

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
KEANE, GORDON, EDELMAN AND STEWARD JJ

DQU16 & ORS

APPELLANTS

AND

MINISTER FOR HOME AFFAIRS & ANOR

RESPONDENTS

DQU16 v Minister for Home Affairs
[2021] HCA 10
Date of Hearing: 4 February 2021
Date of Judgment: 7 April 2021
S169/2020

ORDER

Appeal dismissed with costs.

On appeal from the Federal Court of Australia

Representation

C A Webster SC with I J King and E C Graham for the appellants (instructed by Clifford Chance)

A M Mitchelmore SC with G J Johnson for the first respondent (instructed by Australian Government Solicitor)

Submitting appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

DQU16 v Minister for Home Affairs

Immigration – Visas – Application for protection visa – Where s 36(2) of *Migration Act 1958* (Cth) provides two criteria for grant of protection visa – Where s 36(2)(a) provides refugee criterion – Where s 36(2)(aa) provides complementary protection criterion – Where Court in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 ("*Appellant S395*") held asylum seeker cannot be expected to hide or change behaviour manifesting protected characteristic under Refugees Convention for purposes of assessing claim under s 36(2)(a) – Where s 36(2)(aa) requires assessment of whether "significant harm" a "necessary and foreseeable consequence" of applicant's return to receiving country – Where first appellant applied for protection visa under both ss 36(2)(a) and 36(2)(aa) – Where Immigration Assessment Authority found first appellant would modify behaviour on return to Iraq – Whether failure to consider principle in *Appellant S395* under s 36(2)(aa) constituted jurisdictional error.

Words and phrases – "absolute and non-derogable", "complementary protection", "Convention Against Torture", "cruel, inhuman or degrading treatment or punishment", "innate or immutable characteristics", "International Covenant on Civil and Political Rights", "manifestation of a Convention characteristic", "membership of a particular social group", "modification of behaviour", "necessary and foreseeable consequence", "non-refoulement obligations", "real chance", "real risk", "refugee", "Refugees Convention", "sale of alcohol", "significant harm", "well-founded fear of persecution".

Migration Act 1958 (Cth), ss 5H, 5J, 36(2)(a), 36(2)(aa).

1 KIEFEL CJ, KEANE, GORDON, EDELMAN AND STEWARD JJ. Section 36(2) of the *Migration Act 1958* (Cth) relevantly provides two criteria for the grant of a protection visa: that the applicant is a non-citizen in Australia "in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee" under s 36(2)(a); and, if the applicant does not satisfy that criterion, that the applicant meets the complementary protection criterion under s 36(2)(aa), which gives effect to some of Australia's non-refoulement obligations under international instruments.

2 The first appellant, an Iraqi national, sought a protection visa relying on s 36(2)(a) and s 36(2)(aa) of the *Migration Act*. The first appellant said he feared persecution¹, and would suffer significant harm², if returned to Iraq because, while in Iraq, he sold alcohol, which is banned by local law in some parts of Iraq and considered "immoral" and "un-Islamic" by Sunni and Shi'ite extremists. The claims of the second and third appellants, the first appellant's wife and child, depended on the claims of the first appellant. The Immigration Assessment Authority ("the Authority") found that the first appellant had not been personally targeted for reasons relating to the sale of alcohol, that he did not face a real risk of harm if returned to Iraq because he had sold alcohol previously, and, critically for this appeal, that if the first appellant returned to Iraq he would not continue to sell alcohol. The Authority affirmed the decision of the delegate of the then Minister for Immigration and Border Protection³ ("the Minister") not to grant the appellants protection visas. The Authority's approach to, and determination of, the first appellant's claim under s 36(2)(a) was not in issue in this Court.

3 This Court held in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs*⁴ that, in assessing the refugee criterion in s 36(2)(a), an asylum seeker cannot be expected to hide or change behaviour that is the manifestation of a protected characteristic under the Convention relating to the Status of Refugees as modified by the Protocol relating to the Status of Refugees

1 *Migration Act*, s 36(2)(a).

2 *Migration Act*, s 36(2)(aa).

3 Now the Minister for Home Affairs.

4 (2003) 216 CLR 473 at 489-491 [40]-[43], 500-502 [80]-[83], 503 [88].

