FEDERAL MAGISTRATES COURT OF AUSTRALIA

SZRSN v MINISTER FOR IMMIGRATION & ANOR *[2013] FMCA 78*

MIGRATION – Review of Refugee Review Tribunal decision – refusal of a protection visa – applicant claiming persecution in New Zealand – applicant's fears found not to be well-founded or Convention related – applicant wishing to remain in Australia with his children – whether the Tribunal erred in its consideration of the complementary protection criterion in view of the cancellation of the applicant's Australian residence visa and the impact of separation from his Australian children considered.

Migration Act 1958 (Cth), ss.5, 32, 36, 65, 91D, 91R, 417, 422B, 424A, 425, 501
Migration Amendment (Complementary Protection) Bill 2011
Migration Amendment (Complementary Protection) Act 2011 (Cth)
Migration Regulations 1994 (Cth)

Kindler v Canada, Communication No 470/1991, UN Doc CCPR/C/48/D/470/1991 (11 Nov 1993)
MSS v Belgium and Greece, European Court of Human Rights, Application No 30696/09
Re v Minister for Immigration; ex parte Yusuf (2001) 206 CLR 323
Soering v United Kingdom (1989) 11 EHRR 439, [91], [111] (7 July 1989)
SZBEL v Minister for Immigration (2006) 228 CLR 152
SZEHN v Minister for Immigration [2005] FCA 1389
Vuolanne v Finland, Communication No.265/1987 (7 April 1987), [9.2] (Human Rights Committee)

Applicant:	SZRSN
First Respondent:	MINISTER FOR IMMIGRATION & CITIZENSHIP
Second Respondent:	REFUGEE REVIEW TRIBUNAL
File Number:	SYG 1794 of 2012
Judgment of:	Driver FM
Hearing dates:	25 October 2012, 13 February 2013

Date of Last Submission:	13 February 2013
Delivered at:	Sydney
Delivered on:	1 March 2013

REPRESENTATION

The Applicant appeared in person

Counsel for the Respondents:	Ms H Younan
Solicitors for the Respondents:	DLA Piper

ORDERS

(1) The application filed on 20 August 2012 is dismissed.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT SYDNEY

SYG 1794 of 2012

SZRSN
Applicant

And

MINISTER FOR IMMIGRATION & CITIZENSHIP
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Introduction and background

1. This is an application to review a decision of the Refugee Review Tribunal (Tribunal) made on 30 June 2012. The Tribunal affirmed a decision of a delegate of the Minister not to grant the applicant a protection visa. The applicant is from New Zealand and had claimed protection because of a fear of violence in New Zealand. He also made clear that he wanted to remain in Australia with his children and that he does not have family or friends in New Zealand, apart from his estranged father. This case raises issues in particular about complementary protection in circumstances of forced separation of a parent from his children.

2. The following statement of background facts is derived from the initial submissions of the Minister filed on 18 October 2012 and supplementary submissions filed on 7 February 2013.

3. The applicant is a male citizen of New Zealand born on 18 January 1984.[1]

4. The applicant arrived in Australia on 13 July 1995, when he was 11 years of age, with his mother and brother.[2] On the same day, the applicant was granted a subclass TY 444 (Special Category) visa.[3]

5. On 18 October 2010, following a term of imprisonment for the offence of robbery with an offensive weapon, the applicant's subclass TY 444 visa was cancelled on character grounds, pursuant to s.501 of the *Migration Act 1958* (Cth) (Migration Act).[4] This decision took account of considerations relating to separation of the family and the best interests of the children, in accordance with Ministerial Direction No.41 and Australia's international obligations.

6. The applicant sought review of that cancellation decision before the Administrative Appeals Tribunal (AAT), but was unsuccessful[5].

7. The applicant appealed the decision of the AAT to the Federal Court of Australia, but was again unsuccessful[6].

8. The applicant also made an application for Ministerial intervention under s.417 of the Migration Act, but that application was denied.

