pretty v United Kingdom* (2002) 35 EHRR 1 at [52] cited in McAdam, 'Australian Complementary Protection', above n 49 at 705-706. Such descriptions may be useful for gauging the level of humiliation which could amount to 'extreme'.

<sup>105</sup> *SZRSN v MIAC* [2013] FMCA 78 (Driver FM, 1 March 2013) at [66] (upheld on appeal, but this aspect of the reasoning was not expressly considered: *SZRSN v MIAC* [2013] FCA 751 (Mansfield J, 6 August 2013)). In *SZRUT v MIAC* [2013] FCCA 368 (Judge Driver, 15 July 2013) at [26] the Court accepted that 'criticism' on its own could not amount to significant harm given the definition in s.5 and s.36(2A) of the Act (upheld on appeal, although the Court did not make any findings on that point: *SZRUT v MIBP* [2013] FCA 1276 (Rares J, 27 November 2013)).

<sup>106</sup> *SZSFX v MIBP* [2013] FCCA 1309 (Judge Driver, 18 October 2013). The Court stated that even if such a claim could be made it would have to be considered in context of the generalised risk qualification in s.36(2B)(c).

<sup>107</sup> *AGH15 v MIBP* [2015] FCCA 1797 (Judge Smith, 11 June 2015) at [56] (upheld on appeal, but this aspect of the reasoning was not considered: *AGH15 v MIBP* [2015] FCA 1181 (Perry J, 4 November 2015)).

<sup>108</sup> Department of Home Affairs, Complementary Protection Guidelines, section 25, as re-issued 21 May 2015.

<sup>109</sup> Department of Home Affairs, Complementary Protection Guidelines, section 25, as re-issued 21 May 2015.

### **Intention**

Like the definitions of torture and cruel or inhuman treatment or punishment, degrading treatment or punishment requires an element of intent – it must be an act or omission which causes and is *intended* to cause extreme humiliation which is unreasonable.<sup>110</sup> This is differently worded from the intent requirement in those other definitions but it involves similar considerations<sup>111</sup> – see the discussion of [‘Intentionally Inflicted’](#) under ‘Torture’ above.

### **Act or omission not inconsistent with Article 7**

As with the definition of cruel or inhuman treatment or punishment discussed above, the definition of degrading treatment or punishment does not include an act or omission that is not inconsistent with Article 7 of the ICCPR. As such, an act or omission which is of a level which would *not* breach Article 7 will not amount to degrading treatment or punishment, even if it satisfies other elements of the definition.

In considering whether humiliation inflicted in the context of law enforcement would point to degrading treatment or punishment, international jurisprudence has held that the level of humiliation must go beyond that ‘inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment’.<sup>112</sup> In any event, depending upon the circumstances such treatment may fall within the ‘lawful sanctions’ qualification.

### **Lawful sanctions**

Under the definitions in s.5(1), torture, cruel or inhuman treatment or punishment and degrading treatment or punishment do not include an act or omission ‘arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.’ As such, an act or omission that arises from, is inherent in or incidental to a lawful sanction, where that sanction itself does not breach the Articles of the ICCPR, will not amount to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment, even if it inflicts (severe) pain or suffering or extreme humiliation. The imposition of a lawful sanctions qualification appears to derive from Article 1 of CAT which states that ‘torture’ does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’.

The Complementary Protection Guidelines state that if a claimed lawful sanction meets the requisite level of severity necessary to constitute torture, cruel or inhuman treatment or punishment, or degrading treatment or punishment within the meaning of the Act, it will

<sup>110</sup> The intention element of degrading treatment or punishment was considered in *CVJ15 v MIBP* [2016] FCCA 2897 (Judge Smith, 7 November 2016), where the Court confirmed that actual intention to cause the relevant humiliation is required: at [22].

<sup>111</sup> See, for example *SZTAL v MIBP*; *SZTGM v MIBP* [2017] HCA 34 (Kiefel CJ, Gageler, Nettle, Gordon and Edelman JJ, 6 September 2017) at [26]-[29].

<sup>112</sup> *Labita v Italy*, European Court of Human Rights, Application No 26772/95 (6 April 2000) at [120].



necessarily be inconsistent with the ICCPR and that in such a case, there is no need for decision-makers to determine whether the sanction is lawful.<sup>113</sup> The Guidelines include examples of treatment pursuant to lawful sanctions which will or will not amount to torture, cruel or inhuman treatment or punishment or degrading treatment or punishment, particularly relating to imprisonment or prison conditions.<sup>114</sup> The Guidelines state that detention itself is not a breach of Article 7, although particularly harsh treatment in detention may be.<sup>115</sup> Prison conditions which seriously or systematically deprive a detainee of human dignity may constitute cruel, inhuman or degrading treatment or punishment.<sup>116</sup> Consistent with the approach advocated in the Guidelines to assessing whether harm meets the pain or suffering, or humiliation threshold in the s.5(1) definitions, the Guidelines state that assessment of whether lawful sanctions breach Article 7 is subjective and depends upon the particular characteristics of the victim.<sup>117</sup>

The discussion in the Guidelines of sanctions suggests that the consideration of whether a lawful sanction is inconsistent with the articles of the ICCPR requires consideration only of whether the sanction is consistent with Article 7 of the ICCPR.<sup>118</sup> However, this appears to impose a limit on the scope of the 'lawful sanctions' exception that is more narrow than the Act itself, which refers to inconsistency with the 'Articles of the ICCPR' (not only Article 7).