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("the Convention") in order to avoid persecution⁵. *Appellant S395* preceded both the insertion of s 36(2)(aa)⁶ and subsequent amendments to s 36(2)(a)⁷.

4 The sole question raised by this appeal is whether the Authority committed jurisdictional error in failing to apply the principle in *Appellant S395* when considering the first appellant's application for complementary protection under s 36(2)(aa)⁸, namely, in failing to ask why the first appellant would not sell alcohol if he returned to Iraq. The appellants' contention that the Authority should have applied that principle when considering the first appellant's application for complementary protection was based on what was said to be the protective objective behind s 36(2)(aa) and the absolute and non-derogable nature of the international obligations to which it gives effect, as well as what were said to be similarities between s 36(2)(a) and s 36(2)(aa).

5 As these reasons will explain, the differences in the text, context and purpose of s 36(2)(a) and s 36(2)(aa) and, thus, in the construction and application

5 See also *Minister for Immigration and Border Protection v SZSCA* (2014) 254 CLR 317 at 330-331 [37].

6 Section 36(2)(aa) commenced in March 2012: *Migration Amendment (Complementary Protection) Act 2011* (Cth), s 2(1), Sch 1, item 12.

7 Section 36(2)(a) was substantively amended, and ss 5H and 5J were inserted, in 2014 as part of a suite of amendments introduced by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), s 2(1), Sch 5, items 7 and 10. The relevant amendments commenced on 18 April 2015.

8 The appellants' application in the Federal Circuit Court of Australia for judicial review of the Authority's decision was dismissed on 3 August 2017: see *DQU16 v Minister for Immigration and Border Protection* [2017] FCCA 1818. On 14 December 2018, the Federal Court of Australia granted the appellants an extension of time to appeal to the Federal Court against the judgment of the Federal Circuit Court, subject to the notice of appeal being confined to the single ground that the Authority committed jurisdictional error by failing to apply the principles in *Appellant S395* when considering the complementary protection criterion under s 36(2)(aa) of the *Migration Act*: see *DQU16 v Minister for Home Affairs* [2018] FCA 1695. On 22 April 2020, the Federal Court dismissed the appeal: see *DQU16 v Minister for Home Affairs* [2020] FCA 518.

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of the separate criteria in s 36(2)(a) and s 36(2)(aa) compel the conclusion that the principle in *Appellant S395* in relation to s 36(2)(a) (whether as that provision was framed at the time of the decision or as now in force) does not apply to the statutory task when considering the complementary protection criterion in s 36(2)(aa). The appeal should be dismissed.

***Appellant S395* and the statutory task under s 36(2)(a)**

6 In *Appellant S395*, this Court was concerned with a claim for protection based on a person's refugee status under what became s 36(2)(a) of the *Migration Act*⁹. Central to the reasoning in *Appellant S395* was the definition of "refugee" in Art 1A(2) of the Convention. The definition contains four cumulative elements¹⁰: "(1) the person concerned must fear 'persecution' in the country of his or her nationality; (2) the persecution so feared must be 'for reasons of race, religion, nationality, membership of a particular social group or political opinion'; (3) that fear of persecution for one or more of those Convention reasons must be 'well-founded'; and (4) the person must be outside the country of his or her nationality 'owing to' that well-founded fear".

7 It is sufficient for present purposes to focus on the second and third elements of the definition. Both elements reflect that the purpose of the Convention is to "protect the individuals of every country from persecution on the grounds identified in the Convention whenever their governments wish to inflict, or are powerless to prevent, that persecution"¹¹. The third element of the definition, which is objective, "requires the decision-maker to decide what may happen if the applicant returns to the country of nationality"¹². That element requires

9 As in force in 2001, s 36(2) provided that "[a] criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol".

10 *SZSCA* (2014) 254 CLR 317 at 330 [35].

11 *Appellant S395* (2003) 216 CLR 473 at 489 [40]; see also 490-491 [41].

12 *Appellant S395* (2003) 216 CLR 473 at 499 [73].

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consideration of the situation of a particular applicant and "identification of the relevant Convention reasons that the applicant has for fearing persecution"¹³.