9. The applicant's bridging visa E ceased on 22 March 2012, upon which the applicant was detained at Villawood Immigration Detention Centre.[7]

10. On 2 May 2012, the applicant lodged an application for a protection visa,[8] and claimed that:[9]

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[1] Court Book (CB) 13–14
[2] Tribunal's Reasons at [105], [110] (CB 242); CB 15, 19
[3] Protection (Class XA) Visa Decision Record, page 1 (CB 74); CB 50
[4] Protection (Class XA) Visa Decision Record, page 1 (CB 74); CB 50, 55. The applicant unsuccessfully sought review of the cancellation decision before the Tribunal: *Muliaga v Minister for Immigration and Citizenship* [2010] AATA 1034 (21 Dec 2010). The applicant was unsuccessful in appealing the Tribunal's decision: *Muliaga v Minister for Immigration and Citizenship* [2011] FCA 1168 (17 June 2011). A request for ministerial intervention under s.417 of the Migration Act was denied.
[5] [2010] AATA 1034 (21 December 2010)
[6] [2011] FCA 1168 (17 June 2011)
[7] Protection (Class XA) Visa Decision Record, p 2 (CB 75)
[8] CB 2ff
[9] CB 20

a) he wants to remain in Australia because his children live in Australia, he wants to be with them, and needs to help his de-facto wife with the care of the children;

b) he does not have family or friends in New Zealand;

c) his father lives in New Zealand, but he is not in contact with him, nor does he wish to be so;

d) he has not returned to New Zealand since his arrival in Australia;

e) he does not have any skills or employment history to assist him gain employment;

f) he has a criminal record;

g) he will not be able to find a job, accommodation or survive in New Zealand;

h) there is violence in New Zealand.

11. On 10 May 2012, the delegate refused the application.[10]

12. The applicant applied to the Tribunal for review of the original decision on 18 May 2012.[11]

13. By letter dated 25 May 2012, the applicant was invited to appear before the Tribunal on 4 June 2012.[12]

14. The applicant and his representative attended the hearing scheduled for 4 June 2012,[13] which was adjourned in order to give the applicant an opportunity to respond to information put to him by the Tribunal.[14]

15. By letter dated 4 June 2012, the applicant was invited to appear before the Tribunal on 18 June 2012,[15] which hearing the applicant and his representative attended.

[10] CB 83.
[11] CB 85ff.
[12] CB 100.
[13] CB 105.
[14] CB 106-107. Tribunal's reasons at [58]-[64] (CB 230-231).
[15] CB 114.

16. At the hearing of 4 June 2012, the applicant indicated that the claims in his protection visa application were still his claims, that nothing had been left out, that there was nothing further that he would like to claim, and that he did not have any further documents to submit.[16] However, at the hearing of 18 June 2012, the applicant submitted a number of documents,[17] including a Violent Offenders Therapeutic Program Treatment Report,[18] which the Tribunal subsequently accepted.[19]

The decision of the Tribunal

17. On 30 June 2012, the Tribunal affirmed the decision under review. The Tribunal made the following significant findings:

    a) The applicant has not experienced any harm in New Zealand[20].

    b) As a result, the Tribunal does not accept the applicant's claims regarding future harm from his father and members of his family in New Zealand. There is not a real chance of "serious harm" to the applicant from his father or family[21].

    c) The applicant's claim that he does not have any friends in New Zealand is not a Convention-related claim[22].

    d) The applicant has the skills, experience, and motivation to gain employment in New Zealand[23].

    e) There is no evidence to indicate that the applicant has a criminal record in New Zealand. As a result, there is not a real chance of any discrimination in, and the applicant will be able to find relevant, employment in New Zealand[24].

    f) The applicant will be able to find appropriate accommodation[25].

