FEDERAL COURT OF AUSTRALIA

MZAAD v Minister for Immigration and Border Protection [2015] FCA 1031

|  |  |
| --- | --- |
| Citation: | MZAAD v Minister for Immigration and Border Protection [2015] FCA 1031 |
|  |  |
| Appeal from: | MZAAD v Minister for Immigration & Anor [2015] FCCA 1132 |
|  |  |
| Parties: | **MZAAD v MINISTER FOR IMMIGRATION AND BORDER PROTECTION and REFUGEE REVIEW TRIBUNAL** |
|  |  |
| File number: | VID 302 of 2015 |
|  |  |
| Judge: | **BEACH J** |
|  |  |
| Date of judgment: | 18 September 2015 |
|  |  |
| Catchwords: | **MIGRATION** – Protection (Class XA) visa – refusal of visa application by delegate of Minister – decision of delegate upheld by Refugee Review Tribunal – dismissal of application for judicial review of Tribunal decision by Federal Circuit Court – appeal from Federal Circuit Court – whether jurisdictional error in decision of Tribunal – consideration of complementary protection – real risk test – illogicality – appeal dismissed  |
|  |  |
| Legislation: | *Migration Act 1958* (Cth) s 36(2)(aa) |
|  |  |
| Cases cited: | *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379*Contreras v Minister for Immigration and Border Protection* [2015] FCAFC 47*DZADQ v Minister for Immigration and Border Protection* (2014) 143 ALD 659*El Merhabi v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 375*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332*Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211*Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611*Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505*Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259*Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611*Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1*NBCY v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 922 |
|  |  |
| Date of hearing: | 18 August 2015 |
|  |  |
| Place: |  |
|  |  |
| Division: | GENERAL DIVISION |
|  |  |
| Category: | Catchwords  |
|  |  |
| Number of paragraphs: | 72 |
|  |  |
| Counsel for the Appellant: | Mr M L L Albert |
|  |  |
| Solicitor for the Appellant: | Clothier Anderson |
|  |  |
| Counsel for the First Respondent: | Mr T B Goodwin |
|  |  |
| Solicitor for the First Respondent: | Australian Government Solicitor |
|  |  |
| Solicitor for the Second Respondent: | The Second Respondent filed a submitting appearance  |

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 302 of 2015 |

|  |
| --- |
| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

|  |  |
| --- | --- |
| BETWEEN: | MZAADAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentREFUGEE REVIEW TRIBUNALSecond Respondent |

|  |  |
| --- | --- |
| JUDGE: | BEACH J |
| DATE OF ORDER: | 18 September 2015 |
| WHERE MADE: | MELBOURNE |

THE COURT ORDERS THAT:

1. The appellant’s appeal be dismissed.
2. The appellant pay the first respondent’s costs of and incidental to the appeal.
3. The name of the second respondent be changed to the Administrative Appeals Tribunal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

|  |  |
| --- | --- |
| IN THE FEDERAL COURT OF AUSTRALIA |  |
| VICTORIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | VID 302 of 2015 |

|  |
| --- |
| ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA |

|  |  |
| --- | --- |
| BETWEEN: | MZAADAppellant |
| AND: | MINISTER FOR IMMIGRATION AND BORDER PROTECTIONFirst RespondentREFUGEE REVIEW TRIBUNALSecond Respondent |

|  |  |
| --- | --- |
| JUDGE: | BEACH J |
| DATE: | 18 September 2015 |
| PLACE: | MELBOURNE |