8 The Refugee Review Tribunal ("the Tribunal") in *Appellant S395* had accepted that it was not possible for the protection visa applicants in that case to live openly as homosexuals in Bangladesh, but found that they had previously conducted themselves "discreetly" in Bangladesh, and there was no reason to suppose that they would not continue to do so if they returned to that country. The Tribunal concluded that the applicants were not entitled to protection visas. The Tribunal's reasoning was held to be fallacious. The principle for which *Appellant S395* stands is that "a fear of persecution for a Convention reason, if it is otherwise well-founded, remains well-founded even if the person concerned would or could be expected to hide his or her race, religion, nationality, membership of a particular social group, or political opinion by reason of that fear and thereby to avoid a real chance of persecution"¹⁴. The principle "directs attention to *why* the person would or could be expected to hide or change behaviour that is the *manifestation of a Convention characteristic*"¹⁵ (emphasis added).

9 The rationale for the principle is that a person who would otherwise be entitled to protection under s 36(2)(a) will not, and should not, lose that protection if it can be shown that the person would or could avoid persecution by sacrificing a protected attribute under the Convention. The principle, and its rationale, ensure that "the very protection that the Convention is intended to secure" for those facing persecution because of a protected attribute is not undermined, or surrendered, by requiring such a person to conceal that attribute on return to their home country¹⁶.

13 *Appellant S395* (2003) 216 CLR 473 at 499 [73].

14 *SZSCA* (2014) 254 CLR 317 at 330 [36].

15 *SZSCA* (2014) 254 CLR 317 at 330-331 [37].

16 *SZSCA* (2014) 254 CLR 317 at 330 [36], citing *HJ (Iran) v Secretary of State for the Home Department* [2011] 1 AC 596 at 656 [110].

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Section 36(2)(a) was amended in 2014. At the same time, ss 5H and 5J were inserted¹⁷: s 5H provides a definition of "refugee" and s 5J provides a definition of "well-founded fear of persecution", largely codifying the definition of "refugee" under the Convention. The question that s 36(2)(a) asks is whether a person is owed protection obligations because they are a refugee. The statutory definition of "refugee" in s 5H directs attention to whether a person is unable or unwilling to avail himself or herself of the protection of his or her country of nationality, or unable or unwilling to return to the country of his or her former habitual residence, owing to a well-founded fear of persecution for one of the reasons set out in s 5J(1) (which in turn correspond to the five grounds for refugee status listed in Art 1A(2) of the Convention: race, religion, nationality, membership of a particular social group or political opinion). A fear of persecution will be "well-founded" if there is a "real chance" that the person will suffer the feared persecution if returned¹⁸. A "real chance" is a prospect that is not "remote" or "far-fetched": it does not require a likelihood of persecution on the balance of probabilities¹⁹. Section 5J(3) provides exceptions to what constitutes a well-founded fear of persecution. It provides that a person does not have a well-founded fear of persecution "if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country", unless the modification, among other things, relates to fundamental, innate or immutable characteristics. The qualification has the effect that s 5J(3) is not inconsistent with the principle in *Appellant S395*²⁰.

17 *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth), Sch 5, item 7.

18 *Migration Act*, s 5J(1)(b). The real chance of persecution must relate to all areas of a receiving country: *Migration Act*, s 5J(1)(c).

19 *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389, 398, 407, 429; Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 10. See also *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 at 551 [242]; *CGA15 v Minister for Home Affairs* (2019) 268 FCR 362 at 369-370 [22].

20 Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 174 [1194]. See also, for example, *Minister for*

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Statutory task under s 36(2)(aa)

11 Section 36(2)(aa), which implemented the regime for "complementary protection" and with which this appeal is concerned, was inserted into the *Migration Act*²¹ to provide an additional basis to s 36(2)(a) for the grant of a protection visa. Section 36(2)(aa) provides:

"A criterion for a protection visa is that the applicant for the visa is:

...

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm".