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[16] Tribunal's reasons at [30], [124] (CB 230, 244).
[17] Tribunal's reasons at [95] (CB 240). These documents are found at CB 50-65, 119-218.
[18] CB 119. Tribunal's reasons at [67] (CB 235-6), 96-100 (CB 240).
[19] Tribunal's reasons at [125] (CB 244).
[20] at [139], [143], [157]
[21] at [144], [157]
[22] at [146]
[23] at [147]
[24] at [148]
[25] at [149]

g) Any possible harm from gangs or other sources in New Zealand would be random, and not involve systematic and discriminatory conduct. The risk is faced by the population generally and not by the applicant personally. There is not a real chance that the applicant will face any direct harm from these sources in New Zealand[26].

h) There is no evidence to support the claim that the New Zealand authorities cannot or will not protect the applicant, and New Zealand has low levels of police corruption and effective government mechanisms to investigate and punish incidents of corruption. There is not a real chance that the applicant will be persecuted based on a discriminatory denial or withholding of State protection for a Convention reason[27].

i) The applicant has a place to go where there are people whom he once knew, and in a city (Wellington) in which he lived for his first 11 years. There is no real chance that the applicant will self-harm in the reasonably foreseeable future[28].

j) The Tribunal does not accept, either individually or cumulatively, that the applicant has a well-founded fear of being persecuted for a Convention reason if he returns to New Zealand now or in the reasonably foreseeable future. The applicant is not a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees (Refugees Convention) as referred to in s.36(2)(a) of the Migration Act[29].

18. The Tribunal was not satisfied that the information before it was sufficient to establish that, as a necessary and foreseeable consequence of the applicant being removed from Australia to New Zealand, there is a real risk that he will suffer "significant harm" as defined in s.36(2A) of the Migration Act. The Tribunal also found that the applicant is not a person to whom Australia has protection obligations under s.36(2)(aa) of the Migration Act[30].

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[26] at [150]
[27] at [152]
[28] at [154], [156]
[29] at [158], [162]
[30] at [159]

The judicial review application

19. These proceedings began with a show cause application filed on 20 August 2012. The applicant continues to rely upon that application. There are three grounds in that application:

    1. *When the Tribunal made its decision on 30 June 2012 to affirm the delegate's decision, it was made in denial of procedural fairness and natural justice to me.*

    2. *Procedures that were required to be followed in the making of the decisions in accordance with the Migration Act 1958 were not observed or complied with.*

    3. *The Tribunal constructively failed to exercise discretion.*

20. The applicant required an extension of time for the application, which was consented to by the Minister and which I granted.

21. The matter came before me for hearing on 25 October 2012. At that hearing, while it was apparent that there appeared to be no substance in relation to Grounds 1 and 2, there was an issue in relation to the complementary protection criterion in relation to Ground 3 because the Tribunal's reasons did not address the issue of the consequences of the separation of the applicant from his children. I gave the applicant the opportunity to amend his application and to provide written submissions. He has not taken up that opportunity. I also invited further written submissions from the Minister, which were filed on 7 February 2013. The Minister contends that there was no error by the Tribunal in not specifically addressing the issue of the applicant's separation from his children in considering the complementary protection criterion. The applicant, who is held in immigration detention, sought an adjournment, which I declined. He made no submissions bearing upon the legal issue.

Consideration

22. The applicant faces removal to New Zealand because his Australian residence visa has been cancelled. It was not initially apparent to me what form of visa had been cancelled as it was not apparent to me that New Zealand citizens or permanent residents required a visa to come to

Australia. The Minister's supplementary written submissions helpfully address that question.

The applicant's right to enter and reside in Australia

23. The Tribunal accepted that the applicant entered Australia on a New Zealand passport on 13 July 1995.[31] As stated above, the applicant was granted a special category visa on the same day. That visa was subsequently cancelled on character grounds, pursuant to s.501 of the Migration Act.[32]

24. I accept that the Tribunal made no error in not considering this issue (that is, the applicant's eligibility for the grant of a special category visa) for the following reasons.

25. First, this issue was not part of the question before the Tribunal (and therefore not within its jurisdiction). The review application concerned the review of the decision of the delegate to refuse to grant the applicant a protection visa under s.65 of the Migration Act, and in particular, whether the applicant is a person in respect of whom Australia has protection obligations under ss.36(2)(a) and 36(2)(aa) of the Migration Act. Whether or not the applicant is eligible for the grant of another visa does not impact on this question. There is otherwise no provision in the Migration Act requiring the Tribunal to consider this issue.

