FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Border Protection v SZSWB [2014] FCAFC 106

Citation:	Minister for Immigration and Border Protection v SZSWB [2014] FCAFC 106
Appeal from:	SZSWB v Minister for Immigration [2014] FCCA 765
Parties:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION v SZSWB and REFUGEE REVIEW TRIBUNAL**
File number:	NSD 519 of 2014
Judges:	**GORDON, ROBERTSON AND GRIFFITHS JJ**
Date of judgment:	22 August 2014
Catchwords:	**MIGRATION** – Refugees – Protection visas – Complementary protection – Fear of persecution based on past harm – Whether Refugee Review Tribunal failed to address claim – Whether claim clearly emerges from material – *Migration Act 1958* (Cth) s 36(2)(aa)
Legislation:	*Migration Act 1958* (Cth) s 36
Cases cited:	*Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211 *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441
Date of hearing:	7 August 2014
Date of last submissions:	7 August 2014
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	45

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IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 519 of 2014**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN:	**MINISTER FOR IMMIGRATION AND BORDER PROTECTION** **Appellant**
AND:	**SZSWB** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**

JUDGES:	**GORDON, ROBERTSON AND GRIFFITHS JJ**
DATE OF ORDER:	**22 AUGUST 2014**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders of the Federal Circuit Court made on 5 May 2014 be set aside and, in their place, order that the application to that Court be dismissed with costs.

3. The First Respondent pay the Appellant's costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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DATE:	**22 AUGUST 2014**
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REASONS FOR JUDGMENT

THE COURT

INTRODUCTION

1 This appeal is from the judgment of the Federal Circuit Court given on 5 May 2014 allowing an application for judicial review of a decision of the Refugee Review Tribunal (the **Tribunal**). The decision of the Tribunal dated 19 April 2013 was to affirm the decision not to grant the First Respondent (the **visa applicant**) a Protection (Class XA) visa.

2 The visa applicant is from Iran. His claims were based on two key incidents. One allegedly involved his being targeted by a rival cigarette seller in Iran and the other allegedly involved a speech that the visa applicant made at a mosque in Iran. Further, according to the Tribunal, the visa applicant also claimed he would be targeted on the basis that he had sought asylum in the West and because he does not practice the Islamic religion. As will appear, it is necessary only to consider the first of these claims.

3 There is both a notice of appeal by the Minister for Immigration and Border Protection (the **Minister**) and a notice of contention on the part of the visa applicant. Each centres on s 36(2)(aa) of the *Migration Act 1958* (Cth) (the **Act**), the visa applicant's complementary

protection claim. In contrast, before the Tribunal the visa applicant claimed that Australia had protection obligations to him both under the Refugees Convention (the **Convention**) and by virtue of the complementary protection criterion in s 36(2)(aa).

4 The issues raised by the appeal may be summarised as follows:

(a) did the visa applicant make a claim for complementary protection based not only on past disputes which he had had with a rival distributor of cigarettes, but also on an intention to resume his cigarette business if he were returned to Iran?

(b) if such a claim was sufficiently raised:

(i) did s 36(2)(aa) apply in circumstances where the visa applicant could avoid any risk of significant harm by choosing to not resume distributing cigarettes; and

(ii) if it was open to the visa applicant to make that choice, would there be a real risk that the visa applicant would suffer significant harm as a necessary and foreseeable consequence of him being removed from Australia to Iran;

(iii) do the principles in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 (***Appellant S395***), concerning a well-founded fear of persecution for a Convention reason and to the effect that it is impermissible for the Tribunal to reason that the visa applicant could avoid persecution if he were to change his behaviour, apply to a claim under s 36(2)(aa); and

(iv) did the Tribunal err in the way in which the Tribunal in *Appellant S395* erred?