**REASONS FOR JUDGMENT**

1. This is an appeal against a decision of his Honour Judge Burchardt of the Federal Circuit Court of Australia dismissing an application for judicial review of a decision of the Refugee Review Tribunal (the Tribunal). The Tribunal had affirmed a decision of a delegate of the first respondent (the Minister) to refuse to grant the appellant a protection visa.
2. On 12 November 2012 the appellant applied for a Protection (Class XA) visa on the basis that he feared that if he were to be returned to Afghanistan he would be killed because of his Shia religion. On 5 July 2013 a delegate of the Minister refused his application. On 10 July 2013 the appellant applied to the Tribunal for a review of the delegate’s decision. Following a hearing on 12 November 2013, the Tribunal affirmed the delegate’s decision on 14 January 2014. The appellant sought judicial review of the Tribunal’s decision in the Federal Circuit Court. On 20 May 2015 the Federal Circuit Court dismissed that application for review. It is from that decision that the appellant now appeals.
3. It should be said at the outset that the appeal only concerns the Tribunal’s consideration of the “complementary protection criterion” and the Federal Circuit Court’s review of that aspect. No challenge has been made to the Tribunal’s rejection of the appellant’s claim that he satisfied the “refugee criterion”. In terms of the “complementary protection criterion”, the appellant asserted before the Tribunal that there was a real risk that he would suffer significant harm if he was returned to Afghanistan because he was a Tajik or a Shia Muslim (including being a Shia Muslim coming from Parachinar, Pakistan). That assertion was rejected by the Tribunal and not the subject of any challenge in the Federal Circuit Court or before me. The appellant also asserted before the Tribunal that there was a real risk that he would suffer significant harm because of travel that he would need to take along a road between Parachinar and Kabul (particularly between Parachinar and Khoshi) where he would be exposed to the risk of violence, kidnapping and possibly death. The Tribunal rejected this claim. The judicial review proceedings in the Federal Circuit Court raised alleged jurisdictional errors on the part of the Tribunal concerning this claim only.
4. In my view, and for the reasons that follow, the appeal should be dismissed.

# Background

1. The appellant is a citizen of Afghanistan. His family was originally from the Khoshi district in the Logar province of Afghanistan, but he was born in Parachinar, Pakistan, in 1983 and has since then resided in Parachinar with his family. The appellant has only visited Afghanistan twice for several days each time (once to collect an identification document and once to obtain an Afghanistan driver’s licence).
2. In May 2012, the appellant left his wife and two young children in Parachinar and entered Australia as an irregular maritime arrival on 29 June 2012.
3. During his irregular maritime arrival entry interview on 4 August 2012, the appellant claimed that in December 2011 his brother had been abducted by the Taliban in Afghanistan who threatened to kill the brother if a ransom was not paid of 1.5 million Afghani. The appellant and other family members were unable to pay the ransom and they have not heard of his brother since. The appellant claimed that if he returned to Afghanistan he would suffer the same fate as his brother and that the Taliban would question him about his religion and would kill him if they found out that he was not of the Sunni religion.
4. On 12 November 2012, the appellant lodged an application for a Protection (Class XA) visa in which he reiterated the claim that his brother had been caught by the Taliban in December 2011 while returning from Kabul to Parachinar and that the appellant and other family members could not afford to pay the ransom. He said that the Taliban had accused his brother of taking supplies to Shia people in Parachinar and being involved in fighting against the Taliban. As a result the appellant said that he decided to leave Pakistan as he feared he would be killed. Principally, the appellant’s apprehension was sourced to the fact that he was a Shia from Parachinar and that the violence, if not death, suffered by his brother could also, potentially, be his fate, particularly if he travelled along the same route (see his statement dated 5 November 2012).
5. On 5 July 2013, a delegate of the Minister refused the appellant’s application for a protection visa.

# Tribunal’s decision

1. On review of the delegate’s decision, the Tribunal affirmed the refusal to grant the appellant a protection visa pursuant to s 36 of the *Migration Act 1958* (Cth).
2. The appellant’s claim for the grant of a protection visa relied upon satisfaction of both the refugee criterion (s 36(2)(a)) and the complementary protection criterion (s 36(2)(aa)). The Tribunal was not satisfied that the appellant’s claim fell within either criteria.
3. In respect of s 36(2)(a), the Tribunal found that if the appellant returned to Afghanistan, the appellant would not face a real chance of persecution for reasons of his Tajik ethnicity, his Shia religion, an imputed political opinion of opposition to the Taliban based on his Shia Muslim faith, his status as a Shia from Parachinar or his status as a failed asylum seeker or returnee.
4. As I have said above, the appellant has not challenged the Tribunal’s reasoning on the refugee criterion. He has limited his challenge to the Tribunal’s decision on the complementary protection criterion.
5. Section 36(2)(aa) (as at 12 November 2012) provided:

(2) 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; …

1. Sections 36(2A) and (2B) (as at 12 November 2012) provided:

(2A) A non-citizen will suffer ***significant harm*** if:

(a) the non-citizen will be arbitrarily deprived of his or her life; or

(b) the death penalty will be carried out on the non-citizen; or

(c) the non-citizen will be subjected to torture; or

(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or

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

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

(a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or

(b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

1. Whether s 36(2B)(c) applied to the appellant’s circumstances was not raised by the Minister before or considered by the Tribunal. On one view, even accepting everything claimed by the appellant with respect to the complementary protection criterion, there may have been scope for this to apply.
2. The Tribunal made a number of findings, which were not in dispute for present purposes, relevant to its decision on complementary protection.
3. The Tribunal accepted that the appellant and his family lived in Parachinar, Pakistan, as undocumented refugees and had no right to enter or reside in Pakistan. Accordingly, the Tribunal assessed his claims to protection in the context of the situation in Afghanistan only and treated Afghanistan as the appellant’s receiving country for the purposes of complementary protection under s 36(2)(aa). That has not been challenged.
4. At [28], the Tribunal stated:

The Tribunal has considered whether the applicant would face a real chance of persecution as a Tajik Shia in the Logar province of Afghanistan. While the country information the Tribunal put to the applicant in the hearing indicates that the Taliban are active in the applicant’s home area and there are many Pashtuns in the province, there is nothing to suggest that the Taliban or other non-state actors are specifically targeting Tajik Shias for attack or harm. The Tribunal refers to a September 2011 report by Landinfo, which it put to the applicant in the hearing, which stated that ethnic conflict is rare in the Pashtun belt, even where minorities exist and that Tajiks and Pashtuns seem mostly well integrated in Logar (Landinfo 2011, *Afghanistan: Human Rights and Security Situation*, 9 September, p.10). The Tribunal also notes, as sited [sic] in the independent information provided in the submission from the applicant’s adviser dated 4 November 2013, that a review of security incidents in Logar between January 2012 and October 2012 found that attacks by insurgents primarily targeted government institutions and military personnel/security forces and were concentrated around the provincial capital and in the western district of Baaraki Barak. The Tribunal finds on the basis of the applicant’s evidence that he has no association with the government or the security forces in Afghanistan, and therefore it does not accept he has a profile that would draw the attention of the Taliban or any other group.

1. The Tribunal summarised the position with respect to the kidnapping of the appellant’s brother at [31] and [32]:

31. The Tribunal has considered the applicant’s claims regarding the kidnapping and disappearance of his brother in December 2011, while travelling between Kabul and Parachinar for business purposes. The Tribunal notes that according to the applicant’s evidence in the hearing, his brother had been doing this business for about seven years, travelling from Parachinar to Kabul and returning, every two to three months. The Tribunal also notes the applicant’s evidence that despite being usual that everyone is stopped when travelling between Parachinar and Kabul, his brother had not been stopped over the extensive period he had been regularly and routinely travelling back and forth, until December 2011 and had never had any contact with the Taliban prior to this incident.

32. Considering all the circumstances of the incident and the fact the applicant’s brother had been travelling between Parachinar and Kabul every two to three months over a period of seven years for business purposes, the Tribunal does not accept the kidnapping of his brother was in any way related to his Shia religion or Tajik ethnicity. The Tribunal does not accept the applicant’s brother was questioned about taking goods to Shia people. Rather, the Tribunal finds that this incident was a criminal act aimed at extorting money. The Tribunal accepts the applicant’s evidence that the same thing was done to many other people. The Tribunal notes the information it put to the applicant in the hearing, which was cited in the delegate’s decision, that whilst kidnapping can be common in many parts of the country, criminal gangs are usually responsible and where the Taliban is involved in such activities, it is often to finance the insurgency or gain leverage over prisoner releases. The Tribunal finds the applicant’s claim that a ransom was asked for his brother’s release consistent with this information and does not accept the essential and significant reason for his brother being targeted was his religion or because he was believed to be fighting against the Taliban, as he claimed in his statutory declaration attached to his protection visa application.

Query whether the brother’s travel between Parachinar and Kabul was seven years or four to five years.