12 Section 36(2)(aa) applies where the applicant does not fall within s 36(2)(a) of the Act²² and it engages some, but not all, of Australia's non-refoulement obligations under the International Covenant on Civil and Political Rights ("the ICCPR") and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the CAT")²³. The provision was introduced to "allow all claims by visa applicants that may engage Australia's *non-refoulement* obligations under the [identified] human rights instruments to be considered under

Immigration and Border Protection v BBS16 (2017) 257 FCR 111 at 140 [82]; *AWL17 v Minister for Immigration and Border Protection* [2018] FCA 570 at [41]. The Minister accepted that the principles in *Appellant S395* may still be relevant in determining whether a person is a "refugee" under s 5H.

21 *Migration Amendment (Complementary Protection) Act 2011* (Cth), with effect from 24 March 2012.

22 *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362 at 365 [1], 384-386 [69]-[73].

23 *SZTAL* (2017) 262 CLR 362 at 365-366 [1]-[5]; *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211 at 215 [18]-[20].

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a single protection visa application process, with access to the same transparent, reviewable and procedurally robust decision-making framework ... available to applicants who make claims that may engage Australia's obligations under the ... Convention"²⁴. Importantly, however, s 36(2)(aa) only relevantly captures Australia's non-refoulement obligations under the ICCPR and the CAT, by which Australia agreed not to return a non-citizen to a receiving country where they would be subjected to the death penalty, arbitrarily deprived of their life or subjected to torture or cruel, inhuman or degrading treatment or punishment: it does not incorporate into domestic law any of the other protections contained within the ICCPR as a basis upon which a protection visa may be granted.

13 The question s 36(2)(aa) asks is whether the decision-maker has substantial grounds for believing that there is a real risk that a person will suffer significant harm, as defined in s 36(2A) and subject to the matters in s 36(2B) and (2C), as a "necessary and foreseeable consequence" of the person's return to a receiving country. The inquiry is prospective. There are three elements that must be satisfied for the prospective harm to satisfy s 36(2)(aa): (1) the decision-maker must have substantial grounds for believing (2) that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, (3) there is a real risk that the non-citizen will suffer significant harm.

14 The circumstances constituting "significant harm" are exhaustively identified in s 36(2A) in the following terms:

"[I]f:

- (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

24 Australia, House of Representatives, *Migration Amendment (Complementary Protection) Bill 2011*, Explanatory Memorandum at 1.

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(e) the non-citizen will be subjected to degrading treatment or punishment."

15 The specific harms identified in paras (a) and (b) of s 36(2A), namely, arbitrary deprivation of life and being subject to the death penalty, are intended to give effect to Art 6 of the ICCPR, which prohibits the arbitrary deprivation of life and prescribes when the death penalty may be carried out in countries which have not abolished it²⁵. "[T]orture", in para (c), is defined²⁶ to mean "an act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" for specific identified purposes including intimidating or coercing the person or a third person.

16 In order to fall within para (d) or (e) of s 36(2A), the acts or omissions constituting "cruel or inhuman treatment or punishment" or "degrading treatment or punishment", by definition²⁷, are considered against Art 7 of the ICCPR²⁸. Relevantly, "cruel or inhuman treatment or punishment" means an act or omission by which, among other things, "severe pain or suffering, whether physical or mental, is intentionally inflicted on a person" or "pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature". The other kind of harm – "degrading treatment or punishment" – refers to "an act or omission that causes, and is intended to cause, extreme humiliation which is unreasonable".

17 The decision-maker must also consider, in the context of paras (c) to (e) of s 36(2A), whether the acts or omissions arise from, or are inherent in or

25 Regarding arbitrary deprivation of life, see *SZDCD v Minister for Immigration and Border Protection* [2019] FCA 326 at [33]-[35].

26 *Migration Act*, s 5(1) definition of "torture".

27 *Migration Act*, s 5(1) definitions of "cruel or inhuman treatment or punishment" and "degrading treatment or punishment".

28 Although the definitions are not taken from the ICCPR, which does not provide a definition of "cruel, inhuman or degrading treatment or punishment": see *SZTAL* (2017) 262 CLR 362 at 366 [4]-[5], 377 [45], 387 [78].

incidental to, lawful sanctions that are not inconsistent with the Articles of the ICCPR²⁹.