5 The decision of the Tribunal must be considered in the light of the basis upon which the application was made. A claim for complementary protection based not only on past disputes which the visa applicant had had with a rival distributor of cigarettes, but *also* on an intention to resume distributing cigarettes if the visa applicant were returned to Iran, was not expressly made by the visa applicant, and did not clearly emerge from the material before the Tribunal. In those circumstances, the other issues raised on the appeal (see [4(b)] above) do not arise for determination. The visa applicant's notice of contention contained two grounds. Ground 1 stated that the Tribunal failed to consider his complementary protection claim relating to his cigarette selling business and that failure was constituted by a failure to consider a relevant consideration or a constructive failure by the Tribunal to exercise jurisdiction. Ground 2 was that if the Tribunal did consider the claim, it considered it by reference to whether the claim

was related to persecution for a reason specified in the Convention, and thereby asked itself the wrong question, misunderstood the nature of its task and/or took into account an irrelevant consideration. Ground 1 of the notice of contention fails because it depends on the establishment of the same factual predicate (that the visa applicant made a claim for complementary protection based not only on past disputes which he had had with a rival distributor of cigarettes, but also on an intention to resume his cigarette business if he were returned to Iran) and that factual predicate was not established. Ground 2 does not arise for determination. The appeal should be allowed with costs.

LEGISLATIVE FRAMEWORK

6 The relevant provisions of the Act were as follows:

> **36 Protection visas**
>
> (1) There is a class of visas to be known as protection visas.
>
> Note: See also Subdivision AL.
>
> …
>
> (2) A criterion for a protection visa is that the applicant for the visa is:
>
> (a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or
>
> (aa) 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; or
>
> …
>
> (2A) A non-citizen will suffer ***significant harm*** if:
>
> (a) the non-citizen will be arbitrarily deprived of his or her life; or
>
> (b) the death penalty will be carried out on the non-citizen; or
>
> (c) the non-citizen will be subjected to torture; or
>
> (d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or
>
> (e) the non-citizen will be subjected to degrading treatment or punishment.
>
> (2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:
>
> (a) 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; or

(b) 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; or

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

…

7 Section 5(1) relevantly defined "***cruel or inhuman treatment or punishment***", "***degrading treatment or punishment***", "***significant harm***" and "***torture***" and provided that:

receiving country, in relation to a non-citizen, means:

(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 an habitual resident;

to be determined solely by reference to the law of the relevant country.

THE PROCEEDINGS BEFORE THE FEDERAL CIRCUIT COURT

8 The grounds of application brought by the visa applicant before the Federal Circuit Court, which grounds remain relevant in light of the notice of appeal and the notice of contention, were as follows:

1. The Tribunal failed to consider a relevant consideration and/or constructively failed to exercise its jurisdiction in that it failed to consider a claim made by the [visa applicant], namely, that, as a result of incidents relating to his cigarette selling business, he faced a real risk of significant harm within the meaning of s 36(2)(aa) of the Act.

Particulars

a. One of the claims made by the [visa applicant] was that he is [a] person in respect of whom Australia has protection obligations referred to in s 36(2)(aa) of the Act, arising out of significant harm he had suffered at the hands of a man named "Ali" and his associates, in relation to the [visa applicant]'s cigarette selling business (the "**cigarette business CP claim**").

b. In relation to the harm the [visa applicant] had suffered at the hands of Ali and his associates in connection with the [visa applicant]'s cigarette selling business, the Tribunal only considered whether the [visa applicant] was a person in respect of whom Australia has protection obligations referred to in s 36(2)(a) of the Act.

2. In the alternative to Ground 1, if the Tribunal did consider (which is not conceded), the [visa applicant]'s cigarette business CP claim, the Tribunal asked itself the wrong question and/or misunderstood the nature of its task and/or took

into account an irrelevant consideration when it considered the [visa applicant]'s cigarette business CP claim.

Particulars

a. In making findings about the harm that the [visa applicant] had suffered at the hands of Ali and his associates, the Tribunal:

   i. referred to an absence of a connection to the [visa applicant]'s "refugee claims"; and

   ii. indicated that it considered that the incidents concerning the [visa applicant]'s cigarette selling business were "*a nonrelated convention turf war*".

b. In making findings in respect of claims made by the [visa applicant] in relation to s 36(2)(aa) of the Act, the Tribunal referred to the fact that it was not satisfied that the [visa applicant] had suffered "*convention based harm*".

c. The Tribunal's determination of the [visa applicant]'s cigarette business CP claim was based on the matters referred to in paragraphs (i) and (ii) above.

d. In considering the matters referred to in paragraphs (i) and (ii) above when determining the [visa applicant]'s cigarette business CP claim, the Tribunal thereby asked itself the wrong question and/or misunderstood the nature of the task and/or took into account an irrelevant consideration.

