# FEDERAL COURT OF AUSTRALIA

Rezaei v Minister for Immigration and Multicultural Affairs [2001] FCA 1294

**MIGRATION –** protection visas – application for review of a decision of a delegate of the Minister not to revoke cancellation of protection visas previously granted – cancellation on basis of voluntary re-availment of protection of and voluntary re-establishment in country of nationality – whether placement of protection visas in new passports of country of nationality was a relevant consideration for decision maker in circumstances – whether open to delegate to find cessation of refugee status – no error of law – application dismissed.

**MIGRATION –** Refugees Convention – interpretation of provisions – role of UNHCR Handbook.

**MIGRATION –** Refugees Convention – re-availment of protection and re-establishment – Articles 1C(1) and 1C(4) – interpretation.

**MIGRATION –** protection visas – protection obligations owed to member of family unit of a person owed protection obligations – dependent nature of protection obligations – effect of cancellation of visa of primary applicant on visa of family unit member – no error of law – application dismissed.

*Migration Act 1958* (Cth) ss 36, 116, 118, 128, 129, 131, 140

*Acts Interpretation Act 1901* (Cth)
Migration Regulations 1984 subcl. 866

Convention relating to the Status of Refugees (1951) Articles 1C(1), 1C(4)

Vienna Convention on the Law of Treaties (1969) Article 31

*Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1 applied
Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 379 referred to
*R v Home Secretary; Ex parte Sivakumaran* [1988] 1 AC 958 referred to
*A v Minister for Immigration and Multicultural Affairs* [1999] FCA 227 referred to

*Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 29 applied
*Telstra Corporation Ltd v Seven Cable Television Pty Ltd* (2000) 178 ALR 707 applied
*Paul v Minister for Immigration and Multicultural Affairs* [2001] FCA 1196 referred to

*Applicant R v Minister for Immigration and Multicultural Affairs* [2001] FCA 1304 referred to
*Awan v Minister for Immigration and Multicultural Affairs* [2001] FCA 1036 referred to
*Ragunathan v Minister for Immigration and Multicultural Affairs* [2001] FCA 1142 referred to
*Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 referred to
*Cheaib v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 308 referred to
*Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 applied
*Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 referred to

*K & S Lake City Freighters Pty Ltd v Gordon & Gotch* (1985) 157 CLR 309 referred to
*Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169CLR 594 referred to

Grahl-Madsen *The Status of Refugees in International Law* (1966) vol 1
McNair *The Law of Treaties* (1961)ch XXIV
Grahl-Madsen "Protection of Refugees by their Country of Origin" (1986) vol 11 (2) *Yale J International Law* 362,
Weis "The Concept of the Refugee in International Law" (1960) *Journal du Droit International* 928
Goodwin-Gill *The Refugee in International Law* (Clarendon, 2nd ed, 1998)
Hathaway *The Law of Refugee Status* (Butterworths, 1991)
Zambelli *The Refugee Convention* (Carswell, 1999)
Cartier, Hullmann and Galiano (eds) *Who is a Refugee? A Comparative Case Law Study (*Kluever, The Hague, 1997)
Notes on the Cessation Clauses (Executive Committee of the High Commissioner's Programme, 8th meeting 30 May 1997)
Weis (ed) *The Refugee Convention, 1951* (travaux préparatoires, Cambridge University Press, 1995)

Pearce and Geddes *Statutory Interpretation in Australia* (4th ed)
Bennion *Statutory Interpretation* (3rd ed)

Seyed Hamid Rezaei and Zahra Ghanbarnezhad v Minister for Immigration and Multicultural Affairs

**N123 of 2001**

**ALLSOP J**

**SYDNEY**

**14 SEPTEMBER 2001**

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| IN THE FEDERAL COURT OF AUSTRALIA | |
| NEW SOUTH WALES DISTRICT REGISTRY | N123 of 2001 |

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| BETWEEN: | SEYED HAMID REZAEI<br><br>FIRST APPLICANT<br><br>ZAHRA GHANBARNEZHAD<br><br>SECOND APPLICANT |
| AND: | MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS<br><br>RESPONDENT |
| JUDGE: | ALLSOP J |
| DATE OF ORDER: | 14 SEPTEMBER 2001 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. the applications be dismissed; and

2. the applicants pay the respondent's costs.

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

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| JUDGE: | ALLSOP J |
| DATE: | 14 SEPTEMBER 2001 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

1 These are applications for review of decisions of a delegate of the Minister not to revoke decisions, earlier made, to cancel protection visas which had been granted to the applicants.

2 The applicants, who are husband and wife, arrived in Australia on 12 August 1993 on medical treatment visas issued for the purpose of the second applicant obtaining in vitro fertilisation (IVF) treatment in Australia. On 12 August 1994, they applied for protection visas under the *Migration Act 1958* (Cth) (the Act). Their applications were refused by the Minister's delegate on 19 February 1996. On 10 April 1997 the Refugee Review Tribunal (the Tribunal) affirmed the delegate's decision.

3 By consent orders made in this court on 17 November 1997, the Tribunal's decision was set aside and the matter remitted for reconsideration by the Tribunal which, on 16 February 1998, found that the first applicant (the husband) was a refugee and was a person to whom Australia owed protection obligations under the Act. The second applicant (who made no claims to be a

refugee in her own right) was recognised as being entitled to the protection of Australia as a member her husband's family unit.

4 On 7 April 1998 the applicants were granted protection visas.

5 On 15 and 21 July 1998, each of the applicants was issued with a new Iranian passport issued by the Iranian embassy in Canberra. On 1 and 2 December 1998, protection visa labels were placed in the applicants' new Iranian passports. On 9 December 1998, both applicants left Australia for Iran where they have remained ever since. While in Iran they adopted a child by a lawful process involving the Iranian legal system. Towards the end of 2000, they applied to the Australian authorities to sponsor a child for migration and return to Australia.

6 On 15 September 2000, a delegate of the Minister made a decision under s 128 of the Act cancelling the applicants' protection visas without notice to the applicants. The applicants were notified of the cancellation under s 129 of the Act. They made written submissions in opposition to the cancellation decisions, submitted documents, and were interviewed by Australian embassy officers in Tehran, in person (in the case of the second applicant) and by telephone (in the case of the first applicant).

