

1412136 [2015] RRTA 80 (24 February 2015)

DECISION RECORD

RRT CASE NUMBER: 1412136
COUNTRY OF REFERENCE: Cambodia
TRIBUNAL MEMBER: Stuart Webb
DATE: 24 February 2015
PLACE OF DECISION: Melbourne
DECISION: The Tribunal affirms the decision not to grant the applicant a Protection (Class XA) visa.

Statement made on 24 February 2015 at 10:57am

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 431(2) of the *Migration Act 1958* and replaced with generic information which does not allow the identification of an applicant, or their relative or other dependant.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration to refuse to grant the applicant a Protection (Class XA) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant who claims to be a citizen of Cambodia, applied to the Department of Immigration for the visa [in] September 2013 and the delegate refused to grant the visa [in] June 2014.
3. On 23 January 2015 the Tribunal wrote to the applicant advising that it had considered all the material before it relating to her application but it was unable to make a favourable decision on that information alone. The Tribunal invited the applicant to give oral evidence and present arguments at a hearing on 26 February 2015. [In] February 2015 the applicant advised the Tribunal that she did not wish to give oral evidence and consented to the Tribunal proceeding to make a decision on the review without taking any further action to allow or enable her to appear before it. This matter has therefore been determined on the evidence available to the Tribunal.
4. The applicant's agent submitted that the applicant was ultimately seeking the intervention of the Minister for Immigration and Citizenship pursuant to section 417 of the *Migration Act*. The agent requested time to provide a submission to the Tribunal with respect to the applicant's circumstances, which was provided.
5. The applicant was represented in relation to the review by her registered migration agent. The applicant provided a copy of the delegate's decision to the Tribunal.

RELEVANT LAW

6. The criteria for a protection visa are set out in s.36 of the Act and Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person in respect of whom Australia has protection obligations under the 'refugee' criterion, or on other 'complementary protection' grounds, or is a member of the same family unit as such a person and that person holds a protection visa.

Refugee criterion

7. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention).
8. Australia is a party to the Refugees Convention and generally speaking, has protection obligations in respect of people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country

of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

9. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the Regulations to a particular person.
10. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
11. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). Examples of 'serious harm' are set out in s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
12. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.
13. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be *solely* attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
14. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
15. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
16. Whether an applicant is a person in respect of whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

Complementary protection criterion

17. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia 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 applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
18. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
19. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise 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 applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

Section 499 Ministerial Direction

20. In accordance with Ministerial Direction No.56, made under s.499 of the Act, the Tribunal is required to take account of policy guidelines prepared by the Department of Immigration –PAM3 Refugee and humanitarian - Complementary Protection Guidelines and PAM3 Refugee and humanitarian - Refugee Law Guidelines – and any country information assessment prepared by the Department of Foreign Affairs and Trade expressly for protection status determination purposes, to the extent that they are relevant to the decision under consideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

21. The applicant provided a certified copy of a Cambodian passport with her application, which stated that she was born in [Cambodia]. The delegate provided the following migration history for the applicant. The applicant first arrived in Australia [in] December 2008 on a tourist visa. The applicant departed Australia [in] February 2009. The applicant re-entered Australia [in] June 2009 on another tourist visa. The applicant departed the country [in] September 2009. The applicant re-entered Australia [in] November 2009 on a tourist visa, valid until [date] February 2010. The applicant has not departed since. [In] February 2012 the applicant was provided a bridging visa E, valid for seven days. [In] September 2013 the applicant applied for the condition 8503 (No Further Stay), imposed on her visitor visa, to be waived. This application was refused on to October 2013. [In] September 2013 the applicant applied for a protection visa.
22. In her application, the applicant stated that she and her husband would be separated for a long time, and that this separation would be a breach of his and her fundamental human right to found a family, pursuant to Article 23 of the ICCPR. The separation would cause significant harm to her psychological health and well-being.