3. In the alternative to Grounds 1 and 2, if the Tribunal did consider the [visa applicant]'s cigarette business CP claim independently of its consideration of whether the [visa applicant] had suffered "Convention-based harm" (which is not conceded), the Tribunal failed to apply the correct legal test and/or failed to consider a relevant consideration, in that when assessing whether there is a real risk that the [visa applicant] will suffer significant harm, the Tribunal failed to consider whether the [visa applicant]'s modified conduct was influenced by the threat of harm.

Particulars

a. If (which is not conceded) the Tribunal's determination of the [visa applicant]'s cigarette business CP claim was independent of the Tribunal's references to an absence of Convention-related harm, then the reasons given for the Tribunal's rejection of the cigarette business CP claim were that the [visa applicant] had not suffered any harm since the incident in 2010 and he had not sold cigarettes after that time.

b. In rejecting the [visa applicant]'s cigarette business CP claim for these reasons, the Tribunal failed to consider whether the [visa applicant] had modified his conduct (by ceasing to sell cigarettes after the incident in 2010) as a consequence of the harm he had suffered.

c. The Tribunal therefore determined the question of whether the [visa applicant] faced a real risk of significant harm without determining whether the [visa applicant]'s modified conduct (in not selling cigarettes) after the incident in 2010 was influenced by the threat of significant harm.

(Original emphasis.)

9 The Federal Circuit Court rejected grounds 1 and 2 but upheld ground 3, identifying the Tribunal's error as a failure to determine whether the visa applicant's modified conduct was influenced by the threat of harm he faced, which was inconsistent with the International Covenant on Civil and Political Rights (the **ICCPR**), before finding that the visa applicant did not face a real risk of significant harm arising out of the cigarette business incidents. That error, the primary judge said, could be characterised as failing to apply the correct legal test or failing to consider a relevant consideration or as a constructive failure to exercise jurisdiction.

THE APPEAL TO THE FEDERAL COURT

10 The Minister's grounds of appeal were as follows:

> 1. The Court below erred in finding that the [Tribunal] had failed to apply the correct legal test, or alternatively failed to consider a relevant consideration, or alternatively constructively failed to exercise its jurisdiction in determining whether the [visa applicant] satisfied s 36(2)(aa) of the [Act].
>
> 2. The Court below erred in finding that, when assessing whether the [visa applicant] satisfied s 36(2)(aa) of the Act, the [Tribunal] was required to determine whether the [visa applicant]'s conduct in refraining from engaging in the sale of cigarettes:
>
>   a. was influenced by the threat of harm; or
>
>   b. involved the acceptance by him of a violation of a right protected by the [ICCPR].

11 The grounds relied on in the visa applicant's notice of contention were as follows:

> 1. The Court below should have held (contrary to [28]-[40] of the judgment below) that the [Tribunal]:
>
>   a. failed to consider the [visa applicant]'s complementary protection claim relating to his cigarette business; and
>
>   b. thereby failed to consider a relevant consideration and/or constructively failed to exercise its jurisdiction.
>
> 2. If (contrary to Ground 1 above) the Tribunal did consider the [visa applicant]'s complementary protection claim relating to his cigarette business, the Court below should have held (contrary to [46]-[49] of the judgment below) that the Tribunal:
>
>   a. assessed that claim by reference to whether the claim was related to persecution for a reason specified in the Refugees Convention; and

b. thereby asked itself the wrong question, misunderstood the nature of its task and/or took into account an irrelevant consideration.

THE DECISION OF THE TRIBUNAL

12 The reasons of the Tribunal were short. The body of the findings and reasons begins with the heading "Targeting by a rival cigarette seller". It continues with the further headings "Incident at Mosque", "Claim that the applicant does not practice the Islamic religion" and concludes with what the Tribunal said under the heading "Failed asylum seekers". However the reasons had, as Attachment A, a 15 paragraph summary of the relevant law, including the complementary protection criterion in s 36(2)(aa), and, as Attachment B, a statement of the claims and evidence of 30 pages. One of the issues there identified, in a lengthy paragraph numbered 40 setting out the submission of the visa applicant's adviser, was whether the visa applicant was entitled to complementary protection.