7 The claims made by the applicants in opposition to the cancellation decisions were that:

a) the applicants returned to Iran in order save their marriage and in order to see the husband's mother who was seriously ill;

b) the applicants were able to re-enter Iran due to the help of "an organisation which is fairly powerful"; and

c) the applicants now wished to return to Australia, with their adopted child.

8 In the statement of agreed facts, it was agreed before me that neither of the applicants claimed that he or she had had any problems with the Iranian authorities in relation to the adoption, or otherwise in the time that he or she has been back in Iran.

9 By decisions made under s 131 of the Act dated 10 January 2001, a delegate of the Minister declined to revoke the cancellations. Those decisions are the subject of the present application for review by this court. It should be noted that the second decision (under s 131) was made by a delegate different from the person who made the decision under s 128. However, that first delegate prepared the recommendation which was before the second

delegate and which recommendation was accepted by the second delegate. No complaint was made about this procedure.

**The Statutory Framework**

10 At all relevant times, the circumstance which permitted the granting of a protection visa was that each applicant was a person to whom Australia had protection obligations under the Convention relating to the Status of Refugees done at Geneva on 28 July 1958 as amended by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (to which I will refer as the Convention): see subs 36(2) and s 65 of the Act and cl 866.221 of Schedule 2 of the *Migration Regulations* (the Regulations).

11 Section 128 of the Act dealt with the cancellation of visas of persons *outside* Australia and provided, at the relevant time, as follows:

**S 128 Cancellation of visas of people outside Australia**

If:

(a) the Minister is satisfied that:

(i) there is a ground for cancelling a visa under section 116; and

(ii) it is appropriate to cancel in accordance with this Subdivision; and

(b) the non-citizen is outside Australia;

the Minister may, without notice to the holder of the visa, cancel the visa.

12 Section 116 of the Act also provided a power in the Minister to cancel a visa. At the time it relevantly provided as follows:

**S 116 Power to cancel**

(1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:
(a) any circumstances which permitted the grant of the visa no longer exist;

…

(2) The Minister is not to cancel a visa if there exist prescribed circumstances in which a visa is not to be cancelled.
(3) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled.

13 Section 118 provided for the relationship between various powers of cancellation. At the relevant time it was in the following terms:

**S 118 Cancellation powers do not limit or affect each other**

The powers to cancel a visa under:

(a) section 109 (incorrect information); or

(b) section 116 (general power to cancel); or

(c) section 128 (when holder outside Australia); or

(d) section 134 (cancellation of business visas); or

(e) section 140 (consequential cancellation of other visas); or

(ea) section 500A (refusal or cancellation of temporary safe haven visas); or

(f) section 501, 501A or 501B (special power to refuse or cancel);

are not limited, or otherwise affected, by each other.

14 If the Minister exercised the power under s 128 of the Act to cancel a visa without notice he or she was required to give the former visa holder a notice under s 129 of the Act that complied with paragraphs 129(1)(a) to (e):

**S 129 Notice of cancellation**

(1) If the Minister cancels a visa under section 128, he or she must give the former holder of the visa a notice:

(a) stating the ground on which it was cancelled; and

(b) giving particulars of that ground and of the information (not being non-disclosable information) because of which the ground was considered to exist; and

(c) inviting the former holder to show, within a specified time, being a prescribed time, that:

(i) that ground does not exist; or

(ii) there is a reason why the visa should not have been cancelled; and

(d) stating that, if the former holder shows, within the specified time, that the ground does not exist, the cancellation will be revoked; and

(e) stating that, if the former holder shows that there is a reason why the visa should not have been cancelled, the cancellation might be revoked.

15 Subsection 129(2) provided for notice being given in the prescribed way.

16 Section 131 of the Act provided for a further decision as to whether the decision to cancel the visa, made under s 128 of the Act, should be revoked, the Minister having had the benefit of any response provided for by s 129. At the relevant time s 131 was in the following terms:

**S 131 Decision about revocation of cancellation**

(1) Subject to subsection (2), after considering any response to a notice under section 129 of the cancellation of a visa, the Minister:

(a) if not satisfied that there was a ground for the cancellation; or

(b) if satisfied that there is another reason why the cancellation should be revoked;

is to revoke the cancellation.

(2) The Minister is not to revoke the cancellation of a visa if there exist prescribed circumstances in which the visa must be cancelled.

17 The heading to subdivision F of the Act (in which ss 128 to 133 appear) is as follows, noting that subdivision D contains ss 116 to 118:

Subdivision F- Other procedure for cancelling visas under subdivision D outside Australia

18 Subdivision H of the Act deals with general provisions concerning cancellation of visas. Section 140 at the relevant time was in the following terms:

**S 140 Cancellation of visa results in other cancellation**

(1) If a person's visa is cancelled under section 109 (incorrect information) or 116, a visa held by another person because of being a member of the family unit of the person (within the meaning of the regulations) is also cancelled.

(2) If:

(a) a person's visa is cancelled under section 109 (incorrect information) or 116; and

(b) another person to whom subsection (1) does not apply holds a visa only because the person whose visa is cancelled held a visa;

the Minister may, without notice to the other person, cancel the other person's visa.

(3) If:

(a) a person's visa (the **cancelled visa**) is cancelled under any provision of this Act; and

(b) the person is a parent of another person; and

(c) the other person holds a particular visa (the **other visa**), that was granted under section 78 (child born in Australia) because the parent held the cancelled visa;

the other visa is also cancelled.

(4) If:

(a) a visa is cancelled under subsection (1), (2) or (3) because another visa is cancelled; and

(b) the cancellation of the other visa is revoked under section 131;

the cancellation under subsection (1), (2) or (3) is revoked.

19 Subclause 866 of Schedule 2 of the Regulations was at the relevant time in the following form:

**866.1 Interpretation**

866.111 In this Part:

**Refugees Convention** means the 1951 Convention relating to the Status of Refuges as amended by the 1967 Protocol relating to the Status of Refugees.

866.112 For the purposes of this Part, a person (A) is a member of the same family unit as another person (B) if:

a) A is a member of B's family unit; or

b) B is a member of A's family unit; or

c) A and B are members of the family unit of a third person.

[There was no issue but that the second applicant was a member of the first applicant's family unit].