23. The delegate noted that the applicant was born in [Town 1], Cambodia. The delegate noted that the applicant claimed she had married an Australian citizen [in] October 2011, a copy of the couple's marriage certificate was provided to the Department.
24. The delegate summarised the applicant's claims as follows at page 4 of their decision. The applicant intended to request the Minister to exercise his power to grant a visa on compassionate grounds. She had not experienced harm in Cambodia in the past. She fears that if she returns to Cambodia, she and her husband will be separated from long time. Separation from her husband would be a breach of their fundamental human rights. The separation would cause significant harm to her psychological health and well-being. Her husband left Cambodia many years ago as refugee and could not come back with her to Cambodia.
25. The delegate noted a letter from the applicant's migration agent that acknowledged that a protection visa is not a visa for which the applicant meets the relevant criteria. The protection visa application was lodged so that the applicant could ultimately seek the Minister is discretionary grant of a permanent visa under section 417 of the Migration Act on compassionate and humanitarian grounds.
26. The delegate considered that the applicant had not demonstrated a fear of harm for reasons relating to a Convention ground. The delegate noted that the applicant claims that basis of being separated from her husband she would be cause significant harm to her psychological health and well-being. The delegate considered the claim that the separation would be a breach of the applicant's fundamental human rights under article 23 of the ICCPR. The delegate considered that the claimed harm to the applicant was inadvertent and not of sufficient severity to constitute significant harm. The delegate determined that the applicant did not meet the criteria for the grant of a protection visa.
27. The Tribunal received a significant submission from the applicant's agent and a further statement from the applicant and her husband.

I make the following statement in support of my request to the Minister for Immigration under s 417 of the Migration Act 1958 I ask that the Minister intervene in my case to allow me to lodge my Partner (subclass 20/80I) visa application in Australia and to stay with my husband, [Mr A], during the processing of that visa application.

I grew up in [Town 1], Cambodia. My mother, [was] a housewife, and my father, [was] a furniture maker. I have [siblings]. Prior to coming to Australia, I worked selling clothes at the markets in [Town 1].

In 1990, I entered into a de-facto relationship with [Mr B]. We did not formally marry but we considered ourselves to be married. We were initially happy together — I fell in love with him initially, and I thought that he was the right person for me. We had [children together].

Our relationship turned sour after we had been married for several years. [Mr B] became verbally abusive towards me and would occasionally slap me. I found myself depressed and lonely in my relationship. He controlled the finances in our household and I did not have very much freedom. While I was working selling clothes at the market, he was in charge of our income and only allowed me to have a minimal amount. I began to feel that I needed to leave the relationship. We separated around 2000, just after [one of the children] was born.

My husband left the family home where we had been living with my parents and continued to raise the children alone. He had not been a cruel father to them and they maintained a relationship with him after our separation. They would occasionally spend time with him.

Life was not easy for me after my husband left. Even though my relationship had been full of problems, and was ultimately an unhappy one, being seen as a 'divorcee' or 'single mother' was also difficult. There is a social stigma attaching to women in these circumstances in Cambodia. I felt embarrassed in front of my neighbours and friends and I struggled to cope as the years passed. As well, finances were difficult for me. [Mr B] did not provide any financial support to me after we separated and I had to support the children alone. I was still working at the market but my income was barely enough to support our family.

