IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M143 of 2013

B E T W E E N:

FTZK
Appellant

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

FIRST RESPONDENT'S SUBMISSIONS

Filed on behalf of the First Respondent by:

Australian Government Solicitor
Level 21, 200 Queen Street
Melbourne VIC 3000
DX50 Melbourne

Date of this document: 14 January 2014

Contact: Emily Nance
File Ref: 13202267
Telephone: 03 9242 1316
Facsimile: 03 9242 1496
Email: emily.nance@ags.gov.au

PART I: FORM OF SUBMISSIONS

1. The First Respondent certifies that these submissions are in a form suitable for publication on the internet.

PART II: ISSUES

2. The two main issues in this case are:

   (a) Did the Administrative Appeals Tribunal (**the Tribunal**) make a jurisdictional error by failing to address the question that Article 1F(b) of the *Convention relating to the Status of Refugees*, as amended by the *1967 Protocol relating to the Status of Refugees* (**the Convention**) required it to address?

10 (b) Did the Tribunal make a jurisdictional error by taking "irrelevant matters" into account, either by relying on matters that "were not capable of being objectively relevant to the question that the Tribunal was required to consider", or because the Tribunal did not make an express finding that those matters evidenced "consciousness of guilt"?

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

3. The First Respondent does not consider that any notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: FACTS

4. The Appellant's statement of facts in paragraphs 6 to 17 of his submissions is
20 materially incomplete. The relevant facts are as follows:

   (a) On 20 December 1996, in the city of Tianjin in the Peoples' Republic of China (**PRC**), a 15 year old boy named Zhang Xi (**Xi**) was kidnapped on his way to school. After an unsuccessful ransom attempt, Xi was murdered by being tied up and thrown through a hole in the ice, where he drowned. His body was found the next day.[1]

   (b) Approximately 3 weeks later, on 14 January 1997, the Appellant applied for a Class UC Temporary Business Subclass 456 visa (**456 visa**). He provided false information to obtain that visa.[2] The Tribunal did not accept the Appellant's

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1 The Tribunal's reasons for decision dated 23 May 2012 (**Reasons**) at [10], [11], [14] and [17]. See also *FTZK v Minister for Immigration and Citizenship* [2013] FCAFC 44; 211 FCR 158 (**Full Court**) at [28]-[29].

2 Reasons at [47].

evidence as to why he needed to leave the PRC on a visa obtained using false information.[3]

(c) The Appellant arrived in Australia on 1 February 1997.

(d) In May 1997, the Appellant was implicated in the kidnapping and murder of Xi by two co-accused, Zhong Weidong and Wu Zhijun. Both Zhong and Wu identified the Appellant as a co-offender, gave detailed and substantially consistent accounts of his role in the crimes, and told Chinese investigators that he had gone to Australia.[4] There was no evidence to suggest any reason why Zhong and Wu would have conspired to implicate the Appellant.[5] Zhong and Wu were executed about a year after they admitted their roles in the crimes.

(e) A PRC warrant was issued for the arrest of the Appellant on 26 May 1997.[6]

(f) On 8 December 1998, the Appellant applied for a protection visa,[7] and received a bridging visa while that application was considered.

(g) On 20 January 1999, the application for the protection visa was refused, and the Appellant's application to the Refugee Review Tribunal (**RRT**) was refused on 17 December 1999. Neither the delegate, nor the RRT, believed the Appellant's claims that he had left the PRC because he had been persecuted on account of his religious beliefs.

(h) On 21 January 2000, the Appellant's bridging visa ceased and he became an unlawful non-citizen.[8] Between January 2000 and February 2004, he lived unlawfully in the community. The Tribunal did not accept the Appellant's evidence that he believed he was entitled to remain in Australia during this period.[9]

(i) In February 2004 the Appellant was located and taken into immigration detention. In March 2004, shortly after a new application for a bridging visa was refused,[10] the Appellant attempted to escape from immigration detention.

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3 Reasons at [70] and [71]. See also Full Court at [35].
4 Reasons at [18] – [25]. See also Full Court at [30]-[31].
5 Reasons at [69]. See also Full Court at [33].
6 Reasons at [26].
7 Reasons at [1] and [46].
8 Reasons at [50].
9 Reasons at [52] and [72].
10 Reasons at [72].

(j) On 23 June 2004, the Appellant was advised of the PRC arrest warrant by an officer of the First Respondent.[11]

(k) On 22 May 2006, the Ministry of Foreign Affairs of the PRC provided a written assurance to the Australian Government that if the Appellant was returned to the PRC and found guilty of the charges the death penalty would not be carried out. The PRC Government also provided assurances that Chinese judicial organs would ensure that the Appellant would not be subject to torture or to any other cruel, inhuman or degrading treatment or punishment.

(l) After a series of decisions of the RRT and judicial review proceedings of those decisions, on 11 May 2010 the RRT found that the Appellant satisfied Article 1A(2) of the Convention by reason of his political opinion as a result of his activities in Australia (not by reason of his religious activities in the PRC, as had originally been claimed), but it noted that the application may raise issues that fell within the scope of Article 1F(b) of the Convention.

(m) On 24 May 2011, a delegate of the Minister again refused the protection visa application, on this occasion relying on Article 1F(b) of the Convention. The Appellant sought review of that decision in the Tribunal.

(n) On 23 May 2012, the Tribunal affirmed the decision under review. The Tribunal relied, in part, on material received from the Ministry of Public Security in Beijing copies of the file, or part of the file, in relation to the murder investigation, including records of interviews with accomplices Zhong and Wu.

PART V: LEGISLATIVE PROVISIONS

5. The applicable legislative provisions are set out in the Annexure to these submissions.

PART VI: ARGUMENT

The issues below

6. During the hearing in the Tribunal, which lasted three days, the Appellant did not dispute that kidnapping and murder are serious non-political crimes for the purposes of Article 1F(b).[12] Nor was there any debate concerning the test for determining whether there were "serious reasons for considering" whether the Appellant had committed the alleged crimes.[13] The only area of dispute was whether, on the facts,

11 Reasons at [33].
12 Reasons at [8]. See also Full Court at [39]; Appellant's submissions, paragraph 40.
13 Reasons at [66].

there were "serious reasons for considering" that the Appellant had committed those crimes.

