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' SUBMISSIONS

Part I: Certification

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

Part II: Statement of Issues

2. The issues for this Court to decide are:

   (a) Whether, in determining a claim for complementary protection under s 36(2)(aa) of the *Migration Act 1958* (Cth) (***Migration Act***), a decision maker should apply the principles in *S395*;[1] and

   (b) In determining a claim for complementary protection, is it open to the second respondent (the **Authority**) to rely on findings made in relation to a claim for

[1] *Appellant S395/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 216 CLR 473; [2003] HCA 71. "S395 principles" are referred to in these submissions below at paragraphs 36 to 43.

refugee status as to modification of behaviour without addressing the reason for the intended changed conduct?

3. The appellants say that the answer to question 2(a) is yes and that the answer to question 2(b) is no.

Part III: Notices

4. This appeal does not attract the operation of s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Citations

5. The judgments below are unreported and have the following medium neutral citations:

   (a) *DQU16 v Minister for Home Affairs* [2020] FCA 518 (22 April 2020);

   (b) *DQU16 v Minister for Home Affairs* [2018] FCA 1695 (14 December 2018) (Leave to Appeal to Federal Court);

   (c) *DQU16 & Ors v Minister for Immigration & Anor* [2017] FCCA 1818 (3 August 2017).

Part V: Relevant Facts

6. The first appellant is an Iraqi male who was born in 1980. Most recently before leaving Iraq in 2012, he worked as an alcohol seller in a city in Iraq.

7. The second and third appellants are the first appellant's wife and child.

8. The first and second appellants were Iraqi citizens who arrived in Australia in 2012 as "unauthorised maritime arrivals".

9. The third appellant was born in Australia in 2013.

10. On 7 November 2012, the first appellant participated in an "irregular maritime arrival" interview with a delegate of the first respondent (the **Minister**). He claimed that he left Iraq because he was being threatened by members of the Mahdi Army and various other groups for selling alcohol in Iraq.

11. The first appellant lodged an initial application for a permanent protection visa on 14 August 2013. The second and third appellant made claims as members of the first appellant's family unit.

12. On 21 July 2015, the first appellant was invited to make an application for a Temporary

Protection (class 785) Visa. The appellants' application for the Temporary Protection Visa was made on 31 August 2015.

13. The application was refused by a delegate of the Minister on 9 September 2016. The delegate's decision was referred to the Authority, which affirmed the decision on 2 November 2016.

The first appellant's claims

14. The first appellant's claims were summarised in the Authority's decision as follows:[2]

(a) The [appellant] husband worked as an alcohol seller in [name of city deleted] between 2010 and 2012. He used to obtain liquor from Baghdad and sold them to customers in [name of town deleted] privately. He did not have a public front for his business, and all the sales of alcohol were done through his Mercedes car. His sales were usually done through phone calls. He usually sold alcohol around evening time and kept a low profile because alcohol business was very dangerous in Iraq. He did not operate from a single point; he changed his location frequently and it was difficult for someone to find him. He was careful not to conduct business with people that he did not know.

(b) In 2012, he discovered that the Mahdi Army (**JAM**) was planning to kill him because of his work as an alcohol seller. He was chased by a vehicle and motorbike, who attempted to shoot and kill him. He managed to escape and reported to the police who was [sic] unable to assist because the police were afraid of JAM who is a strong militant group.

(c) Following these incidents, he left [name of town deleted] and hid in Baghdad for about a month.

(d) He received a call from unknown people who threatened to kill him as he sold alcohol.

(e) While in Baghdad, he made arrangements to leave Iraq due to fear of harm.

(f) In October 2013 and August 2014 while he was in Australia, his family home was raided by JAM. JAM searched for alcohol, inquired about the [appellant] husband and threatened his family. His family told JAM that they have no idea

[2] The Authority's decision at [9]: Core Appeal Book (**CAB**) Tab 1, at 7.10-8.10. See also Federal Court leave judgment at [11]: CAB Tab 5, at 47.20-48.10. NB: References to page numbers in the CAB are to the page numbers at the foot of the page as inserted by the DLS Portal which differs by one from the page number at the top of the page.

and they did not know where he was.

(g) He fears being killed by JAM because of his work as an alcohol seller.