Principle in *Appellant S395* does not apply to complementary protection claims

18 As is self-evident, the text of s 36(2)(a) and s 36(2)(aa) is different and therefore, unsurprisingly, the statutory questions are different: they are not interchangeable. And they are different because the purpose of the inquiry under each provision is different³⁰. Determining whether a person has a well-founded fear of persecution for a Convention reason under s 36(2)(a) is a fundamentally different inquiry to the question in s 36(2)(aa). Section 36(2)(a) seeks to define when a protection visa will be granted to a person seeking refuge. Under s 36(2)(aa), the question is whether a person can be returned to a particular State: and the provision is formulated by reference to the *consequences* of a non-citizen's removal to a particular State.

19 The fact that the Explanatory Memorandum to the *Migration Amendment (Complementary Protection) Bill 2011*, containing what became s 36(2)(aa), recorded³¹ that Australia's non-refoulement obligations under the ICCPR and the CAT are "absolute and cannot be derogated from" does not support the contention that the principle in *Appellant S395* has any application in assessing the complementary protection criterion under s 36(2)(aa). The relevant question is not what the ICCPR and the CAT provide, but rather the statutory question posed by s 36(2)(aa)³², which engages some, but not all, of Australia's non-refoulement

29 *Migration Act*, s 5(1) definitions of "cruel or inhuman treatment or punishment", "degrading treatment or punishment" and "torture".

30 See, eg, *Minister for Immigration and Citizenship v Anochie* (2012) 209 FCR 497 at 516 [78]; *SZQRB* (2013) 210 FCR 505 at 526 [99]-[100]; *SZTAL* (2017) 262 CLR 362 at 385-386 [73].

31 Australia, House of Representatives, *Migration Amendment (Complementary Protection) Bill 2011*, Explanatory Memorandum at 3.

32 *Dietrich v The Queen* (1992) 177 CLR 292 at 305; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 at 527-528 [10]-[12].

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obligations under the ICCPR and the CAT³³. The statutory question, namely whether a person can be removed to a particular State without suffering identified forms of harm, is framed by reference to the risk of a non-citizen suffering significant and specified harm as a necessary and foreseeable consequence of removal to a receiving country. Assessing the risk that a non-citizen will suffer significant *harm* within s 36(2A) necessarily involves an assessment of the individual circumstances of the non-citizen and the basis on which the non-citizen claims that those circumstances give rise to the requisite degree of risk as a necessary and foreseeable consequence of removal to a receiving country.

20 Another important difference arising from the different statutory text and purpose of the inquiry under s 36(2)(a) and s 36(2)(aa) is that the nature of the harm at which each provision is directed is different. The Convention will be satisfied by persecution which may fall well short of death, torture or irreparable harm. Non-refoulement obligations under the ICCPR are directed at irreparable harm of the specific kinds contemplated in Arts 6 and 7 of the ICCPR, which include being arbitrarily deprived of life or subjected to the death penalty; subjected to torture; subjected to cruel or inhuman treatment or punishment; or subjected to degrading treatment or punishment.

21 In relation to the harm at which s 36(2)(aa) is directed, two further aspects of the provision are of particular significance. The definition of "significant harm" in s 36(2A) is not formulated by reference to a person's inherent or immutable beliefs, attributes, characteristics or membership of a particular group. And assessment of the risk of that harm under s 36(2)(aa) does not involve finding a nexus between the harm feared by the non-citizen and those beliefs, attributes or characteristics, or the non-citizen's membership of a particular group. The provision only requires an assessment of the "necessary and foreseeable consequence[s]" of a person's return to a receiving country. It is a corollary of the statutory test in s 36(2)(aa) being framed in those terms that where a risk of "significant harm" can be avoided by modification of behaviour, such modification does not involve a manifestation of the very harm at which the criterion in s 36(2)(aa) is directed.

22 Of course, in some, perhaps many, cases in which the criterion in s 36(2)(aa) is satisfied, the basis for the risk of significant harm will be inherent to, or an immutable characteristic of, the non-citizen and modification of conduct may

33 SZTAL (2017) 262 CLR 362 at 365-366 [1]-[5]; MZYLL (2012) 207 FCR 211 at 215 [18]-[20].

not be possible. The bases for the claimed risk of significant harm are not prescribed but may include, for example, the fact that an applicant may have already committed an offence for which they will receive the death penalty if returned to a receiving country. In those cases, the principle in *Appellant S395* not only is inapplicable as a matter of statutory construction but is necessarily superfluous: no modification of behaviour could avoid the risk of significant harm.