7. The Appellant gave evidence in which he denied committing the alleged crimes. The question for the Tribunal was whether, notwithstanding that denial, there were serious reasons for considering that he had committed the crimes alleged. The key evidence bearing on that question was:

(a) documentary material provided by the PRC, including most importantly the records of the interviews given by Zhong and Wu in which both men identified the Appellant as having committed the kidnapping and murder with them, and in which both gave substantially consistent accounts of the circumstances of the crimes and the role played by each participant, including the Appellant;

(b) the absence of any suggested reason for either Zhong and Wu to implicate the Appellant (the Appellant claiming never to have met or heard of either man);

(c) the location of the kidnapping and murder – they occurred within a few kilometres of the place where the Appellant lived before he left the PRC;

(d) the absence of any reason for the PRC authorities to fabricate a case against the Appellant (the Appellant's claim to have experienced past persecution at the hands of the PRC authorities having been rejected);

(e) the circumstances in which the Appellant left the PRC: he left a few weeks after the kidnapping and murder took place, using a visa that he applied for after those crimes had been committed and that he obtained only after providing false information to Australian authorities; and

(f) the Tribunal's rejection of the only explanation that the Appellant advanced for leaving the PRC in the above circumstances.

8. While the focus in the Tribunal was on the issues identified above, the hearing did touch on the significance of the Appellant's conduct in Australia since his arrival (including his period of several years living unlawfully in the Australian community, and his attempt to escape immigration detention). No objection was made that those matters were not relevant to the Tribunal's task.[14] Instead, the Appellant advanced what were said to be innocent explanations for his conduct.[15] The Appellant's

14 Full Court at [46].
15 Some of those explanations are summarised at Reasons at [31], [43], [47], [49] and [50].

attempts to provide innocent explanations for these matters were relevant (at a minimum) to his credit.

9. The Tribunal found, for reasons it explained, that there were serious reasons for considering that the Appellant had committed the alleged crimes. Its reasons included the evidence of the two alleged accomplices, and the absence of any evidence to suggest that they conspired to name him; the fact that the Appellant left the PRC shortly after the crimes were committed, and used false information to do so; the fact that the Appellant was evasive when giving evidence before the Tribunal as to the reason that he left the PRC; and the Tribunal's rejection of his claim to have been detained and tortured in the PRC (this being the reason he claimed to have left the PRC when he did).[16]

10. In the hearing before the Full Federal Court, the application and written submissions raised numerous issues. However, at the outset of the hearing Senior Counsel for the Appellant expressly confined the appeal to one argument, being the allegation that the Tribunal had taken irrelevant material into account.[17] That was the only ground the Full Court considered.

11. In this Court, the Appellant now seeks to advance a different and wider case. However, an appeal to this Court exists to correct error. The Full Court did not err in failing to address arguments that were never advanced, or that were not pressed. This Court has long accepted that a party is bound by the conduct of its case, and that "[e]xcept in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so".[18]

12. The First Respondent does not suggest that different evidence would have been led had the grounds now sought to be raised been advanced in the Federal Court. However, the above principle is not limited to cases where different evidence would have been led. The Appellant was represented in the Federal Court by Senior and Junior Counsel. He should be taken to have made an informed choice to advance his case in that Court solely by reference to the relevant considerations ground. He

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16 Reasons at [66]-[72].

17 The actual order of the Full Court was to dismiss an application for leave to amend the notice of appeal, and then to dismiss the appeal as incompetent. As to the reasons for this, see Full Court at [12], [17]-[18], [20].

18 *University of Wollongong v Metwally (No 2)* [1985] HCA 28; (1985) 59 ALJR 481 at 483, quoted with approval in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36; (2012) 246 CLR 379 at [32]. See also *Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1 at 6-7; *Suttor v Gundowda Pty Ltd* [1950] HCA 35; (1950) 81 CLR 418 at 438.

has not pointed to any exceptional circumstance to explain why he should be permitted to raise for the first time in this Court the arguments reflected in grounds 7(b) to (e) inclusive in the Notice of Appeal.

13. In any event, for the reasons that follow the appeal should be dismissed. The Federal Court could set aside the decision of the Tribunal only in the event that the Tribunal made a jurisdictional error.[19] No such error was made.

(a) The meaning of "serious reasons for considering" in Article 1F

14. The Appellant contends that the Tribunal misconstrued or misapplied Article 1F of the Convention.[20] In support of that proposition, the Appellant advances two distinct arguments:

(a) First, he contends that the Tribunal's reasoning process indicates that it failed to address the question it was required to consider.[21]

(b) Second, he contends that in assessing the degree of satisfaction required to find that there were "serious reasons for considering" he had committed the alleged crimes, the Tribunal was required to have regard to the consequences of refoulement.[22]

(a) The asserted failure to address the correct question

15. The Tribunal correctly identified the single issue for its determination as being whether there were "serious reasons for considering" that the Appellant had committed the crimes of kidnapping and murder.[23] It summarised the principles relevant to answering that question as follows (at [66]):

1) The provisions of the Convention are beneficial and should not be construed narrowly, however the provisions of Article 1F are protective of the order and safety of the State in which refuge is being sought. (citing *Dhayakpa v Minister for Immigration and Ethnic Affairs*[24] (***Dhayakpa***))

2) It is not necessary that the Tribunal be satisfied that the alleged crime has been committed. (citing *Dhayakpa* at 563.)

3) Strong evidence that the person has committed the alleged offence is sufficient. (citing *Dhayakpa*)

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19 *Migration Act 1958* (Cth) ss 476A(1)(b), read with s 474(2) and s 5E; *Plaintiff S157 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476.
20 Appellant's submissions, Part VI, paragraphs 18-38.
21 Appellant's submissions, paragraphs 28-31, apparently concerning grounds 7(c) and (d).
22 Appellant's submissions, paragraphs 32-37, concerning ground 7(e).
23 Reasons at [6]-[7].
24 [1995] FCA 1653, (1995) 62 FCR 556, 565.