(h) He claims that the political and security situation of Iraq has deteriorated since 2003. Sectarian violence is rampant and the religious parties rule Iraq with impunity.

15. The first appellant claimed that his alcohol selling business, conducted in private, was the only job he had in Iraq from 2010 until he left Iraq in 2012. He stated that he failed to find any other job and, because of his financial needs, continued to sell alcohol until he left Iraq in 2012, notwithstanding the threats he faced from the Shia militia for selling alcohol.[3]

The decision of the Authority

16. The delegate of the Minister accepted that the first appellant had sold alcohol in Iraq.[4] Then, the Authority noted his consistent claims that he was an alcohol seller in Iraq and accepted on the evidence that he "operated an alcohol selling business through his car in private from around February 2010 to July 2012".[5]

17. In considering whether the appellants were entitled to complementary protection, the Authority stated:

> "[59] I have found above that the applicant husband could take reasonable steps to modify his behaviour by ceasing to sell alcohol so as to avoid a real chance of harm, and therefore, he does not have a well-founded fear of persecution…
>
> [60] I have found that the applicant husband would not continue to sell alcohol upon return.
>
> [61] Having found that he would not work as an alcohol seller upon return, I find that he does not face a real risk of harm on this basis."[6]

18. The findings of the Authority in relation to the first appellant's intentions are to be found earlier in the Authority decision dealing with the first appellant's Refugee claim[7], where the following statements are made:

> "[13] The applicant husband has consistently claimed since arriving in Australia, including at the arrival interview, his previous permanent protection visa

[3] The Authority's decision at [36]: CAB Tab 1, at 12.10.
[4] The Authority's decision at [2]: CAB Tab 1, at 6.10.
[5] The Authority's decision at [13]: CAB Tab 1, at 8.20.
[6] The Authority's decision at [59]-[61]: CAB Tab 1, at 16.30.
[7] The Authority's decision at [10ff]: CAB Tab 1, at 7.40.

> application (PPV), and at the TPV interview, that he was an alcohol seller at [name of city deleted].…[8]
>
> [33] …I have accepted that alcohol is forbidden and prohibited in [name of city deleted], and that alcohol sellers are targeted. However, the country information before me does not suggest that alcohol sellers will not be forgiven even if they were to cease selling alcohol and repent.…[9]
>
> [36] At the TPV interview, the applicant husband stated that it would not be an option to return to Iraq and stop selling alcohol.… In the IAA submission, the applicant husband claims that he failed in getting any other job and his financial needs led him to work in alcohol sales …[10]
>
> [39] Having regard to all the circumstances of this case and the information before me, I consider that if the applicant husband were returned to Iraq, he will be concerned about his own safety and the safety [sic] his wife and child, and would not engage in selling alcohol given the risks associated with selling liquor."[11]

19. The Authority accepted that the sanctions faced by alcohol sellers are beyond lawful sanctions and include facing attacks from local extremists "with impunity".[12] The Authority expressly accepted the risks of the first appellant's alcohol selling to the first appellant's safety (and that of the second and third appellants).

20. Notwithstanding those findings of the Authority, it upheld the decision of the delegate of the Minister to refuse the appellants' application for visas, giving its reasons for decision on 2 November 2016.

Judgment of the Federal Circuit Court

21. The appellants filed an application for review in the Federal Circuit Court on 30 November 2016. The appellants' application for review was dismissed with costs by Judge Street on 3 August 2017.[13]

Judgments of the Federal Court

22. By order dated 14 December 2018,[14] the appellants were granted leave to appeal to the Federal Court from the decision of Judge Street on one ground:

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[8] The Authority's decision at [13]: CAB Tab 1, at 8.20.
[9] The Authority's decision at [33]: CAB Tab 1, at 11.40.
[10] The Authority's decision at [36]: CAB Tab 1, at 12.10.
[11] The Authority's decision at [39]: CAB Tab 1, at 12.50-13.10.
[12] The Authority's decision at [15]: CAB Tab 1, at 8.30.
[13] Noting that the reasons for judgment were published on 28 August 2017 cf *AAM17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2019] FCA 1951: CAB Tab 3, pp. 28-40.
[14] *DQU16 v Minister for Home Affairs* [2018] FCA 1695 (14 December 2018): CAB Tab 5, pp. 42-57.

