FEDERAL COURT OF AUSTRALIA

Al-Rahal v Minister for Immigration & Multicultural Affairs [2000] FCA 1141

MIGRATION - whether appellant is a person to whom Australia has protection obligations under the Refugee Convention – where appellant is a citizen of Iraq – where RRT found that appellant could re-enter Syria and remain there indefinitely with no threat of persecution – where RRT found that the risk the appellant would be deported by Syria was remote – application of Art 33 of Refugee Convention – existence of a "safe third country" – relevance of whether third country has undertaken to receive and protect the appellant – right of non-refoulement to certain places – whether person who may be expelled or returned to a third country where there is no threat to their life or freedom for a Convention reason is a person to whom Australia has "protection obligations" – whether essential to determine whether person concerned is a refugee before deciding whether Australia has protection obligations

Migration Act 1958 (Cth)

Border Protection Legislation Amendment Act 1999 (Cth)

Immigration and Asylum Act 1999 (UK)

Convention Relating to the Status of Refugees 1951 as amendedby the *Protocol Relating to the Status of Refugees 1967*

Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997-1998) 80 FCR 543 followed

Minister for Immigration and Multicultural Affairs v Thiyagarajah (2000) 199 CLR 343 considered

Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 353 cited

Patto v Minister for Immigration and Multicultural Affairs [2000] FCA 1554 referred to

Reg v Home Secretary; Ex parte Sivakumaran [1988] AC 958 referred to

R v Secretary of State for Home Department; Ex parte Adan [2001] 1 All ER 593 cited

R v Secretary of State for Home Department; Ex parte Bajram Zeqiri [2001] EWCA CIV 342 cited

Minister for Immigration and Multicultural Affairs v Thiyagarajah (1998) 151 ALR 685 cited

Reg v Secretary of State for the Home Department; Ex parte Onibiyo [1996] QB 768 considered

Minister for Immigration and Multicultural Affairs v Al-Sallal (1999) 94 FCR 549 cited

The Immigration and Asylum Act 1999: A Missed Opportunity? (2001) 64 (3) MLR 413

Hathaway *The Law of Refugee Status* (1991)

Hailbronner K, *The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western European Perspective* 5 (1) IJRL (1993) 31

Goodwin-Gill G S, *The Refugee in International Law*, 2nd ed (1996)

Dunstan R, *Playing Human Pinball: The Amnesty International United Kingdom Section Report on UK Home Office 'Safe Third Country' Practice*, 7 IJRL, (1995) 4, 606

Abbel N A, *The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees*, 11 (1) IJRL (1999) 60

Byrne R and Shacknove A "The Safe Third Country Notion in European Asylum Law", 9 *Harvard Human Rights Journal* 185 (1996)

Achermann A and Gattiker M, *Safe Third Countries: European Developments*, 7 (1) IJRL (1995) 19

Marx R, *Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims*, 7 (3) IJRL (1995) 383

Jackson D, *Immigration Law and Practice* (1996)

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Nicholson F and Twomey P, *Refugee Rights and Realities: Evolving International Concepts and Regimes*, (1999)

HAYDAN AL-RAHAL v MINISTER FOR IMMIGRATION

& MULTICULTURAL AFFAIRS

W138 OF 2000

SPENDER, LEE AND TAMBERLIN JJ

BRISBANE (HEARD IN PERTH)

20 AUGUST 2001

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W138 OF 2000

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	HAYDAN AL-RAHAL APPELLANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

	RESPONDENT
JUDGES:	SPENDER, LEE & TAMBERLIN JJ
DATE OF ORDER:	20 AUGUST 2001
WHERE MADE:	BRISBANE (HEARD IN PERTH)

THE COURT ORDERS THAT:

The appeal be dismissed with costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY W 138 OF 2000 ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA	
BETWEEN:	HAYDAN AL-RAHAL APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS RESPONDENT

JUDGES:	SPENDER, LEE & TAMBERLIN JJ
DATE:	20 AUGUST 2001
PLACE:	BRISBANE (HEARD IN PERTH)

REASONS FOR JUDGMENT

SPENDER J:

1 In my opinion this appeal should be dismissed with costs, for the reasons given by Tamberlin J.

2 While the reasoning of Lee J in his reasons for judgment is both cogent and persuasive, in my opinion this Court, consistent with authority including *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997-1998) 80 FCR 543, should hold that a person, who may be expelled or returned by Australia to a third country where there is no threat to their life or freedom for a Convention reason (and therefore not within the prohibition on Australia contained in Article 33 of the Convention Relating to the Status of Refugees as amended by the Refugees Protocol), is not a person to whom Australia has “protection obligations” within s 36(2) of the *Migration Act 1958* (Cth) (the Act).

3 It was held in *Thiyagarajah* that it was sufficient to permit a contracting state to return an asylum seeker to a third country without undertaking an assessment of the substantive merits of the claim for refugee status if it was proposed to return the asylum seeker to a third country which has already recognised that person’s status as a refugee and had accorded that person effective protection, including a right to reside, enter and re-enter that country: von Doussa J (with whom Moore and Sackville JJ) agreed at 562.

4 I take this to mean that it is **sufficient** for effective protection of a person in the third country if that person has a right to reside, enter and re-enter that country, but that it is not a **necessary** requirement of effective protection that the person have a formal right to reside, enter and re-enter that country.

5 In the appeal to the High Court from the Full Court in *Thiyagarajah*, Gleeson CJ, McHugh, Gummow and Hayne JJ (*Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343) observed at 349-50 that von Doussa J was correct in the Full Court in emphasising that, under the legislation, the inquiry was not confined (as it had been under earlier legislation) to the question whether the asylum seeker had the “status” of a “refugee”. Their Honours continued:

“Even were the respondent a refugee, he was not a person to whom Australia had protection obligations if Art 33 applied.”

6 Their Honours noted at 350 [17] that the error of law which will attract review under s 476(1)(e), namely that the decision involved an error of law, must be

"…more than one found in a step taken at some stage in the decision making process",

and

"The involvement of which s 476(1)(e) speaks postulates an error which finds a necessary consequence in the ultimate decision to affirm the refusal of the grant of a protection visa (Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 353).

Von Doussa J had concluded at 568:

"The [Tribunal] has found as a fact that effective protection is available to the respondent in France, and that there is no real chance that the French authorities are unable or unwilling to provide such protection. This finding involves no error of law. It determines adversely to the respondent the question whether there was any potential for Art 33 to have application to the respondent, if he were a refugee. Accordingly, Australia did not owe the respondent protection obligations, and the criterion laid down in s 36(2) of the Act for a protection visa was not fulfilled.

…

As there was no real chance that the respondent would suffer persecution in France, Australia was entitled as a Contracting State to deport the respondent to France without considering the substantive merits of his claim to be a refugee."

7 The majority judges in the High Court acknowledged that this reasoning correctly recognised that the error referred to in s 476(1)(e) has to be one which finds a necessary consequence in the ultimate decision to affirm refusal of the grant of a protection visa.

8 Whether Article 33 applies depends on whether *refoulement* would involve a threat to the person's life or freedom on account of his race, religion, nationality, membership of a particular social group or political opinion. That question, it seems to me, is a question of fact. Moreover, it does not necessarily require that a third country has already accepted an obligation to protect the person who is an applicant for a protection visa, with the consequence that that person has a right to reside in that country and a right to have issued to him travel documents that permit departure from and re-entry into that country. That view is consistent with the observations of French J in *Patto v Minister for Immigration and Multicultural Affairs* [2000] FCA 1554, particularly at [37].

9 The conclusion of the Tribunal in this case was:

“The Tribunal therefore finds that the applicant can re-enter Syria where he can remain indefinitely; where there is nothing to suggest that he would be persecuted; and where the risk of deportation to Iraq, such that he would be in the hands of the Iraqi authorities, is highly unlikely to the point of being remote.”