4) The evidence need not be of such weight as to meet either the criminal or civil standard of proof. (citing *Arquita v Minister for Immigration and Multicultural Affairs*[25] at [54])

16. In *Dhayakpa*, upon which the Tribunal particularly relied, French J (as his Honour then was) observed:[26]

> Article 1F excludes from the application of the Convention persons with respect to whom there are serious reasons for considering that they have committed the classes of crime or been guilty of the classes of act there specified. The use of the words "serious reasons for considering that" suggests that it is unnecessary for the receiving State to make a positive or concluded finding about the commission of a crime or act of the class referred to. It appears to be sufficient that there be strong evidence of the commission of one or other of the relevant crimes or acts.

17. That dictum was accepted as correctly stating the requisite approach in *Ovcharuk v Minister for Immigration and Multicultural Affairs*, both at first instance[27] and by the Full Federal Court on appeal.[28] Subsequently, in *WAKN v Minister for Immigration and Multicultural and Indigenous Affairs*, French J summarised the law as follows: [29]

> The Australian jurisprudence presently supports the proposition that the use of the words 'serious reasons for considering that ...' does not mandate a positive finding by the receiving State that the applicant for protection has engaged in conduct of the kind contemplated in Art 1F. No question of proof on the civil or criminal standard arises in that context ...

18. The above approach has been applied many times by Full Courts of the Federal Court,[30] and by single judges of that Court.[31] It accords with the approach taken by superior courts in the United Kingdom,[32] Canada[33] and New Zealand.[34] It also accords with the approach of the United Nations High Commissioner for Refugees, which has recognised that "[t]he standard of proof set out in Article 1F – "serious reasons for considering" – is not a familiar concept in domestic legal systems. State practice is not consistent on this matter but does, at least, make it clear that the

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25 [2000] FCA 1889; (2000) 106 FCR 465 at 478.
26 [1995] FCA 1653; (1995) 62 FCR 556 at 563 [23].
27 [1998] FCA 313; (1998) 153 ALR 385 at 388.
28 [1998] FCA 1314; (1998) 88 FCR 173.
29 [2004] FCA 1245; (2004) 138 FCR 579 at [51].
30 See, e.g., *SYYY v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 42; (2005) 147 FCR 1 at [79]-[80] (Merkel, Finkelstein and Weinberg JJ). See also *SZCWP v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 9 at [22] (Wilcox J dissenting, but not on the statement of principles).
31 See *NADB v Minister for Immigration & Multicultural Affairs* [2002] FCA 200; (2002) 189 ALR 293 at [27] (Hely J); *SBAR v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1502 at [11] (Mansfield J); *SZITR v Minister for Immigration and Multicultural Affairs* [2006] FCA 1759; (2006) 44 AAR 382 at [8] (Moore J); *MZYVM v Minister for Immigration and Citizenship* [2013] FCA 79 at [67]-[68] (Dodds-Streeton J).
32 *Al-Sirri v Secretary for State for the Home Department* [2012] UKSC 54; [2013] 1 All ER 1267 at [75]. This is the case that the Appellant refers to as *DD v Secretary for State for the Home Department.*
33 *Ramirez v Canada* (1992) 89 DLR (4th) 173.
34 *Attorney General (Minister for Immigration) v Tamil X* [2010] NZSC 107; [2011] 1 NZLR 721.

criminal standard of proof (e.g. beyond reasonable doubt in common law systems) need not be met."[35]

19. The Appellant does not challenge the statements of principle concerning the construction of Article 1F in any of the authorities discussed above. Indeed, he accepts that the "Tribunal correctly stated the issue for determination".[36] In those circumstances, it is apparent that the Appellant does not in truth contend that the Tribunal misconstrued Article 1F. He says only that the Tribunal misapplied[37] Article 1F, by relying on facts that were not probative of the commission of the crimes alleged. That error, even if proved, would not be a jurisdictional error.

10 20. No doubt for that reason, the Appellant contends that the Tribunal's reliance on material that was not probative demonstrates that it "failed to address the question it was required to consider". But that does not follow. Even if the Tribunal erroneously treated some facts that were not probative as being relevant to its task (which is denied), that would not indicate that the Tribunal asked itself the wrong question. It would show only that the Tribunal may have reached an incorrect answer to the right question. However, once the Tribunal correctly formulated the test, even if it "went on to err in [its] analysis of the evidence, or in the application of the correct test to the evidence before [it], such later error would not be a jurisdictional error and would not be amenable to judicial review on that or on any other basis".[38]

20 21. The position would be different if none of the factors relied on by the Tribunal were probative of whether there were "serious reasons for considering" that the Appellant had committed the alleged crimes, because in that case it would be open to infer that the Tribunal must have misunderstood its task. But that is not this case. The documents provided by the PRC – including in particular the records of the interviews of the two alleged accomplices – were before the Tribunal and were directly relevant to the question it had to answer. So much is implicitly conceded by the Appellant.[39]

22. In any event, the Tribunal's findings at [70] to [72] do not support the contention that the Tribunal relied on information that was not probative of the matter it had to

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35 United Nations High Commissioner for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F,* Published on 4 September 2003 at [107]. See also UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979 at [149] (**UNHCR Handbook**).

36 Appellant's submissions, paragraph 26.

37 Appellant's submissions, paragraph 26.

38 *Barrett v Coroner's Court of South Australia* [2010] SASCFC 70; (2010) 108 SASR 568 at [147] (Peek J, with whom Anderson J generally agreed).

39 Appellant's submissions, paragraph 31, where complaint is made only about the matters referred to in paragraphs 30.2, 30.3 and 30.4 of the submissions (and not [30.1], which concerns the PRC material).

consider, or that it failed to address the correct question. The Appellant's submission to the contrary disregards the way the case before the Tribunal was conducted.

