FEDERAL COURT OF AUSTRALIA

Minister for Immigration and Citizenship v MZYYL [2012] FCAFC 147

Citation:	Minister for Immigration and Citizenship v MZYYL [2012] FCAFC 147
Parties:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP v MZYYL and REFUGEE REVIEW TRIBUNAL**
File number:	VID 493 of 2012
Judges:	LANDER, JESSUP AND GORDON JJ
Date of judgment:	24 October 2012
Catchwords:	**MIGRATION** – application for protection visa – application of complementary protection regime under s 36(2)(aa) of the *Migration Act 1958* (Cth) – taken not to be a "real risk" of "significant harm" if the non-citizen could obtain state protection such that there would not be a real risk that the non-citizen will suffer significant harm – level of state protection required in order for Minister to be satisfied within the meaning of s 36(2B)(b)
Legislation:	*Federal Court of Australia Act 1976* (Cth) *Federal Magistrates Act 1999* (Cth) *Migration Act 1958* (Cth) *Migration Amendment (Complementary Protection) Bill 2011* (Cth)
Cases cited:	*A v Minister for Immigration and Multicultural Affairs* (1999) 53 ALD 545 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 *Minister for Immigration and Multicultural Affairs v Prathapan* (1998) 86 FCR 95 *Minister for Immigration and Multicultural Affairs v S152/2003* (2004) 222 CLR 1 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 *SZTAV v Minister for Immigration and Citizenship* (2007) 233 CLR 18
Date of hearing:	16 October 2012
Place:	Melbourne

Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	41
Counsel for the Applicant:	Dr M Perry QC and Ms H Younan
Solicitor for the Applicant:	Australian Government Solicitor
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Solicitor for the First Respondent:	Victoria Legal Aid

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 493 of 2012**

BETWEEN:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Applicant**
AND:	**MZYYL** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**LANDER, JESSUP AND GORDON JJ**
DATE OF ORDER:	**24 OCTOBER 2012**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The Application is dismissed.

2. The Applicant is to the pay the First Respondent's costs of and incidental to the Application, such costs to be taxed in default of agreement.

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

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DATE:	**24 OCTOBER 2012**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

THE COURT:

INTRODUCTION

1 The *Migration Act 1958* (Cth) (the **Act**) now provides for the grant of a protection visa to a non-citizen of Australia in certain circumstances notwithstanding that the Minister is not satisfied that Australia owes protection obligations to that person under the 1951 Convention Relating to the Status of Refugees as amended by the Protocol (the **Refugees Convention**). This is known as the complementary protection regime which was implemented by amendments to s 36 of the Act which came into force on 24 March 2012 (the **Complementary Protection Regime**).

2 Section 36(2)(aa) provides that a criterion for such a protection visa is that the applicant for the visa is:

> a non-citizen in Australia … to 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* …

(Emphasis added.)

3 Section 36(2B) provides 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, *inter alia*, "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).

4 This is an application by the Applicant, the Minister for Immigration and Citizenship (the **Minister**), to quash a decision made by the Second Respondent, the Refugee Review Tribunal (the **Tribunal**), on 3 May 2012 (the **Decision**). The application was originally brought in the Federal Magistrates Court, but both the Minister and the First Respondent, MZYYL, sought to have the matter transferred to the Federal Court for hearing by the Full Court of the Federal Court pursuant to s 20(1A) of the *Federal Court of Australia Act 1976* (Cth) (the **FCA**).

5 On 4 July 2012, the Federal Magistrates Court made an order transferring the proceeding to the Federal Court pursuant to s 39 of the *Federal Magistrates Act 1999* (Cth). On 3 August 2012, the Chief Justice made a determination pursuant to s 20(1A) of the FCA that the original jurisdiction of the Federal Court be exercised by the Full Court.