23 In other cases, a decision-maker may find that a non-citizen is in a position to, and would, on their return to a receiving country, modify their behaviour in a way which would avoid the relevant significant harm so that the harm would not be the necessary and foreseeable consequence of their removal to that country. In those cases, there is nothing in the text, context or purpose of s 36(2)(aa) requiring the decision-maker to consider *why* the non-citizen would modify their behaviour. That an applicant might modify their behaviour in response to the possibility of significant harm as defined in s 36(2A) does not itself involve a realisation of the harm at which s 36(2)(aa) is directed. The underlying motivation of the applicant is not required to be considered under s 36(2)(aa). It is simply the case that, if, by modification of behaviour, a person will avoid a risk of harm of the kind at which s 36(2)(aa) is directed, it cannot be said to be a "necessary and foreseeable consequence" of the person's refoulement to that place that they will be at risk of that *kind* of harm³⁴.

24 The appellants' further contention, that the approach taken in *Appellant S395* applies when considering s 36(2)(aa) because the test for "real chance" in s 36(2)(a) is the same as that required for "real risk" under s 36(2)(aa), is misconceived³⁵. "Real chance" and "real risk", in s 36(2)(a) and s 36(2)(aa) respectively, are the *standards* by which the decision-maker is required to assess the relevant risks of harm. That the standards by which the relevant risks of harm are to be assessed are the same does not address the fact that the statutory question, including, importantly, the relevant kinds of harm against which the risks are to be assessed, is substantively different in each provision.

34 See *CRI026 v Republic of Nauru* (2018) 92 ALJR 529 at 541 [43]; 355 ALR 216 at 228-229.

35 It has been accepted in the Full Court of the Federal Court that the "real risk" standard that applies to complementary protection under s 36(2)(aa) is the same as the "real chance" test applicable under s 36(2)(a): see, eg, *SZQRB* (2013) 210 FCR 505 at 551 [245]-[246], 557-558 [297], 565 [342].

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25 The decision in *Appellant S395*, therefore, does not apply to a claim for complementary protection. The rationale for the principle in *Appellant S395* does not, and cannot, apply to the inquiry under s 36(2)(aa), which requires an assessment of the "necessary and foreseeable consequence[s]" of a person returning to a receiving country. The decision is not directed at a prohibition on refoulement to the kinds of harm contemplated in the ICCPR and the CAT. Indeed, as Gageler J recognised in *Minister for Immigration and Border Protection v SZSCA*, in the course of warning against the extension of the principle in *Appellant S395* "beyond its rationale", the principle has no application to a person who would or could be expected to hide or change their behaviour when that behaviour is not a manifestation of a Convention characteristic³⁶ – a warning now given effect by s 5J(3), which expressly requires a decision-maker to have regard to the prospect of behavioural modifications which are *unrelated* to Convention characteristics.

26 Something further needs to be said about s 5J(3). The appellants contended that the absence of an equivalent provision to s 5J(3) in relation to s 36(2)(aa) was indicative of a legislative intention to limit the application of the principle in *Appellant S395* to refugee claims arising under s 36(2)(a), but *not* to limit its application to complementary protection claims under s 36(2)(aa). That contention should be rejected. For the reasons stated³⁷, the principle in *Appellant S395* has no application to the assessment of a complementary protection claim under s 36(2)(aa). In any event, the appellants' contention misunderstands the effect of s 5J(3). The sub-section provides that a person does not have a well-founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid persecution, *other* than modifications of the kind listed in s 5J(3)(a) to (c), which are modifications relating to characteristics protected by the Convention: that is, innate or immutable characteristics of the person, such as identity, disability, race, ethnicity, religious beliefs, sexual orientation and so on. As the Explanatory Memorandum³⁸ to the Bill that introduced s 5J(3) expressly noted, the sub-section is consistent with the principle stated in *Appellant S395* and

36 (2014) 254 CLR 317 at 330-331 [37]-[38].