23. With respect to the findings at [70], the timing and circumstances of the Appellant's departure from the PRC (including by using a visa that he applied for after the kidnapping and murder had occurred, and that he knew he had obtained by providing false information to Australian authorities[40]) were objectively capable of supporting the conclusion that there were serious reasons for considering that the Appellant committed the crimes alleged. It was circumstantial evidence capable of supporting the admissions of Zhong and Wu. It was open to the Tribunal to rely on that evidence, in combination with the admissions of Zhong and Wu, to support its ultimate conclusion.[41] In particular, the timing and circumstances of the Appellant's departure from the PRC made it inherently less likely that Zhong and Wu had fabricated their accounts, or that it was merely a co-incidence that a person who had lived very close to the place where the kidnapping and murder had occurred had been wrongly implicated in those crimes by two different people who the Appellant claims he had never even met.

24. Contrary to his position in this Court, during the hearing in the Tribunal the Appellant did not contend that the timing and circumstances of his departure from the PRC were incapable of being relevant to whether there were serious reasons for considering that he had committed the alleged crimes. Instead, he attempted to provide an innocent explanation of those facts. That explanation involved a claim that he had been subjected to religious persecution in the PRC, and that he fled to escape that persecution (that being a claim that had previously been rejected by the Refugee Review Tribunal).[42]

25. Plainly the Tribunal could not properly have relied on the timing and circumstances of the Appellant's departure from the PRC without evaluating the Appellant's explanation for those facts. That is what the Tribunal did at [71]. Had it not made findings concerning the Appellant's explanation for his departure from the PRC, the Tribunal would likely have erred. The making of these findings therefore plainly does not suggest that the Tribunal was asking itself the wrong question.

26. The Tribunal's reasoning in [71] cannot properly be isolated from its reasoning in [70]. The finding in [71] had the result that no acceptable explanation for the facts found in

40 Reasons at [44].
41 Reasons at [73].
42 Reasons at [43], [47].

[70] had been advanced. On that basis, it was open to the Tribunal to infer that the timing and circumstances of the Appellant's departure from the PRC involved an attempt to escape the consequences of his crimes.

27. Finally, with respect to the findings at [72], it is necessary to recall that the Appellant gave written and oral evidence in which he denied that he committed the crimes alleged.[43] As such, his character was squarely in issue. At least for that reason, the Tribunal was entitled to consider the admittedly false claims that the Appellant had previously made to Australian authorities when seeking a protection visa (that being the subject of the second sentence of [70]). It was also entitled to evaluate the Appellant's claim that he believed he was living lawfully in Australia for a period of four years after his visa expired, and his explanation for his attempt to escape immigration detention in 2004.

28. There is nothing in the findings in [72] to suggest that the Tribunal failed to address the question that it was required to consider by Article 1F(b) of the Convention. Even assuming the facts referred to in that paragraph were not themselves probative of the Appellant's commission of the crimes alleged (and therefore that his efforts to remain unlawfully in the Australian community did not reveal any consciousness of guilt on his part), the findings in the second sentence of [70] and in [72] provided ample reason to doubt the Appellant's credibility, and therefore not to accept his denial that he committed the alleged crimes. The Tribunal's reference to those facts therefore cannot support an inference that the Tribunal asked itself the wrong question, particularly given that it had identified that question correctly earlier in its reasons.

29. For the above reasons, there is no basis upon which the Court could find that the Tribunal failed to address the correct question.

(b) The consequences of refoulement

30. In this Court, the Appellant asserts for the first time that the Tribunal was "required to have regard to the consequences of refoulement to the Appellant."[44] He submits that those consequences are relevant to the degree of satisfaction that is required before it can be found that there are "serious reasons for considering" that a serious non-political crime has been committed.

43 Reasons at [27], [42].
44 Appellant's Submissions, paragraphs 32 and 35.

31. The Court should not permit this argument to be advanced. Not only was it not raised below, it is contrary to a concession made by counsel for the Appellant when the matter was before the Tribunal.[45]

32. In any event, the argument should be rejected. It attempts to import into the meaning of the Convention, which is applicable to States with a wide variety of domestic legal systems, an element or aspect to the standard of proof akin to the *Briginshaw*[46] standard under Australian law that is not required by the terms of the Convention. The Convention should be interpreted in good faith and in accordance with the ordinary meaning of its terms, having regard both to context and to the object and purpose of the Convention.[47] Its meaning should not be distorted by reference to concepts drawn from the domestic law of particular States.

33. The Appellant attempts to support the above argument by reference to the decision of Mathews J in *Re W97/164 and Minister for Immigration and Multicultural Affairs*,[48] where her Honour, sitting as President of the Tribunal, said:

> I find it difficult to accept that the requirement that there be "serious reasons for considering" that a crime against humanity has been committed should be pitched so low as to fall, in all cases, beneath the civil standard of proof. The seriousness of the allegation itself and the extreme consequences which can flow from an affirmative finding upon it would, in my view, require a decision-maker to give substantial content to the requirement that there be "**serious** reasons for considering" (emphasis added) that such a crime has been committed. The process whereby the seriousness of the allegation influences the level of proof required to substantiate it is well known to Australian courts (*Briginshaw v Briginshaw* ...

34. The above passage does not in fact support the Appellant's argument, because Mathews J referred to *Briginshaw* in support of an argument that Article 1F should be construed as requiring proof at least on the balance of probabilities standard in all cases. Her Honour was referring to the possible serious consequences of exclusion under Art 1F generally, rather than on a case by case basis, and did not suggest that the content of the applicable standard of proof varies depending on the possible consequences of refoulement for a particular individual.

35. In any event, *W97/164* has not been accepted in Australia. In *WAKN*, French J described Mathews J's approach in that decision as expressing "a contrary view" to

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45 Transcript of Tribunal hearing on 11 April 2012, p 120, lines 14-19, where counsel for the Appellant expressly withdrew her written submission to the effect that in applying Article 1F the Tribunal was required to consider the consequences of the refusal of a protection visa.

46 *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336.

47 Article 31 of the *Vienna Convention on the Law of Treaties*. See also *Minister for Home Affairs for the Commonwealth) v Zentai* [2012] HCA 28; (2012) 246 CLR 213 at 238 [36].

48 [1998] AATA 618; (1998) 27 AAR 482 at 491. See Appellant's submissions, paragraph 36.

that supported by both the Australian and Canadian jurisprudence.[49] In *Arquita*,[50] Weinberg J was similarly critical of *W97/164*, his Honour expressing a preference for focusing on the text of Article 1F rather than putting a gloss on the words of the Article by introducing domestic law notions of standard of proof.

