HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S169 of 2020

BETWEEN:

DQU16
First Appellant
DQV16
Second Appellant
DQW16
Third Appellant

and

MINISTER FOR HOME AFFAIRS
First Respondent
IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

APPELLANTS' REPLY

Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Reply to first respondent's submissions

2. These submissions respond to the first respondent's submissions filed 25 November 2020 (**Minister's submissions**). The abbreviations used in the appellants' submissions are continued in this reply.
3. In response to the Minister's contentions as to the findings of the Authority at [4]-[11] of the Minister's submissions, the appellants do not consider it necessary to deal with each and every factual contention set out in the Minister's submissions.
4. Relevant to the issues in this Court (as identified in the Statement of Issues at paragraphs 2(a) and (b) of the appellants' submissions[1]) is, however:
    a. whether the findings of the Authority were made in the context of the application of the "correct legal test"[2] being applied for each of the

[1] Explicitly agreed to by the Minister: Minister's submissions at [4].

appellants' claims, first their refugee claim and secondly their application for complementary protection; and

b. whether the Authority's findings are by reference to the "distinct statutory task"[3] that the Authority is required to perform in relation to each claim.

The Authority's statutory review function

5. The findings of the Federal Court that the Authority's findings in relation to the complementary protection claim "*implicitly* adopted"[4] an earlier finding made "*perhaps unwittingly*"[5], in particular, support the appellants' proposition that the Authority did not apply the correct legal tests in determining each of the claims separately.

6. Read fairly, *BCX16 v Minister for Immigration and Border Protection* [2019] FCA 465 (5 April 2019) does not support the statement made in the Minister's submissions at [38]. The relevant portion of Charlesworth J's decision is:

> "[23] …The facts bearing on the alternate visa criteria in s 36(2)(a) and s 36(2)(aa) may partially or wholly overlap, particularly in cases where a claim to have an objectively well-founded fear of persecution for the purposes of s 36(2)(a) of the Act is supported by the same facts that are said to give rise to a real risk of significant harm faced by the visa applicant "personally". To the extent of any such overlap in the factual bases for the claims, the Tribunal is entitled to rely on its earlier factual findings, *provided that it applies the correct legal test to them*: *Minister for Immigration and Citizenship v Applicant A125 of 2003* (2007) 163 FCR 285.
>
> [24] Here, the facts alleged in support of each alternate criterion did not wholly coincide. The appellant did not claim to fear persecution by reason of his status as a resident of the city of Kabul. He did, however, rely on his place of residency as a personal circumstance that caused him to face a real risk of significant harm that was not the same as that faced by the population of Afghanistan generally." (emphasis added)

7. The reasoning exercise required by each of s 36(2)(a) (**Refugee claim**) and s 36(2)(aa) (**complementary protection claim**) involves consideration of different tests. Justice Reeves erred in finding that it was sufficient for the Authority to

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[2] See at [45]-[48] of the appellants' submissions. See also reference below to *BCX16 v Minister for Immigration and Border Protection* [2019] FCA 465 at [23]-[24].
[3] See at [44]-[48] of the appellants' submissions including by reference to this Court's decisions in *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34 at [5] and *AUS17 v Minister for Immigration and Border Protection* [2020] HCA 37 at [12].
[4] CAB Tab 8, [10] page 77 (emphasis added).
[5] CAB Tab 8, [9] page 76 (emphasis added).

make findings "*perhaps unwittingly*"[6] and "*implicitly* adopting"[7] findings in relation to the Refugee claim to base the rejection of the first appellant's complementary protection claim. The Authority's failure to make *explicit* findings in relation to the separate claim for complementary protection was a jurisdictional error because the Authority failed to fulfil its statutory task.

2014 Amendments to the *Migration Act*

8. At [21] and [22] of the Minister's submissions, it is suggested that the introduction of sections 5H and 5J of the *Migration Act* had the effect of "largely codifying the definition of 'refugee' under the Convention". Those sections do not "largely codify", they narrow the application of *S395* principles in the consideration of refugee applications.

9. In response to the Minister's submissions at [27], the appellants note that the definition of "torture" in s 5(1) is "clearly enough derived from the definition of "torture" in Art 1 of the CAT".[8] While there is an additional requirement of "intention" imported into the definitions of "torture", "cruel or inhuman treatment or punishment" or "degrading treatment or punishment"[9], the definitions also exclude lawful sanctions that are not inconsistent with the ICCPR. It is not suggested in the present case that the actions of the Sunni and Shi'ite extremists, referred to in the Authority's decision as acting "with impunity"[10], would not have the requisite intent to fulfil the statutory definitions of "torture", "cruel or inhuman treatment or punishment" or "degrading treatment or punishment".

10. As indicated at [21] of the Minister's submissions, sections 5H and 5J of the *Migration Act* were introduced in 2014.[11] Section 36(2)(aa) was inserted in 2011.