1. The Tribunal did not accept that the kidnapping of the brother was in any way related to his Shia religion or Tajik ethnicity. The Tribunal found that the kidnapping of the brother was a criminal act aimed at extorting money. The Tribunal also accepted that “the same thing was done to many other people”, although it is unclear whether this reference was limited to the particular route between Parachinar and Kabul or more generally; the appellant’s evidence on this aspect was unclear (see T15, line 10). It appears to be a more general reference. Further, the Tribunal did not make a precise finding that it was the Taliban which was responsible for the kidnapping and disappearance of the appellant’s brother, although they may have been.
2. On the basis of its findings set out above and referring to the meaning of “significant harm” in s 36(2A), the Tribunal stated at [45] that:

Having regard to the definition of significant harm in s.36(2A) of the Act as set out under the heading ‘relevant law’ above, and the findings of the Tribunal above, the Tribunal does not accept that the applicant will face a real risk of being arbitrarily deprived of his life; having the death penalty carried out on him; or being subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment from the Taliban or affiliated groups, as claimed in the submission from the applicant’s adviser. The Tribunal accepts that the applicant may experience difficulties in settling in his village in Logar district but does not accept that this could be said to amount to significant harm within the meaning of section 36(2A) or that the applicant would be denied access to education, healthcare or employment to such an extent that his dignity, autonomy and survival are threatened, amounting to cruel or inhuman or degrading treatment or punishment, as contended the [sic] by the applicant’s adviser. Nor does the Tribunal accept that there is any real risk that he would be unable to access shelter or employment or a means to provide for himself. The applicant’s evidence in the hearing is that his family, particularly his father, has knowledge of connections in their village such as neighbours, which the applicant can rely on and the applicant’s employment experience in Pakistan would assist him in finding employment on his return. The Tribunal is also not satisfied on the country information before it and discussed above, that as a necessary and foreseeable consequence of the applicant’s return to Afghanistan the applicant would face significant harm as a failed asylum seeker or returnee from Parachinar.

1. At [46], the Tribunal stated that:

The Tribunal does not accept that if the applicant returns to his home in Khoshi there is a real risk he will suffer significant harm because he is a Tajik or a Shia Muslim or a Shia Muslim from Parachinar. The Tribunal refers to its findings above and the country information regarding Tajik Shias in Logar district and does not accept the claim that the applicant faces a real risk of significant harm, including degrading treatment or punishment or deprivation of life, as the applicant’s adviser submitted.

1. There has been no challenge to such findings.
2. The principal reasoning by the Tribunal upon which the appellant’s challenge rests is at [47]:

The Tribunal notes the applicant’s adviser’s reference to information from UNHCR’s Eligibility Guidelines which asserts that ‘certain parts’ of Afghanistan are subject to generalised violence and Afghan asylum seekers formerly residing in these areas may be in need of international protection under broader international protection criteria including complementary protection and their submission that this recommendation should not just apply to people physically resident in these areas but also to Afghans who are reliant on transport and travel thought [sic] areas suffering generalised violence. However, having regard to the applicant’s brother’s experience of travelling between Parachinar and Kabul for a period of seven years without any difficulties except for when he became the victim of a criminal act and the fact the applicant travelled twice to Afghanistan from Parachinar including to Khoshi and did not report experiencing any problems, the Tribunal finds that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to Afghanistan, there is a real risk that he will suffer significant harm as defined in subsection 36(2A) of the Act.

1. The Tribunal concluded that the appellant would not be at real risk of significant harm if he were returned to Afghanistan and therefore did not satisfy the complementary protection criterion contained in s 36(2)(aa).

# Proceedings before the Federal Circuit Court

1. The appellant applied for judicial review of the Tribunal’s decision in the Federal Circuit Court on essentially the same grounds as the grounds of appeal argued before me (see the amended application dated 6 March 2015). The Federal Circuit Court dismissed the appellant’s application.
2. The two grounds on which the appellant has appealed the Federal Circuit Court’s decision are based on the Tribunal’s finding that the appellant would not be at real risk of significant harm in Afghanistan.

# Ground 1 — Failure to apply the correct test

1. The appellant’s first ground of appeal asserted that:

The Federal Circuit Court erred by failing to conclude that the Second Respondent was in error by not applying the “real risk” test in s 36 of the *Migration Act 1958* (Cth) when evaluating future significant harm to the Appellant on the roads to and from his ancestral home of Khoshi, Afghanistan.