36. The approach taken by French and Weinberg JJ is supported by a subsequent decision of the Full Federal Court, which emphasised that it is "undesirable to interpret the 'serious reasons for considering' test, found in an international instrument, by reference to standards of proof required for different purposes in the legal systems of some, but by no means all, countries which are parties to that instrument".[51] The view that the words of Article 1F mean what they say, and that it is unnecessary and confusing to add glosses by analogy with civil litigation, criminal prosecution or domestic standards of proof, is also supported by decisions of the Supreme Court of the United Kingdom[52] and the Supreme Court of New Zealand.[53]

37. In many cases (of which the present case is an example), the more serious the crime that a person is alleged to have committed in their country of origin, the more serious the possible consequences for that person if he or she is returned to that country. However, it would defeat the purpose of Article 1F if the article is interpreted in such a way that, the more serious the crime, the harder it is to demonstrate that Article 1F applies.

38. Consistently with that proposition, courts in Australia and overseas have rejected submissions to the effect that it is necessary to balance the seriousness of the crime alleged to have been committed by a person against the seriousness of the consequences that the person fears if returned to his or her country of origin when assessing whether or not a particular crime should be characterised as a "serious crime".[54] For example, as French J observed in *Dhayakpa*:[55]

> once the non-political crime committed outside the country of refuge is properly characterised as "serious" the provisions of the Convention do not apply. There is

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49 [2004] FCA 1245; (2004) 138 FCR 579 at [51].

50 *Arquita v Minister for Immigration and Multicultural Affairs* [2000] FCA 1889; (2000) 106 FCR 465, 478 at [55].

51 *VWYJ v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCAFC 1 at [25] (Gray J, Keifel and Lander JJ agreeing). See also *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* [2006] HCA 53; (2006) 231 CLR 1 at 15 [34]; *Minister for Immigration v Singh* [2002] HCA 7; (2002) 209 CLR 533 at 564 [93] (Kirby J).

52 *Al-Sirri v Secretary of State for the Home Department* [2012] UKSC 54; [2013] 1 All ER 1267 at [74]-[75].

53 *Attorney-General (Minister of Immigration) v Tamil X* [2010] NZSC 107; [2011] 1 NZLR 721 at [39].

54 *Applicant NADB of 2001 v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 326; (2002) 126 FCR 453 at [37] and [41]; *Ovcharuk v Minister for Immigration and Multicultural Affairs* [1998] FCA 1314; (1998) 88 FCR 173. See also *Canada (Minister of Citizenship and Immigration) v Malouf* (1995) 190 NR 230 (FCA); *Gil v Canada* [1995] 1 F.C. 508 (CA).

55 [1995] FCA 1653; (1995) 62 FCR 556 at 563 [24].

> no obligation under the Convention on the receiving State to weigh up the degree of seriousness of a serious crime against the possible harm to the applicant if returned to the state of origin.

39. While the above authorities do not in terms establish that the seriousness of the consequences that may follow refoulement do not affect whether the evidence is sufficiently strong to give rise to "serious reasons for considering" that a crime has been committed, the reasoning in those authorities supports that conclusion. That reasoning starts from the proposition that the purpose of Article 1F is to exclude a person who would otherwise satisfy the definition under Article 1A because, at the time the Convention was drafted, there was "a desire on the part of States to deny admission to their territories of criminals who would present a danger to security and public order".[56] The purposes of Article 1F(b) are "to protect the community of a receiving country from the danger of admitting a refugee who has committed a serious common crime,"[57] and to ensure that the Convention cannot be used by the perpetrators of serious crimes to avoid the jurisdiction of a State in which they may lawfully face punishment.[58] Accordingly, "the exclusions in Art 1F of the Convention are to be construed as constituting part of the compromise under which 'countries of refuge' will hold themselves bound by international law (and municipal law giving it effect) to afford protection to refugees, but not in cases where such an obligation would be intolerable."[59]

40. It follows that, notwithstanding the humanitarian purpose of the Convention, effect should be given to the agreement the Contracting States in fact made. As Gummow J said in *Applicant A v Minister for Immigration and Ethnic Affairs*:[60]

> I have referred to those aspects of the background to the adoption of the Convention which show the danger in approaching it as designed, on a broad front, to advance humanitarian concerns. Rather, the text of the Convention manifested a compromise between various interests perceived by the Contracting States. As Dawson J points out in his reasons for judgment, the demands of language and context should not be departed from by invoking the humanitarian objectives of the Convention, without an appreciation of the limits placed by the Convention upon achievement of such objectives.

41. Finally, if the consequences of refoulement affect whether there are "serious reasons for considering" that the applicant has committed a serious non-political crime, it would be necessary to ascertain those consequences before it would be possible to

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56 UNHCR Handbook at [148]. See also Hathaway, *The Law of Refugee Status* (1991) pp 214, 221.
57 UNHCR Handbook at [151].
58 See Hathaway, *The Law of Refugee Status* (1991) p 221; United Nations High Commissioner for Refugees, *Background Note on the Application of the Exclusion Clauses: Article 1F*, Published on 4 September 2003 at [3]. .
59 *Minister for Immigration v Singh* [2002] HCA 7; (2002) 209 CLR 533 at 565 [96] (Kirby J).
60 [1997] HCA 4; (1997) 190 CLR 225 at 283.

determine whether Article 1F applies. But that would be inconsistent with this Court's confirmation in *Singh* that Article 1F may be considered before any finding as to a person's eligibility for protection.[61] That consideration provides a further reason to reject the Appellant's argument that the Tribunal erred by failing to consider the consequences of refoulement.

(b) Irrelevant Considerations

42. The Appellant contends that, in deciding whether there were serious reasons for considering that he had committed the alleged crimes, the Tribunal took irrelevant matters into account.[62] That contention is legally meaningful only if it is properly understood as an argument that the Tribunal had regard to matters that the Act required it to disregard.[63] As the Full Federal Court correctly held, to make good this ground it was necessary for the Appellant "to establish that material taken into account by the Tribunal was objectively irrelevant to the task of the Tribunal".[64]

43. In this appeal, the Appellant apparently advances his irrelevant considerations argument in two ways:

(a) First, he contends that the Tribunal had regard to irrelevant considerations by having regard to facts or circumstances that "lack any probative weight" (i.e. that were incapable of being relevant).[65]

(b) Alternatively, he contends that the Tribunal had regard to irrelevant considerations because the facts it found were not accompanied by a further express finding that those facts demonstrated "consciousness of guilt".[66]

Both versions of the argument should be rejected.