13 As we have indicated, it is not necessary to consider the substance of anything but the cigarette seller claim.

14 The relevant paragraphs of the Tribunal's statement of reasons concerning the cigarette seller claim were as follows:

> *Targeting by a rival cigarette seller*
>
> 7. The [visa applicant] has stated that he was run over in 2010 and Ali, a rival cigarette seller was to blame. He also claims that the distribution network which Ali worked in was controlled by Sepah. The Tribunal has found the [visa applicant]'s story difficult to follow, that is at hearing he initially stated that before he left Iran he was selling kitchen appliances, accessories, cigarettes and air fresheners however he subsequently changed his evidence and said that he did not sell cigarettes after he was warned off. Whilst the Tribunal accepts that there may have been a distribution dispute, the [visa applicant] failed to explain at hearing how that related to his refugee claims. In addition, his consistent evidence was that he moved from [location A] to a different unit in [location B] and continued to be in business without incident after being run over in 2010. Even if the Tribunal accepts that the [visa applicant] has been involved in some sort of territorial dispute involving the sale of cigarettes which lead to his being run over in 2010, and even if the Tribunal accepts the rival network was controlled by Sepah, the Tribunal is not satisfied that the [visa applicant] described at hearing anything more than a nonrelated convention turf war. Neither did the [visa applicant] suggest that anything had happened to him since 2010. Given this and given the [visa applicant]'s concluding statements at hearing which were that he was not selling cigarettes when he departed Iran, the Tribunal is not satisfied that there is a real chance that the [visa applicant] will suffer harm because of any past dispute on his return.

…

16. The Tribunal has considered the [visa applicant]'s claims individually and cumulatively and finds it is not satisfied that the [visa applicant] faces a real chance of persecution for a Convention reason on return to Iran now or in the reasonably foreseeable future and that his fear of persecution is not well founded.

17. The Tribunal finds the [visa applicant] is not a refugee within the meaning of the Convention and Australia does not owe him protection obligations within the meaning of s36(2)(a) of the Act.

18. The [visa applicant]'s agent has submitted that there are substantial grounds for believing that there is a real risk that the [visa applicant] will suffer significant harm.

19. As noted above, the Tribunal is not satisfied that the [visa applicant] engaged in the alleged behaviour at the mosque or that he has been imputed with any anti regime political opinion. The Tribunal is not satisfied that the [visa applicant] has suffered any harm since 2010 and has not suffered convention based harm. It is not satisfied that the [visa applicant] has engaged in any anti-religious or any political activities in the past. It is not satisfied that he has been imputed with any antigovernment opinion either in Iran or at any time after he departed. Given this, the Tribunal is not satisfied he will be imputed with an anti-government political opinion merely for leaving Iran, or for seeking asylum in a Western country or for being in or returning from or even forcibly returning from a Western country. Whilst he may be questioned on return and may even be monitored, this treatment does not amount to significant harm. The Tribunal is not satisfied on the evidence that there are substantial grounds for believing that as a necessary and foreseeable consequence of the [visa applicant] being removed from Australia to Iran there is a real risk that the [visa applicant] will be arbitrarily deprived of his life, the death penalty will be carried out, he will be subjected to torture or cruel or inhuman treatment or punishment or degrading treatment or punishment for a combination of being a failed asylum seeker or because he has left Iran, or been in, or returned from or even forcibly returned from a Western country to Iran.

CONCLUSIONS

20. The Tribunal is not satisfied that the [visa applicant] is a person in respect of whom Australia has protection obligations. Therefore the [visa applicant] does not satisfy the criterion set out in s. 36(2)(a) or (aa) for a protection visa. It follows that he is also unable to satisfy the criterion set out in s. 36(2)(b) or (c). As he does not satisfy the criteria for a protection visa, he cannot be granted the visa.

DECISION

21. The Tribunal affirms the decision not to grant the [visa applicant] a Protection (Class XA) visa.

THE DECISION OF THE FEDERAL CIRCUIT COURT

Ground 1

15 Ground 1 before the Federal Circuit Court is raised by ground 1 of the visa applicant's notice of contention and need not be considered in detail because it is predicated on the proposition that the visa applicant made a claim for complementary protection based on the intention to resume his cigarette business if he were returned to Iran. As will shortly emerge we consider that no such claim was made.

Ground 2

16 Ground 2 before the Federal Circuit Court is raised by ground 2 of the visa applicant's notice of contention and need not be considered in detail for the same reasons given in [15] above.