10 These findings were findings for the Tribunal to make, and it is not for the Court to substitute whatever may be its view on those matters. Those findings permit the conclusion that Article 33 applies to such a person, with the consequence that Australia does not owe protection obligations to that person. It follows that no error has been shown in the judgment of Nicholson J.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Spender

Associate:

Date: 20 August 2001

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY W138 OF 2000

BETWEEN:	HAYDAN AL-RAHAL APPELLANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS RESPONDENT

JUDGES:	SPENDER, LEE & TAMBERLIN JJ
DATE:	20 AUGUST 2001
PLACE:	BRISBANE (HEARD IN PERTH)

REASONS FOR JUDGMENT

LEE J:

11 The relevant facts are set out in the reasons of Tamberlin J and it is unnecessary to repeat them.

12 The appellant applied for a “protection visa” under the *Migration Act 1958* (Cth) (“the Act”) on 21 September 1999. On 8 November 1999 a delegate of the respondent determined that the appellant not be granted a visa. The appellant applied to the Refugee Review Tribunal (“the Tribunal”) for review of that decision on 9 November 1999. On 20 January 2000 the Tribunal “affirmed” the decision of the delegate.

13 On 18 December 1999, significant amendments to the Act, contained in Pt 6 of Sch 1 of the *Border Protection Legislation Amendment Act 1999* (Cth) (“the amending provisions”), came into effect. Item 70 of Pt 6 of Sch 1 of the amending provisions stated that the amendments made by that Part applied to applications made after the commencement of that item, that is, after 18 December 1999.

14 As will appear later in these reasons, the fact that the amending provisions did not apply to the appellant’s application had a bearing on the “jurisdiction” that was exercisable by the Tribunal when it made its decision on 20 January 2000. To understand what the Tribunal was authorised to do, it is necessary to have regard to the relevant provisions of the Act relating to “protection visas”.

15 Pursuant to s 65 of the Act, the Minister, if satisfied that, *inter alia*, the criteria for a visa prescribed by the Act have been satisfied, is to grant the visa, but if the Minister is not so satisfied, the grant of the visa is to be refused. Section 36(2) of the Act provides that:

“A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.”

16 In s 5 of the Act, “the Refugees Convention” (“the Convention”) and “the Refugees Protocol” (“the Protocol”) (together referred to hereafter as the “Treaty”) are defined respectively as “the Convention relating to the Status of Refugees done at Geneva on 28 July 1951” and “the Protocol relating to the Status of Refugees done at New York on 31 January 1967”. The term “protection obligations” is not defined in the Act and is not a term used in the Treaty.

17 Article 1(A) of the Treaty provides:

“For the purposes of the present Convention, the term ‘refugee’ shall apply to any person who:

…

(2)…owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence is unable or, owing to such fear, is unwilling to return to it."

18 It may be noted that the foregoing definition of "refugee" appears to accept that a country within which a person who does not have a nationality has habitually resided will have no obligation to offer protection to that person of which that person may avail himself.

19 The term "refugee" is further defined in Article 1 by Sections (C), (D), (E) and (F) thereof which read as follows:

"C. This Convention shall cease to apply to any person falling under the terms of Section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily reacquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under Section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. 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."

20 The Convention is divided into seven chapters under the following headings:

Chapter I	(Articles 1-11)	General Provisions
Chapter II	(Articles 12-16)	Juridical Status
Chapter III	(Articles 17-19)	Gainful Employment
Chapter IV	(Articles 20-24)	Welfare
Chapter V	(Articles 25-34)	Administrative Measures
Chapter VI	(Articles 35-37)	Executory and Transitory Provisions
Chapter VII	(Articles 38-46)	Final Clauses

21 Australia acceded to the Convention on 22 January 1954 with several reservations, one of which was that Australia "does not accept the obligations stipulated" in paragraph 1 of Article 28 and in Article 32. Australia acceded to the Protocol on 13 December 1973.

22 As a Contracting State, Australia has undertaken the obligations imposed on Contracting States by the Convention, being obligations not to discriminate against a refugee (Articles 3, 8, 13, 14, 17, 18, 26, 29); to offer to a refugee welfare services available to a national of that State (Articles 20-24); and to provide for recognition of the standing of a refugee within that Contracting State (Articles 27, 28, 34). All of the foregoing may be generically described as "protection obligations" as that term is used in s 36(2) of the Act but specific obligations that may be said to be directly concerned with the protection of a refugee from harm are those set out in Articles 32 and 33. These Articles read as follows:

"Article 32

Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33

Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler")a refugee in any manner whatsoeverto the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been

convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

23 Such obligations arise when a refugee is within the territory of a Contracting State. As noted above, Australia has accepted the obligations imposed on Contracting States by the Treaty other than the obligations set out in Article 32.

24 The Minister has submitted, in effect, a mirror argument to the foregoing, namely, that Australia has no "protection obligations" to a person who may be expelled by Australia according to the rights accorded to Australia by Article 33 of the Treaty.

25 Article 33 applies to a person who is defined as a refugee by the terms of Article 1 of the Treaty. The obligation upon a Contracting State under Article 33 is not to expose a refugee to harm in expelling that person from the Contracting State. That Treaty obligation is a "protection obligation" that Australia has to a refugee as that term is used in s 36(2) of the Act.

26 Although incidental to the issue decided in the case, the remarks of Lord Goff in *Reg v Home Secretary; Ex parte Sivakumaran* [1988] AC 958 at 1001, (endorsed by Lord Keith at 995), support that view:

"The Master of the Rolls suggested, ante, p. 965E-F, that, even if the Secretary of State decides that an applicant is a refugee as defined in article 1, nevertheless he has then to decide whether article 33, which involves an objective test, prohibits a return of the applicant to the relevant country. I am unable to accept this approach. It is, I consider, plain, as indeed was reinforced in argument by Mr. Plender with reference to the travaux préparatoires, that the non-refoulement provision in article 33 was intended to apply to all persons determined to be refugees under article 1 of the Convention."

27 The report of the case includes (at 983-988) the argument of Mr Plender, counsel for the United Nations High Commission for Refugees as intervener, which sets out significant elements of the history and function of the Convention. In particular, there is discussion on the operation of Article 33, and its object of reinforcing the protection provided by Article 1A(2). Of course, Australia, by Executive act, or by legislation enacted by Parliament, may provide for persons to be expelled, or returned, without determining whether they are refugees. Prior to 18 December 1999 Parliament had so provided in a limited respect. Sections 91A-91G in subdiv AI of Div 3 of Pt 2 of the Act stated that certain non-citizens, in relation to whom there is a prescribed "safe third country", cannot apply for a protection visa and are subject to removal from Australia under Div 8 of Pt 2 of the Act. The provisions give effect to the terms of bilateral agreements made between Australia and a "safe third country" to give effect to the Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees held at Geneva, Switzerland from 13 to 14 June 1989. Pursuant to s 91D, the "safe third country", and the degree of connection between the non-citizen and that

country which will trigger the operation of the sub-division, are to be prescribed.

28 The Act thereby defines circumstances in which particular non-citizens who arrive in Australia are deemed to have a “safe third country” and are not persons able to make application for a protection visa unless the Minister exercises a discretion to permit such an application to be made.

29 If the Minister exercises that discretion then, notwithstanding that there is a prescribed “safe third country” for that person, the person may apply for a protection visa and the application may be determined. Obviously, as a matter of construction, it could not be said that the protection visa applied for by that person could not be granted because Australia had no “protection obligations” to that person under the Treaty by reason of the existence of a “safe third country” for that person.