Whether a sanction is 'inconsistent with the Articles of the ICCPR' may be assessed by reference to the content of those Articles and international jurisprudence interpreting them.<sup>119</sup> A sanction may be inconsistent with the Articles of the ICCPR in different ways. It may be considered inconsistent if it breaches one of the rights or obligations imposed by the Articles, or if it is inconsistent with a prohibition or breaches an obligation aimed at providing certain protections in the imposition of lawful sanctions.<sup>120</sup>

The lawful sanctions qualification applies only to treatment which arises from, is inherent in or incidental to the sanction. In some cases, an applicant may claim that they are at risk of treatment which, while occurring during the course of the imposition of a lawful sanction, is not in fact inherent in or incidental to the sanction, such as mistreatment at the hands of

<sup>113</sup> Department of Home Affairs, Complementary Protection Guidelines, section 29, as re-issued 21 May 2015.

<sup>114</sup> Department of Home Affairs, Complementary Protection Guidelines, section 29, as re-issued 21 May 2015.

<sup>115</sup> Department of Home Affairs, Complementary Protection Guidelines, section 29, as re-issued 21 May 2015.

<sup>116</sup> Department of Home Affairs, Complementary Protection Guidelines, section 29, as re-issued 21 May 2015.

<sup>117</sup> Department of Home Affairs, Complementary Protection Guidelines, section 29, as re-issued 21 May 2015.

<sup>118</sup> Department of Home Affairs, Complementary Protection Guidelines, section 29, as re-issued 21 May 2015.

<sup>119</sup> For example, the UN Human Rights Committee has held that corporal punishment is a violation of Article 7 of the ICCPR: *Views, Communication No 759/1997*, 68<sup>th</sup> sess, UN Doc CCPR/C/68/D/759/1997 (13 April 2000) at [9.1] (*Osbourne v Jamaica*).

<sup>120</sup> Note that there is an exception in the ICCPR for times of public emergency which allows states to take measures which derogate from their obligations under the ICCPR to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, colour, sex, language, religion or social origin. However, that exception does not allow for derogation from Articles 6, 7, 8, 11, 15, 16, or 18 (Respectively, the right to life and prohibition on arbitrary deprivation of life; prohibition on torture, cruel, inhumane or degrading treatment or punishment; prohibition on slavery and servitude; prohibition on imprisonment on the basis to fulfil a contractual obligation; prohibition on retrospective criminal laws; right to recognition as a person before the law; right to freedom of thought, conscience and religion). Further, some rights are expressed as subject to certain limitations necessary to protect national security, public order, public health or morals or the rights and freedoms of others (e.g. Articles 12, 18, 19, 21, 22).

rogue prison officials. Whether or not an act or omission arises from, is inherent in or incidental to a sanction, and whether that sanction is 'lawful', will ultimately be a question of fact to be determined on the evidence.<sup>121</sup> This qualification appears to have been included as a safeguard and in practice may not require detailed consideration, as it is difficult to envisage treatment or punishment which meets the other requirements of the definitions yet is consistent with the Articles of the ICCPR.

### **Perpetrator of the harm**

The Act is silent as to whether significant harm for the purpose of ss.36(2)(aa) and 36(2A) necessarily involves a perpetrator, and if so, the identity of that perpetrator. While on one view this may leave open the possibility that harm inflicted by an applicant upon themselves (or otherwise suffered without a perpetrator) or harm stemming from the actual act of removal of the applicant from Australia could fall within the scope of s.36(2)(aa), it would appear from the words of s.36(2)(aa), s.36(2A) and s.5(1) that these provisions do not encompass harm of that nature.

### **Self harm or harm not resulting from actions of others**

The descriptions of the types of significant harm in s.36(2A) are passively worded, referring to the non-citizen being *arbitrarily deprived of his or her life*, the death penalty being *carried out on* the non-citizen, and harm that the non-citizen *will be subjected to*. The Federal Court has confirmed that the definition in s.36(2A) is framed in terms of harm suffered because of the acts of other persons. It does not encompass harm arising from mental illness or harm that a non-citizen would suffer as a result of any other illnesses arising on return to a receiving country.<sup>122</sup> For the same reasons it would not encompass self-harm.<sup>123</sup>

### **Harm caused by removing the applicant from Australia**

An applicant may claim that the very act of removal from Australia to a receiving country will result in harm. For example, the resulting separation from friends or family, or poorer living conditions, or lack of access to essential services.

<sup>121</sup> In *BPF15 v MIBP* [2018] FCA 964 (Beach J, 26 June 2018), the Court described as 'persuasive' an argument by the Minister that the harm the appellant faced while detained for up to several days on return to Sri Lanka as a result of departing illegally, could only be incidental to the lawful sanction being applied under a law of general application and would therefore not amount to significant harm. However, the Court declined to consider the argument, finding instead that this was a matter for the Tribunal to consider and determine: at [97]-[101] and [107].

<sup>122</sup> *CSV15 v MIBP* [2018] FCA 699 (Collier J, 21 May 2018) at [34]. See also *SZDCD v MIBP* [2019] FCA 326 (Gleeson J, 13 March 2019) where the Court held that deprivation of an appellant's access to medical treatment in Australia as a consequence of his removal to Bangladesh would not amount to him being arbitrarily deprived of his life under s.36(2A)(a): at [48].

<sup>123</sup> In *CSV15 v MIBP* [2018] FCA 699 (Collier J, 21 May 2018) the appellant claimed that she would commit suicide if she returned to India: see [17]. In this context it appears from the wording of the Court's reasoning at [34] that the definition of 'significant harm' would not encompass such harm. See also *EZC18 v MHA* [2019] FCCA 464 (Judge Brown, 1 March 2019) where the Court upheld the Tribunal's finding that suicide could not constitute the 'arbitrary deprivation of life' in s.36(2A)(a): at [73].