37 See [18]-[25] above.

38 Australia, House of Representatives, *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, Explanatory Memorandum at 174 [1194]. See also [10] above.

its rationale. It preserves the protection that the Convention intended to secure, and ensures that the principle articulated in *Appellant S395* is not "extended beyond its rationale"³⁹. The principle will therefore not apply where a person may be expected to modify behaviour that is not a manifestation of a Convention characteristic.

Overlapping claims

27 Although the statutory questions posed by s 36(2)(a) and s 36(2)(aa) are different, it has long been recognised⁴⁰ that, to the extent that the factual bases for claims under s 36(2)(a) and s 36(2)(aa) overlap, a decision-maker, when considering the complementary protection criterion under s 36(2)(aa), is entitled to refer to and rely on any relevant findings the decision-maker made when considering the refugee criterion under s 36(2)(a). The question under s 36(2)(aa) then is whether, in light of those and any other relevant findings, 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 of the kind prescribed in s 36(2A), subject to s 36(2B) and (2C). And, as will be seen, that is what the Authority did in this case.

Appellants' claims and the decision of the Authority

28 The appellants are Iraqi nationals and Shia Muslims from Nasiriya, Dhi Qar, Iraq. The second and third appellants are the wife and child of the first appellant. The first and second appellants arrived in Australia as "unauthorised maritime arrivals" within the meaning of s 5AA of the *Migration Act* on 23 August 2012. The third appellant was born in Australia. Subsequently, on 3 September 2015, the appellants lodged applications for temporary protection visas. The first appellant claimed protection as a refugee under s 36(2)(a) and complementary protection under s 36(2)(aa). The second and third appellants did not apply for protection in their own rights, but as members of the first appellant's family unit under s 36(2)(b)(i) and (c)(i) of the *Migration Act*.

39 *SZSCA* (2014) 254 CLR 317 at 330 [37].

40 See, eg, *SZSGA v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCA 774 at [56]; *SZSQG v Minister for Immigration and Citizenship* (2013) 136 ALD 360 at 375-377 [84]-[93]; *SZSHK v Minister for Immigration and Border Protection* (2013) 138 ALD 26 at 34 [31]; *BCX16 v Minister for Immigration and Border Protection* (2019) 164 ALD 313 at 318 [23].

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29 On 9 September 2016, a delegate of the Minister refused to grant the appellants protection visas. That decision was referred to the Authority for review under the fast track review scheme provided by Pt 7AA of the *Migration Act*.

30 The basis of the first appellant's claims for protection were summarised in the Authority's reasons. The first appellant worked as a private alcohol seller in Nasiriya between 2010 and 2012, selling liquor obtained from Baghdad from his car at various locations and arranging sales by phone. In 2012, he discovered that the "Mahdi Army", or "JAM", as it was referred to in the Authority's reasons, a "strong militant group", was planning to kill him because of his work as an alcohol seller. Around this time, he reported being shot at and chased by a vehicle or motorbike. He subsequently arranged to leave Iraq due to his fear of harm.

Authority's consideration of s 36(2)(a)

31 The Authority commenced by considering the first appellant's claim for protection as a refugee under s 36(2)(a). The Authority accepted the first appellant's claim that he worked as an alcohol seller in Iraq, noting that he had consistently made this claim since arriving in Australia. The Authority referred to reports, from the United Nations High Commissioner for Refugees, that in primarily conservative Shi'ite communities alcohol shops are banned by local law, while in the major cities of Baghdad, Basrah, Kirkuk and Mosul, shops and bars are severely restricted by the "conservative political and social atmosphere" because the consumption of alcohol is considered "un-Islamic" or "immoral behaviour". The Authority also accepted that alcohol sellers and those consuming alcohol have been targets of violence inflicted by militia groups in the past and that Sunni and Shi'ite extremists have in the past reportedly attacked liquor shops "with impunity".

32 But the Authority did not accept the first appellant's claims that he was followed by members of the Mahdi Army, that he was shot at or chased by a vehicle or motorbike, or that he "is or was" of interest to the Mahdi Army or militia groups for reasons relating to the sale of alcohol, the consumption of alcohol by the first appellant or his friends, or any smuggling of alcohol between Iraq and Iran. The Authority accordingly found that the first appellant and his family did not face a "real chance" of harm on these bases now or in the foreseeable future.