30 The United Kingdom, a Contracting State under the Treaty, has enacted provisions to permit the Executive to remove from the United Kingdom applicants for asylum in certain circumstances. In 1990 the European Community signed the Dublin Convention which set out which member state had responsibility for determining a claim for asylum made by an alien who had entered the member states. The basic principle was that the first member state to receive the alien had responsibility for examining the application for asylum. The *Immigration and Asylum Act 1999* (UK) provides as part of the domestic law of the United Kingdom that the United Kingdom may remove an applicant for asylum if the Home Secretary certifies in respect of that applicant that the applicant may be returned to a member state that has accepted under the Dublin Convention that it is the responsible State in relation to the claim (s 11). Alternatively, that person may be removed to a country certified by the Home Secretary as being, in the Home Secretary’s opinion, a country where the life and liberty of that person would not be threatened for a Convention reason and where the government of that country would not send the applicant to another country otherwise than in accordance with the Convention (s 12). The countries so certified by the Home Secretary are Canada, Norway, Switzerland and the United States of America (The Asylum (Designated Third Countries) Order S1 2000 No 2245).

31 In practice, however, those provisions have introduced further litigation by applications for judicial review of the Home Secretary’s decision to certify. (See: *R v Secretary of State for Home Department; Ex parte Adan* [2001] 1 All ER 593; *R v Secretary of State for Home Department; Ex parte Bajram Zeqiri* [2001] EWCA CIV 342; D Stevens, *The Immigration and Asylum Act 1999: A Missed Opportunity?* (2001) 64 (3) MLR 413.)

32 Until 18 December 2000, the Act provided that except where s 91A-91G applied, a valid application for a protection visa had to be determined under the Act in accordance with ss 36(2), 47 and 65(1) of the Act. The principle criterion determining whether a visa must be granted or refused was whether the applicant was a person to whom Australia had protection obligations under the Treaty. That is, the substantive issue raised by the

application that had to be determined, was whether the applicant was a refugee as defined by the Treaty. The Minister was required by the Act to make that determination, as was the Tribunal upon any application to the Tribunal to review a decision of the Minister.

33 The reasons for decision in this matter, provided by the Tribunal pursuant to s 430 of the Act, concluded with the following paragraphs:

"The Tribunal is therefore satisfied that the applicant has effective protection, in Syria. Accordingly, Australia does not owe protection obligations to the applicant. It is therefore unnecessary to undertake an assessment of the substantive merits of the applicant's claim for refugee status: Thiyagarajah at 702.

…

Having considered the evidence as a whole, the Tribunal is not satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Therefore the applicant does not satisfy the criterion set out in s.36(2) of the Act for a protection visa."

(The reference to "*Thiyagarajah at 702*" is to *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1998) 151 ALR 685 at 702.)

34 The Minister submitted that the Tribunal was entitled to undertake consideration of whether there was a "safe third country" for the appellant in determining whether the appellant was a person in respect of whom Australia had protection obligations under the Treaty. But that submission does not address the question of the proper construction of the Act. It is plain that under the Treaty the existence of a "safe third country" does not prevent "protection obligations" arising for a Contracting State under the Treaty. Stated at its lowest, the obligation imposed by Article 33 on a Contracting State is to protect a refugee by not expelling or returning that person to a country other than a country where that person will be safe from persecution.

35 In *Reg v Secretary of State for the Home Department; Ex parte Onibiyo* [1996] QB 768, Sir Thomas Bingham MR described the obligations on a Contracting State arising out of Article 33 as follows:

"This is the overriding obligation to which states party to the Convention commit themselves. The risk to an individual if a state acts in breach of this obligation is so obvious and so potentially serious that the courts have habitually treated asylum cases as calling for particular care at all stages of the administrative and appellate processes." (778)

"The obligation of the United Kingdom under the Convention is not to return a refugee (as defined) to a country where his life or freedom would be threatened for any reason specified in the Convention. That obligation remains binding until the moment of return. A refugee (as defined) has a right not to be returned to such a country, and a further right not to be returned pending a decision whether he is a refugee (as defined) or not." (781)

36 In *The Law of Refugee Status* (1991),Prof Hathaway (at 47) has described the obligation arising under the Treaty as follows:

"At the international level, a conclusion of the Executive Committee foreshadows the exclusion of 'irregular' asylum seekers, that is, refugees whose protection needs can be met in some other state. While not as yet fully defined, this notion could ultimately legitimate the refusal of claims from, for example, persons who have family connections or long-term work authorization in a safe intermediary country.

Beyond this initiative at the universal level, European states are moving rapidly toward a system designed to limit the right of refugees to choose their place of asylum within that regional community. Canada's new legislation, in this respect still not proclaimed, also authorizes the turning away of asylum seekers eligible to have the merits of their claim determined in another state. Schemes of this sort are inconsistent with the spirit of the Convention, and reflect a weakening of the commitment to the refugee's right to decide for herself the most effective means of securing safety from persecution. Direct flight schemes also infringe the principle of burden-sharing, as those countries closest to the site of refugee movements will bear a disproportionate share of the collective duty of protection.

At present, then, the only claims to refugee status which may be deflected under international law remain those from the narrow category of persons defined in Conclusion 15, and then only insofar as the state with which they are affiliated agrees to extend protection. Otherwise, unless the refugee secures the actual or de facto nationality of another state, she is entitled to have her claim to refugee status determined in the country of her choice."

[Footnotes omitted]

37 Other than the provisions contained in ss 91A-91G of the Act, the Act did not prohibit an alien from making an application for a protection visa and did not permit the Minister, and, ergo, the Tribunal, to decline to consider such an application or to decide whether the applicant may be removed from Australia irrespective of the obligations owed to the applicant under the Treaty.

38 Furthermore, the question whether a person who is a refugee under the Treaty, should be removed from Australia raises issues likely to involve sensitive political matters and dependence upon bilateral arrangements or upon understandings reached at an Executive level. Parliament could not have contemplated that the plain words used in s 36(2) were to be given

another meaning that required the Tribunal to be involved in excursions in decision-making in the sensitive area of international policy.

39 As has been commented by K. Hailbronner, The Concept of 'Safe Country' and Expeditious Asylum Procedures: A Western European Perspective, 5 (1) IJRL (1993) 31 (at 56):

"Safe country determinations involving elements of discretion must remain within the area of the government's political responsibility."

Unilateral decisions based on the concept of a "safe third country" may lead to a waste of time and effort if persons whose applications have been refused on this ground, will not be accepted by the "safe third country". Furthermore, it would appear that under the Act such persons would face an indefinite period in "immigration detention". In the interests of international comity, accord between nations is essential if the concept of "safe third country" is to be given practical application. (Goodwin-Gill, G S, *The Refugee in International Law*, 2nd ed (1996) 339 (Fn: 65) 340-341, 344; Dunstan, R, *Playing Human Pinball: The Amnesty International United Kingdom Section Report on UK Home Office 'Safe Third Country' Practice*, *7* IJRL, (1995) 4, 606.)

40 Indeed, so much is reflected in the preamble to the Convention:

"…**CONSIDERING** that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international cooperation,

EXPRESSING the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,

NOTING that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective coordination of measures taken to deal with this problem will depend upon the cooperation of States with the High Commissioner..."

As Goodwin-Gill pointed out (p 90):

"Problems arise, however, where the candidate for refugee status has not been formally recognized, has no asylum or protection elsewhere, but is nevertheless unilaterally considered by the State in which application is made to be some other State's responsibility. Individuals can end up in limbo, unable to return to the alleged country of asylum or to pursue an application and regularize status in the country in which they now find themselves. The absence of any convention or customary rule on responsibility in such cases, the variety of procedural limitations governing applications for refugee status and asylum, as well as the tendency of States to interpret their own and other States' duties in the light of sovereign self-interest, all contribute to a negative situation potentially capable of leading to breach of the fundamental principle of non-refoulement."

N A Abbel, *The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees*, 11 (1) IJRL (1999) 60 states:

"The safe third country concept is undermining the very institution of asylum in Europe and thus of refugee protection at large. The growing scale and complexity of the refugee problem, the threat to a country posed by influxes of economic migrants, must not detract from the responsibility of the receiving country and the importance of principles for the protection of refugees, including those prohibiting refoulement and providing for asylum." (81)

That comment is endorsed by R Byrne and A Shacknove "The Safe Third Country Notion in European Asylum Law", 9 *Harvard Human Rights Journal* 185 (1996) at 215:

"[t]he return of asylum-seekers to reputed safe countries of asylum stresses the random geographic proximity of host States to the country of origin, runs counter to the intended universal scope of the Refugee Convention and Protocol, and undermines the principle of burden-sharing."