**866.2 Primary Criteria**

Note all applicants must satisfy the primary criteria

866.21 **Criteria to be satisfied at time of application**

866.211 The applicant claims to be a person to whom Australia has protection obligations under the Refugees Convention and:

a) makes specific claims under the Refugees Convention; or

b) claims to be a member of the same family unit as a person who:

(i) has made specific claims under the Refugees Convention; and

(ii) is an applicant for a Protection (Class AZ) visa.

866.22 **Criteria to be satisfied at time of decision**

866.221 The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

866.222 In the case of an applicant referred to in paragraph 866.211(b):

c) the Minister is satisfied that the applicant is a member of the same family unit as a person who has made specific claims under the Refugees Convention (a **claimant**); and

d) that claimant has been granted a Protection visa.

866.223 The applicant has undergone a medical examination carried out by a Commonwealth Medical Officer.

866.224 The applicant:

(a) has undergone a chest x-ray examination conducted by a medical practitioner who is qualified as a radiologist in Australia; or

(b) is under 16 years of age and is not a person in respect of whom a Commonwealth Medical Officer has requested such an examination; or

(c) is a person:

(i) who is confirmed by a Commonwealth Medical Officer to be pregnant; and

(ii) who has been examined for tuberculosis by a chest clinic officer employed by a health authority of a State or Territory; and

(iii) who has signed an undertaking to place herself under the professional supervision of a health authority in a State or Territory and to undergo any necessary treatment; and

(iv) who the Minister is satisfied should not be required to undergo a chest x-ray examination at this time.

866.225 The applicant satisfies public interest criteria 4001, 4002 and 4003.

866.226 The Minister is satisfied that the grant of the visa is in the national interest.

20 It was not put that there was no "decision" under s 131. So, unless the decision of the delegate under s 131 was "an RRT – reviewable decision", para 475(1)(c) applied and made review of the decision of a delegate under s 131 available by this court under Part 8 of the Act. The decision of the delegate under review was not "an RRT-reviewable decision" for the purposes of para 475(2)(d), because of the effect of para 411(2)(a) of the Act.

**The grounds of review**

21 The amended application which was the subject of debate before me was as follows:

The application is amended by substitution of the following as the grounds for review:

1. In relation to the first applicant: the decision involved an error of law, being an incorrect application of the law of the facts as found by the person who made the decision.

   Particulars

   The respondent's delegate incorrectly applied the law with relation to a refugee who has voluntarily re-availed himself of the protection of the country of his nationality by failing to take into account that the Australian government had placed evidence of a protection visa in passports applied for and obtained by the applicants after they had been recognised as refugees by the Australian government.

2. In relation to the second applicant: the decision involved an error of law, being an incorrect interpretation of the applicable law.

   Particulars

   The delegate considered that a circumstance which permitted the grant of the visa to the second applicant was that she was the "the dependant of a person to whom Australia has protection obligations", whereas the visa was granted to her on the basis that the Minister was satisfied that she was a member of the same family unit as a person who has made

specific claims under the Refugees Convention (a claimant); and that claimant has been granted a Protection (Class XA) visas: Migration Regulations Schedule 2 cl 866.222. The circumstance that the first applicant had been granted a protection visa did not change even though his visa had been subsequently cancelled.

3. The decision was an improper exercise of the power conferred by the Act, in that it was an exercise of a discretionary power without regard to the merits of the case.

Particulars

The respondent's delegated did not have regard to all of the merits of the case to the extent that he did not weigh the merits of the argument that the applicants were led to believe by the Australian government that they continued to have the protection of the Australian government even after they had obtained Iranian passports and after they had informed the Australian government that they wished to use those passports to travel to Iran.

22 Grounds 1 and 3 concern the first applicant.

23 Grounds 2 and 3 concern the second applicant.

# The first applicant

24 The ground for cancellation of the first applicant's protection visa under s 128 and the ground for refusing to revoke the cancellation of the first applicant's protection visa was the application of two of the cessation clauses in Article 1 of the Convention: Article 1C(1) and (4), which, (along with subclauses (2) and (3)), are in the following terms:

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 re-acquired 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; …

25 Ground 1 in the amended application is directed to one of the two cessation provisions applied by the delegate: Article 1C(1).

26 It is necessary first to understand how the delegate came to her decision under s 131.

27 On 15 September 2000 the first applicant was sent a letter by the Department advising him that his protection visa had been cancelled under s 128. He was provided with a copy of the Decision Record. Within that record there was the following:

Evidence of grounds for cancellation

Departmental movement records indicate that the visa holder and his wife left Australia on 9 December 1998. Neither the visa holder not his wife have returned to Australia since then.

The Australian Embassy in Tehran has reported that the visa holder is currently resident in Tehran, and that they have communicated with him in Tehran, arranging an appointment for an interview with him on 28 September 2000 at the Embassy. This communication is related to the application that has been made by the visa holder and his wife for sponsorship for migration to Australia of a child born to them since their departure in 1998.

This evidence indicates that the applicant has not been resident in Australia for 21 months, and has since his departure returned to Iran, from which location he and his wife are sponsoring a child for migration.

This evidence is contained on Departmental file CLF 2000/046812. Departmental files A94/2364 and A98/2055 have also been consulted in relation to this case.

28 Article 1C of the Convention was set out. Clauses (1) and (4) of Article 1C were said to be relevant.

29 In relation to Article 1C(1), paragraphs 118 to 125 of the Handbook on Procedures and Criteria for Determining Refugee Status (the UNHCR Handbook) were set out.

30 In relation to Article 1C(4), paragraphs 133 and 134 of the UNHCR handbook were set out.

31 These paragraphs are as follows:

118 This cessation clause refers to a refugee possessing a nationality who remains outside the country of his nationality. (The situation of a refugee who has actually returned to the country of his nationality is governed by the fourth cessation clause, which speaks of a person having ‘re-established’ himself in that country.) A refugee who has voluntarily re-availed himself of national protection is no longer in need of international protection. He has demonstrated that he is no longer ‘unable or unwilling to avail himself of the protection of the country of his nationality’

119 This cessation clause implies three requirements:

(a) voluntariness: the refugee must act voluntarily;

(b) intention: the refugee must intend by his action to re-avail himself of the protection of the country of his nationality;

(c) re-availment: the refugee must actually obtain such protection.