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).<sup>124</sup> The Court upheld the reasoning of the Federal Magistrate at first instance, which turned on the relationship between various aspects of the complementary protection provisions. Firstly, the Court had regard to the reference in s.36(2)(aa) to Australia’s ‘protection obligations’ as referring to the obligation to afford protection to a non-citizen where the harm faced arises in the receiving country, rather than in the State where protection is sought.<sup>125</sup> Secondly, the Court reasoned that the qualifications in s.36(2B) (discussed below) expressly refer to harm ‘in a country’ which is necessarily the receiving country if the circumstances of ss.36(2B)(a) (relocation) and 36(2B)(b) (protection from an authority) are to have any application.<sup>126</sup>

Further, the Court noted the circularity in the operation of s.36(2)(aa) if the harm arose from the act of removal itself. Section 36(2)(aa) requires that the real risk of significant harm must arise ‘as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country’. The Court stated that the fact that the significant harm must be a consequence of the removal strongly suggests that the removal itself cannot be the significant harm.<sup>127</sup>

Lastly, the Court in *SZRSN v MIAC* had regard to the ‘intention’ requirements in the s.5(1) definition of degrading treatment or punishment. The Court reasoned that separation from family (in that case, children) is the consequence of removal, and a consequence cannot be said to have an ‘intention’, so the act of removal itself cannot be said to be perpetrated by the State with the intention to cause extreme humiliation that is unreasonable.<sup>128</sup>

Although the Court in *SZRSN* was largely focusing on degrading treatment or punishment, by implication its reasoning is equally applicable to the other types of significant harm in s.36(2A).<sup>129</sup> As such, it appears that although the *risk* of significant harm envisaged by

<sup>124</sup> *SZRSN v MIAC* [2013] FCA 751 (Mansfield J, 6 August 2013) at [48]-[49], upholding the reasoning at first instance *SZRSN v MIAC* [2013] FMCA 78 (Driver FM, 1 March 2013) at [61]-[65]. Similarly, in *WZARI v MIMAC* [2013] FCA 788 (Siopis J, 9 August 2013) at [31]-[32] the Court upheld the Tribunal finding that the applicant would not face ‘degrading treatment’ for the stress and pain of being separated from his family if he were returned to Fiji (special leave to appeal dismissed: *WZARI v MIAC* [2013] HCASL 201 (Kiefel and Keane JJ, 13 December 2013)). In *SZSNX v MIBP* [2015] FCCA 2271 (Judge Driver, 30 September 2015) at [70]-[72], the Court applied *SZRSN v MIAC* [2013] FCA 751 in different factual circumstances, upholding the Tribunal’s findings that any psychological suffering the applicant may experience in being removed from Australia would not be intentionally inflicted or intended to subject him to further harm.

<sup>125</sup> *SZRSN v MIAC* [2013] FCA 751 (Mansfield J, 6 August 2013) at [48] and *SZRSN v MIAC* [2013] FMCA 78 (Driver FM, 1 March 2013) at [61]-[62].

<sup>126</sup> *SZRSN v MIAC* [2013] FCA 751 (Mansfield J, 6 August 2013) at [48] and *SZRSN v MIAC* [2013] FMCA 78 (Driver FM, 1 March 2013) at [63].

<sup>127</sup> *SZRSN v MIAC* [2013] FCA 751 (Mansfield J, 6 August 2013) at [48] and *SZRSN v MIAC* [2013] FMCA 78 (Driver FM, 1 March 2013) at [64]. The Federal Court also noted that being separated from one’s children is not an ‘act or omission’ as required by the relevant definitions of significant harm, but a consequence of an act. The relevant act is the act of removal from Australia: *SZRSN v MIAC* [2013] FCA 751 (Mansfield J, 6 August 2013) at [47].

<sup>128</sup> *SZRSN v MIAC* [2013] FCA 751 (Mansfield J, 6 August 2013) at [48] and *SZRSN v MIAC* [2013] FMCA 78 (Driver FM, 1 March 2013) at [65].

<sup>129</sup> Those aspects of the Court’s reasoning in *SZRSN v MIAC* [2013] FCA 751 (Mansfield J, 6 August 2013) which turn on the definition of ‘degrading treatment or punishment’ in s.5(1) of the Act would appear equally applicable to the definitions of ‘torture’ and ‘cruel or inhuman treatment or punishment’ which each require an ‘act or omission’ by which pain or suffering is intentionally inflicted. Although the other types of significant harm (the death penalty and arbitrary deprivation of life) are

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.<sup>130</sup>

### CIRCUMSTANCES IN WHICH THERE IS TAKEN NOT TO BE A REAL RISK

Section 36(2B) qualifies s.36(2)(aa) by setting out three circumstances in which there is taken *not* to be a real risk that a non-citizen will suffer significant harm in a country. In order to find that an applicant meets s.36(2)(aa), decision-makers will need to be satisfied that none of these circumstances exist.

The circumstances are:

- where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm;
- where the applicant could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or
- the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

The inquiry under s.36(2B) is into the particular circumstances that appertain to the applicant, and should be considered together with the assessment of ‘real risk’ in s.36(2)(aa).<sup>131</sup>

The qualifications as to relocation and protection from an authority, and to a degree, personal risk, are broadly similar to issues which arise for consideration under Article 1 of the Refugees Convention. Although s.36(2B) is not expressed to apply only to consideration under s.36(2)(aa), the reference to ‘real risk’ and ‘significant harm’ in effect confines its operation to that criterion. Despite the similarity of some of the concepts in those qualifications to those relevant to the Refugees Convention, s.36(2B) does not mimic the tests as they have been developed in that context, and is subject to different interpretation. The s.36(2B) qualifications are discussed in turn below.

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not further defined and do not expressly require an ‘act or omission’ or element of intention, the other aspects of the Court’s reasoning would be applicable to those types of harm. Further, it is unlikely that s.36(2)(aa) was intended to operate differently in respect of the various types of harm.