6 The Tribunal, in addition to remitting MZYYL's application for a protection visa for reconsideration by the Minister or his delegate, directed that there were substantial grounds for believing that, as a necessary and foreseeable consequence of MZYYL being removed from Australia to a receiving country, there was a real risk that MZYYL would suffer significant harm. The Tribunal remitted MZYYL's claim for a protection visa, rather than substituting its own decision, because the material before the Tribunal suggested that consideration would need to be given to s 36(2C) of the Act, which could not be addressed by the Tribunal. The Minister seeks an order quashing the Decision for jurisdictional error and seeks a writ of mandamus issue to the Tribunal requiring it to determine the application according to law.

7 Initially, the Minister contended that the Decision was tainted by jurisdictional error in two respects:

1. the standard or threshold of risk in s 36(2)(aa) of the Act is exposure to harm that is probable or more likely than not to eventuate and the Tribunal erred in holding that the standard of risk was the same as the "real risk" test implied in s 36(2)(a) of the Act; and

2. the standard of protection in s 36(2B)(b) of the Act is that of "reasonable" protection and the Tribunal erred in holding that a higher standard was required than that under s 36(2)(a) of the Act, namely to reduce the level of risk of significant harm to something less than a real one.

Prior to the hearing, the Minister abandoned ground 1. He continues to press the second ground.

8 For the reasons that follow, we would dismiss the application with costs.

FACTS

9 The facts are not in dispute.

10 MZYYL is a citizen of another country (the **receiving country**). He arrived in Australia on 23 February 2005 and, upon arrival, was granted a temporary visa.

11 While in Australia, MZYYL committed various criminal offences and his visa was cancelled on 2 June 2009 on character grounds pursuant to s 501(2) of the Act. That decision was affirmed by the Administrative Appeals Tribunal.

12 MZYYL then applied for a protection visa on 24 June 2010. On 2 July 2010, that application was refused by a delegate of the Minister. On 6 July 2010, MZZYL sought review of the delegate's decision by the Tribunal but, on 23 August 2010, he withdrew that application. Subsequently, MZYYL attempted to lodge a further review application in respect of the same primary decision. The Tribunal determined it lacked jurisdiction to review that decision.

13 On 4 February 2011, MZYYL was removed from Australia to the receiving country. On 12 April 2011, MZYYL re-entered Australia using a passport in a different name, and was granted a further temporary visa on arrival. He came to the attention of the police again,

and was arrested in August 2011. On 29 September 2011, his visa was cancelled on character grounds. On 22 December 2011, he was transferred from criminal to immigration detention.

14 On 20 January 2012, MZYYL made a further application for a Protection (Class XA) visa, which is the subject of this proceeding. A delegate of the Minister refused to grant the visa on 19 March 2012. On 22 March 2012, MZYYL applied to the Tribunal for review of the delegate's decision.

15 On 3 May 2012, the Tribunal considered MZYYL's application for a protection visa under s 36 of the Act and decided to remit the matter to the Minister for reconsideration with the direction referred to at [6] above.

LEGISLATIVE FRAMEWORK

16 Protection visas are dealt with in s 36 of the Act. At the relevant time, s 36 contained the following relevant provisions:

> …
>
> (2) A criterion for a protection visa is that the applicant for the visa is:
>
> (a) a non-citizen in Australia to 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)) to 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.

…

(3) 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.

…

(5A) Also, subsection (3) does not apply in relation to a country if:

(a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a *real risk* that the non-citizen will suffer *significant harm* in relation to the other country.

(Emphasis added.)

17 As noted earlier, we are concerned with s 36(2)(aa) of the Act. It forms part of the Complementary Protection Regime introduced by the *Migration Amendment (Complementary Protection) Bill 2011* (Cth) (the **Bill**) introduced into Parliament in February 2011 and passed on 19 September 2011. The Bill received royal assent on 14 October 2011, and the amending provisions commenced, by proclamation, on 24 March 2012. The amending provisions apply to an application for a protection visa made, but not finally determined (within the meaning of s 5(9) of the Act), before 24 March 2012.