26. It is evident that the applicant no longer would satisfy the statutory criterion for the special category class of visa in s.32 of the Migration Act, which provides that:

> *(1) There is a class of temporary visas to be known as special category visas.*
>
> *(2) A criterion for a special category visa is that the Minister is satisfied the applicant is:*
>
> *(a) a non-citizen:*

[31] Tribunal's reasons at [105] (CB 242)
[32] Protection (class XA) visa decision record, page 1 (CB 74); CB 50, 55

(i) who is a New Zealand citizen and holds, and has presented to an officer or an authorised system, a New Zealand passport that is in force; and

(ii) is neither a behaviour concern non-citizen nor a health concern non-citizen; or

(b) a person declared by the regulations, to be a person for whom a visa of another class would be inappropriate; or

(c) a person in a class of persons declared by the regulations, to be persons for whom a visa of another class would be inappropriate.

(3) A person may comply with subparagraph (2)(a)(i) by presenting a New Zealand passport to an authorised system only if:

(a) the New Zealand passport is of a kind determined under section 175A to be an eligible passport for the purposes of Division 5 of Part 2; and

(b) before the person is granted a special category visa, neither the system nor an officer requires the person to present the passport to an officer.

27. A "behaviour concern non-citizen" is defined in s.5(1) of the Migration Act to mean a non-citizen who:

(a) has been convicted of a crime and sentenced to death or to imprisonment, for at least one year; or

(b) has been convicted of 2 or more crimes and sentenced to imprisonment, for periods that add up to at least one year if:

(i) any period concurrent with part of a longer period is disregarded; and

(ii) any periods not disregarded that are concurrent with each other are treated as one period;

whether or not:

(iii) the crimes were of the same kind; or

(iv) the crimes were committed at the same time; or

(v) the convictions were at the same time; or

(vi) the sentencings were at the same time; or

(vii) the periods were consecutive; or

(c) has been charged with a crime and either:

(i) found guilty of having committed the crime while of unsound mind; or

(ii) acquitted on the ground that the crime was committed while the person was of unsound mind;

(d) has been removed or deported from Australia or removed or deported from another country; or

(e) has been excluded from another country in prescribed circumstances;

where sentenced to imprisonment includes ordered to be confined in a corrective institution."

28. It is evident that the applicant would qualify as a "behaviour concern non-citizen" as defined in s.5(1) of the Migration Act (having been convicted of a crime and sentenced to imprisonment for at least one year), thus rendering him ineligible for such a visa[33]. Furthermore, the applicant is not a person declared by the *Migration Regulations* (Regulations) to be a person for whom, or in a class of persons declared by the Regulations (as per regulation 5.15A) to be persons for whom, a visa of another class would be inappropriate, for the purposes of ss.32(2)(b) and (c). The special category visa is a temporary visa, and any right to "enter and reside" is enlivened only upon the grant, and for the duration, of the visa.

29. Secondly, any right to enter and reside in Australia, in this case, as a consequence of a special category visa, is not an absolute right, and has been abrogated by operation of statute, in this case s.501 of the Migration Act.

30. Thirdly, the only substantive reference in the Migration Act to "a right to enter and reside" in a country appears in s.36(3) of the Migration Act,[34] which provides that:

[33] Section 32(2)(a)(ii)
[34] This is apart from the regulation-making provision in s.91D(2) of the Migration Act

> *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.*

31. This is a disentitling provision, and one that is of no avail to an applicant, to the extent that it negates any "protection obligations" in the circumstances described in the provision. Furthermore, it operates by reference to a right to enter and reside in "any country apart from Australia", and, as such, has no application when considering any right to enter and reside in Australia.

Procedural fairness

32. The applicant asserts a want of procedural fairness by the Tribunal. There is no substance to that assertion. Part 7, Division 4 of the Migration Act sets out an exhaustive statement of the natural justice hearing rule in relation to the matters with which it deals[35]. There is no evidence of a failure on the part of the Tribunal to comply with relevant provisions of the procedural code. The applicant was properly invited to a hearing before the Tribunal and did attend that hearing. In the course of the hearing, the applicant requested a further opportunity to give evidence, and a second hearing was convened, which the applicant also attended.