A Achermann and M Gattiker, *Safe Third Countries: European Developments*, 7 (1) IJRL (1995) 19 at 25, state as follows:

"In international law, States are free to decide which aliens may stay and which have to leave the country. International refugee law also authorizes States to expel even refugees. This freedom is limited, however, in particular by the principle of non-refoulement:" [This is clear from the 1951 Convention, since States have the right to turn back refugees provided they do not expel them to the persecuting country; cf. Frowein, J.A. and Zimmerman, A., Der völkerrechtliche Rahmen für die Reform des deutschen Asylrechts, 1993, 45.

A de facto limitation on the expulsion in general of asylum seekers, refugees and aliens to third States is derived from the principle that – subject to special treaties (see above, section 2.2) – third countries are not obliged to allow aliens to enter their territory if these persons do not have the necessary papers (travel documents and visas). With regard to refugees who are in the country's territory, this means that they may not be turned back or expelled if no other State in which they are safe from persecution is obliged or willing to take them.]"

41 The consent of the third country is fundamental to the operation of any such principle of international law. As stated by R Marx, *Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims*, 7 (3) IJRL (1995) 383 at 395-396:

"Article 2(2) of the 1967 Declaration on Territorial Asylum highlights the principle that the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on States which find it difficult to grant asylum. It is, however, clear that individual State action to relieve itself of this burden can be carried out only with the consent of the State in question by strict adherence to its international obligations. Thus, States have no authorization under international law to expel persons to third States without the consent of the third State. Although the principle of abuse of rights is not well established in international law, expulsion with the consent of a State which is under no obligation to admit the concerned, is unlawful and, in view of its clear illegality, is an 'arbitrary expulsion' and may also be considered an abuse of the third State's rights. The State concerned can simply demonstrate the illegality by referring to its lack of any obligation to admit the asylum seeker.

The prerogative of States to expel asylum seekers is, thus, with respect to the alleged country of persecution, and to any other country which eventually may not adhere to the non-refoulement rule, restricted by the principle of non-refoulement. Their freedom of action with regard to expulsion is further limited so far as general principles of international law, such as the principles of good faith and of the sovereign equality of all States,together with the doctrine of abuse of rights, strictly prohibit expulsion to a third State without its prior consent. National courts affirm this finding. The Supreme Administrative Court of Berlin, for example, has held that international law requires the expressly declared willingness of the competent agencies of the third State to admit an expelled claimant. Such willingness cannot reasonably be assumed simply because the third State allows individuals of the same nationality admission without a tourist visa, particularly when the returning State does not disclose that the individuals being expelled are asylum seekers whose applications have been refused.Accordingly, tacit agreement to admit is not sufficient evidence that the third State will refrain from refoulement and so does not relieve the returning State of its international obligations." [Footnotes omitted]

42 There appears to be no settled rule or principle of international law from which any assistance may be derived in determining the proper construction of s 36(2). Goodwin-Gill has commented:

"At the time [of the 1951 Conference of Plenipotentiaries], however, a number of States were concerned that refugees 'who had settled temporarily in a receiving country' or 'found asylum', should not be accorded a 'right of immigration' that might be exercised for reasons of mere personal convenience. The final wording of article 31 is in fact something of a compromise, limiting the benefits of non-penalization to refugees 'coming directly', but without further restricting its application to the country of origin. (88)

With the background of this somewhat ambiguous reference, a practice developed in certain States of excluding from consideration the cases of those who have found or

are deemed to have found asylum or protection elsewhere, or who are considered to have spent too long in transit. Asylum and resettlement policy tends to concentrate on refugees ‘still in need of protection’. Consequently, a refugee formally recognized by one State, or who holds an identity certificate or travel document issued under the 1951 Convention, generally has no claim to transfer residence to another State, otherwise than in accordance with normal immigration policies. Much the same approach has also been applied to refugees and asylum seekers who, though not formally recognized, have found protection in another State. [Fn: Effective ‘protection’ in this context would appear to entail the right of residence and re-entry, the right to work, guarantees of personal security and some form of guarantee against return to a country of persecution; see Uibopuu, above n. 49, proposing as conditions for an international standard that protection must be explicit, stay in the third State must have been of a particular duration, accompanied by residence permit and/or work permit and/or other possibility to integrate; and above all, protection against expulsion, extradition or refoulement to a State where life or freedom would be endangered…] (88-89)

…

“There is certainly no consistent practice among ‘sending’ and ‘receiving’ States as would permit the conclusion that the [sic] any rule exists with respect to the return of refugees and asylum seekers to safe third countries, simply on the basis of a brief or transitory contract. Equally, it cannot be said that, in relation to the 1951 Convention, there is ‘any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’. [Footnote omitted] In the absence of any applicable agreement, such returns therefore run the risk of violating article 33…” (341-342)

…

“The most that can be said at present is that international law permits the return of refugees and asylum seekers to another State if there is substantial evidence of admissibility, such as possession of a Convention travel document or other proof of entitlement to enter.” (343)

Prof D Jackson, *Immigration: Law and Practice* (1996) supports that view:

“In truth if any concept is reflected in international refugee instruments it is the opposite of that reflected in the 1990 policy of the United Kingdom. If there are any ‘international’ principles they are that a refugee should be recognised as such in all

states and applications considered unless there are strong connections with another state.” (353)

The example given by Prof Jackson of “strong connections with another state” was the “first country of asylum” where refugee status had already been granted by a third country.

43 States may legislate as to how their international legal obligations are to be discharged and, in particular, abuse of the system of refugee protection avoided. At relevant times the United Kingdom, Canada and the United States of America have had such legislative provisions in place.

44 With respect to the risk of abuse of the Treaty’s provisions, the comments of Harvey, C, *Restructuring Asylum: Recent Trends in United Kingdom Asylum Law and Policy*, 9 (1) IJRL (1997) 60 at 72-73 are pertinent:

“…all ‘humanitarian’ institutions offering some form of protection to the needy, such as asylum, are open to ‘abuse’ by those who do not fulfil the legal requirements. This seems to be a straightforward point, acceptable to most engaged in discussion of refugee law and policy. It must also have been accepted by any State party to the 1951 Convention which has constructed an asylum determination system. However, the central factor and the primary purpose in the constructive interpretation and operation of a legal regime for refugees is to offer some form of protection to a defined group. This may be founded on humanitarianism or on pure State interest, or more likely a mixture of the two, but the basic point remains that a modern human rights-based interpretation of refugee law must construct its primary purpose as to provide basic protection to refugees. The eradication of claims which lack merit, although important, is essentially secondary. To ensure the continuing integrity of refugee law, the attempt to prevent abuse should not ‘trump’ the facilitative aspects of the law.

To allow deterrence and restriction to become the dominant factors within a determination process is simply not acceptable in any morally defensible system of refugee protection. The logic of refugee protection dictates that fear of ‘abuse’ should not preside over the law and administration of asylum within individual States. This does not mean that a State, such as the United Kingdom, is prohibited from addressing abuse. On the contrary, States have quite a wide measure of discretion as to how they carry out their international legal obligations in the area of refugee law. The challenge for those administering and adjudicating in the area of asylum law in the United Kingdom, as elsewhere, is to ensure that the persistent emphasis on deterrence and restriction in official rhetoric and in the substance of many of the more recent legal developments does not translate in practice into the creation of a ‘culture of disbelief’ which envelops all asylum applications. The available evidence provides few grounds for optimism.”

45 It should be concluded from the foregoing that no principle of international law presents any implied context for the construction of the term “protection obligations” used in s 36(2) of the Act so as to provide a

construction that does not include the obligations set out in Article 33 of the Treaty.