I made plans to come to Australia for the first time hoping that I might be able to make a future for myself somehow in Australia, to improve my family's prospects. I thought maybe I might be able to find a job or to send some funds home. I had heard that there was more opportunity in Australia than in Cambodia. I arrived in Australia for the first time as the holder of a Tourist (subclass 676) visa on [date] December 2008 and I subsequently returned to Cambodia on [date] February 2009. I stayed with a friend who I knew from Cambodia. His name was [Mr C] and he lived in [City 2]. During that first trip, he introduced me to some of his Cambodian friends and I realised that there was a Cambodian community in [City 2]. I hoped that I could come back to spend more time here. On [date] June 2009, I applied for a further Tourist (subclass 676) visa which VMS subsequently granted on [date] June 2009. I re-entered Australia as the holder of that visa on [date] June 2009. On [date] July 2009, I met [Mr A], an Australian citizen. [Mr C] was a guest at the party and introduced us. I do not remember exactly where the party was held but it was at someone's house. [Mr C] invited me to go with him. He already was acquainted with [Mr A] as they had done farm work together. [Mr A] and I started talking and instantly liked one another. We swapped phone numbers and began to ring one another. We went out on dates together — we would go shopping in [Suburb 3] to buy clothes or food, or we would go to the beach at [another suburb] together. We began to fall in love. [Mr A] had also been married before and had [number] children. Given that we had both had long-term relationships in the past, neither of us was eager to rush into anything. I did not want to enter into a similar relationship to my previous one. Accordingly, we took our time and became very good friends before our relationship turned romantic.

I had to depart Australia on [date] September 2009 as my visa was expiring. When I returned to Cambodia, [Mr A] and I stayed in touch through using phone cards and telephone calls. [Mr A] called me on the mobile phone during this time and initially we did not realise how expensive the calls were — in fact, we have just finished paying off one of our early bills which was very high! I missed [Mr A] a lot when I returned home and I knew that I wanted to come to Australia to see if we had the possibility of a future together.

Accordingly, I re-entered Australia on [date] November 2009 after being granted a further Tourist (subclass 676) visa on [date] October 2009. During this trip, [Mr A]'s and my relationship only solidified and grew stronger. I did not think that there was a visa for me which would allow me to stay with [Mr A] in Australia after the expiry of my Tourist visa. On [date] February 2010, my Tourist (subclass 676) visa expired. I did not receive any advice from Immigration or from a migration agent. I felt intimidated to go and see the Department of Immigration. I did not speak English and felt daunted by the bureaucratic system. By this time, I was in love with [Mr A] and I knew that I wanted to stay with him and have a future in Australia. I missed my children but I knew that they

were safe and well looked after staying with my mother and father. They were all in school and were healthy and doing well. I hoped that if I was able to remain in Australia, I might someday be able to bring my children to Australia too and to give them a better future. I knew that in Cambodia I was not able to really provide for them with my very low income and in Australia, [Mr A] and I were able to send funds back to cover their living expenses.

During 2010 and 2011, [Mr A] and I lived together at various rental properties in Victoria. [Mr A] currently works as a fruit picker, specifically at a [fruit] farm. He has done this kind of work since we first met. Outside of the [fruit] season, [Mr A] does pruning at [certain estates, Mr A] and I married on [date] October 2011 at [a restaurant in Suburb 3]. We had a joint wedding at the restaurant - the restaurant organised it. We did not know the other couple personally but they were an Australian-Cambodian couple as well. There were about 100 guests total - I would say about fifty of those were our guests. [Mr A]'s children were all at school at that time and were unable to attend. I have however met all of [Mr A]'s children — they no longer live with him, as they live with their mother, but he sees them regularly. Our wedding was a very happy day for me and, although I was sad that my children weren't there, I felt that I had finally met the right person for me.

[Mr A] and I have had a beautiful relationship since our marriage. We look after each other in a way that I never experienced with my first partner. [Mr A] is very caring, gentle and attentive to my needs. He is the most hardworking and kind man that I know — he works very hard during the week at his job, which is quite physical work, and yet he is dedicated to looking after me. I worry terribly that if I have to go to Cambodia to apply for my Partner visa, and wait there for 12 months' during processing, he would not cope without me. He is often unwell. He has a number of health issues which I believe are a result of having done heavy farm work for many years. He suffers from arthritis. His legs regularly swell or ache — when this happens he has difficulty doing everyday tasks like cooking or shopping. He cannot work when he is like this. His condition flares up from time to time and he is in considerable pain when it does. His joints also swell up and are very sore — such as his finger and knee joints. He has a great deal of difficulty walking. The doctors tell him to rest and take his medication when he is in a lot of pain from it. He sometimes has chest pain as well which scares me. He is [age] and has worked very hard for many years. There are times when I see myself as his Carer — I do not know how he would cope without me. I do all of the housework and cooking — I look after his basic needs as well as providing emotional support to him. In the last three years or so, his arthritis has become increasingly worse — about three days per week he cannot walk. I have to assist him to use the toilet when he is struggling to walk. He is very sensitive to food and drink making it worse - alcohol and seafood make it worse.