1. The appellant contended that it could be inferred from a combination of the following factors that the Tribunal had not applied the “real risk” test:
	1. First, the Tribunal did not refer to any case law on the meaning of “real risk” or explain the meaning of the threshold in s 36(2)(aa);
	2. Second, the Tribunal engaged in an arithmetical, rather than evaluative, process of reasoning;
	3. Third, the Tribunal’s conclusion that there was no “real risk” was inconsistent with its findings.
2. The third basis for the inference is substantively the same as the second ground of appeal and is addressed under that separate ground from [52]. In my view, each of these sub-elements of the argument seeking to make good the broader proposition of an error are not made out, whether they be looked at separately or collectively. The appellant has complained that the primary judge looked at each point in isolation, rather than collectively. I do not agree with that characterisation. But even if it was accurate, the point goes nowhere. First, each sub-element said to support the inference was rejected by his Honour. To add together each of the rejected sub-elements hardly improves matters for the appellant. Second, I have considered each of the sub-elements separately and collectively. In my view they do not establish that the Tribunal failed to apply the correct test.

## (a) The meaning of “real risk”

1. The appellant contended that having regard to the Tribunal’s conclusions and the factual findings it made, it could be inferred that the Tribunal incorrectly applied a “more likely than not” approach, rather than applying the correct “real chance” test, to the concept of “real risk” in s 36(2)(aa). Contrastingly, the Minister contended that it was clear from the Tribunal’s reference to “real chance” at least in the context of the refugee criterion that it was aware of the substance of the correct test, and that in any event there needed to be a failure to apply the test rather than merely a failure to mention it, which was all that the appellant could point to.
2. It is appropriate to begin by noting a number of matters.
3. First, the phrase must be read in context. The context is “substantial grounds for believing that … there is a real risk that the non-citizen will suffer significant harm”. In addition to the concept of “real risk”, the other parts of the provision, namely, “substantial grounds for believing” and “will suffer”, are not unimportant. Contextually, they emphasise and reinforce the need to establish the substantive nature of the risk.
4. Second, the concept of “real risk” involves a consideration of whether there is a real chance that the appellant will suffer significant harm. It is not a “more likely than not” test. In this respect, the test under s 36(2)(aa) is not unlike the test incorporated within s 36(2)(a) in terms of the “real chance” threshold (see *Minister for Immigration and Citizenship v SZQRB* (2013) 210 FCR 505 at [246] and [247] per Lander and Gordon JJ and *Minister for Immigration and Citizenship v MZYYL* (2012) 207 FCR 211 at [31] per Lander, Jessup and Gordon JJ, where the “real chance” formulation was assumed to be correct). It may also be accepted that a “real chance” does not encompass a chance that is remote, insubstantial or far-fetched (see for example *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 389 per Mason CJ, at 398 per Dawson J and at 407 per Toohey J).
5. Third, what is apprehended by the appellant as “significant harm”, at the least in terms of his own position, falls within s 36(2A)(a).
6. Fourth, the Minister has eschewed any reliance upon any specific operation of s 36(2B)(c) in the present case.
7. Turning then to the appellant’s argument, the appellant has asserted that the Tribunal did not construe “real risk” in terms of a “real chance”, but rather in terms of “more likely than not”. I do not accept that submission. First, the Tribunal never used the language of “more likely than not”, and nor can I infer that such a higher threshold was used from its language in [43] to [48] and in particular [47] of its reasons. Second, in dealing with s 36(2)(a), the Tribunal used the language of “real chance”. Now I accept that this is not an express reference to s 36(2)(aa). But in my view it can be inferred that when the Tribunal came to consider the complementary protection obligation question, it had a similar concept in mind. Third, true it is that at [43] to [48] the Tribunal did not refer to case law on the point and did not explain what the threshold meant, but so what? That does not entail that it failed to apply the correct test. The appellant has invited me to engage in a level of scrutiny of the written reasons of the Tribunal of a type that was rejected in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ (see also *Contreras v Minister for Immigration and Border Protection* [2015] FCAFC 47 at [45] per Kenny, Wigney and Beach JJ). Finally, the appellant took issue with the primary judge’s exposition of the appellant’s argument in his reference to “copious case law” at [52]. But the point goes nowhere in any event. Generally, I agree with what the primary judge said at [52] and [53], omitting the reference to “copious”.