18 The Complementary Protection Regime provides criteria for the grant of a protection visa in circumstances where the Minister is not satisfied that Australia has protection obligations to that non-citizen under the Refugees Convention. The regime establishes criteria "that engage" Australia's express and implied non-refoulement obligations under the International Covenant on Civil and Political Rights (**ICCPR**), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**) and the Convention on the Rights of the Child (**CROC**) (collectively the **International Human Rights Treaties**): Commonwealth, *Parliamentary Debates*, House of Representatives, 24 February 2011, 1357 (Chris Bowen, Minister for Immigration and Citizenship). The Complementary Protection Regime is a code in the sense that the relevant criteria and obligations are defined in it and it contains its own definitions: see, by way of example, the definitions in s 5 of the Act of "torture" and "cruel or inhuman treatment or punishment". Unlike s 36(2)(a), the criteria and obligations are not defined by reference to a relevant international law. Moreover, the Complementary Protection Regime uses definitions and tests different from those referred to in the International Human Rights Treaties and the commentaries on those International Human Rights Treaties. For example, the definition of "torture" in the Complementary Protection Regime is different from that in the CAT: see s 5(1) of the Act, Art 1 of the CAT and the Explanatory Memorandum in relation to the Bill at [52]. Further, the International Human Rights Treaties do not require the non-citizen to establish that the non-citizen could not avail himself or herself of the protection of the receiving country or that the non-citizen could not relocate within that country. Sections 36(2B)(a) and (b) have adopted a different and contrary position. Sections 36(2B)(a) and (b) relieve Australia from its protection obligations in s 36(2)(aa) if those two particular circumstances are satisfied.

19 Further, the test adopted in ss 36(2)(aa), (2A) and (2B) is *significant harm*, not *irreparable harm*, being the test referred to in the General Comment No 31 on the ICCPR (Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligations Imposed on State Parties to the Covenant*, 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) at [12]), or *serious harm*, being the standard referred to and defined in s 91R of the Act.

20 It is therefore neither necessary nor useful to ask how the CAT or any of the International Law Treaties would apply to the circumstances of this case. The circumstances

of this case are governed by the applicable provisions of the Act, namely ss 36(2)(aa) and 36(2B), construed in the way that has been indicated.

THE TRIBUNAL'S DECISION

21 In relation to the question of whether MZYYL could obtain state protection under s 36(2B)(b), the Tribunal found that:

1. the requisite standard of protection from an authority under the complementary protections provisions (in s 36(2B)(b) of the Act) is different from the concept of state protection under the Refugees Convention in that the language requires that "… the level of protection must be such as to reduce the risk of significant harm to something less than a real one": Decision at [156] and [159]; and

2. despite the in-principle availability of state protection in the receiving country for the purposes of the Refugees Convention, for the purposes of s 36(2B) of the Act, MZYYL could not obtain, from an authority in that country, protection such that there would not be a "real risk" that he will suffer significant harm. That is, there remains a "real risk" that if MZYYL was removed to the receiving country he would suffer significant harm for the purposes of s 36(2A): Decision at [162].

ISSUE

22 It is common ground that the Tribunal was concerned with s 36(2B)(b) of the Act and, in particular, the proper construction of the following concept:

> 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.

PARTIES' RESPECTIVE POSITIONS

23 The Minister's complaint was that the Tribunal wrongly construed s 36(2B)(b) of the Act as requiring that a higher standard of state protection must be available to a non-citizen in applying the criterion for a protection visa under s 36(2)(aa) than that required by s 36(2)(a) of the Act. The Minister submitted that neither the wording of s 36(2B)(b) nor its legislative purpose requires a *guarantee* that the non-citizen will not suffer significant harm.

24 Instead, the Minister contends that the prescribed standard in s 36(2)(aa) is satisfied if the State in question operates an effective legal system for the detection, prosecution and punishment of acts constituting serious harm and MZYYL has access to such protection. In support of that contention, the Minister referred to and relied upon three specific matters.