46 The construction of s 36(2) propounded by the Minister sits ill with the terms of s 91A-91G of the Act and with the amendments effected by the amending provisions which introduced additional subsections to s 36 to confine the meaning of "protection obligations" as used in s 36(2). The relevant subsections read as follows:

"**Protection Obligations**

(3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.

(5) Also, if the non-citizen has a well-founded fear that:

(a) a country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion; subsection (3) does not apply in relation to the first-mentioned country."

47 The Minister submits that the foregoing subsections confirm the construction of s 36(2) as determined by earlier decisions of this Court. (See: *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543; *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549.) But the amending provisions also introduced ss 91M-91Q which may be seen as complementary to the amendments to s 36 and which read as follows:

"91M This Subdivision is enacted because the Parliament considers that a non-citizen who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country, should seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.

91N(1) This Subdivision applies to a non-citizen at a particular time if, at that time, the non-citizen is a national of 2 or more countries.

(2) This Subdivision also applies to a non-citizen at a particular time if, at that time:

(a) the non-citizen has a right to re-enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country (the **available country**)apart from:

(i) Australia; or

(ii) a country of which the non-citizen is a national; or

(iii) if the non-citizen has no country of nationality – the country of which the non-citizen is an habitual resident; and

(b) the non-citizen has ever resided in the available country for a continuous period of at least 7 days or, if the regulations prescribe a longer continuous period, for at least that longer period; and

(c) a declaration by the Minister is in effect under subsection (3) in relation to the available country.

(3) The Minister may, after considering any advice received from the Office of the United Nations High Commissioner for Refugees:

(a) declare in writing that a specified country:

(i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and

(ii) provides protection to persons to whom that country has protection obligations; and

(iii) meets relevant human rights standards for persons to whom that country has protection obligations; or

(b) in writing, revoke a declaration made under paragraph (a).

(4) A declaration made under paragraph (3)(a):

(a) takes effect when it is made by the Minister; and

(b) ceases to be in effect if and when it is revoked by the Minister under paragraph (3)(b).

(5) The Minister must cause a copy of a declaration, or of a revocation of a declaration, to be laid before each House of the Parliament within 2 sitting days of that House after the Minister makes the declaration or revokes the declaration.

(6) **Determining nationality** For the purposes of this section, the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

91P(1) Despite any other provision of this Act but subject to section 91Q, if:

(a) this Subdivision applies to a non-citizen at a particular time; and

(b) at that time, the non-citizen applies, or purports to apply, for a visa; and

(c) the non-citizen is in the migration zone and has not been immigration cleared at that time;

neither that application, nor any other application the non-citizen makes for a visa while he or she remains in the migration zone, is a valid application.

(2) Despite any other provision of this Act but subject to section 91Q, if:

(a) this Subdivision applies to a non-citizen at a particular time; and

(b) at that time, the non-citizen applies, or purports to apply, for a protection visa, and

(c) the non-citizen is in the migration zone and has been immigration cleared at that time;

neither that application, nor any other application made by the non-citizen for a protection visa while he or she remains in the migration zone, is a valid application.

91Q(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 91P does not apply to an application for a visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day that the notice is given.

(2) For the purposes of subsection (1), the matters that the Minister may consider include information that raises the possibility that, although the non-citizen satisfies the description set out in subsection 91N(1) or (2), the non-citizen might not be able to avail himself or herself of protection from the country, or any of the countries, by reference to which the non-citizen satisfies that description.

(3) The power under subsection (1) may only be exercised by the Minister personally.

(4) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(5) A statement under subsection (4) is not to include:

(a) the name of the non-citizen; or

(b) any information that may identify the non-citizen; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned – the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) is to be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the determination is made between 1 January and 30 June (inclusive) in a year – 1 July in that year; or

(b) if the determination is made between 1 July and 31 December (inclusive) in a year – 1 January in the following year.

(7) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances."

48 The terms of s 91M do not appear to support the construction which the Minister now submits is to be applied to s 36(2) as it stood prior to the amendment of the Act effected by the amending provisions.

49 It may be accepted that even before the amending provisions, Australia did not have "protection obligations" under s 36(2) to a person who had been accepted as a refugee by another State and accorded rights by the State as contemplated by the Treaty, such as the issue of travel documents with the right to leave and re-enter that State. Even if such a person were not excluded from the definition of refugee under Article 1 by reason of the terms of Article 1E, it is to be noted that Article 1D excludes from the definition a person receiving protection or assistance from organisations or agencies of the United Nations, other than the UNHCR, and it would seem to follow by implication that a person who has been accorded by Contracting States protection as contemplated by the Treaty, is not, at that time, a refugee requiring consideration by another Contracting State. *Thiyagarajah* was such a case and it was held that Australia did not have "protection obligations" under the Treaty to the applicant as required by s 36(2).

50 But as far as the operation of the Treaty is concerned under international law, equivalent protection to that required of a Contracting State under the Treaty must be secured to an applicant in a third country before it can be said that the person is not a refugee requiring consideration under the Treaty.

51 Beyond that limited position, no more can be said than that international law is evolving through debate as is confirmed by the following passage in F Nicholson, P Twomey, *Refugee Rights and Realities: Evolving International Concepts and Regimes*, (1999) (at 287):

"Even if the Geneva Convention contains no explicit and little implicit restriction on refugees' right to choose their country of asylum, the problem cannot be isolated from the context of sovereign state control over immigration issues. In short, there is neither a strict 'direct flight' requirement, nor any legally protected right of individual choice. Yet the totality of international law pertinent to the issue, including especially human rights standards and refugee protection principles, results in a relatively limited scope of action for states intending to restrict refugees' choice. Against this background, recent developments in European 'safe third country' policies are noteworthy and, indeed, debatable.

Rather than giving a definite answer to the question of refugees' right to choose their country of asylum, it might possibly be concluded that the question has been inadequately put. There has been considerable controversy over the issue, with regard to the existing legal norms as well as de lege ferenda. Thus, it seems relevant to pay analytical attention to the legal framing of the problems discussed above. The combined focus on refugee law and standards of human rights law represents a considerable challenge to contemporary developments in the European refugee protection system. As indicated, these issues are increasingly relevant in the evolving system of 'one state responsibility' for examining asylum applications. This becomes particularly clear when 'safe third country' practices are taken together with the parallel and more general policies of non-arrival and non-admission to the territory and asylum procedures of the European Union and associated states."

[Footnotes omitted]

52 It may be thought that in the absence of further legislative provision, the obligation imposed on the Minister, and Tribunal, by the Act to determine an application for a protection visa according to whether the decision-maker is satisfied that Australia has "protection obligations" to that person under the Treaty, does not permit the application to be determined by an assessment whether Australia may seek to exercise a discretion to return the applicant to a third country if the applicant is otherwise a refugee under the terms of the Treaty.

53 The submission that the meaning of "protection obligations" does not include the obligations arising under Article 33 if the applicant for a protection visa is a refugee who may be taken to have "effective protection" in some

other State adds, by implication, restrictions on the meaning of the term that Parliament did not express and replaces the apparent meaning with one for which the content and extent thereof is to be supplied by judicial elucidation.

54 As noted earlier, it is a matter of discretion for a Contracting State to decide whether it will seek to expel or *refoul* a person who is a refugee and unless the Act provides that such a decision is to be part of the decision-making process in respect of the grant of a visa, the only issue for decision under s 36(2) is whether the applicant for a "protection visa" is a refugee and a person to whom Australia has protection obligations under the Treaty.