> "The Federal Circuit Court of Australia erred in failing to find that the [Authority] committed jurisdictional error by failing to apply the principles in *S395/2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 216 CLR 473 when considering the complementary protection criterion under s 36(2)(aa) of the *Migration Act 1958* (Cth)".

23. On 22 April 2020, the appellants' appeal was dismissed by the Federal Court.[15]

24. Justice Reeves declined to apply the principles of *S395* to a claim for complementary protection.[16] Justice Reeves found that the Authority assessed the reason for the first appellant changing his conduct as being for a "non-persecutory reason, or reasons, unconnected with a Refugee Convention characteristic" and that that assessment was sufficient for the purposes of assessing a complementary protection visa.[17]

25. At [9] of the Federal Court's judgment, Reeves J states:

> "while the Authority *may not*, in its decision, have asked the "why" question for the purpose identified in S395/2002 above, it did, *perhaps unwittingly*, make a finding about the issue to which that question relates" (emphasis added).[18]

26. At [10], Reeves J states that:

> "the Authority then *implicitly* adopted that finding, among others, to conclude, with respect to the first appellant's complementary protection claims under s 36(2)(aa) of the Act".[19]

Special Leave to Appeal to the High Court

27. On 20 May 2020, the appellants filed an Application for Special Leave to Appeal to appeal to the High Court from the decision of the Federal Court.

28. On 9 September 2020, the appellants were granted special leave to appeal from the whole of the judgment of the Federal Court of Australia (Reeves J) given on 22 April 2020.[20]

29. Pursuant to the grant of special leave, the appellants filed a Notice of Appeal in the High Court on 22 September 2020.[21]

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[15] *DQU16 v Minister for Home Affairs* [2020] FCA 51 (22 April 2020) (**Federal Court judgment**) (Reeves J): CAB Tab 8, at pp. 71-79.
[16] Federal Court judgment at [16]: CAB Tab 8, at 79.10.
[17] Federal Court judgment at [16]: CAB Tab 8, at 79.10.
[18] Federal Court judgment at [9]: CAB Tab 8, at 76.40.
[19] Federal Court judgment at [10]: CAB Tab 8, at 77.10.
[20] CAB Tab 11, pp. 85-86.
[21] CAB Tab 12, pp. 87-89.

Part VI: Argument

30. There is one ground of appeal:

> "The Federal Court erred in failing to find that the Second Respondent (the Authority) committed jurisdictional error by failing to apply the principles in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473 when considering the complementary protection criterion under s 36(2)(aa) of the *Migration Act 1958 (Cth)*."[22]

31. The appellants' argument is as follows:

(a) Under s 36(2)(aa) of the *Migration Act* the statutory task for the Authority is to assess the "real risk" of "significant harm".

(b) The meaning of the phrase "real risk" of "significant harm" is to be determined in accordance with the conventional rules of statutory construction, including the context and purpose of the provision.[23]

(c) The context of s 36(2)(aa) includes the explanation of the insertion of that section[24] set out in the *Explanatory Memorandum* to the amending Act:

> [67] Australia's non-refoulement obligations under the Covenant and the CAT require a high threshold for these obligations to be engaged. In each case, and in order for an applicant to satisfy the criterion in new paragraph 36(2)(aa), the Minister must have 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. This test is reflected in the views of the United Nations Human Rights Committee in its General Comment 31 as to when a non-refoulement obligation will arise under the Covenant. Australia's non-refoulement obligations under the Covenant and the CAT require that a non-citizen not be removed to a country where there is a real risk they will suffer significant harm. A real risk of significant harm is one where the harm is a necessary and foreseeable consequence of removal. The risk must be assessed on grounds that go beyond mere theory or suspicion but does not have to meet the test of being highly probable. The danger of harm must be personal and present. …

(d) Thus, any assessment of risk for the purposes of s 36(2)(aa) is to be undertaken consistently with the objective of protecting persons who face a "real risk" of "significant harm". The Explanatory Memorandum stated that "Australia's non-

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[22] CAB Tab 12, p. 88.
[23] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34 at 368-372 [14]-[27].
[24] Section 36(2)(aa) was inserted by the *Migration Amendment (Complementary Protection) Act 2011*.

refoulement obligations under the *Covenant* and the *CAT* are *absolute and cannot be derogated from*" (emphasis added).[25]

(e) The test for "real risk" under s 36(2)(aa) is the same as required for a "real chance" under s 36(2)(a).[26] That is, the essential determinative question for complementary protection requires a risk assessment of the same standard as under s 36(2)(a).