44. The first version of the argument reflects an unduly narrow view of the matters the Tribunal is entitled to consider. There is nothing in the Act that confines the Tribunal to consideration of matters that are directly probative of whether a person committed the alleged crimes. In particular, the Act does not prohibit the Tribunal from considering circumstantial evidence that is rationally capable of being treated by the Tribunal as relevant. The Tribunal is likewise entitled to consider evidence given by

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61 *Minister for Immigration v Singh* [2002] HCA 7; (2002) 209 CLR 533 at [5] (Gleeson CJ), [30] (Gaudron J), [87] (Kirby J), [162] (Callinan J). See also *Applicant NADB of 2001 v Minister for Immigration* [2002] FCAFC 326; (2002) 126 FCR 452.

62 Grounds 5, 6 and 7(a); Appellant's submissions, paragraphs 39 to 46.

63 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39 (Mason J); *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 40; (2001) 206 CLR 323 at [74] (McHugh, Gummow and Hayne JJ) and [1] (Gleeson CJ agreeing).

64 Full Court at [43].

65 Appellant's submissions, paragraphs 41, 44.

66 Appellant's submissions, paragraph 45.

a person in an attempt to negate inferences that might otherwise be drawn from the circumstantial evidence.[67] It is also entitled to consider evidence that bears upon the person's credibility, at least in cases where a person has given evidence denying that they committed the crime alleged.

45. For the reasons set out in paragraphs 23 to 27 above, the findings at [70]-[72] of the Tribunal's reasons were not irrelevant to the Tribunal's task in determining whether Article 1F(b) applied. Those findings were relevant to one or more of the matters identified in the previous paragraph. The majority in the Full Court was correct to so find.[68]

46. The alternative version of the Appellant's relevant considerations argument, which appears to be only weakly pressed, is that the Tribunal took irrelevant considerations into account because it did not make a "finding" that the facts in [70]-[72] evidenced "consciousness of guilt", and that without such a finding the matters referred to in those paragraphs were irrelevant considerations.[69] That argument cannot be correct. The question whether a decision-maker is bound by the Act not to consider particular matters must be capable of being determined prior to the decision-maker making a decision. A matter cannot become something the decision-maker is bound not to consider only after it has already been considered. In particular, a matter cannot become something that the decision-maker is bound not to take into account as a result of the reasoning process that the decision-maker adopts, or the factual findings that are made.[70]

(c) Reading in findings of fact not made by the Tribunal

47. The Appellant contends that the Full Court erred by reading into the reasons of the Tribunal findings of fact that the Tribunal was required to, but did not, make.[71]

48. The argument is premised on the assumption that to describe or label post-offence conduct as evidencing "consciousness of guilt" is to make a finding of fact. That assumption is incorrect. To apply that label is to do no more than describe the reasoning process by which particular evidence is used.[72] For example, flight or post-

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67 The Appellant's submission to the contrary in paragraphs 30.3 and 44 of his submissions, which asserts that the findings in [71] of the Reasons involved reference to irrelevant matters, amounts to a submission that the Tribunal was bound by the Act to disregard evidence that he himself advanced in an attempt to explain the circumstances of his departure from the PRC.

68 Full Court at [45].

69 Ground 6 of the Notice of Appeal, read together with paragraph 45 of the Appellant's Submissions.

70 See, by parity of reasoning in the context of procedural fairness: *Applicant VEAL of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 72; (2005) 225 CLR 88 at 96 [17].

71 Grounds 3 and 4; Appellant's submissions, paragraphs 48 and 51.

72 Full Court at [45], [47] and [50].

offence lies might be characterised as evidence of consciousness of guilt, but each might equally constitute an implied admission. The application of labels of this kind does not involve fact finding.

49. Contrary to the Appellant's submissions, this is not a case where the Court ignored the reasons actually given by the Tribunal.[73] Instead, the majority in the Full Court correctly found that, on a fair reading of the Tribunal's reasons,[74] it had implicitly made the findings of fact the Appellant asserts were necessary. In particular, at [68] the Tribunal found there were serious reasons for considering that the Appellant had committed the alleged crimes "on the basis of several findings I have made on the evidence before me", those being the findings identified at [69]-[73]. The Tribunal therefore expressly asserted that each of the findings in those paragraphs was relevant to its conclusion that there were serious reasons for considering that the Appellant had committed the alleged crimes.

50. While the Tribunal did not expressly articulate the basis upon which it considered the above findings to support its conclusion, it was not required to do so. Its reasons were adequate to convey the basis for the decision, particularly having regard to the way the case was argued. The majority in the Full Court correctly accepted that "the connection between the applicant's actions and his participation in the commission of the criminal offences, by way of the actions demonstrating his consciousness of guilt, is readily apparent".[75] The majority continued (at [49]-[50]):

> ... particularly in emphasizing that it assessed each factor in combination with the others, the Tribunal implicitly recognized and found that the factors in [70], [71] and [72] were relevant as evidence of flight and consciousness of guilt. The Tribunal's observations at [69]-[73] can bear no other logical construction.
>
> Accordingly if, contrary to the views expressed above, it were necessary for the Tribunal to make a finding as to the relevance of the matters referred to in [70], [71] and [72] of its reasons, it did so. Such a finding is implicit when the Tribunal's reasons in [69]-[73] are read fairly and in the context of its reasons as a whole, the nature of the evidence before it, and the course of the hearing it had conduct.

51. Alternatively, even if the Tribunal's reasons at [70]–[72] were deficient, that deficiency would not mean that the Tribunal made a jurisdictional error.[76] Consistently with that

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73 Cf Appellant's submissions, paragraph 49.