Ground 3

17 Ground 3 before the Federal Circuit Court lies at the heart of the Minister's appeal.

18 The primary judge held at [52] that the visa applicant's claims and evidence indicated that he had modified his conduct (in not being involved in the cigarette business after September 2010), and this was caused by the harm that he had suffered. In short, he had been scared out of the business. At [56] the primary judge said the visa applicant contended that it was an error for the Tribunal to rely on his non-involvement in the cigarette business in the period before he left Iran (and the consequent lack of harm he suffered during that period) as a basis for concluding that the visa applicant did not face a real risk of significant harm, without first determining whether that non-involvement was influenced by the threat of harm he faced.

19 At [58]-[64], the primary judge did not accept the Minister's submission that the principles articulated in *Appellant S395* were not applicable in respect of complementary protection claims under s 36(2)(aa). The Minister submitted that where, as in this case, the risk of harm contended for by the visa applicant could only arise if he voluntarily chose to resume cigarette trading once returned to the receiving country, this risk was not a necessary consequence of the removal of the person to the receiving country. Because any risk of harm from again selling cigarettes could only arise if and when that choice was made by the visa applicant, the Minister contended that it cannot be a "necessary" consequence of the visa applicant's mere removal from Australia. The visa applicant may choose, as he has in the past, on his own evidence, not to again sell cigarettes because of past harm or threats.

20 At [64], the primary judge described the proposition that protection visa applicants should not be required to deny or conceal a Convention attribute in order to find safety in their country of origin when that Convention attribute is the basis upon which they seek protection in Australia as being at the heart of the decision in *Appellant S395*.

21 At [65], the primary judge said there was no logical reason why the *Appellant S395* principle should not apply to the Conventions which support the complementary protection provisions of the Act — in particular, the ICCPR. A protection visa applicant cannot claim complementary protection in respect of conduct consistent with the ICCPR. Conversely, it would be an error for the Tribunal to expect a protection visa applicant to forego a right conferred by the ICCPR in order to find safety in his or her country of origin, especially if it was the exercise of that right which gave rise to the harm feared by the visa applicant.

22 At [66], the primary judge held that there was no consideration by the Tribunal of the question of whether the visa applicant in this case would be giving up a right conferred by the ICCPR by avoiding his trade or profession of choice if he returned to Iran. His Honour held that in terms of s 36(2)(aa) the issue was whether the significant harm feared by the visa applicant would be the necessary and foreseeable consequence of his removal from Australia if he sought to exercise his Convention rights in Iran. The harm feared could not be consistent with a relevant Convention if the only way of avoiding the harm is to accept a violation of a Convention right. The primary judge held that there needed to be consideration of that issue because it was clear that the visa applicant claimed that he did not abandon cigarette selling by his free choice. He was scared out of the trade by the physical harm he suffered and the subsequent threat of further harm.

23 The primary judge held at [67] that this approach was consistent with the statutory definitions of "torture", "cruel or inhuman treatment or punishment" and "degrading treatment or punishment" in s 5 of the Act which excluded acts "not inconsistent" with articles, in particular Article 7, of the ICCPR.

24 At [68], the primary judge held that the Tribunal's error was a failure to determine whether the visa applicant's modified conduct was influenced by the threat of harm he faced, which was inconsistent with the ICCPR, before finding that the visa applicant did not face a real risk of significant harm. That error could be characterised as failing to apply the correct legal test or failing to consider a relevant consideration, or as a constructive failure to exercise jurisdiction. The visa applicant was therefore entitled to the relief sought in the application.

OUTLINE OF THE PARTIES' SUBMISSIONS

25 We outline the parties' respective submissions concerning the notice of appeal.

26 In challenging the primary judge's finding that the Tribunal had erred because it failed to consider whether the visa applicant's decision to cease trading cigarettes was influenced by the threat of harm and, also, whether in ceasing to trade cigarettes in order to avoid harm, the visa applicant would be forced to accept a violation of rights protected by the ICCPR, the Minister submitted that:

(a) the primary judge's reasoning contained a fundamental error in that it assumed that the Court could and should apply directly the terms of the ICCPR to the visa applicant's case. This was said to be an error for reasons including that, unlike s 36(2)(a) of the Act, s 36(2)(aa) does not directly incorporate any international treaty into domestic law. The Minister relied upon observations of the Full Court in *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211 at [18]-[20] (***MZYYL***). It emerged in oral argument before us that the primary judge's attention was not drawn to *MZYYL*;

(b) *Appellant S395* did not support the judgment below, for reasons including that *Appellant S395* was not a complementary protection case;

(c) in any event, the issue of whether the visa applicant could or should modify his behaviour did not arise here because the Tribunal made no relevant finding on that matter and, indeed, the visa applicant did not express any desire to resume cigarette trading in the event that he was returned to Iran.