## (b) Arithmetical reasoning

1. The appellant contended that in assessing his protection claim the Tribunal was required to make a holistic qualitative evaluation in all the circumstances based upon the facts as found. But instead, so the appellant contended, it engaged in a mere numerical calculation of risk based on the appellant twice having safely travelled on the relevant road and his brother having travelled on the road for seven years until 2011 without any incident. Contrastingly, the Minister asserted that it was not a mere statistical exercise for the Tribunal to use past experiences of the appellant and his brother to predict future risk, taken together with the country information relating to risk profiles of particular classes of persons in terms of religion, nationality, political affiliation and the like.
2. Before analysing the Tribunal’s reasons, a number of comments should be made.
3. First, in considering a “real risk” or a “real chance”, one is looking into the future and making a prediction relevant to the context of the issue being posed. In undertaking that assessment, past events may be a guide to the future. But how probative that guide is may depend on various matters. As was said in *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 574 and 575 in the joint reasons:

The course of the future is not predictable, but the degree of probability that an event will occur is often, perhaps usually, assessable. Past events are not a certain guide to the future, but in many areas of life proof that events have occurred often provides a reliable basis for determining the probability — high or low — of their recurrence. The extent to which past events are a guide to the future depends on the degree of probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity. In many cases, when the past has been evaluated, the probability that an event will occur may border on certainty. In other cases, the probability that an event will occur may be so low that, for practical purposes, it can be safely disregarded. In between these extremes, there are varying degrees of probability as to whether an event will or will not occur. But unless a person or tribunal attempts to determine what is likely to occur in the future in relation to a relevant field of inquiry, that person or tribunal has no rational basis for determining the chance of an event in that field occurring in the future.

Determining whether there is a real chance that something will occur requires an estimation of the likelihood that one or more events will give rise to the occurrence of that thing. In many, if not most cases, determining what is likely to occur in the future will require findings as to what has occurred in the past because what has occurred in the past is likely to be the most reliable guide as to what will happen in the future. It is therefore ordinarily an integral part of the process of making a determination concerning the chance of something occurring in the future that conclusions are formed concerning past events.

1. Second, statistics on past events may have some probative value for predictive purposes. If authority is needed for the obvious, it may be found in *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 222 CLR 1 at [80] where McHugh J stated:

Statistical percentages based on experience of past events are usually an accurate guide to the chance of similar events occurring in the future. Insurance companies and financial institutions, for example, bet heavily on such statistical percentages when estimating the chance of future events occurring. But a percentage chance based on the results of a number of events, by itself, seldom throws light on whether a future event is likely to affect any particular person, place or property. To make the percentage useful for predicting the occurrence of an individual event, the predictor has to know a good deal about the inputs that form the basis of the statistical calculation. The predictor must know, for example, the source and nature of the inputs, the period and the area over which they were collected and their significance for the subject of the prediction.

1. Third, notwithstanding that a consideration of past events and some statistical or computational approach may have some probative value, yet it is inappropriate to confine the evaluative process in assessing “real risk” or “real chance” to only such a data set or quantitative analysis (see *DZADQ v Minister for Immigration and Border Protection* (2014) 143 ALD 659 at [61] and [65] per Mansfield J).
2. It is appropriate to turn to the Tribunal’s reasons, which on the complementary protection aspect are dealt with at [43] to [48].
3. First, at [45], there is reference to “findings of the Tribunal above”. This can be taken to incorporate by reference, *inter alia*, [28] and [32] to [35]. The Tribunal considered country information. Further, the Tribunal rejected any real chance of persecution as a Tajik Shia. Further, at [32], the Tribunal considered the position concerning the appellant’s brother and his frequency of travel between Parachinar and Kabul. Further, the Tribunal found that the kidnapping of the brother was a criminal act aimed at extorting money and in no way related to his Shia religion or Tajik ethnicity. Further, it found that “the same thing was done to many other people”.
4. Second, at [47], the Tribunal considered general information, considered the brother’s experience, considered the appellant’s travel experience and then reached its conclusion that there were not substantial grounds for believing that there was the relevant real risk.
5. It is well apparent that the Tribunal did not solely rely upon a statistical or quantitative analysis. Further, to the extent that the Tribunal considered past events, it did so in a permissible way in informing the question of real risk or real chance.
6. There is an air of unreality to the appellant’s submission suggesting that the Tribunal engaged in an arithmetical exercise only. First, the Tribunal quite logically referred to the past experience of both the appellant and his brother as part of the foundation to predict future risk. That is an unremarkable exercise. For the Tribunal to refer to the frequency of use of the relevant road(s) was appropriate and perhaps necessary. Second, the Tribunal considered the country information. Those at risk of generalised violence had a different profile to the appellant. Third, the Tribunal had rejected any particular selection of the appellant because of his status as Tajik or Shia. In my view there is nothing to suggest that the Tribunal only looked at a statistical or arithmetic approach. It contextualised any frequency analysis with reference to the appellant and more general circumstances. More generally, the Tribunal’s reasons at [47] had to be read in context, including the reasons at [28], [31] and [32].
7. I would reject this sub-element of the appellant’s argument and the criticism of the primary judge’s analysis at [54] to [57].