120 If the refugee does not act voluntarily, he will not cease to be a refugee. If he is instructed by an authority, eg of his country of residence, to perform against his will an act that could be interpreted as a re-availment of the protection of the county of his nationality, such as applying to his Consulate for a national passport, he will not cease to be a refugee merely because he obeys such an instruction. He may also be constrained, by circumstances beyond his control, to have recourse to a measure of protection from his country of nationality. He may, for instance, need to apply for a divorce in his home country because no other divorce may have the necessary international recognition. Such an act cannot be considered to be a 'voluntary re-availment of protection' and will not deprive a person of refugee status.

121 In determining whether refugee status is lost in these circumstances, a distinction should be drawn between actual re-availment of protection and occasional and incidental contacts with the national authorities. If a refugee applies for and obtains a national passport or its renewal, it will, in the absence of proof to the contrary, be presumed that he intends to avail himself of the protection of the country of his nationality. On the other hand, the acquisition of documents from the national authorities, for which non-nationals would likewise have to apply – such as birth or marriage certificate – or similar services, cannot be regarded as a re-availment of protection.

122 A refugee requesting protection from the authorities of the country of his nationality has only 're-availed' himself of that protection when his request has actually been granted. The most frequent case of 're-availment of protection' will be where the refugee wishes to return to his country of nationality. He will not cease to be a refugee merely by applying for repatriation. On the other hand, obtaining an entry permit or national passport for the purposes of retuning will, in the absence of proof to the contrary, be considered as terminating refugee status. This does not, however, preclude assistance being given to the repatriant – also by UNHCR – in order to facilitate his return.

123 A refugee may have voluntarily obtained a national passport, intending either to avail himself of the protection of his country of origin while staying outside that country, or to return to that country. As stated above, with the receipt of such a document he normally ceases to be a refugee. If he subsequently renounces either intention, his refugee status will need to be determined afresh. He will need to explain why

he changed his mind, and to show that there has been no basic change in the conditions that originally made him a refugee.

124 Obtaining a national passport or an extension of its validity may, under certain exceptional conditions, not involve termination of refugee status (see paragraph 120 above). This could for example be the case where the holder of a national passport is not permitted to return to the county of his nationality without specific permission.

125 Where a refugee visits his former home country not with a national passport but, for example, with a travel document issued by his country of residence, he has been considered by certain States to have re-availed himself of the protection of his former home country and to have lost his refugee status under the present cessation clause. Cases of this kind should, however, be judged on their individual merits. Visiting an old or sick parent will have a different bearing on the refugee's relation to his former home country than regular visits to that country spent on holidays or for the purpose of establishing business relations.

…

133 This fourth cessation clause applies both to refugees who have a nationality and to stateless refugees. It relates to refugees who, having returned to their country of origin or previous residence, have not previously ceased to be refugees under the first or second cessation clauses while still in their country of refugee.

134 The clause refers to 'voluntary re-establishment'. This is to be understood as return to the country of nationality or former habitual residence with a view to permanently residing there. A temporary visit by a refugee to his former home country, not with a national passport but, for example, with a travel document issued by his country of residence, does not constitute 're-establishment' and will not involve loss of refugee status under the present clause.

32 While I am not reviewing the decision of the delegate under s 128 made on 15 September 2000, it is important to understand how that delegate reached the view he did in that decision under s 128, for his reasons were conveyed to the applicants who then made representations concerning this first decision which were embodied in the material which went to the (second) delegate who made the (second) decision upon a recommendation made by the first delegate not to revoke the cancellation under s 131. It is said, as can be seen from the particulars to ground 1, that the second delegate failed to take into account a relevant consideration: that being the circumstance that the Australian government had placed evidence of a protection visa in the new passports of the applicants which had been recently applied for, and obtained by, them from the Iranian embassy in Canberra. How the applicants dealt with, and responded to, the decision under s 128 may affect the assessment of the decision by the second delegate in connection with this alleged failure.

33 The first delegate (in the Decision Record of the s 128 decision) dealt with the cessation of refugee status and dealt with the operation and effect of clauses (1) and (4) of Article 1C separately. He dealt with the matter in the following way, basing his decision primarily on Article 1C(4):

Consideration of Cessation of Refugee Status

4.1 In this case, the visa holder was granted a protection visa on 7 April 1998. On 9 December 1998 he and his wife departed Australia. In September 2000, an application was made at the Australian Embassy in Tehran for migration to Australia for the child born to the visa holder and his wife in Iran in March 1999.

The visa holder has indicated to the post that he and his wife are now living in Iran, and an appointment has been made by Embassy staff who contacted him on the telephone for them to attend an interview at the embassy on 28 September 2000. The visa holder did not indicate to the Embassy, either when the application for his child was made or when the interview was arranged, that he is living in hiding or otherwise currently in fear of persecution from the Iranian authorities.

4.2 It is clear that the visa holder has returned to Iran, and is presently living freely in Iran.

4.3 In considering whether cessation clause 1C(1) applies, I have considered the UNHCR Handbook's advice, which indicates that this clause is principally applicable in cases where the refugee remains outside his country or nationality.

I note that the applicant is presently living with his family in Iran, and that a child has been born to his wife in Iran in that time. I note that paragraph 122 of the UNHCR handbook indicates that the most frequent cases of re-availment of protection are where the refugee wishes to return to his country of nationality.

Paragraph 125 of the handbook indicates that where a refugee returns to his former home country, he may be considered to have reavailed himself of that country's protection, but that such cases should be considered on their individual merits.

In this case, a considerable period has intervened since the visa holder departed Australia and returned to Iran. I do not consider that this is a case such as suggested in paragraph 125 where re-availment of protection has not occurred, such as where someone is visiting a sick or elderly parent for example.

Given these circumstances, I find that there are prima facie grounds to indicate that cessation clause 1C(1) became applicable to the applicant at or around the time he made his departure from Australia in

December 1998. However, I do not consider that the circumstances and evidence make it conclusive that this particular clause is applicable at this point in time.

4.4 In considering whether cessation clause 1C(4) applies, I have considered the UNHCR handbook's advice, which indicates that this clause is principally applicable in cases where the refugee has voluntarily re-established himself in the country of nationality.