27 The visa applicant's submissions in respect of the Minister's appeal may be summarised as follows:

(a) as to the Minister's submissions regarding the significance of the primary judge's references to the ICCPR, the Minister had misread the primary judge's reasons. The visa applicant also submitted that the primary judge's identification of the Tribunal's error at [68] did not depend upon his Honour's reasoning at [64]-[67];

(b) the visa applicant also contested each of the matters relied upon by the Minister in support of his contention that *Appellant S395* did not apply to the complementary protection criterion.

CONSIDERATION

28 As we have seen, the Minister challenged the primary judge's finding that the Tribunal had failed to consider whether the visa applicant's decision to cease trading cigarettes was influenced by the threat of harm and, also, whether in ceasing to trade cigarettes in order to avoid harm, the visa applicant would be forced to accept a violation of rights protected by the ICCPR: see [24] above. The Minister identified a number of reasons why that finding was said to be in error: see [26] above. One of the identified reasons was that the issue of whether the visa applicant could or should modify his behaviour did *not* arise because the Tribunal made no relevant finding on that matter and indeed, the visa applicant did not express any desire to resume cigarette trading in the event that he was returned to Iran: see [26(c)] above. The visa applicant disputed that characterisation of his claim. The visa applicant submitted that his claim for complementary protection was made not only by reference to the past, but also to the present and the future and that there was no necessity for him to have expressly asserted that he would resume selling cigarettes in order for the Tribunal to be obliged to consider his cigarette business complementary protection claim.

29 In the present appeal, those contentions require the Court to identify at the outset the basis on which the visa applicant's application for complementary protection was made. This section of the judgment will first consider the approach to be adopted and then turn to consider the basis of the visa applicant's application for complementary protection.

30 Following the approach in *MZYYL* at [18]-[20], the necessary starting point is the words of the legislation and, in particular, the applicable provisions of s 36(2)(aa).

31 The question for the Tribunal raised by s 36(2)(aa) was whether it had substantial grounds for believing that, as a necessary and foreseeable consequence of the visa applicant being removed from Australia to Iran, there was a real risk that he will suffer significant harm: s 36(2)(aa) of the Act at [6] above and see the definition of "receiving country" at [7] above. That question necessarily directed attention to the claim made by the visa applicant.

32 This focus on the claim made by the visa applicant is important. As the Full Court said in *NABE v Minister for Immigration and Multicultural and Indigenous Affairs (No 2)* (2004) 144 FCR 1 (***NABE (No 2)***) at [55]:

> … Where the Tribunal fails to make a finding on a 'substantial, clearly articulated argument relying upon *established facts*' that failure can amount to a failure to accord procedural fairness and a constructive failure to exercise jurisdiction: *Dranichnikov v Minister for Immigration and Multicultural Affairs* (2003) 77 ALJR

> 1088 at [24] per Gummow and Callinan JJ, Hayne J agreeing at [95]. Although not expressly so identified in that case, the constructive failure to exercise jurisdiction may be seen as a failure to carry out the review required by the Act.
>
> (Emphasis added.)

These observations were further explained in *NABE (No 2)* at [56]-[63].

33 In the present case, the immediate focus is not whether the Tribunal failed to consider a claim not expressly advanced (*NABE (No 2)* at [68]) but whether, as a matter of fact, the visa applicant said anything about taking up cigarette selling again in the event that he was returned to Iran. As the Full Court said in *NABE (No 2)* at [62], "[w]hatever the scope of the Tribunal's obligations it is not required to consider criteria for an application never made". Moreover, the claim must emerge clearly from the materials: *NABE (No 2)* at [68]. Put another way, on judicial review, a decision of the Tribunal must be considered in the light of the basis upon which the application was made: see *Appellant S395* at [1] per Gleeson CJ, citing *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 211 CLR 441 at [31].