25 First, the purpose of s 36(2)(a) is to ensure the implementation of Australia's non-refoulement obligations under the Refugees Convention and these obligations require no more than that the State "take reasonable measures to protect the lives and safety of its citizens, and those measures would include an appropriate criminal law, and the provision of a reasonably effective and impartial police force and justice system": *Minister for Immigration and Multicultural Affairs v S152/2003* (2004) 222 CLR 1 at [26] and [117]. In other words, Australian refugee law does not require a receiving State to guarantee the safety of its citizens from harm caused by non-State actors. In the Minister's submission, the same could equally be said with respect to the purpose of the Complementary Protection Regime in relation to Australia's non-refoulement obligations under the International Human Rights Treaties.

26 Secondly, the limitations on the definition of "real risk" in s 36(2B) overlap with established notions of refugee law pertaining to the internal relocation and state protection exceptions. The Minister referred to what he described as "similar exceptions" that exist in Canada, New Zealand and the European Union where the relevant exceptions speak of "reasonable" or "meaningful" protection.

27 Thirdly, any construction of s 36(2B)(b) of the Act that requires a guarantee of protection by State authorities has the potential to undermine the operation of s 36(2B)(c) of the Act. In particular, the Minister submitted that "[o]nce the view is taken that there is a risk notwithstanding effective State protection provided on a non-discriminatory basis … that risk necessarily becomes a risk that every member of the population faces and not one faced by the individual personally", a position expressly excluded as constituting a "real risk" under s 36(2B)(c).

28 MZYYL adopted the Tribunal's construction of s 36(2B)(b) of the Act. He submitted that s 36(2B)(b) of the Act did not raise a different or new issue. In his submission, s 36(2B)(b) of the Act reflects the legislative intention that a non-refoulement obligation does

not arise if the relevant state protection is such that there would not be a "real risk" of significant harm in the receiving state. Or, put another way, the state protection is such that it lessens the risk of harm to a level below "real risk".

ANALYSIS

29 The starting point must be the words of the Act. Section 36 deals with protection visas for non-citizens in Australia: ss 36(1) and (2). There are a number of criteria for the grant of a protection visa: s 36(1). The first criterion is a claim based on the Refugees Convention: s 36(2)(a).

30 The second criterion is contained in s 36(2)(aa) and, as explained, has been described as the Complementary Protection Regime: see [1] and [17]-[19] above. It does not include applicants for a protection visa to whom the Minister is satisfied Australia owes protection obligations under the Refugees Convention within the meaning of s 36(2)(a). However, if a non-citizen applies for a protection visa and the Minister is not satisfied Australia has protection obligations under the Refugee Convention, then s 36(2)(aa) provides an alternative, or complementary, basis for protection. One basis is that 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*.
>
> (Emphasis added.)

31 The Tribunal held, and the Minister does not now challenge, that in assessing "real risk … of significant harm" to the non-citizen under s 36(2)(aa) of the Act, that question may be resolved by asking whether there is a "real chance" that the non-citizen will suffer significant harm if he is removed from Australia to the receiving country: Decision at [153]-[154]. That element of the construction of s 36(2)(aa) is important because of the express terms, and role, of s 36(2B) of the Act.

32 As noted earlier, s 36(2B) provides 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 one of three circumstances exists. For present purposes, we are concerned with s 36(2B)(b), namely:

> 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
>
> (Emphasis added.)

33 At the outset, a number of matters should be noted. First, s 36(2B)(b) is the obverse of s 36(2)(aa). It uses the same language as s 36(2)(aa). Section 36(2B)(b), like the other paragraphs in s 36(2B), deems a particular circumstance to mean that the non-citizen will not suffer significant harm if the non-citizen were to be returned to the receiving country. If any of the circumstances mentioned in s 36(2B) are found to exist, the Minister must conclude that the non-citizen would not suffer significant harm for the purposes of s 36(2)(aa). However, the inquiry in s 36(2B) is not at large. It is an inquiry into the particular circumstances that appertain to the non-citizen whose application for a visa is under consideration. That is made clear by the reference in the chapeau to the "non-citizen" and the references in paragraphs (a) and (b) to the non-citizen relocating or seeking protection from an authority of the country but, even more particularly, by paragraph (c) which speaks of the non-citizen personally.