(f) *S395* sets out the correct approach as to how to consider modifications to behaviour in answering whether a person is at a "real chance" of persecution:

> [43] … To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider the issue properly.[27]

(g) Similarly, to properly assess "real risk" for s 36(2)(aa), the tribunal of fact must also consider whether modified conduct was influenced by the threat of harm and ask why a person has modified behaviour, and whether it is because of a threat of harm.

Section 36(2)(aa) of the *Migration Act 1958 (Cth)*

32. The meaning of s 36(2)(aa) is to be determined using the approach stated by Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34:

> [14] The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

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[25] *Explanatory Memorandum, Migration Amendment (Complementary Protection) Bill 2011* (Cth) (**Explanatory Memorandum**), p. 3.
[26] *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505; [2013] FCAFC 33; at 551 [246] and 557-558 [297].
[27] *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473; [2003] HCA 71 at 490-491 [43] (McHugh and Kirby JJ); 500-501 [80]-[82] (Gummow and Hayne JJ).

33. The criterion in s 36(2)(aa) was intended to introduce greater efficiency, transparency and accountability into Australia's arrangements for adhering to its non-refoulement obligations under the:

(a) *International Covenant on Civil and Political Rights* (***ICCPR***);

(b) *Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty*;

(c) *Convention on the Rights of the Child*; and

(d) *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (***CAT***).[28]

10 34. The Explanatory Memorandum to the amending Act both emphasises the absolute nature[29] of the obligation and recognises the importance of risk assessment to the statutory task under s 36(2)(aa).[30]

35. The risk assessment required by s 36(2)(aa) should be undertaken consistently with Australia's obligations under articles 2 and 7 of the *ICCPR* and article 3 of the *CAT*.[31] The importance of article 7 of the *ICCPR* within the statutory context is reinforced through the references to that article in the s 5 definitions in the *Migration Act* of "cruel or inhuman treatment or punishment" and "degrading treatment or punishment".[32]

The *S395* principle[33]

20 36. In *S395*, Gummow and Hayne JJ at [80] – [82] stated[34]:

> "[80] If an applicant holds political or religious beliefs that are not favoured in the country of nationality, the chance of adverse consequences befalling that applicant on return to that country would ordinarily increase if, on return, the

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[28] *Explanatory Memorandum*. The history of s 36(2)(aa) is set out in detail in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34; at 384-388 [69]-[79] (Edelman J); *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211; [2012] FCAFC 147 at 212 [1]-[3], 214-215 [17]-[20].
[29] *Explanatory Memorandum*, p. 3.
[30] *Explanatory Memorandum,* p. 11 [67].
[31] *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34 at 386 [74] and 387 [77].
[32] See *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34 at 373 [33] per Gageler J and at 384 [69]; 386 [74]; 387 [77]-[78] per Edelman J.
[33] *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473; [2003] HCA 71.
[34] *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473; [2003] HCA 71 at 500-501 [80]-[82].

> applicant were to draw attention to the holding of the relevant belief. But it is no answer to a claim for protection as a refugee to say to an applicant that those adverse consequences could be avoided if the applicant were to hide the fact that he or she holds the beliefs in question. And to say to an applicant that he or she should be "discreet" about such matters is simply to use gentler terms to convey the same meaning. The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live in that country without attracting adverse consequences.
>
> ...
>
> [82] Saying that an applicant for protection would live "discreetly" in the country of nationality may be an accurate general description of the way in which that person would go about his or her daily life. To say that a decision-maker "expects" that that person will live discreetly may also be accurate if it is read as a statement of what is thought likely to happen. But to say that an applicant for protection is "expected" to live discreetly is both wrong and irrelevant to the task to be undertaken by the Tribunal if it is intended as a statement of what the applicant must do. The Tribunal has no jurisdiction or power to require anyone to do anything in the country of nationality of an applicant for protection. Moreover, the use of such language will often reveal that consideration of the consequences of sexual identity has wrongly been confined to participation in sexual acts rather than that range of behaviour and activities of life which may be informed or affected by sexual identity. No less importantly, if the Tribunal makes such a requirement, it has failed to address what we have earlier identified as the fundamental question for its consideration, which is to decide whether there is a well-founded fear of persecution. It has asked the wrong question."