33. The Tribunal's decision record sets out in some detail the questions that were asked of the applicant and the answers he provided. It is clear from the Tribunal's decision record that the dispositive issues (including the issue of credibility) were raised with the applicant in the context of the hearing, that he was given a proper opportunity to respond, and that those responses were considered. Consequently, I accept that there was no breach of s.425 of the Migration Act[36].

34. The Tribunal's written reasons for decision clearly demonstrate that it considered all of the applicant's claims, but found that they did not give rise to a well-founded fear of persecution.

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[35] see s.422B of the Migration Act
[36] cf *SZBEL v Minister for Immigration* (2006) 228 CLR 152

35. The applicant submitted a large amount of material in connection with his protection visa application and in support of his Tribunal application. However, this material was related to the decision to cancel the applicant's former visa on character grounds, and had no bearing on the applicant's protection claims. Consequently, there was no error in the Tribunal not referring to this information in greater detail in its reasons for decision.

36. There is no obligation on the Tribunal to refer to every piece of evidence before it[37]

37. In relation to s.424A of the Migration Act, I find that there was no information in respect of the applicant that would have enlivened a disclosure obligation under the section.

A constructive failure of jurisdiction?

38. The issue of significance in this case is whether the Tribunal constructively failed to exercise its jurisdiction in relation to its consideration of the complementary protection criterion. The Tribunal recognised in its reasons at [111]-[114][38] that the applicant has a de facto partner and five children (three of whom are his biological children) who are Australian citizens. The Tribunal accepted that the applicant wished to remain in Australia with them. The Tribunal accurately summarised the application of complementary protection criterion in s.36(2)(a) of the Migration Act in its reasons at [16]-[18][39]. There could be no serious doubt that the applicant's wish to remain in Australia with his family (and the harm to him or them that might result from his enforced separation from them) could not enliven Australia's protection obligations under the Refugees Convention. There is a question, however, whether that enforced separation, with its probable prevention of the applicant performing his parental obligations towards his children, required express consideration under the complementary protection criterion. The Tribunal's consideration of complementary protection criterion was, to say the least, brief. The consideration is limited to one paragraph at [159] of the Tribunal's

[37] *SZEHN v Minister for Immigration* [2005] FCA 1389
[38] CB 242-243
[39] CB 229

reasons[40]. I was concerned that there appeared to have been no consideration by the Tribunal of the impact of the Convention on the Rights of the Child, in particular Articles 5, 7 and 9. Article 9(1) states:

> *States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.*

39. Article 9 nevertheless recognises that a state may take action (including deportation) which involves separation of a parent from his children[41]. The question in my mind, however, was whether the Tribunal failed to give meaningful consideration to the issue of the separation of the applicant from his children with reference to the question of whether that separation might involve cruel, inhuman or degrading treatment.

40. I accept that such consideration might involve difficulties for the Tribunal. The issue of separation had been considered by the Minister in exercising his power to cancel the applicant's former visa on character grounds. That decision was not reviewable by the Tribunal. It was reviewable by the AAT and the applicant had exercised that right of review. The Federal Court found no reviewable legal error by the AAT. Consideration by the Tribunal of the impact of separation on the applicant and his children would probably necessarily involve some reconsideration of the issues already addressed by the Minister and the AAT. It does not follow from that, however, that the Tribunal should not (and in an appropriate case be required to) consider those issues. The issue of law for me to resolve in the present case was whether the complementary protection criterion required any such consideration.

41. In relation to that issue, I accept the Minister's supplementary submissions.

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[40] CB 248
[41] see Article 9(4)

42. The question is whether "forced separation" of the applicant from his children constitutes "significant harm" within the meaning of s.36(2A) of the Migration Act, and specifically "degrading treatment". This question has arisen in the context of the applicant's claim that he wishes to remain in Australia because his children live in Australia, and needs to help his de-facto wife with the care of the children. The Tribunal simply dealt with the issue by concluding that the information before the Tribunal is not sufficient to establish that as a necessary and foreseeable consequence of the applicant being removed from Australia to New Zealand, there is a real risk that he will suffer "significant harm" for the purposes of s.36(2)(aa) of the Migration Act.