The visa holder departed Australia in December 1998. His wife has given birth to a child in Iran in march 1999, and he and his family are living at an address in Boushehr, Iran. They have made an application for their child for migration to Australia at the Australian Embassy in Tehran. It is clear from these circumstances that the visa holder, has resumed residence in Iran.

Whilst he appears to intend to return to Australia, he has been able to live outside Australia and in Iran, the country where he claimed to fear persecution, for a considerable period, during which time he and his wife had a child born to them in Iran.

Findings

I find that cessation clause 1C(4) of the Refugees Convention is applicable to the visa holder. Therefore, the circumstance that permitted the grant of a protection visa to the visa holder, that Australia has protection obligations to him, is no longer applicable.

I therefore consider that there are grounds for cancellation under paragraph 116(1)(a) of the Migration Act 1958, on the basis that the circumstances that permitted the grant of the visa no longer exist, and that therefore the visa may be cancelled under section 128 of the Migration Act 1958 without notice.

PART D: DECISION

In view of the findings and assessment above, I have decided to cancel the visa holder's visa.

34 On 23 October 2000 a migration agent provided a submission on behalf of both applicants. It was directed to both clauses (1) and (4) of Article 1C. The submission disclosed a familiarity and facility with the UNHCR Handbook and with the clauses in question. It reflected instructions having been obtained from, at least, the first applicant.

35 At no point did the submission of the migration agent state that either applicant had been in any way led to think that he or she could apply for an Iranian passport, go to Iran, stay in Iran, stay in Iran for any length of time or take steps to adopt a child in Iran because the protection visa had been placed in the newly obtained passports.

36 The submissions put on behalf of the applicants were received.

37 An opportunity was then provided for the applicants to attend the Australian embassy in Tehran to put any matter in person. The second applicant availed herself of that opportunity. During that interview the second applicant made no claim of the kind referred to in paragraph [35] above.

38 The interview was dealt with as follows in the recommendation and second decision under s 131 not to revoke the cancellation:

The transcript of the interview is contained on file CLF2000/46812. The principal points can be summarised as follows:

- she returned to Iran because she was under stress due to the unsuccessful IVF program and wished to divorce her husband, plus attachment to family. She had not been aware of her husband's political involvement until they had been in Australia;

- they had entered Iran through Shiraz airport. This had been arranged by the 'Organisation'. She did not see her husband again for some 20-25 days after the arrival. She did not know what he does or where he went;

- she is not aware as to whether her husband has entered or departed Iran since they returned in 1998. He never tells her anything;

- they both used their Iranian passports to re-enter Iran;

- she has been living in the village of Seydoun outside Shiraz with her husband's brother;

- she has been supported by her husband's brothers. Her husband has not been working since returning to Iran and has no income;

- she indicated that her husband was a member of the Mujaheddin organisation but did not know what he did for it, or of any activities he undertook for it;

- Mr Rezaei's mother was ill but was still alive;

- The adoption of the baby had been organised by her husband's family, and occurred just over a year ago;

- She has not had any problems with the authorities since her return to Iran, but does not know about her husband as he keeps moving around.

Mrs Ghanbarnezjad produced the Iranian passports which had been used by her and her husband to enter Iran. Photocopies of those passports were made by the interviewing officer. These passports were issued by the Iranian Embassy in

Canberra on 21 July 1998, three and a half months after the protection visas were granted.

39 From the last paragraph of this extract it is plain that the second delegate had before her the two passports.

40 On 15 December 2000 the migration agent of the applicants provided further material "of supporting documents". These were set out in the recommendation and second decision as follows:

- medical certificate dated 6 December 2000 indicating that Mr Rezaei's mother had been under treatment by a cardiologist since 1995. She was admitted to hospital between 20 December 1998 and 3 January 1999 due to recurrent cardiac pains;

- medical certificate dated 6 December 2000 indicating that Mr Rezaei's mother had been treated for major depressive disorder since November 1998. Separation from her son had contributed to her disease;

- medical certificate dated 5 December 2000 indicating that Mr Rezaei's mother had [been] admitted to hospital in November 1998 due to cardiac disease;

- Court judgement dated 14 February 2000 granting final adoption of child to Mr Rezaei and his wife;

- Document from Fars Province Welfare Organisation regarding this adoption and requiring cooperation in the issue of an Identity Card for the adopted child.

41 Other documents were indicated to have been received and to be held on file as follows:

- medical certificate dated 23 August 1998 indicating that Mrs Ghanbarnezhad suffers from paranoid schizophrenia;

- medical certificate dated 15 September 1998 regarding failure of IVF treatment and commenting that adoption is the only solution to Mrs Ghanbarnezhad's childlessness;

- medical certificate dated 24 November 1998 in support of short term return to Iran for Mrs Ghanbarnezhad due to her depression and recent nervous breakdown, to visit her family for 2 or 3 months;

- other medical certificates relating to the situation of Mr Rezaei's mother, similar to those mentioned above, but specifically stating that she is the mother of Seyed Hamid Rezaei.

42 On 21 December 2001 the first applicant was interviewed over the telephone by embassy officials in Tehran. A forty paragraph transcript of that interview was before the delegate. Relevant parts of it were set out *in extenso* in the recommendation and second decision.

43 Nowhere in that interview did the first applicant make a claim or complaint of the kind referred to in paragraph [35] above.

44 The recommendation and second decision then identified the following "evidence":

The decision is based on the following evidence:

- Departmental files A94/2364, A98/2055, CLF2000/46812
- Migration Series Instruction 301
- UNHCR Handbook

45 The recommendation and decision then turned to the question of the applicable law. Article 1C was set out. Paragraphs 118 to 125 and 133 and 134 of the UNHCR Handbook were set out.

46 The recommendation and decision then reconsidered the application of Article 1C(1)and (4). (For ease of comprehension it is necessary to recall that the first delegate drafted the recommendation.) I set out the deliberation in full:

Article 1C(1)

As has been indicated above, Mr Rezaei and his wife were granted protection visas on 7 April 1998. On 21 July 1998, they were granted new Iranian passports by the Iranian Embassy in Canberra.

His agent, in relation to paragraph 120 of the UNHCR handbook, has claimed that Mr Rezaei did not act voluntarily, asserting that the part of that paragraph which states 'If the refugee does not act voluntarily, he will not cease to be a refugee.' is relevant to this case.