74 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* [1996] HCA 6; (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

75 Full Court at [46].

76 *Soliman v University of Technology, Sydney* [2012] FCAFC 146; (2012) 207 FCR 27 at [54] (Marshall, North and Flick JJ), citing *Kennedy v Australian Fisheries Management Authority* [2009] FCA 1485; 182 FCR 411; *Civil Aviation Safety Authority v Central Aviation Pty Ltd* [2009] FCAFC 137 at [45] - [49]; [2009] FCAFC 137; 179 FCR 554 at 562-563 (Bennett, Flick and McKerracher JJ); *Sherlock v Lloyd* [2008] VSC 450 (Kyrou J).

submission, in *Wingfoot Australia Partners Pty Ltd v Kocak*[77] this Court held that the statutory regime that was in issue in that case[78] was such that an error of law that was manifest on the face of whatever reasons a Medical Panel in fact gave for its opinion would necessarily constitute an error of law on the face of the record, such that certiorari would issue to deprive that opinion of any legal effect it would otherwise have had. But in so holding, the Court emphasised that its conclusion did not mean that a deficiency in the reasons of an administrative decision-maker constituted a jurisdictional error.[79]

52. Of course, in some cases jurisdictional error may be revealed by analysis of the reasons that are provided.[80] In other cases, a complete failure to comply with a statutory obligation to give reasons may support an inference that the Tribunal did not have reasons for its decision (although that inference plainly is not open in this case having regard to the reasons given by the Tribunal[81]). But in both cases, an identifiable process of reasoning to support an established ground of jurisdictional error must be shown. Jurisdictional error cannot be established by showing only the absence of reasons, or that the reasons that are provided are insufficiently detailed.[82]

53. In cases where there is a failure to comply (or to comply adequately) with a duty to give reasons, the appropriate course is for the aggrieved applicant to seek an order compelling the Tribunal to comply with its duty.[83] As Brennan J said in *Repatriation Commission v O'Brien*,[84] when an obligation to give reasons is imposed by statute:

> the remedy for a failure to fulfil that obligation adequately is a mandatory order by the court to do so. [A] ... decision ... is not invalidated by a mere failure to expose fully the reasons for making it.

54. Accordingly, even if this Court were to conclude that the Tribunal did not adequately explain the basis upon which it considered the facts found at [70]-[72] to be relevant,

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77 [2013] HCA 43.

78 Including, importantly, s 10 of the *Administrative Law Act 1978* (Vic), which has no equivalent in relation to the reasons of the AAT: [2013] HCA 43 at [28]. See also at [53].

79 [2013] HCA 43 at [26]-[29].

80 *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 40; (2001) 206 CLR 323 at 338-339 [37]-[38] (Gaudron J), 348-349 [75] (McHugh, Gummow and Hayne JJ); *Avon Downs Pty Ltd v Commissioner of Taxation* [1949] HCA 26; (1949) 78 CLR 353, 360 (Dixon J).

81 *Minister for Immigration and Citizenship v SZGUR* [2011] HCA 1; (2011) 241 CLR 594 at [72] (Gummow J, with whom Heydon and Crennan JJ agreed), referring to *Public Service Board of NSW v Osmond* [1986] HCA 7; (1986) 159 CLR 656 at 663-664 and *Padfield v Minister of Agriculture, Fisheries and Food* [1968] UKHL 1; [1968] AC 997 at 1053-1054.

82 *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* [2003] HCA 56; (2003) 216 CLR 212 at [48] and [55]-[57].

83 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* [2003] HCA 56; (2003) 216 CLR 212 at 224-25 [41]-[46] (Gleeson CJ, Gummow and Heydon JJ); *Minister for Immigration and Citizenship v SZLSP* [2010] FCAFC 108; (2010) 187 FCR 362 at [54] (Kenny J, with whom Rares J agreed); *Kennedy v Australian Fisheries Management Authority* [2009] FCA 1485; (2009) 182 FCR 411 at 435 [70] (Tracey J).

84 [1985] HCA 10; (1985) 155 CLR 422 at 445-446.

that conclusion would not support a finding that the Tribunal made a jurisdictional error. At most, it would have supported an order that the Tribunal provide further reasons pursuant to s 43(2B) of the *Administrative Appeals Tribunal Act 1975* (Cth). However, the Appellant has never sought such an order. Plainly there would not be any utility in making such an order now.

PART VII: ESTIMATED HOURS

55. It is estimated that 1 hour will be required for the presentation of the oral argument of the First Respondent.

Date of filing: 14 January 2014

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Stephen Donaghue
Telephone: (03) 9225 7919
Facsimile: (03) 9225 6058
Email: s.donaghue@vicbar.com.au

Raelene Sharp

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Telephone: (03) 9225 7631
Facsimile: (03) 9225 6058
Email: rae.sharp@vicbar.com.au

Counsel for the First Respondent

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M143 of 2013

B E T W E E N:

FTZK
Appellant

and

MINISTER FOR IMMIGRATION AND CITIZENSHIP
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

FIRST RESPONDENT'S ANNEXURE OF APPLICABLE LEGISLATIVE PROVISIONS

The Convention relating to the Status of Refugees*, as amended by the *1967 Protocol relating to the Status of Refugees

Article 1F

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Filed on behalf of the First Respondent by:

Australian Government Solicitor
Level 21, 200 Queen Street
Melbourne VIC 3000
DX50 Melbourne

Date of this document: 14 January 2014

Contact: Emily Nance
File Ref: 13202267
Telephone: 03 9242 1316
Facsimile: 03 9242 1496
Email: emily.nance@ags.gov.au

Migration Act 1958 (Cth)

Section 5 - Interpretation

"migration decision" means:

(a) a privative clause decision; or

(b) a purported privative clause decision; or

(c) a non-privative clause decision.

Section 5E - Meaning of purported privative clause decision

(1) In this Act, ***purported privative clause decision*** means a decision purportedly made, proposed to be made, or required to be made, under this Act or under a regulation or other instrument made under this Act (whether in purported exercise of a discretion or not), that would be a privative clause decision if there were not:

(a) a failure to exercise jurisdiction; or

(b) an excess of jurisdiction;

in the making of the decision.