<sup>130</sup> SZRSN was distinguished on its facts in *MZAEN v MIBP* [2016] FCCA 620 (Judge Riley, 24 March 2016), where a mother and her child claimed they would suffer significant harm as a result of being separated from one another in different receiving countries. The Federal Circuit Court commented in *obiter* that it may not be entirely correct that the consequences of the removal cannot be significant harm, given that the focus of s.36(2)(aa) is on the necessary and foreseeable consequences of the removal: at [49]-[50]. This aspect of *MZAEN* was followed in *AUB16 v MIBP* [2017] FCCA 2634 (Judge Riethmuller, 31 October 2017), a case involving a family unit consisting of two Malaysian citizens and two Nigerian citizens. However, neither judgment considered this issue in detail, nor the intention element of the definitions of ‘significant harm’. This question was considered in detail by the Tribunal in *1605592 (Refugee)* [2017] AATA 914 (Deputy President Redfern and Member Caravella, 8 May 2017), with the Tribunal ultimately preferring the approach of *SZRSN*: at [154]-[155]. The Tribunal’s decision was upheld on appeal in *COH17 v MIBP* [2018] FCCA 1656 (Judge Smith, 1 May 2018), with the Court following *SZRSN* and disapproving of Judge Riley’s comments in *MZAEN*: see [17]-[20].

## Relocation

The first qualification under s.36(2B) is that there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that ‘it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm’: s.36(2B)(a).

The test in s.36(2B)(a) broadly reflects the relocation test in the Refugees Convention context – that is, that depending on the circumstances of the particular case, it may be reasonable for an applicant to relocate in their country to a region where, objectively, there is no appreciable risk of the occurrence of the feared harm.<sup>132</sup> There is an existing body of Australian case law on the principles which apply when considering relocation in that context. The Federal Court has confirmed that the issues which arise when considering the reasonableness of relocation in the refugee context are the same which arise in the complementary protection context.<sup>133</sup> Federal Circuit Court authority suggests that where those issues have already been considered in relation to the refugee criterion (as in effect prior to 16 December 2014<sup>134</sup>), it may be open to the tribunal to refer to those earlier findings when addressing the complementary protection criterion.<sup>135</sup>

The first question which arises in assessing relocation is whether there is an area of the country where, objectively, there would not be a real risk that the applicant will suffer significant harm, that is, whether the real risk of harm is localised rather than nation-wide.<sup>136</sup> If satisfied that the risk of harm is localised, it then becomes relevant to consider whether it

<sup>131</sup> In *MIAC v MZYLL* (2012) 207 FCR 211 at [36] the Court stated that the section must be read as a whole, and that the enquiry provided for in s.36(2)(aa) necessarily involves consideration of the matters referred to in s.36(2B).

<sup>132</sup> *SZATV v MIAC* (2007) 233 CLR 18; *SZFDV v MIAC* (2007) 233 CLR 51.

<sup>133</sup> *AHK16 v MIBP* [2018] FCAFC 106 (Mortimer, Moshinsky and Thawley JJ, 6 July 2018) at [53]; *MZYXS v MIAC* [2013] FCA 614 (Marshall J, 21 June 2013) at [37], followed in *MZZAD v MIMAC* [2013] FCA 879 (Dodds-Streton J, 30 August 2013) at [65]-[66].

<sup>134</sup> Whereas reasonableness of relocation may arise as an issue in pre 16 December 2014 applications, for applications made on or after that date, the applicable definitions of ‘refugee’ and ‘well-founded fear of persecution’ require that the real chance of harm relate to all areas of the receiving country, and so do not require consideration of whether relocation to an area would be reasonable: ss.5H and 5J(1)(c).

<sup>135</sup> *SZSRD v MIBP* [3] FCCA 1714 (Judge Barnes, 25 October 2013) [87]-[88]. In *SZSQH v MIMAC* [2013] FCCA 817 (Judge Driver, 15 July 2013) the Court noted at [13] that effectively the Tribunal needed to make two relocation findings as the obligation to consider complementary protection was only enlivened if the applicant was found not to meet the refugee criterion (an application for leave to appeal this judgment was dismissed: *SZSQH v MIBP* [2013] FCA 1195 (Tracey J, 8 November 2013)). However, in *SZSRD*, the Court confirmed that in circumstances where the Tribunal had already held that it was unlikely the applicant would suffer harm of any kind if he relocated, and that he could reasonably be expected to relocate to having regard to the extensive consideration of his particular circumstances, it was not necessary for the Tribunal to repeat its findings when it came to consideration of relocation for the purposes of the complementary protection claims. In *APS16 v MIBP* [2016] FCA 1422 (Bromwich, J, 29 November 2016), the Tribunal relied on its relocation reasoning on the refugee criterion in addressing relocation under the complementary protection criterion. The Court found no error, stating that there was no relevant difference between relocation to avoid Refugees Convention harm or relocation to avoid the harm sought to be addressed by the complementary protection criterion: at [31]; application for special leave to appeal refused: *APS16 v MIBP* [2017] HCASL 36 (Nettle and Gordon JJ, 2 March 2017).

<sup>136</sup> In *MZYXS v MIAC* [2013] FCA 614 (Marshall J, 21 June 2013) at [37] the Federal Court confirmed that decision-makers are required to consider whether the applicant will suffer significant harm in the area of relocation. Note that the issue of relocation arises when an applicant is determined to have a real risk of significant harm in that part of their country *where they resided*, and might reasonably be expected to relocate to a different area. It may be inappropriate to use the term ‘relocate’ in circumstances where an applicant fears harm in an area in which they used to live, but not in the area to which they have since moved, and in which, at the time of departure from their country, they resided. See, e.g., *Durairajasingham v MIEA* (1997) 50 ALD 469 at 479; *Nouredine v MIMA* (1999) 91 FCR 138 at [14]; *Sabarathasingam v MIMA* [2000] FCA 261 (Whitlam, Lehane and Gyles JJ, 10 March 2000) at [13]; *SZQEN v MIAC* (2012) 202 FCR 514 at [38].

would be reasonable to expect the applicant to relocate to another area where there is not a real risk of significant harm (whether the harm initially feared, or another type of significant harm),<sup>137</sup> including risks of generalised violence.<sup>138</sup>

What is reasonable, in the sense of practicable, must depend upon the particular circumstances of the applicant and the impact upon that person of relocating within their country.<sup>139</sup> The range of factors that may be relevant in any particular case to the question of whether relocation is reasonably available will be largely determined by the case sought to be made out by an applicant and the material before the decision-maker.<sup>140</sup> The consideration does not require a comparison of hardships between an applicant's home area and the proposed area of relocation.<sup>141</sup> The question that arises under s.36(2B)(a) is whether it is reasonable for the *particular protection visa applicant* to relocate.<sup>142</sup>

The principles relevant to the 'relocation' test are discussed in detail in Chapter 6 of this Guide.