I consider that the agent's assertion is out of context of the guidance of the UNHCR Handbook in this particular matter.

I am guided by the UNHCR handbook which, as cited above, indicates that obtaining or renewing a national passport can be presumed as an intention to re-avail oneself of the protection of the country of nationality. Where such a passport is granted in the absence of evidence to the contrary, it will be considered as terminating refugee status.

Paragraph 124 of the UNHCR Handbook, referring particularly to paragraph 120, indicates that there are exceptional conditions where obtaining or renewing a national passport may not involve termination of refugee status. An example given is applying to the diplomatic mission of country of nationality for a national passport on the instructions of an authority (such as of the country of residence). Another example in that paragraph is needing to apply for a divorce in the country of nationality because no other divorce would have the necessary international recognition.

In this particular case, Mr Rezaei applied for and obtained a new Iranian passport within 3 and a half months of the grant of a protection visa. He has not made any claims that the Australian authorities instructed him to approach the Iranian embassy and obtain such a travel document. Nor would a protection visa holder normally travel on a travel document issued by the country of nationality. There are alternative travel documents which are issued to refugees to enable travel until they acquire a new nationality.

Paragraph 125 of the UNHCR Handbook states that in some cases, people who return to their home country on a travel document other than a national passport may be considered to have re-availed themselves of the protection of their home country. However, cases should be judged on their own merits, and that cases where people visit old or sick parents should be judged differently from holidays or business trips.

This advice however is not of direct relevance in considering cessation clause 1C(1). This is because Mr Rezaei did not travel to Iran on an alternative travel document, but on an Iranian passport which he had obtained five months earlier. I also observe that whilst one of the claimed reasons for travelling was to visit his mother, another reason was on business – namely to accomplish a political mission for his organisation.

Therefore, I do not consider that Mr Rezaei acted involuntarily in obtaining a new Iranian passport. He was not compelled by the Australian authorities to approach the Iranian Embassy and obtain such a passport. In these circumstances there were alternative travel documents available (such as Convention Travel Documents or Australian government issued 'Certificates of Identity'); the absence of such options might have compelled Mr Rezaei to seek an Iranian passport out of desperation.

In obtaining an Iranian passport, Mr Rezaei acted voluntarily. Therefore, I consider from the evidence now available, cessation clause (1) of Article 1C came into effect at the time he obtained that passport, on 21 July 1998

Article 1C(4)

In the original visa cancellation decision, I concluded that Mr Rezaei had voluntarily re-established himself in his home country.

In assessing whether cessation clause 1C(4) is appropriate in the current circumstances, I need to consider the claims Mr Rezaei has made.

He has claimed that he returned to Iran partly in order to visit his mother, who was unwell, and whom he believed was dying at that time. I accept this. I also accept that his wife was extremely depressed and wished to return to Iran to her own family as indicated by the medical certificate supporting a temporary visit of some 2 or 3 months.

However, Mr Rezaei and his wife had remained in Iran for a period of almost 2 years at the time and their visas were cancelled. Two years is not a period which could be considered as a brief visit for the purposes of seeing elderly or sick parents, but a much more significant length of time, particularly given that Mr Rezaei's mother is now 'fine', in his own words.

During that time, Mr Rezaei and his wife have adopted a baby through the Iranian authorities. This involved an initial provisional adoption, and then confirmation of the adoption six months later. I find that such a transaction could not be completed if Mr Rezaei was of adverse interest to the authorities.

Also, in this period, Mr Rezaei has undertaken at least one mission for a political organisation which he continues to be active in. Despite his claims at his interview that 'they know in Melbourne' all about this risky mission, he and his agent have failed to provide the Melbourne office with any information relating to that mission.

At the time the Refugee Review Tribunal found Mr Rezaei to meet the Convention Definition of a Refugee, the Tribunal commented in their decision that they had 'doubts about the credibility of some of the Applicant's claims and evidence'. The Tribunal also commented at that time that he had 'demonstrated a propensity to escalate his claims, particularly where the delegate or previous Tribunal member directed his attention to contentious issues arising from his evidence.'

In considering Mr Rezaei's current circumstances, I find that there is reason to doubt his credibility. He had no hesitation in attending an interview at the Embassy when he believed it related to the migration application for his adopted child, at which time he was notified of his visa cancellation. However after that, although the only circumstance which had changed was the cancellation of that visa, he claimed that it was dangerous for him to come to Tehran to be interviewed in relation to the request for revocation of the visa cancellation.

I also observe that the application for migration for their adopted child gave an address in Bushehr, where Mr Rezaei and his wife claimed to live. However, after the cancellation of the visa, he now claims to be dwelling in various villages along the Iraqi border, and his wife in a village called Saydan, with his brother. These places are all considerable distances from each other, and from Bushehr.

In these two instances in particular, I consider that Mr Rezaei is making claims which are either untrue or exaggerated about fears of danger in Tehran, and about his usual whereabouts. Given this, I consider that he is making misleading claims relating to his other circumstances in Iran since his return in late 1998, such as his activities on behalf of his organisation.

Taking into account the likelihood that Mr Rezaei is making exaggerated or untrue claims relating to his current circumstances in Iran, the amount of time he has spent in Iran (almost 2 years at the time of visa cancellation), the adoption of a child without difficulties with the authorities, and the use of an Iranian passport to re-enter Iran legally, I find that he has voluntarily re-established himself in Iran.

I find that cessation clause 1C(4) is applicable in this case.

Conclusion

Having considered the circumstances of this case and the claims and evidence provided, I conclude that the Cessation of refugee Status in Mr Rezaei's case remains appropriate.

47 The recommendation and decision then set out certain "primary considerations" and "secondary considerations" in relation to the discretion to revoke the cancellation.

48 The complaint in ground 1 of the amended application is that matters were not taken into account which should have been. The argument is based on the decision of the High Court in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 180 ALR 1. The argument was expressed in a number of ways. In the primary written submission the following appears at paras 11-13:

11. The delegate considered that issue of the passports to the applicants and their travel to Iran meant that they had voluntarily re-availed themselves of the protection of Iran. However, he failed to consider or give weight to the fact that the Australian government was previously aware of the issue of the passports and the intention of the applicants to travel to Iran, and had led the applicants to believe that it did not object to these events by placing the visa labels in their passports.