34 What then did the materials disclose about the visa applicant's claim for complementary protection under s 36(2)(aa)? Counsel for the visa applicant identified the following passages. In the visa applicant's statutory declaration made on 1 August 2012, the visa applicant simply stated that "I am also afraid of Ali and his men who are connected to the Basij who will try to kill me again because I am their competitor". That document was witnessed by the visa applicant's lawyer.

35 The visa applicant's claim was also set out by the delegate in the decision record of the Department dated 19 October 2012 in the following terms:

> … [T]he [visa applicant] claims to fear that he will be killed by Ali and/or his associates on account of a business dispute. The [visa applicant] has given evidence that he believes Ali would try to kill him '*because I am their competitor*' … [This] is in fact best described as a private dispute. Consequently this claim will be addressed under the Complementary Protection section of this assessment.
>
> (Original emphasis.)

36 In the context of the Complementary Protection section of the decision record, the delegate described the claim as follows:

> As discussed above, the [visa applicant] claims to fear harm from Ali and/or his associates on account of a business dispute. However, based on the cumulative

> evidence of the [visa applicant], I remain unsatisfied that he would face a real risk of such harm as a necessary and foreseeable consequence of his return to Iran. *By the [visa applicant]'s own testimony he has had no contact with Ali since their altercation in 2010*. The [visa applicant] has also given evidence that he has lived in the same location since 2010 and that he believes Ali could find the [visa applicant] fairly easily if he wanted to. Considering this evidence provided by the [visa applicant] and his testimony that Ali had connections with both the Basij and Sepah, I consider that *had Ali wanted to harm the [visa applicant] it would have been open to him to do so at any time during the 18 months immediately following their altercation*. However this did not happen. I therefore do not accept that I can be seen to be established that there is a real risk the [visa applicant] would suffer such harm from Ali as a necessary and foreseeable consequence of his removal to Iran.
>
> (Emphasis added.)

37 Before the hearing of the matter by the Tribunal on 20 March 2013, the visa applicant's solicitor and migration agent filed a 19 page submission. The cigarette business claim was addressed in more detail under the heading "Harm from Ali (and the Basij / Sepah)" and was put in the following terms:

> In respect of this element, the [visa applicant] has presented evidence in his claims that he fears harm from Ali, a businessmen supported by the Basij and Sepah in cigarette distribution in Iran. The Delegate stated in relation to this claim that – "*I will accept the [visa applicant]'s claims in this regard as I have found that even if all claims are accepted … there is not a real risk the [visa applicant] would face significant harm for this reason.*
>
> The [visa applicant] reiterates his evidence regarding this claim (as per paragraphs 18-21 above) and notes that as a result of the dispute with Ali he has suffered significant harm in the past. This past harm indicates the capabilities of Ali (and his associates). The [visa applicant]'s dispute with Ali (and his associates) is compounded by the incident at the mosque – where the [visa applicant] has been labelled an *enemy of God* by the Sepah. …
>
> (Original emphasis, citations omitted.)

38 Paragraphs 18-21 were set out earlier in the solicitor's submission and stated:

> 18. After a few months of importing and distributing cigarettes, the [visa applicant] had control of a large portion of the market. The [visa applicant] sold his cigarettes at a reduced price compared to his competitors – and to make up for any shortfall he would sell different goods at higher prices. This caused riffs (sic) within the distribution networks.
>
> **Sep-2010: Applicant starts to receive threats**
>
> 19. About seven months into the cigarette business, the [visa applicant] was approached by a man known to the [visa applicant] through the retail distribution business, named Ali who worked in a competitor's cigarette distribution network. The [visa applicant] suspects that the distribution network which Ali worked in was controlled by the Vezarat-e Sepah

Pasdaran-e-Enqelab-e Islamic (**"Sepah"**).

20. The network which Ali was working in was losing business as a result of the [visa applicant]'s breaking in to the cigarette business. Ali told the [visa applicant] (face-to-face) that he should "*pull out of this business – or we are going to hang you"*. The [visa applicant], although somewhat taken back by Ali's threats believed them to be futile. He continued to sell the cigarettes, and continued to generate a large income - taking away his competitor's business.

21. About one week later, the [visa applicant] received a phone call from Ali, making the same threats – Ali said to the [visa applicant] "*I am telling you this for your own good, if you don't get out, you will be hurt"*. The [visa applicant] again continued to sell the cigarettes. Two or three days later, the [visa applicant] received another phone call from Ali – telling him that he would "*disappear into thin air*" (which the [visa applicant] interpreted as a threat to his life) if he did not cease his activities.