37. In *Minister for Immigration and Border Protection v BBS16* (2017) 257 FCR 111; [2017] FCAFC 176 (***BBS16***) at [82], Kenny, Tracey and Griffiths JJ considered the application of *S395* in the context of determining a claim under s 36(2)(a) and found:

> "… in the light of *S395* the IAA should have asked **why** the first respondent had not in the past practised his religion more extensively or been more politically active and, moreover, **why** he would not alter his past behaviour if he were returned to Iran. The IAA needed to inquire, and make relevant findings, as to whether this was because of the very harm which the IAA accepted confronted more prominent and active religious and political proponents. As McHugh and Kirby JJ observed in *S395* at [43] (to similar effect, see Gummow and Hayne JJ at [82]):
>
> > 43. The notion that it is reasonable for a person to take action that will avoid persecutory harm invariably leads a tribunal of fact into a failure to consider properly whether there is a real chance of persecution if the person is returned to the country of nationality. This is particularly so where the actions of the persecutors have already caused the person affected to modify his or her conduct by hiding his or her religious beliefs, political opinions, racial origins, country of nationality or membership of a particular social group. In cases where the applicant has modified his or her conduct, there is a natural tendency for the

> tribunal of fact to reason that, because the applicant has not been persecuted in the past, he or she will not be persecuted in the future. The fallacy underlying this approach is the assumption that the conduct of the applicant is uninfluenced by the conduct of the persecutor and that the relevant persecutory conduct is the harm that will be inflicted. In many - perhaps the majority of - cases, however, the applicant has acted in the way that he or she did only because of the threat of harm. In such cases, the well-founded fear of persecution held by the applicant is the fear that, unless that person acts to avoid the harmful conduct, he or she will suffer harm. It is the threat of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly." (emphasis in original)

38. While the reference in *BBS16* arose in the context of s 36(2)(a), the considerations in *S395* should apply with equal force to a claim for complementary protection under s 36(2)(aa).[35] The application of the principles in S395 to s 36(2)(aa) was argued in BBS16, but the Full Court of the Federal Court did not find it necessary to decide the issue.

39. The *S395* principle was described further in *Minister for Immigration and Border Protection v SZSCA*[36] at [17]:

> "The essential reasoning in S395 was that the Tribunal had diverted itself from its task of determining whether there would be a real chance that the applicants would be persecuted if they returned to Bangladesh, by focusing on an assumption about how the risk of persecution might be avoided. Gummow and Hayne JJ said that the enquiry was what might happen if the applicants returned, not whether adverse consequences could be avoided.[37] It followed that the issue to which the correct enquiry was directed – whether the fear of persecution was well founded – had not been addressed.

40. In *Minister for Immigration and Border Protection v SZSWB* [2014] FCAFC 106[38] a Full Federal Court declined to consider whether the principles of *S395* applied to claims for complementary protection, finding that the factual premise for the claim for complementary protection[39] had not been made before the Tribunal.[40] Ultimately, the

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[35] See *ELX17 v Minister for Immigration and Border Protection* [2018] FCA 1372 (5 September 2018) where Perry J considered at [19] that similar considerations in relation to the reasonableness of relocation arose under both regimes.
[36] (2014) 254 CLR 317; [2014] HCA 45 (**SZSCA**).
[37] *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473; [2003] HCA 71; at 500 [80].
[38] Special leave refused *SZSWB v Minister for Immigration and Border Protection & Anor* [2015] HCATrans 17 (13 February 2015).
[39] In that case, an intention to resume the illegal sale of cigarettes.
[40] At [5] and [33]-[42].