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[6] CAB Tab 8, [9] page 76 (emphasis added).
[7] CAB Tab 8, [10] page 77 (emphasis added).
[8] *SZTAL v Minister for Immigration and Border Protection; SZTGM v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 (6 September 2017) at [4] 366 per Kiefel CJ, Nettle and Gordon JJ.
[9] *SZTAL v Minister for Immigration and Border Protection; SZTGM v Minister for Immigration and Border Protection* [2017] HCA 34; (2017) 262 CLR 362 (6 September 2017) at [4]–[5] 366 per Kiefel CJ, Nettle and Gordon JJ.
[10] CAB Tab 1, [15] page 8.40.
[11] See Schedule 5 of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

The section 5J Amendments are not expressed to apply to the complementary protection criterion.[12]

Legislative context of s 36(2)(aa) and statutory construction

11. The Minister contends at [34] of his submissions that:

> "the absence of any reference to such considerations…is consistent with a legislative intention that such considerations are not applicable in considering the criterion in s 36(2)(aa)."

12. The appellants refer to the Explanatory Memorandum in respect of the introduction of s 5J.[13] The 2014 amendments were expressed to be a legislative response to this Court's decision in *S395*, to limit the operation of those *S395* principles in Refugee claims. That there were no such similar provisions in relation s 36(2)(aa) claims does not, as the Minister contends at [34] of his submissions, reflect an intention that *S395* principles do not apply in the consideration of the separate statutory task of determining complementary protection claims.

13. At [23] of the Minister's submissions, the Minister states that it is significant that Parliament did not enact an analogous provision to s 5J in relation to the complementary protection criterion in s 36(2)(aa). The Minister does not identify what significance flows from that omission. The Minister appears to be asking this Court[14] to infer from the silence as to complementary protection claims in the 2014 amendments an unstated Parliamentary intention to affect the construction of s 36(2)(aa) which was inserted by the 2011 amendments.

14. Such a submission is inconsistent with statutory construction principles, including the principles of legality. In *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1; (2015) 255 CLR 514, French CJ stated at [8][15]:

> " 'every Statute is to be so interpreted and applied as far as its language admits as not to be inconsistent with the comity of nations or with the established rules of international law'. It has ample support in subsequent decisions of this Court." (footnotes omitted)

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[12] Cf *SZSCA* [2014] HCA 45; (2014) 254 CLR 317 at 330-331 [36]-[38] (Gageler J); Federal Court judgment at [15]: CAB Tab 8, at 79.10.
[13] See appellants' submissions at [31(d)]; *Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011* (Cth) (**Explanatory Memorandum**), p. 3.
[14] See also at [34] of the Minister's submissions as cited above.
[15] Citing O'Connor J in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* [1908] HCA 95; (1908) 6 CLR 309 at 363.

15. Where there is "constructional choice"[16] in respect of the construction of the statutory task required by s 36(2)(aa), as the parties contend in the present case, in addition to consideration of the legislative history, the principles of legality would apply to construing this provision. Further, the statutory task should be construed consistently with an interpretation that conforms with international law and obligations.[17] Accordingly, limitations on Australia's non-refoulement obligations ought not be "read in" to the statutory task pursuant to s 36(2)(aa) unless the legislative provision makes such limitations clear and express.

16. When inserting s 5J, the Parliament clearly and expressly intended to limit the application of *S395* principles to Refugee claims, but not to claims for complementary protection. If the Parliament sought to limit the application of *S395* principles to complementary protection visa applications in the same way as they have done in respect of Refugee applications, an explicit statement to that effect would have been required. That there is no such explicit statement in relation to complementary protection claims supports the appellants' proposition that the first question identified in the agreed Statement of Issues be answered in the affirmative.

17. Further, the construction of s 36(2)(aa), taking into account the above legislative history, supports the appellants' proposition that there is a separate statutory task that the Authority must perform in determining an applicant's complementary protection visa application. The Authority will err in its assessment and determination of a complementary protection visa application if it relies on findings made in the context of the Refugee claim as to modification of behaviour, without more, and in particular without addressing the reason for any intended changed conduct on the part of an applicant.

Dated: 16 December 2020

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[16] *Momcilovic v The Queen* [2011] HCA 34; 245 CLR 1 at 46 [43] per French CJ.
[17] See cases cited in *Momcilovic v The Queen* [2011] HCA 34;(2011) 245 CLR 1 at 46 [43] per French CJ. See further Herzfeld P and Prince T, *Interpretation* 2nd ed (Lawbook Co, 2020) at [9.350] including cases cited therein in particular *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31 at [44] (French CJ and Kiefel J) and at [134] (Gageler J); and *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1; (2015) 255 CLR 514 at [8] (French CJ).