### Protection from an authority

Under s.36(2B), there is taken not to be a real risk of significant harm if the non-citizen 'could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm': s.36(2B)(b).

Section 36(2B)(b) refers to an applicant obtaining, from an authority of the country, protection *such that there would not be a real risk* that the applicant would suffer significant

<sup>137</sup> See *MZYXS v MIAC* [2013] FCA 614 (Marshall J, 21 June 2013) at [39] where the Court confirmed that it was appropriate for the Tribunal to draw guidance from the High Court judgments of *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51 when considering reasonableness of relocation. If consideration is given to whether there is protection of an authority available in the area of proposed relocation, the relevant standard of protection for the purpose of ss.36(2)(aa) and 36(2B)(a) would be that in s.36(2B)(b) (protection such that there is not a real risk of harm) rather than the 'adequate protection' standard which applies under the refugee criterion.

<sup>138</sup> In *SZSSM v MIBP* [2013] FCCA 1489 (Judge Driver, 11 November 2013) at [98] and [100]-[104] the Court found error on the basis that the Tribunal had focused on the applicant's Convention attributes when considering the risk of significant harm on relocation, rather than whether there was a risk of harm as a result of generalised violence, even if that violence was sectarian in nature. The Court further stated the Tribunal could not avoid consideration of s.36(2B)(c) in addressing the generalised violence claim.

<sup>139</sup> *SZATV v MIAC* (2007) 233 CLR 18 at [24]. Note however that in the context of the Refugees Convention, there is authority that the Refugees Convention is concerned with persecution, not human rights more generally and that reasonableness should not be judged by reference to human rights norms (see *SZFDV v MIAC* (2007) 233 CLR 51 at [33] per Kirby J; *SZATV v MIAC* (2007) 233 CLR 18 at [72] per Gummow, Hayne and Crennan JJ; *Januzi v SSHD* [2006] 2 AC 426 at 457 per Lord Hope of Craighead, as quoted in *SZATV v MIAC* (2007) 233 CLR 18 at [25]. This limitation on reference to human rights standards may not sit easily with relocation in the context of s.36(2B)(a), given the express references in the Explanatory Memorandum (e.g. at 1) to obligations under the ICCPR, which is directed at human rights more widely, although unlike s.36(2)(a), s.36(2)(aa) and related provisions do not incorporate international obligations arising from the ICCPR.

<sup>140</sup> *Randhawa v MILGEA* (1994) 52 FCR 437 per Black CJ at 443; per Whitlam J at 453 and, applying this to s.36(2B)(a), *AZAEH v MIBP* [2015] FCA 414 (Kenny J, 6 May 2015) at [21]. See Chapter 6 of this Guide of further discussions and examples in relation to factors found to be relevant to the consideration of relocation.

<sup>141</sup> *MIBP v MZZEV* [2014] FCCA 22 (Judge Burchardt, 23 January 2014) at [61]-[63] and *MIBP v MZZGD* [2014] FCCA 60 (Judge Burchardt, 23 January 2014) at [32]-[33], [42].

<sup>142</sup> *AZAEH v MIBP* [2015] FCA 414 (Kenny J, 6 May 2015), where the Court held that to require that consideration of the best interests of children who are not applicants for protection is to focus on the wrong person. However, the Court observed in *obiter* that that is not to say that the circumstances of dependent children who are not applicants need necessarily be left out or treated as secondary – the extent to which such matters require consideration would depend upon the case made by the applicant: at [30], [34].



harm. In *MIAC v MZYLL* the Full Federal Court held that, to satisfy s.36(2B)(b), the level of protection offered by the receiving country must reduce the risk of significant harm to something less than a real one.<sup>143</sup> In that sense, there is some overlap between this qualification and the assessment of ‘real risk’ under s.36(2)(aa), which necessarily involves consideration of a range of matters, including the availability of protection from the authorities.<sup>144</sup>

The Complementary Protection Guidelines state that an authority can be the State, including its government and related forces or it can be a rebel or military force in power.<sup>145</sup> However, the text of s.36(2B)(b), which refers to ‘an authority of the country’, appears to require that the protection be provided by an authority of the State. As such, protection from a body or person *other than* an authority of the country would not be sufficient to engage the qualification, but would be relevant to the assessment of whether there is a real risk for the purpose of s.36(2)(aa).

Although the qualification in s.36(2B)(b) bears some similarity to the consideration of ‘state protection’ for the purpose of determining whether an applicant’s fear of persecution is well-founded in the refugee sense, it is to be contrasted with that test. The test in s.36(2B)(b) is differently expressed to the state protection test as understood in Australian refugee law, where the relevant standard is an adequate or effective, rather than perfect, level of protection.<sup>146</sup> In emphasising that the express terms of s.36(2B)(b) require the Minister to be satisfied that the protection available would remove the real risk of significant harm, the Court in *MZYLL* expressly rejected that s.36(2B)(b) requires only that the receiving country have an effective legal system for detection, prosecution and punishment, or a system that meets ‘international standards’.<sup>147</sup>

Given the different standard implied by the language in s.36(2B)(b), judicial authority on the state protection test in the refugee context will not be directly applicable to assessment of the level of protection from an authority required by s.36(2B)(b).