High Court refused to grant special leave from the Full Federal Court in *SZSWB,* concluding that the case was not a suitable vehicle to raise the point of principle for which the applicant contended.[41] Unlike the applicant in *SZSWB*, the first appellant has repeatedly expressed an intention to resume the activity which gave rise to the risk of significant harm, and was accepted by the Authority as having expressed that intention.[42]

41. In *Minister for Immigration and Border Protection v MZAIV* [2016] FCA 251 (17 March 2016), it was unnecessary for Mortimer J to determine a ground of appeal in relation to the applicability of *S395* principles to the operation of s 36(2)(aa).[43] The Federal Circuit Court in that matter had found at [21]-[25] of the Federal Circuit Court decision that the Tribunal below had erred in finding that s 36(2B)(a) applied in that matter because the Tribunal asked what the first respondent *could* or *should* do to avoid the risk of harm identified, rather than what he *would* do, the error identified in *S395*. Justice Mortimer characterised a contention by the Minister that *S395* principles did not apply to the consideration of complementary protection claims was "a contention of considerable breadth, and could affect decision making at both a merits and judicial review level in many cases."[44]

42. In *ADL17 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 178, the Full Court of the Federal Court recently allowed an appeal from the decision of the Federal Circuit Court.[45] The appeal was allowed on a ground relating to the determination of s 5L of the *Migration Act*. The Full Federal Court declined to address ground 2 complaining that the Authority should have applied *S395* principles to its consideration of the complementary protection criteria, given the appellant's success on ground 1 and the fact that special leave to appeal had been granted in this matter. In *ADL17*, the appellant's claim related to an interest in music and dance.

43. In *CTY15 v Minister for Immigration and Border Protection*[46], Perry J applied *S395* principles to a consideration of complementary protection claims. In *CTY15*, the

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[41] *SZSWB v Minister for Immigration and Border Protection & Anor* [2015] HCATrans 17 (13 February 2015).
[42] See paragraph 18 of these submissions above.
[43] At [41].
[44] At [43]-[44].
[45] *ADL17 v Minister for Immigration* [2020] FCCA 148.
[46] [2019] FCA 197; (2019) 163 ALD at [27]597 and [52]603-604.

conduct being considered was that of women who chose not to conform to strict Islamic dress codes in the receiving country.

Statutory task of the Authority

44. The law is "settled" in respect of the nature of the Authority's general statutory task. The Authority's task is to provide a de novo consideration of the merits of the decision before it.[47] Accordingly, it was the Authority's task to determine the protection visa application afresh and whether the criteria had been met in respect of each of the Refugee claim and the complementary protection claim.

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Statutory task in assessing complementary protection claims

45. The statutory task in assessing complementary protection must be approached by reference to the specific criterion of s 36(2)(aa) of the *Migration Act*. It is not sufficient for a decision maker to simply replicate their process of reasoning in relation to their consideration of the Refugee criterion in s 36(2)(a) of the *Migration Act*.

46. Accordingly, if the decision maker simply repeats or relies upon the same reasoning process in determining the "real risk of significant harm" pursuant to s 36(2)(aa) as they did in determining the "real chance of persecution", they are not correctly fulfilling their distinct statutory task of determining the complementary protection claim.[48]

20 47. While "real risk" and "real chance" are analogous legal terms, the factual inquiries necessary to make the determination in each case are distinct. To fail to address the complementary protection factual inquiry, as distinct from the determination of the Refugee criteria, is to fail to consider the determination properly and so results in jurisdictional error by the decision maker.

48. The procedural duty imposed by s 36(2)(aa) to consider the complementary protection claim, separately from the Refugee criteria, and as a distinct statutory task, is similar to

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[47] *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34 at [5], citing *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217; [2018] HCA 16 at 226 [17].
[48] Cf the Authority's decision at [61]: CAB Tab 1, at 16.40 stating that the basis for finding there is no real risk is that the first appellant will not continue to sell alcohol if returned to Iraq.

the duty found by the High Court in relation to s 473DD of the *Migration Act* in *AUS17 v Minister for Immigration and Border Protection* [2020] HCA 37.[49]

Application of legal principles to facts of this case

49. In failing to apply the principles of *S395* to a claim for complementary protection, Reeves J failed to consider the decision of Perry J in *CTY15 v Minister for Immigration and Border Protection*[50]. Notwithstanding the carefully considered dicta of Perry J, Reeves J referred to her Honour having "touched on" that issue ("albeit obliquely").[51]

50. In terms of the complementary protection regime code,[52] on the Authority findings:

(a) if removed, unless the first appellant ceased to sell alcohol (contrary to his stated intentions) there is a real risk that the appellants will suffer significant harm;

(b) such attacks are "cruel or inhuman treatment or punishment": s 36(2A)(d);

(c) they are clearly not "lawful sanctions that are not inconsistent with the Articles of the Covenant": cf s 5; and

(d) the appellants cannot obtain State protection from such attacks: cf s 36(2B)(b).