None of [Mr A]'s children are in a position to care for him when his arthritis flares up. They are all still in [deleted] school and are concentrating on their studies.

[Mr A] came here as a refugee many years ago and obtained his permanent residency via a Protection visa. He has never returned to Cambodia since his arrival in Australia and I do not think he could bring himself to visit me. He would find this decision psychologically very difficult. As well, I do not believe that [Mr A] could afford to take trips to see me during the year during the processing of the visa. Money is already tight given that he cannot work five days' per week anymore due to his health.

On [date] February 2012, I attempted to lodge a Protection (subclass 866) visa application at [City 2 DIAC], as I feared returning to Cambodia without [Mr A]. The case officer at Compliance did not receipt my application as valid and gave me a bridging visa E for a week. I was told I could apply for an 8503 waiver. However, I did

not understand what this was. I did not have the benefit of any immigration advice at that time and I was very nervous about interacting with the Department. I was scared that if I went back to Compliance they would deport me back to Cambodia. Looking back, I probably should have sought immigration advice at this time, However, given that I had been unlawful for some time before that point, I was scared that I would be sent home and did not realise I would have any options to stay in Australia.

However, in 2013 I sought immigration advice from lawyers and on [date] September 2013, I lodged a further Protection (subclass 866) visa application with their assistance. I have fully integrated into the local Cambodian community in [City 2] and have a number of close friends here. I attend temple in [Suburb 3 with Mr A] and feel a strong connection with the Cambodian community in [City 2]. My sister, [name], lives here with her husband, [name] and is expecting a baby. I hope to be here during the duration of her pregnancy and the first couple of years of her baby's life, which will be very precious to me.

My children are staying with [another] sister, [name], as my mother recently passed away and my father passed away in 2011. I miss them every day but I know that they are well looked after. [Mr A] needs me in Australia to care for him at the moment and I cannot think of leaving him while his health is in such poor condition.

28. The applicant's agents' submission relevantly stated:

It is acknowledged that a Protection visa is not a visa for which my client meets the relevant criteria. Nevertheless, my client made her application to the Tribunal on the basis that she will ultimately seek the Minister's intervention pursuant to section 417 of the Act on compassionate and humanitarian grounds and will request the Minister to grant her a "clean" Visitor visa (not subject to condition 8503) in order to allow her to apply for a Partner visa onshore, based on her very real and genuinely loving relationship with her husband, [Mr A], who relies significantly on [the applicant] for his daily care.

It is submitted that their case is compelling and compassionate given [Mr A]'s poor health and his daily reliance on [the applicant] for his care. I remind the Tribunal that [the applicant] is not asking the Minister for a permanent visa, but merely the opportunity to be granted a "clean" Visitor visa (that is, one that does not have condition 8503 attached to it) so that she can apply for a Partner visa onshore and spare this loving and gentle couple from prolonged separation, which would impact [Mr A]'s physical and mental health greatly. In light of this, I respectfully request that after consideration of their circumstances, the Tribunal consider making a recommendation to the Minister that he intervene using his personal powers under section 417 of the Act.

29. It was submitted that the applicant was not seeking a permanent visa from the Minister, merely the opportunity to stay onshore and apply for a Partner visa. It was stated:

[The applicant] and I understand that the Department needs to assess our relationship through her application for a Partner visa. For the sake of my health and wellbeing, all we ask is that the Minister allow her to remain onshore so that she can apply for a Partner visa and have it processed onshore. I love [the applicant] so much. She is my soul mate and I hate to think of my life without her.