34 Second, the language in s 36(2B)(b) is different to the state protection test adopted in relation to the Refugees Convention: cf s 36(2)(a) of the Act and Art 1A(2) of the Refugees Convention and *S152/2003* at [26], [29], [117]; *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 566-8; *Minister for Immigration and Multicultural Affairs v Prathapan* (1998) 86 FCR 95 at 104-5; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 248.

35 Third, contrary to the submissions of the Minister, s 36(2B)(b) does not, in its terms or in its operation, require either the conclusion that it is inevitable that the non-citizen will suffer significant harm or the conclusion that it is certain that he or she will not. The express terms of the section require the Minister to be satisfied that, given the protection available to MZYYL in the receiving country, there would not be a *real risk* that he will suffer significant harm. There is nothing to suggest or warrant the imposition of some kind of guarantee of one or other outcome. And, indeed, such a guarantee is practically impossible: cf *S152/2003* at [28].

36 The Minister submitted that the prescribed standard of protection in s 36(2B)(b) is satisfied (as required by international standards) if the State authority in question operates an effective legal system for the detection, prosecution and punishment of acts constituting serious harm and the non-citizen has access to such protection. That construction is rejected. It is contrary to the express words of the section. To construe the provision in that way would have the Court ignore or read out of s 36(2B)(b) (and, indeed, other sections in the Complementary Protection Regime) the phrase "real risk" and the reference to the non-citizen. The Minister's construction seeks to have the Court focus on the system rather than the individual. That is not the question posed by the section. At least part of the problem with the Minister's construction of s 36(2B)(b) arises because the Minister seeks to treat s 36(2B)(b) as a "carve-out" to be considered after the enquiry provided for in s 36(2)(aa). That approach should be rejected. The section must be read as a whole. The enquiry provided for in s 36(2)(aa) necessarily involves consideration of the matters referred to in s 36(2B). The Minister does not undertake the enquiry in s 36(2)(aa) and then move to s 36(2B).

37 The Minister's construction also suffers from two further problems – it is impractical and contrary to existing authority. It is impractical because if adopted it would not provide any objective criteria for assessing whether the "international standards" had been met. Different countries have different systems. Not only do different countries have different standards but, if the Minister's construction were correct, it would arguably mean that, if the system provided by the receiving country, in some minor way, failed to meet the "international standards", whatever they might be, then s 36(2B) would not be satisfied. That is contrary to the purpose of the Complementary Protection Regime.

38 Further, the Minister's construction proceeds from an assumption that is contrary to existing authority. In considering an application for a protection visa under s 36(2)(a), courts have recognised that the mere existence of a system of state protection may not of itself be sufficient: see *A v Minister for Immigration and Multicultural Affairs* (1999) 53 ALD 545 at [38]-[43]. Unsurprisingly, the particular circumstances of the individual may be determinative: see *SZTAV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 at [24].

39 Section 36(2B)(b) poses the question whether, in obtaining protection from the receiving country, the protection is such that there would not be a real risk that the non-citizen would suffer significant harm if returned. The section proceeds from an assumption (correctly made) that there will be circumstances where the protection offered is not sufficient to remove the fact that there is a real risk that the non-citizen will suffer significant harm.

40 As the Tribunal found in relation to s 36(2)(aa), that requires an assessment of whether the level of protection offered by the receiving country reduces the risk of significant harm to the non-citizen to something less than a real one. In the present case, the Tribunal found that, for the purposes of s 36(2B)(b), MZYYL could not obtain from an authority in the receiving country protection such that there would not be a real risk that he would suffer significant harm if he was returned to that country. Accordingly, the Tribunal was satisfied that there remains a real risk that if MZYYL is removed to the receiving country, he will suffer significant harm for the purposes of s 36(2A). The Tribunal did not misconstrue the Act.

41 The application is dismissed with costs.

I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Lander, Jessup and Gordon.

Associate:

Dated: 24 October 2012