## (c) Alleged inconsistency

1. I would reject this argument as well for reasons that I address below.
2. In summary, each of the so called inferential elements of the appellant’s argument to support ground 1 fails. The appellant’s arguments separately or collectively do not establish ground 1.

# Ground 2 — Illogicality

1. The appellant’s second ground of appeal (and also a sub-element of the first ground) asserted that:

The Federal Circuit Court erred by failing to conclude that the Second Respondent’s decision was illogical in circumstances where the Second Respondent accepted that:

a. the Appellant’s brother had been kidnapped and killed on a road in the part of Afghanistan to which the Appellant would return;

b. “the same thing was done to many other people”; and

c. “kidnappings can be common in many part of” Afghanistan

and then concluded that there was not a real risk of significant harm to the Appellant in the part of Afghanistan to which the Appellant would return.

1. The appellant contended that the Tribunal’s findings, taken together, were inconsistent with its conclusion that there was no real risk. He relied on the Tribunal’s acceptance of the appellant’s claims that the Taliban were active in the appellant’s home area, that his brother was kidnapped on the road between Parachinar and Kabul because of a criminal act to extort money, that his brother had travelled on that road every two to three months for seven years, that the same thing was done to many other people, and that kidnappings can be common in many parts of Afghanistan. He further argued that the evidence indicated that if he returned to Afghanistan the appellant would necessarily use the roads between Parachinar and Kabul.
2. Contrastingly, the Minister asserted that there were additional findings of the Tribunal, not referred to in the appellant’s submissions, which led the Tribunal to conclude that there was not a real risk of significant harm including that there was no causal connection between the appellant’s brother’s kidnapping and religion or race and that the country information before the Tribunal referred to risks of harm against government institutions, police personnel, armed services or persons with a high profile, rather than the appellant.
3. The Minister also relied on the Tribunal’s reasons at [32] to contend that the risk of kidnapping was remote.
4. The Minister further asserted that there was no evidence about how frequently and for what purpose the appellant would travel on the roads between Khoshi and Parachinar if he returned to Afghanistan.
5. Before addressing in detail the appellant’s assertion of “illogicality” in the Tribunal’s reasons and conclusion, the following should be observed.
6. First, the use of such an expression may be no more than to strongly emphasise disagreement with someone else’s process of reasoning on an issue of fact (see *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [40] per Gleeson CJ and McHugh J). But that does not in and of itself establish jurisdictional error.
7. Second, and relatedly, the use of such an expression may be little more than a contrivance to shoehorn arguments about the merits of the Tribunal’s conclusion into the category of jurisdictional error; but that is to descend into impermissible merits review.
8. Third, differences of degree, impression and empirical judgment between the approach and reasoning of the Tribunal as compared with the opinion of a court undertaking judicial review, do not establish “illogicality”. To establish “illogicality” amounting to a jurisdictional error requires satisfying a high threshold. The question is whether no rational or logical decision maker could arrive at the relevant decision on the evidence before the decision maker: *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [78] per Heydon J and [130] per Crennan and Bell JJ. As their Honours said at [131]:

The complaint of illogicality or irrationality was said to lie in the process of reasoning. But, the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.