<sup>143</sup> *MIAC v MZYLL* (2012) 207 FCR 211 at [40]. In that case, the Minister had appealed against a decision of the Tribunal which had found that the applicant could not obtain from an authority of the receiving country protection such that there would not be a real risk that he would suffer significant harm if returned to that country. The Court, upholding the Tribunal’s decision, rejected the Minister’s argument that the level of protection required by s.36(2B)(b) was that of ‘reasonable’ protection and that the Tribunal had erred in holding that a higher standard was required than that under s.36(2)(a) of the Act.

<sup>144</sup> In *MIAC v MZYLL* (2012) 207 FCR 211 the Court stated at [36] that the section must be read as a whole, and that the enquiry provided for in s.36(2)(aa) necessarily involves consideration of the matters referred to in s.36(2B).

<sup>145</sup> Department of Home Affairs, Complementary Protection Guidelines, section 38, as re-issued 21 May 2015.

<sup>146</sup> Under the Convention, the standard is an adequate or reasonable standard, rather than a perfect one, which standard does not require the state to guarantee the safety of its citizens from harm caused by non-state agents: *MIMA v Respondents S152/2003* (2004) 222 CLR 1 at [26] and [117]. Similarly, for the codified definition in s.5H, s.5J(2) requires an ‘effective’ (as defined in s.5LA) level of protection, rather than a guarantee. See Chapter 8 of this Guide for further discussion.

<sup>147</sup> *MIAC v MZYLL* (2012) 207 FCR 211 at [36]-[37].

## A risk faced by the population generally

The final qualification in s.36(2B) is that there is taken not to be a real risk that an applicant will suffer significant harm in a country if ‘the real risk is one faced by the population generally and is not faced by the applicant personally’: s.36(2B)(c). The language of the qualification and its meaning is not explained in the Explanatory Memorandum to the Bill that introduced the provision, nor in the associated Second Reading Speech.<sup>148</sup> However it has been the subject of some judicial consideration.

The Federal Court has held that the natural and ordinary meaning of s.36(2B)(c) requires the decision-maker to determine whether the risk is faced by the population of a country generally as opposed to the individual claiming complementary protection based on his or her individual exposure to that risk.<sup>149</sup> In *SZSPT v MIBP* the Court held that, while every citizen who broke a law of general application would necessarily face a risk of punishment personally, s.36(2B)(c) applied because it was no different from the risk faced by the population generally.<sup>150</sup> The Court’s reasoning suggests that the ‘faced personally’ element of this qualification requires the individual to face a risk of differential treatment, or because of characteristics that distinguish them from the general populace.<sup>151</sup> This approach has also been taken in relation to the risk of harm from inadequate medical treatment.<sup>152</sup> Similarly, it has been held that a risk faced ‘personally’ is one that is particular to the individual and is not attributable to his or her membership of the population of the country, or shared by that population group in general.<sup>153</sup> In *BBK15 v MIBP* the Federal Court held that the ‘population of the country generally’ refers to the commonly understood concept of the

<sup>148</sup> The qualification is not explained in the Explanatory Memorandum, although the Explanatory Memorandum does comment (at [67]) in relation to the test in s.36(2)(aa) that ‘[t]he danger of harm must be personal and present’. The Second Reading Speech to the Migration Amendment (Complementary Protection) Bill 2011 states ‘[a] personal or direct risk can be found in instances where the significant harm is faced by a broad group, so long as that harm is personally faced by the person seeking protection’: Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 24 February 2011, 1357 (Chris Bowen, Minister for Immigration and Citizenship).

<sup>149</sup> *SZSPT v MIBP* [2014] FCA 1245 (Rares J, 3 November 2014) at [11]-[13]. An application for special leave to appeal this aspect of the judgment was dismissed by the High Court: *SZSPT v MIBP* [2015] HCA 114 (Kiefel J, 18 June 2015). See also comments of the court to similar effect in: the judgment at first instance in *SZSPT v MIBP* [2014] FCCA 1388 (Judge Raphael, 1 July 2014) at [15] (the provision would apply in a situation of ‘universal danger’, but not where the situation was ‘worse for a person of [a particular] ethnicity’); *SZSFF v MIBP* [2013] FCCA 1884 (Judge Lloyd-Jones, 22 November 2013) at [33], [49] (risk must be ‘faced by the individual personally in light of the individual’s specific circumstances’); *SZTES v MIBP* [2014] FCCA 1765 (Judge Cameron, 12 August 2014) at [24] (risk must be ‘particular to’ the individual); *SZSRY v MIBP* [2013] FCCA 1284 (Judge Driver, 13 December 2013) at [43] (risk must be faced ‘in light of [the applicant’s] specific circumstances’).

<sup>150</sup> *SZSPT v MIBP* [2014] FCA 1245 (Rares J, 3 November 2014). In this regard, the Court observed that there was no differential treatment as the law was one of general application and was not applied in a discriminatory manner: at [12]-[14].

<sup>151</sup> *SZSPT v MIBP* [2014] FCA 1245 (Rares J, 3 November 2014) at [11]-[15]. Contrast *SZSFF v MIBP* [2013] FCCA 1884 (Judge Lloyd-Jones, 22 November 2013), where the Court endorsed a submission by the Minister to the effect that where serious human rights violations in a particular country are so widespread or so severe that almost anyone would potentially be affected by them, this may disclose a sufficiently real and personal risk: at [34], [49]; however, these *obiter* comments should not be followed as they are inconsistent with other authorities including the appellate level judgment in *SZSPT v MIBP* [2014] FCA 1245 (Rares J, 3 November 2014). Nonetheless, in *CLJ15 v MIBP* [2018] FCA 1638 (Kenny J, 31 October 2018) the Court held that the Tribunal did not commit a jurisdictional error by incorrectly adopting the more generous approach endorsed in *SZSFF* as opposed to that in *SZSPT*: at [50]-[51].