12. It can reasonably be inferred from the actions of the applicants in requesting "permission" to travel to Iran [CD 188], and the fact that the Australian government subsequently evidenced their visa status in their passports, that they believed they continued to have the protection of the Australian government. Article 1C of the Convention implies an understanding on the part of the refugee of the consequences of his or her actions in obtaining a passport or travelling to the country of origin. The refugee does not "voluntarily" re-avail himself of the protection of the country of origin if he believes that he still has the protection of the country of refuge.

13. The delegate gave no consideration to the fact that the applicants had been led to believe that the Australian government had no objection to their actions before they left Australia. Were the respondent not exercising a statutory discretion, the applicants could claim that the respondent was estopped by its actions and the reliance placed on them by the applicants. Nevertheless, the circumstances under which

the applicants acted was an essential element in the merits of the case and by failing to take those circumstances into account the delegate exercised the discretion to cancel the visas without regard to the merits of the case.

49 These submissions were elaborated upon in 'reply' under the heading: "Whether the delegate erred in misinterpreting Article 1C(1) of the Convention". In those submissions Mr Jones, who appeared for the applicants, submitted, in connection with Article 1C(1), that there must be a voluntary availment of protection. In these submissions he appeared to put a submission that the reference in para 121 of the UNHCR Handbook to a "presumption" was laying down a rule not otherwise to be taken from Article 1C(1). I set out these substantive written submissions:

3. The Handbook states at [121] that when a refugee applies for and obtains or renews a national passport, there is a presumption that the refugee has the intention of re-availing himself of the protection of that country.

4. The handbook is, on the one hand, a long-established and widely-used guide to the practical implementation of the Convention. In Chan [Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1990) 169 CLR 379], Mason CJ said (at 392):

> "I regard the handbook more as a practical guide for the use of those who are required to determine whether or not a person is a refugee than as a document purporting to interpret the meaning of the relevant parts of the Convention."

5. There is no legal presumption created by the refugee renewing a national passport. The words of 1C(1) must be given their full effect, and the refugee must in all circumstances be shown to have acted in a voluntary way with the intention, and result, of obtaining the protection of the country of origin. The onus of establishing that the clause applies in any particular case must rest with the party claiming that it does.

6. A person's intention in doing an act is a matter of fact. There is no evidence that, merely by obtaining the passports, the applicants intended to re-avail themselves of the protection of Iran. Passports may be obtained merely as documents of identity. Even though alternative documentation was available from the Australian government, it is not possible to conclude from the mere act of obtaining an Iranian passport that the applicants sought the protection of Iran.

7. Nor is it possible to create a presumption that merely by obtaining the passports the applicants obtained the protection of Iran. Indeed, it is arguable that the authorities in the persecuting State may be very willing to facilitate the return of the refugee so that the persecution can be renewed. Alternatively, the diplomatic representatives of the persecuting State may not wish to be embarrassed by refusing documentation and thus appearing to give credence to the applicant's claims.

8. The learned author A. Grahl-Madsen [A. Grahl-Madsen, The Status of Refugees in International Law, 1966, vol 1 p384] formulated the meaning of re-availment of protection as: "[it is] the conscious subjection under the government of that country – or, in other words, the normalization of the relationship between State and individual – which matters".

Returning to Iran

9. While return to the country of origin, particularly for an extended period of time, would normally constitute re-availment of protection, the essential elements of voluntariness, intention and actual obtaining of protection must still be made out.

10. The applicants in this case sought the permission of the Australian government before returning to Iran. They would have assumed that permission had been granted when the visa labels, permitting unrestricted travel in and out of Australia for a number of years, were placed in their Iranian passports after they had requested that permission. Rightly or wrongly, they could have expected that they continued to enjoy Australia's protection.

50 I think there is some force in the proposition that the use of the term "presumption" in para 121 of UNHCR Handbook is questionable. However, it is arguable that the Handbook is a piece of extrinsic material (though of later production) which can be used to interpret the Convention: Article 31 of the Vienna Convention on the Law of Treaties, McNair *The Law of Treaties* (1961)ch XXIV and *R v Home Secretary; Ex parte Sivakumaran* [1988] 1 AC 958 at 981 (arguendo); cf *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 379 atp392 per Mason CJ.

51 There is much to be said for what Grahl-Madsen said in *The Status of Refugees in International Law* (1966) vol 1 at p 384, that for there to be a re-availment of the protection of the country of nationality there needs to be shown the voluntary and conscious choice of subjection to the government of the relevant country. In other words, there has to be shown the normalisation of the relationship between State and individual. In such an assessment a use of presumptions is perhaps, as I have said, questionable.

52 However, it should not be forgotten that the 'protection' which is to be re-availed of is not limited to the protection brought about by physical presence within the relevant country, once again as a citizen, but includes the re-availment of consular and diplomatic protection: Grahl-Madsen "Protection of Refugees by their Country of Origin" (1986) vol 11 (2) *Yale J International Law* 362, esp pp 364 – 370, and see generally Weis "The Concept of the Refugee in International Law" (1960) *Journal du Droit International* 928; Grahl-Madsen *The Status of Refugees in International Law* (1966) Vol 1, pp 367-392, Goodwin-Gill *The Refugee in International Law* (Clarendon, 2nd ed, 1998) pp 80 – 84; Hathaway *The Law of Refugee Status* (Butterworths, 1991) ch 6; Zambelli *The Refugee Convention* (Carswell, 1999) pp 246 – 247; Cartier, Hullmann and Galiano (eds) *Who is a Refugee? A Comparative Case Law*

*Study, (*Kluever, The Hague, 1997) pp 16, 220, 433 – 36, 560 – 61; Notes on the Cessation Clauses, Executive Committee of the High Commissioner's Programme, 8th meeting 30 May 1997.