30. With respect to the Ministerial guidelines, the following was submitted.

It is submitted that [the applicant]'s only other option (other than making a request to the Minister) would involve her going offshore and applying for a Partner visa, which, as explained above, would severely detrimentally affect the physical and psychological health of her beloved husband [Mr A]. The applicant's only option to remain onshore

and apply for a Partner visa onshore (given that her 8503 waiver application has been refused) is to seek Ministerial intervention.

[Mr A and the applicant] are clearly devoted to one another, as evidenced in the enclosed Form 888's from their friends and family. [Mr A]'s health concerns are very real and he struggles often with the basic daily tasks that most of us take for granted. Enclosed are two letters from his doctor describing [Mr A]'s medical history and the challenges his arthritis, in particular, presents him.

As detailed above, it is submitted that [the applicant]'s case raises clear and compelling public interest arguments arising from their unique and exceptional circumstances. She and [Mr A] are a gentle and loving couple who are devoted to each other and [Mr A] would suffer irreparable harm if they were separated even on a temporary basis

31. A significant number of documents were provided in support of the application, including a statement from [Mr A], supporting materials from other members of the community, marriage certificate, medical materials pertaining to [Mr A]'s health and photographs of [the applicant and Mr A] together.

FINDINGS AND REASONS

Country of nationality

32. The applicant claims to be a citizen of Cambodia. The applicant has provided documentary evidence to the Tribunal in the form of a copy of a passport issued by Cambodia, with the applicant's name, date and place of birth shown. The Tribunal finds that the applicant is a citizen of Cambodia, that Cambodia is the applicant's country of nationality for the purposes of the Refugees Convention, and that Cambodia is her receiving country for the purposes of complementary protection.

Third country protection

33. There is no evidence before me to suggest that the claimant has the right to enter and reside in any safe third country for the purposes of s.36(3) of the Act.
34. The applicant and her agents have provided a clear statement regarding whether the applicant was eligible for a protection visa. The submissions have been consistent in their statement that the applicant acknowledged that a protection visa is not a visa for which she meets the relevant criteria. The protection visa application was lodged so that the applicant could ultimately seek the Minister is discretionary grant of a permanent visa under section 417 of the Migration Act on compassionate and humanitarian grounds.
35. The applicant and her agents have subsequently been considerate to not require a hearing to be held, and have asked for the decision regarding the protection visa to be made on the information before the delegate and the Tribunal. It is to the applicant's credit that she has not required that finite resources be used in pursuing her matter when her intention was to take this matter to the Minister for his personal intervention.
36. While it is clear that admissions about the eligibility of the applicant have been made and the purpose of the application, it is still incumbent on the Tribunal to consider the materials provided and make a determination on the protection visa application.

37. The Tribunal has considered the applicant's circumstances pursuant to the Convention. The criteria for the assessment as to whether an applicant meets the Convention definition of a refugee is provided above. The Tribunal considers that the applicant has not made any claims that express a fear of persecution for any Convention based reason.
38. The Tribunal finds that the applicant does not face a real chance of serious harm, now or in the reasonably foreseeable future, arising from a Convention reason. The Tribunal finds that the applicant does not have a well-founded fear of persecution for a Convention reason.
39. The Tribunal has considered the applicant's claims under the complementary protection provisions of the Act. The applicant has claimed that by being separated she would be caused significant harm to her psychological health and well-being, and that the separation of her and her husband would be a breach of the right to found a family under Article 23 of the ICCPR.
40. Significant harm is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act. The definitions of 'cruel or inhuman treatment or punishment' and 'degrading treatment or punishment' were included in the delegate's decision.
41. Included in these definition is the requirement that the pain or suffering must be intentionally inflicted, or be an act or omission which causes, and is intended to cause, extreme humiliation which is unreasonable.
42. The Tribunal does not accept that there is any intention to cause the applicant harm by separating the applicant from her husband. While the fact that the applicant is separated from her husband may cause the applicant some hardship and distress, the Tribunal does not consider that it is there is any intention in the act of separating the applicant from her husband to cause any significant harm to the applicant.
43. The Tribunal also does not accept that the actual act of removal of the applicant from Australia falls within the scope of s.36(2)(aa), as it would appear from the words of s.36(2)(aa) and s.5(1) that these provisions do not encompass harm of this nature.
44. In *SZRSN v MIAC* the Federal Court confirmed that harm arising from the act of removal itself will not meet the definitions of 'significant harm' in s.36(2A).¹ 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.² Secondly, the Court reasoned that the qualifications in s.36(2B) expressly refer to harm 'in a country' which is necessarily the receiving country if the