43. The question, therefore, is whether the Tribunal, in so dismissing the applicant's claim, has erred. I accept that no jurisdictional error is made when a Tribunal makes findings at a higher level of generality that are capable of dealing with more specific claims that have been made.[42] Furthermore, as I have noted, the Tribunal outlined the complementary protection statutory criteria,[43] and further recited the applicant's oral evidence at the hearing (4 June 2012) in response to the Tribunal's specific line of enquiry regarding complementary protection.[44] Furthermore, the Tribunal made specific findings (outlined below) that bear upon the question of complementary protection under s.36(2)(aa) of the Migration Act.

44. In order to address this question, it is convenient first to outline the complementary protection scheme in the Migration Act.

(i) Complementary protection scheme in s.36 of the Migration Act

45. The complementary protection scheme was implemented by relatively recent amendments to s.36 of the Migration Act.[45] Section 36 (together with s.65) provides for the grant of a protection visa to a non-citizen in Australia in certain circumstances notwithstanding that the Minister is

[42] *Re v Minister for Immigration; ex parte Yusuf* (2001) 206 CLR 323 at [91] (McHugh, Gummow and Hayne JJ).
[43] Tribunal's Reasons at [16]-[18] (CB 229).
[44] Tribunal's Reasons at [45]-[51] (CB 233).
[45] The *Migration Amendment (Complementary Protection) Bill 2011* was introduced into Parliament in February 2011, and was passed by the Senate on 19 September 2011. The Bill received royal assent on 14 October 2011, and the amending provisions commenced, by proclamation, on 24 March 2012: item 2 of the table in s 2(1) of the *Migration Amendment (Complementary Protection) Act 2011* (Cth).

not satisfied that Australia has "protection obligations" to that person under the Refugees Convention pursuant to s.36(2)(a).

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

> *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.*

47. Subsection 36(2A) provides that 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.*

48. The terms "torture", "cruel or inhuman treatment or punishment", and "degrading treatment or punishment", are defined in s.5(1) of the Migration Act in a manner that is not inconsistent with Article 1 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),[46] and Article 7 of the 1966 International Covenant on Civil and Political Rights (ICCPR), respectively.

[46] Although the definition of 'torture' goes beyond that prescribed in Article 1 of the CAT in that it is not limited to torture committed by a public official or other persons acting in an official capacity, Article 1(2) of CAT leaves it open to States to enact laws with wider application: see *Migration Amendment (Complementary Protection) Bill 2011: Explanatory Memorandum*, House of Representatives, [20], [24], [51]-[52]; C Bowen, Second Reading Speech: *Migration Amendment (Complementary Protection) Bill 2011*, House of Representatives, *Parliamentary Debates*, 24 February 2011, page 1357. No express limitation in equivalent terms qualifies the prohibition against torture contained in Article 7 of the ICCPR.

49. In particular, "degrading treatment or punishment" means:

> *…an act or omission that causes, **and is intended to cause**, **extreme humiliation which is unreasonable**, but does not include an act or omission:*
>
> *(a) that is not inconsistent with Article 7 of the Covenant; or*
>
> *(b) that causes, and is intended to cause, extreme humiliation arising only from, inherent in or incidental to, lawful sanctions that are not inconsistent with the Articles of the Covenant.* [emphasis added]

50. Subsection 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:

> *(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.*

51. It is clear from the language of the statutory scheme, as confirmed by the extrinsic material[47], that the purpose of the scheme is to introduce a system for considering claims that may engage Australia's *non-refoulement* obligations, including those under the ICCPR and CAT.

52. It is relevant, first, to identify these obligations under the ICCPR. While there is an express *non-refoulement* obligation in Article 3 of the CAT, that obligation pertains to acts of "torture", and not to acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1 of the Convention.