33 The Authority then considered the first appellant's claim that "because the sale of alcohol is forbidden by Islamic law, [the first appellant] will not be forgiven [on return to Iraq] even if he were to cease this conduct". Having regard to s 5J(3) of the *Migration Act*, the Authority considered that, because the first appellant could take reasonable steps to modify his behaviour so as to avoid a real chance of

persecution by ceasing to sell alcohol on return, and there was no country information indicating that persons who had previously sold alcohol are targeted once they have stopped, the first appellant did not have a well-founded fear of persecution on the basis that he had sold alcohol in the past.

34 In addressing the first appellant's future employment, the Authority turned to the question of whether he would continue to sell alcohol upon return to Iraq. The Authority's reasons record that at his interview for a temporary protection visa, the first appellant initially stated that it would not be an option for him to return to Iraq and not sell alcohol, but when asked whether it had ever been an option for him to stop selling alcohol after finding out that the Shia militia were interested in him, he said he had decided to quit. After setting out the first appellant's education and employment history, which included having completed nursing studies and working as a mechanic, the Authority concluded that if the first appellant was returned to Iraq, he would be concerned about his own safety and the safety of his wife and child and he would not engage in selling alcohol.

35 For the purposes of s 5J(3), the Authority turned to consider whether the first appellant could take reasonable steps to modify his behaviour so as to avoid a real chance of persecution by ceasing to sell alcohol on return and concluded that he could. It was observed in the Federal Court that it was implicit in the Authority's reasoning that the Authority proceeded on the basis that the first appellant may have satisfied the protection visa criterion in s 36(2)(a) on the basis that being a "seller of alcohol" constitutes "membership of a particular social group" for the purposes of the definition of "refugee" in s 5H and the reasons listed in s 5J(1). It suffices for present purposes to observe that the Authority's conclusion under s 5J(3), consistent with the principle in *Appellant S395*, was only open if, in the circumstances faced by the first appellant, feared persecution by reason of being an alcohol seller was not a manifestation of a Convention characteristic: that is, it was *not* a fear faced because of the first appellant's "membership of a particular social group" under s 5J(1). As noted above, the Authority's approach to, and determination of, the first appellant's claim under s 36(2)(a) was not in issue in this Court.

Authority's consideration of s 36(2)(aa)

36 The Authority then turned to consider the first appellant's claim for complementary protection under s 36(2)(aa). The Authority correctly identified the statutory question: whether there were substantial grounds for believing that, as a necessary and foreseeable consequence of the first appellant being removed from Australia to Iraq, there was a real risk that he would suffer significant harm within the meaning of s 36(2A). Relevantly, and critically for the purposes of the

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present appeal, having earlier found that the first appellant would not work as an alcohol seller upon his return to Iraq, the Authority found that he did not face "a real risk of harm" in Iraq on that basis. Accordingly, the Authority found that there were not substantial grounds for believing that, as a necessary and foreseeable consequence of the first appellant being returned to Iraq, there was a real risk that he would suffer significant harm of a kind listed in s 36(2A). And, as has been explained, the Authority did not commit jurisdictional error in not applying the principle in *Appellant S395* when considering the first appellant's application for complementary protection under s 36(2)(aa).

37 The conclusion that there was no real risk of significant harm to the first appellant as a necessary and foreseeable consequence of him being returned to Iraq followed from the finding that he would not sell – that is, there was no real possibility of him selling – alcohol when he returned to Iraq. Other cases may be less clear cut. In some cases, it may not be possible to make as definite a conclusion about an applicant's future conduct as the Authority did here. It is always necessary to recall that the question is whether there is a real risk of significant harm if an applicant is returned to a receiving country. That assessment will depend on the facts in any given case.

38 As the first appellant's wife and child did not make their own claims for protection, the Authority found that they did not meet the family unit criteria in s 36(2)(b)(i) or (c)(i). On 2 November 2016, the Authority affirmed the decision of the delegate not to grant the appellants protection visas.

Conclusion and orders

39 For those reasons, the Authority did not make the jurisdictional error the appellants alleged. The appeal should be dismissed with costs.