¹ *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.

² *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].

circumstances of ss.36(2B)(a) (relocation) and 36(2B)(b) (protection from an authority) are to have any application.³

45. Further, the Court noted the circularity in the operation of s.36(2)(aa) were harm to arise from the actual 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.⁴
46. 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.⁵
47. 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). As such, it appears that although the *risk* of significant harm envisaged by s.36(2)(aa) must arise as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, s.36(2)(aa) will not be engaged by harm inflicted by the act of removal itself.
48. Having regard to all the circumstances and findings above, the Tribunal finds that the applicant does not have substantial grounds for believing that there is a real risk she will suffer significant harm being removed from Australia.

Ministerial Referral

49. The applicant has requested that the Tribunal refer the case to the Department for consideration by the Minister pursuant to s.417 of the Act which gives the Minister a discretion to substitute for a decision of the Tribunal another decision that is more favourable to the applicant, if the Minister thinks that it is in the public interest to do so.
50. The applicant's agents have presented a lengthy and detailed submission regarding the applications' relationship and interdependence upon each other, including medical evidence regarding [Mr A]'s condition. The submission details as to why the applicant's husband, as a recognised refugee from Cambodia, and now an Australian citizen, cannot return to Cambodia to visit his wife if she was to be returned to Cambodia. The submission includes information about the applicant's migration history and explanations for her overstaying her visa previously.
51. The submission states that the circumstances raise clear and compelling public interest arguments. The submission notes that the applicant's circumstances meet 5 Ministerial Guidelines, though it is not clear from the submission exactly how some of them, such as the guidelines referencing legislation, relate to the applicant. She has been in Australia, she states her circumstances have changed while in Australia, affecting an Australian citizen, and she wants to

³ *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].

⁴ *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].

⁵ *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].

stay. It is not clear how any relevant legislation affects the applicant in an unanticipated, unfair or unintended manner.

52. The applicant has provided materials to support her circumstances which state that she has a compelling and compassionate case. These submissions have been, in the view of the Tribunal, well laid out by the agent, who obviously has a positive ongoing relationship with the applicant and her supporters. The Tribunal considers that in the circumstances, the most appropriate step is for the agent to prepare the Ministerial application and clearly outline how the Ministerial Guidelines are addressed, all 5 elements as submitted to the Tribunal, in all the circumstances.
53. The Tribunal has considered the applicant's case and the ministerial guidelines relating to the discretionary power set out in PAM3 'Minister's guidelines on ministerial powers (s345, s351, s391, s417, s454 and s501J)' but has decided not to refer the matter. The Tribunal notes that the applicant can still make a request directly to the Minister.
54. For the reasons given above, the Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under the Refugees Convention. Therefore the applicant does not satisfy the criterion set out in s.36(2)(a).
55. Having concluded that the applicant does not meet the refugee criterion in s.36(2)(a), the Tribunal has considered the alternative criterion in s.36(2)(aa). The Tribunal is not satisfied that the applicant is a person in respect of whom Australia has protection obligations under s.36(2)(aa).
56. There is no suggestion that the applicant satisfies s.36(2) on the basis of being a member of the same family unit as a person who satisfies s.36(2)(a) or (aa) and who holds a protection visa. Accordingly, the applicant does not satisfy the criterion in s.36(2).

DECISION

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

Stuart Webb
Member