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[47] The purpose of introducing such a system is to "*align our protection visa process with our existing international obligations and practices*": C Bowen, Second Reading Speech: Migration Amendment (Complementary Protection) Bill 2011, House of Representatives, *Parliamentary Debates*, 24 February 2011, page 1356. See also *Migration Amendment (Complementary Protection) Bill 2011: Explanatory Memorandum*, House of Representatives, p 1. "*The purpose of new paragraph 36(2)(aa) is to provide for a criterion for a protection visa on the basis of a non-refoulement obligation contained or implied in the Covenant or CAT*": *Migration Amendment (Complementary Protection) Bill 2011: Explanatory Memorandum*, House of Representatives, [65]

53. A *non-refoulement* obligation has been implied from Article 2 and, relevantly, Article 7 of the ICCPR[48]. The primary obligation imposed upon State parties by the ICCPR is found in Article 2(1), which provides that:

> *Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

54. Article 7 provides relevantly that: "[n]o one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment." The United Nations Human Rights Committee has stated in CCPR General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on State Parties to the Covenant (adopted 29 March 2004) that:

> *… the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of* ***irreparable harm****, such as that contemplated by articles 6 and 7 of the Covenant,* ***either in the country to which removal is to be effected or in any country to which the person may subsequently be removed****."*[49] [emphasis added]

(ii) The findings of the Tribunal indicate that the harm claimed is not "significant harm"

55. The applicant claims to fear harm should he be returned to New Zealand from: (i) his father, and members of his family; and (ii) gangs and other unidentified sources.

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[48] See, for example, *Kindler v Canada*, Communication No 470/1991, UN Doc CCPR/C/48/D/470/1991 (11 Nov 1993), [6.2], [13.1]; *Soering v United Kingdom* (1989) 11 EHRR 439, [91], [111] (7 July 1989); *MSS v Belgium and Greece*, European Court of Human Rights, Application No 30696/09 (21 Jan 2011)

[49] CCPR/C/21/Rev.1/Add.13 (General Comments), at [12]. See also CCPR General Comment No 20 at [9].

56. The applicant did not present any evidence to suggest that the harm feared would meet the high threshold in s.36(2A) of torture, cruel, inhuman or degrading treatment or punishment.

57. Furthermore, the Tribunal did not find credible the applicant's claim that he had been beaten by his father almost to death[50]. The Tribunal accepted that the applicant had not experienced any harm in New Zealand, and found that there was no real chance of "serious harm" to the applicant from his father or his family[51]. While this is an express reference to the standard of harm for the purposes of s.91R of the Migration Act (relevantly, a threat to the person's life or liberty, or significant physical harassment or ill-treatment of the person, s.91R(2)(a)-(c)), in relation to claims under the Refugees Convention, these factual findings also bear upon the question of "significant harm" in s.36(2A) of the Migration Act (relevantly, arbitrary deprivation of life, torture, and cruel, inhuman or degrading treatment or punishment, s.36(2A)(a), (c)-(e)).

58. Similarly, the Tribunal found that any possible harm from the claimed violence in New Zealand was random and not selective, and that the risk faced was one by the population of New Zealand generally and is not faced by the applicant personally[52]. As such, the exception in s.36(2B)(c) of the Migration Act operates such that there is taken not to be a real risk that the person will suffer "significant harm" for the purposes of s.36(2)(aa) and (2A).

59. In addition, the Tribunal found that there was no evidence to support the applicant's claim that the New Zealand authorities could not or would not protect him[53]. As such, the exception in s.36(2B)(b) of the Migration Act operates such that there is taken not to be a real risk that the person will suffer "significant harm" for the purposes of s.36(2)(aa) and (2A).

[50] Tribunal's reasons at [141]-[142] (CB 246)
[51] Tribunal's reasons at [143]-[144] (CB 246)
[52] Tribunal's reasons at [150] (CB 247)
[53] Tribunal's reasons at [152] (CB 247)

(iii) "Forced separation" does not constitute "significant harm"

60. I accept that the act of removal resulting in "forced separation" from children residing in Australia, or the ongoing effect of that separation in New Zealand, does not constitute "significant harm", and in particular "degrading treatment", for the following reasons.

