HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S169 of 2020

BETWEEN:

DQU16
First Appellant
DQV16
Second Appellant
DQW16
10 Third Appellant

and

MINISTER FOR HOME AFFAIRS
First Respondent
IMMIGRATION ASSESSMENT AUTHORITY
Second Respondent

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APPELLANTS'
OUTLINE OF ORAL SUBMISSIONS

Part I: CERTIFICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: OUTLINE OF PROPOSITIONS

2. This appeal concerns the application of s 36(2)(aa) of the *Migration Act* regarding complementary protection by the second respondent (the **Authority**) in its statutory task of reviewing the Minister's decision to refuse a protection visa to the appellants.
3. The Authority found, when considering the first appellant's Refugee claim, that if the first appellant was 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
10 associated with selling liquor": **CAB** Tab 1 at 12.50-13.10 at [39]-[40][1].
4. This finding was made after several other findings about what might happen to the first appellant if he were to "cease selling alcohol and repent": **CAB** Tab 1 at 11.40-50 at [33].
5. The Authority then applied that finding in determining whether the first appellant was entitled to complementary protection, without separate consideration of the reason for the change of the first appellant's behaviour.
6. In *S395* this Court held that "focusing on an assumption about how the risk of persecution might be avoided" is a diversion from the task of the Tribunal in applying the legal test for a Refugee claim ("real risk of persecution").
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   - *Minister for Immigration and Border Protection v SZSCA* (2014) 254 CLR 317 at [17]: **JBA/C/Vol 5/1412** (pdf 205)[2]
7. The issues in this case are agreed: **AS** [2], **RS** [2].
8. The Authority has distinct statutory tasks in considering the complementary protection claim after determining the Refugee claim. If the Refugee claim is not made out, the Authority must separately determine the complementary protection claim under s 36(2)(aa) of the *Migration Act.* It must engage with the language of s 36(2)(aa) and distinguish between the two legal tests. It must address the question whether there is a real risk that the appellants will suffer significant harm. The principles in *S395* apply in determining a claim for complementary protection. In determining a claim for
30 complementary protection, it is not open to the Authority to rely on findings made in relation to a Refugee claim as to modification of behaviour without addressing the reason for the intended changed conduct.

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[1] CAB references are to the consecutive page numbers generated by the DLS Portal and are the numbers at the bottom centre of the page.
[2] JBA references are to the consecutive page numbers across all volumes at the top centre of page, with references to each volume's PDF file page in brackets.

9. The Authority fundamentally erred in determining the appellants' complementary protection claims. In failing to address the question of "why" there would be the modification of behaviour on which it relied, the Authority did not apply the test under s 36(2)(aa).

Facts and the Authority's findings

10. The Authority's factual findings were made in its consideration of the Refugee claim: **CAB** Tab 1 at 8. 20 [13]; at 8.30 [15]; at 9.10 [17]; at 11.40 [33], at 12.10 [36]; 12.40; [38] 12.50 [39], 16.20-16.40 [58]-[61]; **AS** [16]-[20] and **AS** [50].

Complementary protection pursuant to the Migration Act

10 11. In addition to Australia's obligations to refugees, Australia has international "non-refoulement obligations" to provide non-citizens with "complementary protection". Those obligations are "absolute and cannot be derogated from".

- *Explanatory Memorandum* to *2011 Amendments*: **JBA/E/Vol 7/1769** (pdf 19)

12. Section 36(2)(aa), inserted by the *2011 Amendments*, sets out the basis on which complementary protection visas will be granted to non-citizens in Australia.

- *Migration Amendment (Complementary Protection) Act 2011 (Cth)*: **JBA/B/Vol 4/1058** (pdf 8)
- s 36(2)(aa): **JBA/A/Vol 1/105** (pdf 106)

13. The correct legal test for determining whether a person qualifies for complementary
20 protection is whether the person is a person "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".

- s36(2)(aa): **JBA/A/Vol 1/105** (pdf 106)
- s 5(1) and s 36(2A) exhaustively define *significant harm*: **JBA/A/Vol 1/57** (pdf 58); **105-106** (pdf 106-107)

14. To properly assess "real risk" of "significant harm" for the purposes of s 36(2)(aa), the decision maker must consider whether modified conduct was influenced by the threat
30 of harm and ask *why* a person would modify behaviour, and whether it is *because of* a threat of harm.

- Applying *S395* at 490-491 [43] and 500-501 [80]-[82]: **JBA/C/Vol 5/1232-1233** (pdf 25-26); **1242-1243** (pdf 35-36)

15. The "essential reasoning in *S395*" is that "focusing on an assumption about how the risk of persecution might be avoided" is a diversion from the task of the decision

maker. That "essential reasoning" is applicable to a claim for complementary protection.

- *Minister for Immigration and Border Protection v SZSCA* (2014) 254 CLR 317 at [17]: **JBA/C/Vol 5/1412** (pdf 205)
- *CTY15 v Minister for Immigration and Border Protection* [2019] FCA 197 at [27] and [52]: **JBA/D/Vol 6/1596** (pdf 140) and **1605** (pdf 149)

The Authority's statutory task

16. The Authority's role is to review the decision of the Minister's delegate by engaging in a de novo consideration of an applicant's claims.

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- *ABT17 v Minister for Immigration and Border Protection* [2020] HCA 34 at [5]: **JBA/D/Vol 6/1469** (pdf 13)

17. The statutory task in assessing complementary protection must be approached by reference to the specific criterion of s 36(2)(aa) which is the legal test to be applied. That test differs from the test to be applied in s 36(2)(a). It is not sufficient to replicate the process of reasoning and findings in relation to the Refugee claim when the relevant facts do not "wholly coincide".

- *BCX16 v Minister for Immigration and Border Protection* [2019] FCA 465 at [23]-[24]: **JBA/D/Vol 6/1554** (pdf 98)

18. When considering the appellants' complementary protection claim, it was not
20 sufficient for the Authority to make findings "unwittingly" as to the "why" question (Federal Court at [9] **CAB** Tab 8, 76.40), nor to "implicitly adopt" findings in relation to the Refugee claim (Federal Court at [10] **CAB** Tab 8, 77.10). In doing so, the Authority fell into jurisdictional error and failed in its statutory task.

Dated: 4 February 2021

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