<sup>152</sup> *MZAAJ v MIBP* [2015] FCA 478 (Pagone J, 18 May 2015) at [6] where the Court endorsed the Tribunal’s finding that the risk of harm was a risk faced by all Sri Lankans.

<sup>153</sup> *SZTES v MIBP* [2014] FCCA 1765 (Judge Cameron, 12 August 2014) at [23]-[24], citing *SZSRY v MIBP* [2013] FCCA 1284 (Judge Driver, 13 December 2013). In *SZTES v MIBP*, the Court found there was no error in the Tribunal’s finding that harm from insurgent attacks in Kabul was faced by the population generally and not by the applicant personally. An application for leave to appeal from the judgment was dismissed by the Federal Court: *SZTES v MIBP* [2015] FCA 719

general population, such that there is no requirement that the risk be faced by all members or every citizen of a country's population for s.36(2B)(c) to apply.<sup>154</sup> These cases make it apparent that where a real risk is faced by an individual applicant, but is the same as the risk faced by the general population, s.36(2B)(c) applies. There is some tension between the approach in the above cases and that in the Complementary Protection Guidelines, which state that while a particular individual must face a real risk in light of their specific circumstances, it is not necessary to show that the individual would be 'singled out' or targeted.<sup>155</sup>

Section 36(2B)(c) requires a decision-maker to determine whether the risk faced by an applicant is a risk faced by the population of the *country* generally, not to the population in a particular area of the country such as a particular city or province. In *BCX16 v MIBP*, the Federal Court held that a risk to which a person is exposed by virtue of their residence in a specific area of the country is a risk faced by that person personally, notwithstanding that other persons residing in the same area are exposed to the same degree of risk.<sup>156</sup> This principle is particularly relevant for decision-makers to bear in mind when considering claims of generalised non-targeted violence by virtue of residence in a particular area or region of a receiving country.

## PROTECTION OF A THIRD COUNTRY

Both s.36(2)(a) and s.36(2)(aa) refer to persons in respect of whom Australia has protection obligations. Section 36(3) of the Act qualifies these criteria, by providing that Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national. Before finding that an applicant is a person in respect of whom Australia has protection obligations under one of the criteria in s.36(2), a decision-maker must be satisfied that s.36(3) does not apply to that applicant.

Sections 36(4), (5) and (5A) limit the operation of s.36(3) by providing for circumstances in which s.36(3) does not apply. Broadly, these are where the applicant has either a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, or where there are substantial grounds for

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(Wigney J, 17 July 2015).

<sup>154</sup> *BBK15 v MIBP* [2016] FCA 680 (Buchanan J, 8 June 2016) at [32].

<sup>155</sup> Department of Home Affairs, Complementary Protection Guidelines, section 39, as re-issued 21 May 2015.

<sup>156</sup> *BCX16 v MIBP* [2019] 465 (Charlesworth J, 5 April 2019) at [37]-[38]. The Court held that the Tribunal erred by comparing the risk faced by the appellant with the risk faced by other citizens of Kabul and concluding that any risk of serious harm was not faced by the appellant personally because it was one faced by other people residing there. The Court's interpretation of s.36(2B)(c) was based on analysis of the interrelationship between (c) and the relocation exclusion in s.36(2B)(a): see [37]-[41]. See also *BXY15 v MIBP* [2018] FCCA 2896 (Judge Barnes, 16 October 2018) at [110].

believing that there would be a real risk of significant harm to the applicant, either in respect of the country to which the applicant has a right to enter or reside, or in respect of another country, where the applicant has a well-founded fear of being returned to that other country by the first country.

The issues which arise in relation to consideration of s.36(3) to (5A) are discussed in detail in Chapter 9 of this Guide.

## **INELIGIBILITY FOR GRANT OF A PROTECTION VISA**

Section 36(2C) of the Act sets out five circumstances in which an applicant will be taken not to satisfy the complementary protection criterion in s.36(2)(aa). These relate to the commission of serious crimes by the non-citizen before entering Australia. For visa applications made on or after 16 December 2014, s.36(1C), which is expressed in near identical terms to s.36(2C)(b), will also prevent the grant of a protection visa.

### **Crimes against peace, war crimes, crimes against humanity, serious non-political crimes and acts contrary to the purposes and principles of the UN**

Section 36(2C)(a) provides that a person will be taken not to satisfy the complementary protection criterion if:

- the Minister has serious reasons for considering that the applicant has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations (s.36(2C)(a)(i));
- the Minister has serious reasons for considering that the applicant has committed a serious non-political crime before entering Australia (s.36(2C)(a)(ii)); or
- the Minister has serious reasons for considering that the applicant has been guilty of acts contrary to the purposes and principles of the United Nations (s.36(2C)(a)(iii));

For the purposes of s.36(2C)(a)(i), each international instrument that defines a crime against peace, a war crime, and a crime against humanity is prescribed by r.2.03B of the Migration Regulations 1994. The regulation provides a non-exhaustive list of instruments as examples.<sup>157</sup>

<sup>157</sup> These are: *Rome Statute of the International Criminal Court*, done at Rome on 17 July 1998; the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, signed at London on 8 August 1945; the *Charter of the International Military Tribunal*, signed at London on 8 August 1945; the *Convention on the Prevention and Punishment of the Crime of Genocide*, approved in New York on 9 December 1948; *The First Convention within the meaning of the Geneva Conventions Act 1957*; *The Second Convention within the meaning of the Geneva Conventions Act 1957*; *The Third Convention within the meaning of the Geneva Conventions Act 1957*; *The Fourth Convention within the meaning of the Geneva Conventions Act 1957*; *The Protocol I within the meaning of the Geneva Conventions Act 1957*; the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), done at Geneva on 8 June 1977; the *Statute of the International Criminal Tribunal for the former Yugoslavia*, adopted by the United Nations Security Council on 25 May 1993; and the *Statute of the*