(2) In this section, decision includes anything listed in subsection 474(3).

Section 474 - Decisions under Act are final

(1) A privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

(2) In this section:

privative clause decision means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

(3) A reference in this section to a decision includes a reference to the following:

(a) granting, making, varying, suspending, cancelling, revoking or refusing to make an order or determination;

(b) granting, giving, suspending, cancelling, revoking or refusing to give a certificate, direction, approval, consent or permission (including a visa);

(c) granting, issuing, suspending, cancelling, revoking or refusing to issue an authority or other instrument;

(d) imposing, or refusing to remove, a condition or restriction;

(e) making or revoking, or refusing to make or revoke, a declaration, demand or requirement;

(f) retaining, or refusing to deliver up, an article;

(g) doing or refusing to do any other act or thing;

(h) conduct preparatory to the making of a decision, including the taking of evidence or the holding of an inquiry or investigation;

(i) a decision on review of a decision, irrespective of whether the decision on review is taken under this Act or a regulation or other instrument under this Act, or under another Act;

(j) a failure or refusal to make a decision.

(4) For the purposes of subsection (2), a decision under a provision, or under a regulation or other instrument made under a provision, set out in the following table is not a privative clause decision:

Decisions that are not privative clause decisions		
Item	**Provision**	**Subject matter of provision**
1	section 213	Liability for the costs of removal or deportation
2	section 217	Conveyance of removees
3	section 218	Conveyance of deportees etc.
4	section 222	Orders restraining non-citizens from disposing of property
5	section 223	Valuables of detained non-citizens
6	section 224	Dealing with seized valuables
7	section 252	Searches of persons
8	section 259	Detention of vessels for search
9	section 260	Detention of vessels/dealing with detained vessels
10	section 261	Disposal of certain vessels
11	Division 14 of Part 2	Recovery of costs
12	section 269	Taking of securities
13	section 272	Migrant centres
14	section 273	Detention centres
15	Part 3	Migration agents registration scheme
16	Part 4	Court orders about reparation
17	section 353A	Directions by Principal Member
18	section 354	Constitution of Migration Review Tribunal
19	section 355	Reconstitution of Migration Review Tribunal
20	section 355A	Reconstitution of Migration Review Tribunal for efficient conduct of review
21	section 356	Exercise of powers of Migration Review Tribunal
22	section 357	Presiding member
23	Division 7 of Part 5	Offences
24	Part 6	Establishment and membership of Migration Review Tribunal
25	section 421	Constitution of Refugee Review Tribunal
26	section 422	Reconstitution of Refugee Review Tribunal
27	section 422A	Reconstitution of Refugee Review Tribunal for efficient conduct of review

Decisions that are not privative clause decisions		
Item	**Provision**	**Subject matter of provision**
28	Division 6 of Part 7	Offences
29	Division 9 of Part 7	Establishment and membership of Refugee Review Tribunal
30	Division 10 of Part 7	Registry and officers
31	regulation 5.35	Medical treatment of persons in detention

(5) The regulations may specify that a decision, or a decision included in a class of decisions, under this Act, or under regulations or another instrument under this Act, is not a privative clause decision.

(6) A decision mentioned in subsection 474(4), or specified (whether by reference to a particular decision or a class of decisions) in regulations made under subsection 474(5), is a ***non-privative clause decision.***

(7) To avoid doubt, the following decisions are ***privative clause decisions*** within the meaning of subsection 474(2):

(a) a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power under subsection 37A(2) or (3), section 48B, paragraph 72(1)(c), section 91F, 91L, 91Q, 195A, 197AB, 197AD, 198AE, 351, 391, 417 or 454 or subsection 503A(3);

(b) a decision of the Principal Member of the Migration Review Tribunal or of the Principal Member of the Refugee Review Tribunal to refer a matter to the Administrative Appeals Tribunal;

(c) a decision of the President of the Administrative Appeals Tribunal to accept, or not to accept, the referral of a decision under section 382 or 444;

(d) a decision of the Minister under Division 13A of Part 2 to order that a thing is not to be condemned as forfeited.

Section 476A Limited jurisdiction of the Federal Court

(1) Despite any other law, including section 39B of the *Judiciary Act 1903* and section 8 of the *Administrative Decisions (Judicial Review) Act 1977*, the Federal Court has original jurisdiction in relation to a migration decision if, and only if:

(a) the Federal Circuit Court transfers a proceeding pending in that court in relation to the decision to the Federal Court under section 39 of the *Federal Circuit Court of Australia Act 1999*; or

(b) the decision is a privative clause decision, or a purported privative clause decision, of the Administrative Appeals Tribunal on review under section 500; or

(c) the decision is a privative clause decision, or purported privative clause decision, made personally by the Minister under section 501, 501A, 501B or 501C; or

(d) the Federal Court has jurisdiction in relation to the decision under subsection 44(3) or 45(2) of the *Administrative Appeals Tribunal Act 1975*.

Note: Only non-privative clause decisions can be taken to the Federal Court under subsection 44(3) of the *Administrative Appeals Tribunal Act 1975* (see section 483).

(2) Where the Federal Court has jurisdiction in relation to a migration decision under paragraph (1)(a), (b) or (c), that jurisdiction is the same as the jurisdiction of the High Court under paragraph 75(v) of the Constitution.

(3) Despite section 24 of the *Federal Court of Australia Act 1976*, an appeal may not be brought to the Federal Court from:

(a) a judgment of the Federal Circuit Court that makes an order or refuses to make an order under subsection 477(2); or

(b) a judgment of the Federal Court that makes an order or refuses to make an order under subsection 477A(2).

(4) Despite section 33 of the *Federal Court of Australia Act 1976*, an appeal may not be brought to the High Court from a judgment of the Federal Court that makes an order or refuses to make an order under subsection 477A(2).

(5) In this section:

"***judgment***" has the same meaning as in the *Federal Court of Australia Act 1976*.

Administrative Appeals Tribunal Act 1975 **(Cth)**

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Section 43(2B) - Tribunal's decision on review

Where the Tribunal gives in writing the reasons for its decision, those reasons shall include its findings on material questions of fact and a reference to the evidence or other material on which those findings were based.