61. First, the language of s.36(2)(aa) of the Migration Act makes reference to Australia's "protection obligations" owed in respect of the non-citizen. As stated above, the purpose of the provision is to provide a statutory scheme that gives effect to those obligations. In relation to the claims of the applicant, the obligation invoked is the *non-refoulement* obligation implied under Articles 2 and 7 of the ICCPR: that is, as the Human Rights Committee enunciated, the obligation (on a State) not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of "irreparable harm … either in the country to which removal is to be effected or in any country to which the person may subsequently be removed".

62. It is clear from this comment that the *non-refoulement* obligation is an obligation to afford protection to a non-citizen where the harm faced is that which arises in the receiving country. The *non-refoulement* obligation under international law does not operate to afford protection from harm by a State to a non-citizen from that State itself. While it is no doubt true that any harm stemming from the applicant's separation from his children in Australia would occur in New Zealand if he is removed there, the same would be true in any country to which the applicant is removed. The harm stems from his removal from Australia, not his presence in any particular other country.

63. Secondly, the "exceptions" in s.36(2B) of the Migration Act (which limit the circumstances in which a finding of "real risk" of significant harm for the purposes of s.36(2)(aa) may be made) expressly refer to harm "in a country". That country is necessarily the receiving country if the circumstances pertaining to relocation (s.36(2B)(a)) and State protection (s.36(2B)(b)) are to have any application. Thus, if the risk of harm claimed by the non-citizen is, as suggested in the present case, the risk of degrading treatment as a consequence of removal from Australia (where his children reside), then the prospect of relocation to

another area of Australia, or protection from a public authority, would be nonsensical.

64. Thirdly, if the relevant act were considered to be that of being removed, then s.36(2)(aa) would require that the Minister be satisfied that there are 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 be removed***. This circularity suggests that the relevant act in the definition of "degrading treatment" cannot be the act of removal itself.

65. Fourthly, in determining whether forced separation from children constitutes "degrading treatment", it cannot be accepted that "forced separation", which is ancillary to the return of the non-citizen to the receiving country, is an act that is "intended to cause" extreme humiliation which is unreasonable. That is, "forced separation" is the consequence of removal, and a consequence cannot be said to have an intention to cause a result (which it itself constitutes). Even if one views the relevant act as "removal" (such that removal itself constituted the "degrading treatment") it cannot be said (in the absence of evidence) that the act of removal is perpetrated by the State with the intention to cause extreme humiliation that is unreasonable. It would have to be demonstrated, as a matter of evidence, that the Australian Government intends to cause the non-citizen extreme humiliation by returning them to the receiving State.

66. In any event, even if it were accepted that "forced separation" of the applicant from his children as a consequence of his removal to New Zealand, could, in principle, constitute "significant harm", I accept that that circumstance does not meet the definition of "degrading treatment" in the Migration Act. That is, the circumstance does not meet the high threshold of an act or omission that causes "extreme humiliation" which is unreasonable. This is consistent with international jurisprudence that indicates that the humiliation or debasement must exceed a particular level.[54]

[54] See, for example, *Vuolanne v Finland*, Communication No.265/1987 (7 April 1987), [9.2] (Human Rights Committee). To the extent that the definition of "degrading treatment" expressly excludes an act

67. Accordingly, the Tribunal did not err in determining that the applicant did not meet the criterion of complementary protection. The specific findings of the Tribunal (as outlined above) provide a basis upon which to conclude that the harm claimed by the applicant was not "significant harm" within the meaning of s.36(2A) of the Migration Act, for the purposes of s.36(2)(aa). There was otherwise no reason for the Tribunal to specifically address the question of whether the "forced separation" of the applicant from his children constituted such harm.

Conclusion

68. I find that the Tribunal decision is free from jurisdictional error. The decision is therefore a privative clause decision and the application must be dismissed. I will so order.

69. I will hear the parties as to costs.

I certify that the preceding sixty-nine (69) paragraphs are a true copy of the reasons for judgment of Driver FM

Associate:

Date: 1 March 2013

or omission that is not inconsistent with Article 7 of the ICCPR, the interpretation of that Article becomes a question of statutory construction.