55 The conclusion on which the decision of the Full Court turned in *Thiyagarajah* was expressed in the following terms by von Doussa J with whom Moore and Sackville JJ agreed:

"It is not necessary for the purposes of disposing of this appeal to seek to chart the outer boundaries of the principles of international law which permit a Contracting State to return an asylum seeker to a third country without undertaking an assessment of the substantive merits of the claim for refugee status. It is sufficient to conclude that international law does not preclude a Contracting State from taking this course where it is proposed to return the asylum seeker to a third country which has already recognised that person's status as a refugee, and has accorded that person effective protection, including a right to reside, enter and re-enter that country." (562)

The construction of s 36(2) advanced in these reasons produces the same conclusion as that expressed by von Doussa J in *Thiyagarajah*. In so far as the reasons in *Al-Sallal* (supra) state that the "effective protection" accorded to a person is assessed as "a matter of practical reality and fact", there was no dissent from the fundamental principle stated by von Doussa J in *Thiyagarajah* in determining the meaning to be given to "protection obligations" in s 36(2). The application of "practical reality and fact" does not alter the relevant questions to be answered, namely, has an obligation to protect the applicant for a protection visa been accepted by a third country and have rights to reside in, leave, and re-enter that country been granted to the applicant by that country. That is, in effect, has a third country undertaken to receive and protect the applicant.

56 Although the appeal from the Full Court to the High Court in *Thiyagarajah* was limited to the question whether the orders of the Full Court exceeded the powers vested in the Court by s 481 of the Act, Gleeson CJ, McHugh, Gummow and Hayne JJ (*Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 at [16]) referred, in passing, to the criterion "protection obligations" specified in s 36(2) and stated that even if an applicant for a protection visa were a refugee, he or she would not be a person to whom Australia had protection obligations "if Article 33 applied". Their Honours stated that von Doussa J had correctly identified and dealt with the issue as to the nature of Australia's obligations under the Treaty. It should be

concluded, therefore, that for the purpose of s 36(2) of the Act "Article 33 applies" if a third country has already accepted an obligation to protect a person who is an applicant for a protection visa and in consequence the applicant has correlative rights arising out of that obligation, namely, a right to reside in that country and a right to have issued to him or her travel documents that permit departure from and re-entry into that country.

57 Unless these obligations and rights exist at the time the application for a protection visa is determined by the Minister, Australia will have "protection obligations" to the applicant if that person is a refugee.

58 On no view of the material before the Tribunal could it be said that as at the time of determination of the application the appellant was a person in respect of whom Syria had undertaken the obligation to receive and protect the applicant as a person who possessed a right to reside in Syria, and a right to have Syria issue to him travel documents permitting him to leave and re-enter Syria. Syria had permitted the applicant to enter Syria as an Iraqi national for whom there was a sponsor present in Syria. That involved no right to travel documents nor acceptance by Syria of an obligation to protect the applicant as a refugee. In fact, as the Tribunal noted, Syria expressly disavowed any obligation to refugees.

59 It follows, therefore, that the Tribunal, and his Honour, erred in their interpretation of the relevant law and his Honour's decision should be set aside, the application for review granted, and the matter returned to the Tribunal for re-determination according to law.

I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment herein of Justice Lee.

Associate:

Dated: 20 August 2001

IN THE FEDERAL COURT OF AUSTRALIA

WESTERN AUSTRALIA DISTRICT REGISTRY W138 OF 2000

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	HAYDAN AL-RAHAL APPELLANT
AND:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS RESPONDENT

JUDGES:	SPENDER, LEE & TAMBERLIN JJ
DATE:	20 AUGUST 2001
PLACE:	BRISBANE (HEARD IN PERTH)

REASONS FOR JUDGMENT

TAMBERLIN J

60 The appellant, a citizen of Iraq, arrived in Australia on 13 August 1999. On 21 September 1999 he lodged an application for a Protection Visa with the Department of Immigration and Multicultural Affairs pursuant to the *Migration Act 1958* ("the Act"). On 8 November 1999 a delegate of the Minister for that Department refused to grant a Protection Visa and on 9 November 1999 the appellant applied to the Refugee Review Tribunal ("the RRT") for review of that decision.

61 On 25 January 2000 the RRT dismissed the application and affirmed the decision not to grant a Protection Visa. An application for review of this decision, made to the Federal Court, was heard and dismissed by RD Nicholson J. The matter comes now before the Full Court as an appeal from the decision of his Honour. That being so, the appealable error sought to be established is his Honour's failure to find the error or errors of law that the

appellant alleges were made by the RRT. Consequently the argument on the appeal focused on the reasons of the RRT and reference is made primarily to them.

Background Facts

62 The appellant is a twenty-seven year old Arab Shia who was found by the RRT to be an Iraqi citizen born in Baghdad. He resided in Aqrah in the north of Iraq from 1979 until May 1991 when he claims he went across the border to Syria with the help of a smuggler. The appellant's mother, younger brother, and sister continued to live in Iraq however it appears that they no longer live in north Iraq. In April 1991 after the liberation of the south his family moved south, intending to go to Hillah via Baghdad. The appellant told the RRT that his mother now lives in Babel and his brother and sister in Baghdad. He himself lived in Hasakie from 1991 until 1993. The appellant claimed to have worked for an Iraqi Opposition Party, Al-Dawa, which is a member of the Iraqi Opposition Coalition.

63 In 1993 the appellant moved to Damascus where he said he had a souvenir shop with an Iraqi associate for around five years. Since 1998 the appellant has been self-employed doing word processing for a book shop. He said that during his stay in Syria he had been unable to continue his education because although Iraqi children have access to education in Syria adults do not. In May 1999, in Damascus, the appellant married an Iraqi woman from the south of Iraq. She lived in Syria without difficulty and she is presently there with her parents.

64 The appellant claimed to have left Syria with the help of a smuggler who provided him with a passport which was then taken back by the smuggler. He told the RRT that the smuggler provided him with a false Iraqi passport in his name, which contained his details and photograph, in order to obtain a Syrian exit permit. According to the appellant the smuggler went with him to the Syrian authorities and secured the relevant exit permit which the appellant used to travel to Malaysia. The appellant made a number of claims to the Australian authorities as to his fears concerning persecution in Iraq.

Legal framework

65 The relevant legal framework begins with s 65 of the Act which provides that where the Minister is satisfied that the prescribed legislative criteria and other specified matters have been met by an applicant for a particular visa, that visa must be granted. If the criteria are not met the visa must be refused.

66 Subsection 36 of the Act relates to Protection Visas. It relevantly provides:

“(2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.”

67 Article 33 of the Convention Relating to the Status of Refugees (“the Convention”) provides:

“1. No Contracting State shall expel, or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

68 Article 33 is the central provision of the Convention because it is the provision which imposes the substantive obligation on the Contracting States. The right is expressed in a negative way: it is a right of *non-refoulement* to certain places. Australia, as a Contracting State, is not prohibited from *refouling* a refugee to a country where there is no threat to their life or freedom for a Convention reason (a “safe third country”). There are thus several classes of countries or territories contemplated by the Convention. The first is the country or territory of threatened persecution. In the present case that is claimed to be Iraq. The second is the country or territory where an applicant is located, the Contracting State. In this case the Contracting State is Australia. A third country or territory is that where the refugee can live free from any threat to life or freedom for a Convention reason, the safe third country. In this case the safe third country is said to be Syria.

The issues on appeal

69 The general question raised in the present appeal is whether Article 33 applies to the appellant. The RRT found that the appellant could re-enter Syria and remain there indefinitely with no threat of persecution. The RRT also found that the risk the appellant would be deported by Syria was so unlikely that it could be said to be remote. The RRT was satisfied that because the appellant could obtain effective protection against any threat to his life and freedom in Syria, Australia did not owe him any protection obligation and he was ineligible for a Protection Visa. Therefore the RRT did not consider it necessary or appropriate to undertake an assessment of whether the appellant was a refugee.

SUBMISSIONS FOR APPELLANT

70 The primary submission for the appellant is that the RRT failed to correctly apply the law because it did not decide that the appellant had a right to enter and reside in Syria. The submission is that the existence of protection under Article 33(1) cannot be determined on the basis of conjecture that Syria **may** exercise a discretion in favour of the appellant and grant him entry and residence rights. It is said that it must be established that entry and residence

will be permitted and the RRT erred because it only satisfied itself that there was the potential for the appellant to gain entry to Syria.