1. Moreover, at [135] their Honours continued:

Whilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker. A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn. None of these applied here. It could not be said that the reasons under consideration were unintelligible or that there was an absence of logical connection between the evidence as a whole and the reasons for the decision. Nor could it be said that there was no probative material which contradicted the first respondent’s claims.

1. Fourth, in the context of the ground “illogicality”, the appellant principally relied upon a passage from Gageler J’s reasons in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [105]. The appellant’s reliance was misplaced. First, that passage was in the context of assessing unreasonableness; no doubt the categories of unreasonableness and illogicality overlap, but that hardly avails the appellant. Second, the passage was in the context of the exercise of a *discretionary* statutory power not a forensic *evaluative* exercise; that is not the present context. Third, that passage was little more than an introduction into his Honour’s consideration and fortification of Wednesbury unreasonableness. Fourth, that passage said nothing against the exposition of principle by Crennan and Bell JJ in *SZMDS*.
2. It is appropriate to now address the appellant’s argument seeking to establish illogicality.
3. As this ground of appeal reveals, three matters are principally relied upon by the appellant, from which it is then contended that it was illogical to conclude that there was not a real risk of significant harm. During argument before me, the appellant sought to extend the list, but it is appropriate for the moment to address the three matters identified in the ground of appeal.
4. First, it is said correctly by the appellant that the Tribunal had found that the appellant’s brother had been kidnapped and had disappeared (probably killed) on a road in the part of Afghanistan to which the appellant would return. That is correct so far as it goes. What it leaves out is that the appellant did not give evidence that he (or his family) would *frequently* travel on the relevant road(s); indeed the appellant concedes as much in his written submissions at [34]. The appellant in oral argument sought to finesse more than the evidence established on this aspect. Further and more generally, no focused evidence was led concerning particular and frequent dangers using this road(s), apart from the incident involving his brother.
5. Second, it is said correctly by the appellant that the Tribunal had found at [32] that “the same thing was done to many other people”. But it is important to be clear what the Tribunal was referring to. What the Tribunal said was that it accepted “the applicant’s evidence that the same thing was done to many other people”. But the Tribunal earlier in [32] was referring more generally to the criminal acts of kidnapping and extorting money; this is consistent with later references in [32]. Further, the appellant’s evidence at T15 line 10 on one view is more diffuse, rather than a reference to the specific road(s); indeed his personal knowledge would have been limited concerning the specific road.
6. Third, it is also correct to say that the Tribunal found that kidnappings were common in many parts of Afghanistan. But such a general observation is not to be divorced from the specific risk profile relevant to the appellant.
7. Further, the appellant also highlighted the finding of the Tribunal at [28] that the Taliban were active in the appellant’s home area. But this does not take the matter far given the finding that “there is nothing to suggest that the Taliban or other non-state actors are specifically targeting Tajik Shias for attack or harm”. At best the finding adds to the potentiality for criminal activity in the region.
8. When one considers these findings in combination but taken in context, I do not see how it can be said that the Tribunal’s conclusion was illogical. The evaluation of “real risk” is not a precise exercise. It is an evaluation on which reasonable minds might differ. It cannot be said that the Tribunal’s conclusion was unintelligible or not logically connected to the findings and the underlying evidence. Further, there was no *one* conclusion open.
9. Further, the appellant has taken issue with various matters in the primary judge’s reasons. First, criticism is made of his Honour’s reference to “serious risk” in [68] as being the wrong test. Second, it is said that his Honour at [65] placed a gloss on what the Tribunal had found. But assuming in favour of the appellant that these points are well made, they do not establish that his Honour’s decision should be set aside. That is because, in my view, the Tribunal did not make any jurisdictional error of the type contended for by the appellant.
10. Finally, the appellant referred me to *NBCY v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 922 at [22] to [26] per Tamberlin J and *El Merhabi v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 375 at [16] per Burchett J in order to make relevant the appellant’s concerns for his family who might travel along the relevant road(s). I do not consider these cases to be directly relevant. They addressed the breadth of the concept of “being persecuted” under a different criterion.

# CONCLUSION

1. Neither of the grounds of appeal have been made out. The appellant’s appeal must be dismissed.

|  |
| --- |
| I certify that the preceding seventy-two (72) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach. |

Associate:

Dated: 18 September 2015