(Original emphasis, footnotes omitted.)

39 The claim was put in terms that "this past harm indicates the capabilities of Ali (and his associates)": see [37] above.

40 The Tribunal addressed these arguments in its Statement of Decision and Reasons: see [14] above. As we have said, Attachment B contained the claims and the evidence. After recording that the visa applicant was represented, Attachment B described the visa applicant's position in the following terms:

[45] The [visa applicant] stated before he left Iran he worked in the bazar (sic) where he sold and bought kitchen appliances and air refreshment products which he bought from a merchant in China. He stated he [had] been doing this for approximately 10 years, but for five years he had been in charge of this business. He stated before he left Iran he was selling kitchen appliances, accessories, cigarettes and air refreshment products. He stated that for the last two years he had been very good at it.

[46] … He agreed that Ali was to blame for him being run over … He stated just after he was run over Ali called him and said get out of this business. He stated business was good for him because he was able to sell cheap cigarettes at market prices and as a result, he was able to reduce the prices for his kitchen appliances and he was able to absorb all of the merchants in his market. The Tribunal put to him that he said he was targeted because his business was successful, that he had been bedridden for 12 months but that he then went back to selling cigarettes. He stated that the best time of his business was before the accident. The Tribunal put to him that it was not sure how this related to him being a refugee, that is as far as it understood this happened in 2010 … and Ali did not contact him after that date and he returned to selling.

[47] The [visa applicant] stated Ali contacted him and warned him to get out of the business. The Tribunal put to him that he kept selling cigarettes. He

> stated because it was so profitable. He stated the problem was that two major business icons were hitting up against each other. He stated they hit him and said you have to get out of the business. The [visa applicant] attempted to show the Tribunal his feet but was unable to do so because the screen would not allow it. The Tribunal again put it to him that this happened some time ago and that he had continued to sell and nothing else had happened to him since ... He stated when he came out of hospital Mr Khaegy stopped giving him cigarettes. He stated his plan was to continue his business and to reconnect with Mr Khaegy but that when people noticed he was getting close to him they sent him warnings. The Tribunal put to him that in his adviser's latest submission it said at the end of 2011 the [visa applicant]'s family moved from Sardar Jangal to a different unit in Patris Lomumba and that around this time he regained contact with Khaleghi to distribute cigarettes. The [visa applicant] agreed. The Tribunal put to him that was not consistent with what he just said which was that he did not re-establish contact. He stated that when he said he did not have contact he meant he approached Khaleghi but it did not work. He stated after the 12 months in which he was hospitalised he came out and did not sell cigarettes any more. He stated they warned him to go away from the business and then he came to Australia.

41 As is apparent, the Tribunal made findings in relation to the cigarette seller claim (at [7] extracted at [14] above) that the visa applicant did not suggest that anything had happened to him since 2010 and that the visa applicant was not selling cigarettes when he departed Iran.

42 The submissions with which the Tribunal was dealing did not involve the proposition that the visa applicant would pursue the business of cigarette selling if returned to Iran. The claim (see [34]-[39] above) referred to the past harm as a result of the dispute with Ali as indicating the capabilities of Ali and his associates. The Tribunal did not find as a fact that the visa applicant would or would not return to the cigarette selling business and no such proposition was put.

43 In our opinion, there was no basis in the present appeal for the conclusion of the primary judge that the Tribunal erred in failing to determine whether the visa applicant's modified conduct was influenced by the threat of harm he faced. We accept the submission on behalf of the Minister that the visa applicant did not state that he would recommence his cigarette selling business if returned to Iran. It may be accepted that the visa applicant had not in the past resumed his cigarette selling business because of the threat of harm but that does not, in our opinion, show what the visa applicant would do if returned to Iran. There were no asserted or established facts on which to found the claim.

44 For these reasons we would allow the Minister's appeal. Given that finding, the other issues raised by the appeal and the visa applicant's notice of contention (see [4(b)] and [11] above) do not arise for determination.

ORDERS

45 We would set aside the orders of the Federal Circuit Court made on 5 May 2014. The First Respondent, the visa applicant, should pay the Minister's costs of the appeal and of the proceedings before the Federal Circuit Court.

I certify that the preceding forty-five (45) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Gordon, Robertson and Griffiths.

Associate:

Dated: 22 August 2014