71 A second submission is that there was no evidence before the RRT that supported its finding that the appellant could re-enter Syria. It is said that the RRT should have found that the appellant's entry into Syria is discretionary and unpredictable and that there was no evidence from which a conclusion could be reached that the chance of the appellant being refused entry to Syria was remote.

72 The appellant's third submission was that it was not open to the RRT to conclude that Art 33 entitled Australia to *refoule* the appellantto Syria without first considering whether the appellant qualified for refugee status here.

73 Particularly, the appellant refers to Art 1E of the Convention which provides:

"E. This Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

74 It is said that the appellant could not be excluded from the Convention under Art 1E because in Syria he would not have the same rights, or be under the same obligations, as a Syrian national.

fINDINGS AND REASONing OF THE rrt

75 After referring to the background and the relevant legislation and case law the RRT pointed out that broadly speaking Australia does not have protection obligations to a person who has been afforded effective protection in a safe third country. The reference to "effective protection" was a reference to protection which would effectively ensure that there was not a breach of Art 33 by Australia.

76 The RRT referred to the evidentiary material concerning the circumstances of the appellant and the particular claims made by him. This was followed by a review of the country information contained in Department of Foreign Affairs and Trade ("DFAT") cables, UNHCR Reports and other material. It then referred to the argument made by the appellant and proceeded to set out its findings and reasons.

77 In discussing its findings the RRT accepted the appellant's claim to be an Iraqi citizen and a Shia Arab. The RRT then considered whether Australia has protection obligations in relation to the appellant given his lengthy residence in Syria where his wife resides. In determining this issue the reasons identify the relevant considerations as being whether the appellant

has a right to reside in, enter, and re-enter Syria; whether there is a risk that Syria will return the appellant to Iraq; and whether the appellant has a well-founded fear of persecution in Syria.

78 The RRT accepted that Iraqis may enter and re-enter Syria sponsored by a relative or a friend or an Iraqi opposition party operating in Syria. It concluded that the present appellant could be sponsored by his wife and that he also had the support of Al Dawa operating in Syria. Although the appellant argued in a submission, made after the hearing, that he no longer had the support of Al Dawa because he did not have an official position in the organisation, this argument was not accepted by the RRT.

79 The RRT determined that Iraqis were able to remain in Syria indefinitely and that some Iraqis have stayed for as many as twenty or thirty years without travel documents. In the particular circumstances of the appellant, the RRT considered that "the applicant's evidence suggests that his residence in Syria was legitimate and free from problems".

80 The RRT referred to a submission made by the applicant after the hearing that he would be persecuted upon his return to Syria. The RRT considered this submission was inconsistent with the evidence of the appellant's prior residence in Syria.

81 The RRT rejected the appellant's claim that he would be deported to Iraq by Syria. The RRT found that there was a risk of deportation only in the context of a breach of the law that posed a risk to state security, and even then *refoulement* to Iraq was unlikely.

82 The RRT findings conclude:

"The Tribunal therefore finds that the applicant can re-enter Syria where he can remain indefinitely; where there is nothing to suggest that he would be persecuted; and where the risk of deportation to Iraq, such that he would be in the hands of the Iraqi authorities, is highly unlikely to the point of being remote.

The Tribunal is therefore satisfied that the applicant has effective protection, in Syria. Accordingly, Australia does not owe protection obligations to the applicant. It is therefore unnecessary to undertake an assessment of the substantive merits of the applicant's claim for refugee status; Thiyagarajah at 702."

Reasoning Below

83 His Honour R D Nicholson J heard the appellant's appeal from the RRT and delivered judgment on 28 July 2000. His Honour recited the history of the matter, the appellant's claims before the RRT, and the findings made by the RRT before considering the points of law raised by the appellant. In substance these were that the RRT erred in failing to recognise that the appellant could only be offered effective protection in Syria if he were given the right to reside permanently there, and in failing to consider the application

of Art 1E of the Convention. A further error was said to be that the RRT had no evidence upon which it could conclude that the appellant would receive effective protection in Syria.

84 As to the first ground, his Honour decided that this was answered by the Full Court decision in *Minister for Immigration & Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549 that directed the RRT's inquiry, in the context of Art 33 of the Convention, to the facts of each particular case rather than whether or not formal legal rights of residence or re-entry were provided to an applicant. In relation to the second ground, his Honour decided that it was not incumbent on the RRT to apply Art 1E to every application if, on some other basis such as Art 33, Australia does not owe the applicant protection obligations.

85 These grounds were advanced on the basis that they amounted to an incorrect interpretation of the law: s 476(1)(e). His Honour noted that the grounds were substantially recast as a second breach of s 476(1)(e), being a failure to properly apply the law to the facts. This aspect of the application was dismissed on similar reasoning.

86 As to the no evidence ground, his Honour pointed to material before the RRT that indicated that people in the situation of the appellant would be permitted to re-enter Syria provided they had the appropriate sponsorship, and that the appellant in fact had the sponsorship of Al Dawa and his wife. His Honour also considered that there was no evidence that once admitted the appellant would not be permitted to remain in Syria indefinitely, subject to him obeying the law, and that it was unlikely the appellant would be *refouled* to Iraq.

87 The application was dismissed with costs.

Article 33 and effective protection

88 The central question is whether the RRT erred in law in determining that the appellant could enter and remain in Syria. The appellant says that the RRT erred because it did not positively find that the appellant had a **right** to enter or reside in Syria. He contends that the RRT must be satisfied that an applicant has permission to enter and reside in a third country before it could be said that country offered effective protection. It is said that in determining this question the RRT acted on the basis of speculation and conjecture rather than on the material which was before it which did not support a conclusion that the appellant had the **right** to re-enter Syria, with the consequence that the primary Judge erred in not so finding.

89 Article 33 has been considered in a number of recent cases. In our view, the summary of principles made by von Doussa J in *Minister for Immigration & Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 at 568 is apposite to the present appeal. In that case his Honour decided that Australia did not owe protection obligations to the appellant who had been recognised

as a refugee in France, a Contracting State, and accorded the rights and obligations of a refugee under the Convention in France. His Honour said:

"…

2. Under Art 33 the 'well-founded fear' test which applies under Art 1A(2) should be applied.

3. The RRT has found as a fact that effective protection is available to the respondent in France, and that there is no real chance that the French authorities are unable or unwilling to provide such protection. This finding involves no error of law. It determines adversely to the respondent the question whether there was any potential for Art 33 to have application to the respondent, if he were a refugee. Accordingly, Australia did not owe the respondent protection obligations, and the criterion laid down in s 36(2) of the Act for a protection visa was not fulfilled.

4. As there was no real chance that the respondent would suffer persecution in France, Australia was entitled as a Contracting State to deport the respondent to France without considering the substantive merits of his claim to be a refugee."

90 In *Al-Sallal* the Full Court considered whether Australia owed protection obligations to a refugee who could be *refouled* to a safe third country where that country was not a party to the Convention. At 458-459 the Court said:

"We agree with and adopt the observations of Emmett J in Al-Zafiry v Minister for Immigration and Multicultural Affairs [1999] FCA 443, the appeal from which was heard by us immediately following the present appeal. His Honour said (at [26]):

> 'I consider that that all that von Doussa J was saying and this is consistent with the approach adopted by the Full Court in Rajendran and by Weinberg J in Gnanapiragasam is that so long as, as a matter of practical reality and fact, the applicant is likely to be given effective protection by being permitted to enter and live in a third country where he will not be under any risk of being refouled to his original country, that will suffice.'

…

Since 1992 the focus is on Art 33(1). This is so whether the proposed refoulement is (i) direct to the asylum seeker's country of nationality (country A) or (ii) indirect by means of refoulement to country B which will, or might, refoule him or her to A.

In (i) the "territories are the territories of A. In (ii) the territories are also those of A, the only difference is that the alleged breach of Art 33(1) would be achieved indirectly ('in any manner whatsoever') by refoulement to B.