51. The essential findings of Reeves J that the appellants say reveal his Honour's error, at [9] and [10] of the Federal Court judgment, are set out above at paragraphs 25 and 26.

52. In considering the appellants' claim for complementary protection, the Authority explicitly acknowledged that s 5J(3) does not apply to the issue of complementary protection.[53] However, immediately following that conclusion, the Authority misdirected itself by failing to ask the question (in the terms of *S395*) as to *why* the first appellant would cease selling alcohol if he was returned to Iraq? Had that question been asked, it would have been answered that the reason why the first appellant would cease selling alcohol was because of the real risk that as a consequence of being removed to Iraq, he or his family would suffer significant harm as a result of the actions of local extremists.

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[49] At [12].
[50] [2019] FCA 197; (2019) 163 ALD at [27]597 and [52]603-604; a judgment from which the Minister did not seek special leave to appeal.
[51] Federal Court judgment at [8]: CAB Tab 8, 76.30.
[52] *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211; [2012] FCAFC 147 at 215 [18].
[53] The Authority's decision at [59]: CAB Tab 1, at 16.30.

53. The Authority noted the statement of the first appellant at the interview that he had decided to quit (selling alcohol) "because he knew that those people [Shia militia] were after him and could find him".[54] The Authority also found that the first appellant would, if returned to Iraq, cease selling alcohol (and take up another source of income) because of concerns about his own safety, and the safety of his wife and child if he continued to sell alcohol.[55]

54. Because the Authority relied on the findings under the Refugee criterion, the Authority did not go to the fundamental question which was the real risk of significant harm "as a necessary and foreseeable consequence" of the applicant being removed from Australia to Iraq". It is clear from paragraph 61 of the Authority's decision that its finding (in the Refugee assessment) that, if returned to Iraq the first appellant would not work as an alcohol seller, was the basis of its finding, as to complementary protection, that he "does not face a real risk of harm".[56]

55. Through focussing on what the first appellant would do to avoid the risk of significant harm to him and his family, the Authority failed to consider whether the first appellant or his family would be exposed to a real risk of significant harm in the terms of s 36(2)(aa) as a result of the likely acts of local extremists.

56. In determining the criterion of s 36(2)(aa), the first appellant's claims of his family's home being raided in 2013 and 2014 ought particularly to have been taken into account. This would have gone to the real risk of significant harm arising as a "necessary and foreseeable consequence" of his removal from Australia to Iraq.

57. Justice Reeves erred in his conclusion that what the Authority did was to assess the reason for the changing conduct as being for "a non-persecutory reason, or reasons, unconnected with a Refugee Convention characteristic" and that that assessment was sufficient for the purposes of assessing a complementary protection visa.[57] The Authority was required to expressly consider the reason for the assumed modification of behaviour against the complementary protection criteria.

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[54] The Authority's decision at [36]: CAB Tab 1, at 12.10.
[55] The Authority's decision at [39]: CAB Tab 1, at 12.50-13.10.
[56] The Authority's decision: CAB Tab 1, at 16.40.
[57] Federal Court judgment at [16]: CAB Tab 8, at 79.10-20.

Part VII: Orders

58. The appellants seek the following orders:

(a) The appeal is allowed.

(b) The orders of the Federal Court made on 22 April 2020 be set aside.

(c) In lieu of the Federal Court's orders, it be ordered:

(1) The appeal is allowed.

(2) The judgment of the Federal Circuit Court delivered on 3 August 2017 is set aside.

(3) A writ of certiorari issue quashing the decision of the Authority made on 2 November 2016 to affirm the decision of a delegate of the first respondent to refuse to grant the appellant a Protection Visa.

(4) A writ of mandamus issue requiring the Authority to review the Delegate's decision according to law.

(5) The first respondent pay the appellants' costs of the proceedings before the Court below, and of the appeal.

(d) Costs.

Part VIII: Time Estimate

59. The appellants estimate that one and a half hours will be required for the presentation of their oral argument.

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