The exclusions contained in s.36(2C)(a) mirror those under Article 1F of the Refugees Convention which form a part of the Minister's consideration as to whether the non-citizen is a person in respect of whom Australia has protection obligations under the Refugees Convention - that is, a refugee – for the purposes of s.36(2)(a) as in force prior to 16 December 2014. These provisions are intended to provide the same exclusion to the complementary protection regime as applies to those claiming protection under the Refugees Convention.<sup>158</sup> This is reflected in the language adopted in s.36(2C)(a) which is almost identical to that in Article 1F of the Refugees Convention. Similar wording is contained in the s.5H(2) exclusion criteria which forms part of the codified definition of 'refugee' in s.5H. As such, the same considerations should be applied when determining whether a person is ineligible for a protection visa under s.36(2C)(a), as when determining whether Article 1F or s.5H(2) operates in respect of a person.

It should be noted that despite the parallels between s.36(2C)(a) and Article 1F and s.5H(2), there is a point of distinction. While Article 1F and s.5H(2) are part of the respective definitions of 'refugee' and therefore inform whether a non-citizen is a person in respect of whom Australia has protection obligation under the Refugees Convention, s.36(2C) does not purport to remove Australia's *non-refoulement* obligations that may apply to persons meeting the complementary protection criterion in s.36(2)(aa). That is, the *non-refoulement* obligations under the CAT and ICCPR are such that those persons who would otherwise meet the complementary protection criterion but are found to be not eligible for a protection visa by the operation of these additional exclusion criteria would not be removed from Australia to the country of reference while the real risk of suffering significant harm continues. In such cases, the person would be managed towards case resolution.<sup>159</sup>

For a detailed discussion on the concepts of 'serious reasons for considering', 'war crimes', 'crimes against peace', 'crimes against humanity' 'serious non-political crimes' and 'acts contrary to the purposes and principles of the UN, see Chapter 7 of this Guide.

### **Danger to the Australian community**

Under s.36(2C)(b), a non-citizen is taken not to satisfy the complementary protection criterion in s.36(2)(aa) if the Minister considers, on reasonable grounds, that the non-citizen:

- is a danger to Australia's security; or

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*International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994*, adopted by the United Nations Security Council on 8 November 1994.

<sup>158</sup> Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [87]-[88].

<sup>159</sup> Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [89]-[90].

- is a danger to the Australian community, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence).

As with s.36(2C)(a), these provisions are designed to provide parallel exclusions to those under the Refugees Convention.<sup>160</sup> The terms of s.36(2C)(b) are reflective of Article 33(2) of the Refugees Convention, which indicates that similar considerations are to apply in its interpretation.<sup>161</sup> For further discussion on Article 33, see Chapter 7 of this Guide.

Note that despite the parallels with Article 33, s.36(2C)(b) operates somewhat differently. Article 33 applies to a person who has been recognised as a refugee. It does not form part of the consideration of whether a non-citizen is a refugee and therefore a person in respect of whom Australia has protection obligations for the purposes of s.36(2)(a).<sup>162</sup> Section 36(2C)(b) in contrast, inserts consideration of Article 33 type issues into the actual assessment of whether an applicant is a person in respect of whom Australia has protection obligations, and to this extent, can be seen as a requirement additional to that associated with the refugee criterion.

For protection visa applications made on or after 16 December 2014, s.36(1C) excludes an applicant from the grant of a protection visa on security grounds expressed in similar terms to s.36(2C)(b), regardless of whether they meet the complementary protection criterion or refugee criterion.<sup>163</sup> Although s.36(1C) will operate to prevent the grant of a visa to applicants who meet the refugee criterion but pose a risk to Australia's security, it appears somewhat unnecessary in the context of complementary protection, given that such applicants are unable to meet s.36(2)(aa) by operation of s.36(2C)(b).

Limitations on the Migration and Refugee Division of the AAT's jurisdiction in relation to these provisions are discussed at Chapter 12 of this Guide.

<sup>160</sup> Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011 at [88].

<sup>161</sup> However, while both Article 33(2) and s.36(2C)(b) impose a standard of 'reasonable grounds' for believing that the circumstances outlined in those provisions exist, the Federal Court has suggested in *obiter* that the reference to 'reasonable grounds' in Article 33(2) may refer only to the first circumstance it sets out (a refugee who is a danger to the security of the country in which he is) and not to the second circumstance (having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country): *SZOQQ v MIAC* (2012) 200 FCR 174 per Jagot and Barker JJ at [49], Flick J at [11] (although the High Court subsequently held that those proceedings had miscarried, the Court's reasoning was left undisturbed: *SZOQQ v MIAC* (2013) 259 CLR 577). In contrast, the structure of s.36(2C)(b) appears to require that there be 'reasonable grounds' for considering that either of these circumstances exist. Thus, a different threshold may apply to each of the two tests.

<sup>162</sup> The expression 'a person to whom Australia has protection obligations' in s.36(2)(a) means no more than a person who is a refugee under Article 1 of the Convention and does not call for consideration of Article 33 or s.91U (which elaborates on the concept of 'particularly serious crime' in Article 33(2)): *SZOQQ v MIAC* (2013) 259 CLR 577 per Keane J at [30]-[31], French CJ, Hayne, Crennan, Kiefel, Bell and Gageler JJ agreeing. The Court unanimously rejected the Minister's argument that s.91U somehow changes the operation of s.36(2)(a).

<sup>163</sup> Section 36(1C) was inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Caseload Legacy) Act 2014* (SLI 2014, No. 135).