This analysis suggests an answer to the present question. Is there a real chance' of persecution for a Convention reason in country A? That real chance may exist whether or not country A is a party to the Convention. Likewise, in the latter case, the decision-maker has to assess (also in terms of 'real chance') the prospects of 'effective protection' in country B against refoulement to country A. It is, as Emmett J said in Al-Zafiry, a matter of practical reality and fact. The question whether B is a party to the Convention is relevant, but not determinative either way."

91 Recently in *Patto v Minister for Immigration & Multicultural Affairs* [2000] FCA 1554 at [37] French J, after considering the authorities, derived the following propositions in relation to Art 33 which are relevant for present purposes:

"1. Return of the person to a third party will not contravene Article 33 where the person has a right of residence in that country and is not subject to Convention harms therein.

2. Return of the person to the third country will not contravene Article 33, whether or not the person has a right of residence in that country, if that country is a party to the Convention and can be expected to honour its obligations thereunder.

3. Return of a person to a third country will not contravene Article 33 notwithstanding that the person has no right of residence in that country and that the country is not a party to the Convention, provided that it can be expected, nevertheless, to afford the person claiming asylum effective protection against threats to his life or freedom for a Convention reason."

92 His Honour emphasised that the propositions were not intended to be exhaustive.

93 Consistently with the authorities, the relevant question when determining whether *refoulement* would result in a breach of Art 33 by Australia is whether as a matter of practical reality there is a real chance that the third country will not accept a refugee and would *refoule* them to a country where their life or freedom would be at risk for a Convention reason. This is a question of fact and degree. It does not require proof of actual permission, or of a right, to enter that country.

94 The information relied on by the RRT when deciding whether the appellant would be able to re-enter Syria included a DFAT communication of 20 January 2000 referred to as DFAT Report 019c. This DFAT Report is referred to in the reasons for decision of the RRT. The DFAT Report states that:

"Iraqis who intend to enter Syria should be sponsored by either a relative or friend residing in Syria or by one of the Iraqi Opposition Parties operating in Syria.

Iraqis, like other foreigners, who are residing (legally) in Syria have no problem whatsoever so long as they do not involve themselves in activities considered by the competent authorities to be incompatible with law and order. Such activities vary in their degrees from minor criminal acts to those which are deemed to constitute a threat to the State security. Dealing with foreign currencies, falsifying documents and invitation letters for family members to visit Syria, attempting to cross the border to Lebanon, are common acts which result in detention and possible deportation to Northern Iraq prior to UNHCR intervention. …"

95 Counsel for the appellant in argument before us referred to a UNHCR Information Report No 447/99 of 8 December 1999 which contained the following question and answer:

"Q8 Does Syria deport people to Iraq? To the Kurdish controlled areas?

Answers [08/12/99]:

Please note that in several occasions, Syrian authorities made it quite clear that Syria is not and, will not become an asylum country.

However, according to the Governing BA'ATH Party's ideological beliefs, all nationals of the Arab States can enter at any time without entry visa requirements with the exception of Iraqis and Somalis at present. As such, Iraqis who intend to enter Syria should be sponsored either by a relative/friend residing in Syria or, by one of the Iraqi Opposition Parties operating in Syria. In either case, the security clearance has to be obtained in order to be communicated to the respective Syrian embassies abroad or to the airport or the immigration/security office at the official entry points from Iraq … Jordan or Turkey.

…

All nationals of Arab Countries are therefore able to remain in Syria for as long as they wish provided they do not get involved in activities incompatible with law and order, otherwise, they would be detained and possibly deported."

96 The material before the RRT in this case indicated that the appellant would be able to access Syria with the sponsorship of his spouse, or with the support of Al Dawa. The evidence does not indicate that the appellant would have difficulty re-entering Syria. The reference to a security clearance and the falsifying of documents is, as the DFAT Report makes clear, in relation to falsifying documents and fabricating invitation letters for family members to visit Syria. There is no suggestion of any such falsification in the present case. The falsification in this case was of an Iraqi passport to secure a Syrian exit permit. On this material it was open to the RRT to reach the conclusion that refusal of entry into Syria on the basis of not obtaining a security clearance was remote.

97 It could be inferred from the above extracts that a person may only be refused entry into Syria if grounds going to the security concerns of the Syrian

Government are shown to exist. In particular, the evidence does not point to a suggestion that the appellant may be refused entry to Syria because he claims to have left Syria with the help of a smuggler who provided a false Iraqi passport. The evidence does not indicate that such a forgery would subject him to adverse treatment on the grounds of State security. I can find no error in the RRT's finding that the appellant could re-enter Syria.

98 The RRT concluded that even if people such as the appellant were to breach law and order in Syria it was more likely to result in imprisonment in Syria than in deportation. This, again, is a question of fact. The RRT did not accept that minor crime would place people at the risk of deportation from Syria. The RRT's reasons go on to say that even in those circumstances there are a number of safety mechanisms which would result in Iraqis not being *refouled* to Iraq.

99 In my view, on the evidence and materials before the RRT, the appellant's previous long period of residence in Syria coupled with the presence of his wife in Syria, and also the support of Al Dawa, there was sufficient evidence on which the determination that the appellant would be able to re-enter and remain in Syria could have been made.

100 For these reasons I do not consider that any reviewable error of law has been made out with respect to the appellant having access to effective protection in Syria.

tHE DECISION-MAKING PROCESS

101 The submission made in relation to this provision is that it was not open to the RRT to reach a conclusion on Art 33 without considering whether the appellant was a refugee.

102 Although Art 33 is predicated on the premise that the person concerned is a refugee, it is not essential to determine that question before deciding whether Australia has protection obligations. It is this latter question which the RRT is called upon to answer by the Act. If Australia does not have protection obligations under the Convention then it is immaterial that an asylum seeker may be a refugee.

103 The approach of addressing Art 33 without first deciding whether the person has the status of a refugee was recently approved by the High Court in *Minister for Immigration and Multicultural Affairs v Thryagarajah* (2000) 199 CLR 343. At 349-350 the majority said:

"[16] In the Full Court, von Doussa J correctly emphasised two aspects of the case. The first was that the effect of ss 36 and 65 of the Act and subclass 866 of Sch 2 of the Migration Regulations was that the case turned upon the question whether an error of law was involved in the decision of the Tribunal that the respondent, his wife and child were not "persons to whom Australia has protection obligations under the [Convention]". In its applicable form, the legislation obliged the Minister to grant a

protection visa if this criterion were met and to refuse the visa if it were not met. The second aspect was that, under the legislation, the inquiry was not confined (as it has been under earlier legislation (25)) to the question whether the asylum seeker had the ‘status’ of a ‘refugee’. **Even were the respondent a refugee, he was not a person to whom Australia had protection obligations if Art 33 applied**.” (Emphasis added)

104 This decision affords an answer to the submission made by the appellant on this point.

FRESH EVIDENCE

105 On the hearing of the appeal the appellant sought to tender fresh evidence concerning events arising after the RRT hearing. This evidence related to the relationship between the appellant and the Al Dawa Party, and to his relationship with his wife. The material was not before the RRT. The material was handed up but was rejected on the ground that the question for the Court at first instance (and therefore for this Court on the appeal) was whether the RRT had committed any reviewable error based on the evidence and material before it. I did not consider that the additional material related to this question.

CONCLUSION

106 For the above reasons I consider that the appeal from the judgment of R D Nicholson J should be dismissed with costs.

107 Finally I find that the task of the Court is always greatly assisted by succinct and focussed submissions by Counsel. In the present appeal I wish to record my appreciation of the assistance given to Court in the form of written submissions by both Counsel. I especially appreciate the quality of the submissions of Counsel for the appellant who, I understand, appeared on a *pro-bono* basis.

I certify that the preceding forty-eight (48) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Tamberlin

Associate:

Dated: 20 August 2001

Counsel for the Applicant:	L B Price
Counsel for the Respondent:	L Tsaknis
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	27 November 2000
Date of Judgment:	20 August 2001