53 There has been no extensive analysis of Article 1C(1) in Australian courts, but see *A v Minister for Immigration and Multicultural Affairs* [1999] FCA 227 at paras [38]-[39] per Katz J. It is unnecessary for me to embark on any such analysis of the jurisprudence on Article 1C(1) in various jurisdictions. This is so because the application does not identify as a ground of complaint the identification of a wrong legal standard by the delegate by the application of, or decision by reference to, the UNHCR Handbook; rather, the complaint is the failure to take into account the actions of the Department in stamping the passports with the protection visas. Further, there seems to me to be a clear evidential basis for coming to the conclusion that there was, by the time entry was made into Iran, a re-availment in the sense discussed by Grahl-Madsen*, supra*.

54 As to the question of the alleged failure to take into acount relevant considerations, reliance was placed by Mr Jones on *Yusuf, supra* at paragraphs [83]-[85] in the joint reasons of McHugh, Gummow and Hayne JJ, paragraphs [36]-[44] in the reasons of Gaudron J and paragraph [7] in the reasons of Gleeson CJ.

55 Submissions further dealing with the matter were filed by Mr Jones and contained the following:

7 It is submitted that the facts surrounding the endorsement of the applicants' passports with the visas were considerations that were relevant to the decision of the delegate, for the following reasons:

a. The delegate, having regard to the views expressed in the UNHCR Handbook, took the view that Article 1C(1) came into effect when the first applicant obtained an Iranian passport on 21 July 1998 [CB 263.5]. Even if this were so, which is not conceded, the decision was discretionary and it was relevant to the exercise of the discretion that in December 1998 the Department had acted in a way that indicated to the applicants it did not consider them to have ceased to be refugees by obtaining Iranian passports. The visas were endorsed "Multiple Travel. Must not arrive after 07APR03" [CB 168 and 176]. The applicants would have believed that they had the permission of the Australian government to use those passports, so endorsed, to return to Australia at any time up to 7 April 2003.

b. It was also relevant to the decision that the Department was made aware of the applicants' desire to return to Iran to adopt a child, a matter which was of great significance to the second applicant's mental health [CB 185-188]. This information was actually or constructively before the delegate. In considering whether the applicants' return to Iran constituted an act of re-

availment of the protection of that country, the delegate should have considered whether the applicant had reason to believe they still enjoyed the protection of the Australian government, based on the implicit representations made by the government when it issued the visas in all of the circumstances.

8 In relation to each of the grounds in s 476(1)(b), (c) and (e), it is submitted as follows:

(b) The delegate exceeded her authority or powers by failing to take the relevant considerations into account. In so doing, she deprived herself of jurisdiction to make the decision.

(c) The making of a decision which does not take into account a relevant consideration is not authorised by the Act. S 476(3)(e) does not authorise the making of a decision contrary to the general law of administrative decision making. It merely directs the Federal Court not to consider such a failure under the ground of "improper exercise of power".

(e) The delegate did not correctly apply the law to the facts of the case because the law required her to consider all relevant matters and she did not do so.

56 There are a number of answers to these submissions as grounds for setting aside the decision of the delegate dealing with the first applicant.

57 First, nothing in the Act or Regulations or, through them, the Convention, mandated that the fact that the protection visa was placed in the new passport, or that the possible effect that this had or might have had on the minds of the applicants, be taken into account. *Yusuf* does not stand for the proposition that a relevant consideration has not been taken into account and the decision-maker thereby has failed to embark on or complete his or her jurisdictional task merely because some piece of evidence which the court thinks is relevant in the evidential or probative sense can be seen not to have been weighed or discussed. "Relevant" for this purpose means that the decision-maker is bound by the statute or by law to take this into account: *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 29 at 39-42.; *Telstra Corporation Ltd v Seven Cable Television Pty Ltd* (2000) 178 ALR 707, 739 [131, 132] (special leave refused 20 August 2001); see generally *Paul v Minister for Immigration and Multicultural Affairs* [2001] FCA 1196 at [79]*; Applicant R v Minister for Immigration and Multicultural Affairs* [2001] FCA 1304 at [46] to [55]; *Awan v Minister for Immigration and Multicultural Affairs* [2001] FCA 1036 at [44] to [50]; and *Ragunathan v Minister for Immigration and Multicultural Affairs* [2001] FCA 1142 at [58] to [65]. In *Yusuf* McHugh, Gummow and Hayne JJ (with whom Gleeson CJ agreed) said this at paragraph [14]:

What is important, however, is that the grounds of judicial review that fasten upon the use made of relevant and irrelevant considerations are concerned essentially with

whether the decision-maker has properly applied the law. They are not grounds that are centrally concerned with the process of making the particular findings of fact upon which the decision-maker acts.

> 58 Secondly, I have sought to show (by setting out the material placed before the delegate), that this issue cannot be said to have even been advanced by the applicants as something which should have been considered by the second delegate. Mr Jones sought to show that the first applicant, by the reference in his Tehran embassy interview to "Melbourne" (being, one assumes, the Department in Melbourne) was raising this point. I reject that. There was never any complaint put to the delegate that the Department's actions in stamping the visas somehow led to this course of action. Even if I am wrong about the effect of *Yusuf* above, it can hardly be said that a person exercising a discretion fails to take into account a relevant consideration when the parties fail to bring it squarely to his or her attention as a matter to be weighed.
>
> 59 Thirdly, I agree with the submission of Mr Leeming that there was no evidence, and certainly no satisfactory evidence, before the decision maker, of the subjective state of mind of the applicants. This is closely linked with the point made in paragraph [58] above. There was no basis upon which it could be reliably concluded that the applicants in any way acted on the basis or faith of the stamping of their passports. Further, the lack of any such evidence may, perhaps, be explained by the warning the first applicant received in a letter from the Department in April 1998 telling him of the grant of the protection visa. One paragraph of the letter read as follows:

As you have been recognised as a refugee under the 1951 United Nations Convention on Refugees, you can apply to the Department of Foreign Affairs and Trade for a Convention Travel Document if you need to travel overseas. Warning: According to Article 1C(1) of the 1951 United Nations Convention Relating to the Status of Refugees, the Convention ceases to apply if a person recognised as a refugee "has voluntarily re-availed himself of the protection of the country of his nationality". Therefore it is recommended that you do **not** use a passport or travel document issued to you by your country of nationality as this can be seen as a voluntary re-availment by you of the protection of that country. [Emphasis in the original.]

> 60 Fourthly, even if there were some vitiating error in the approach taken to the question of the applicability of Article 1C(1), the decision was equally open to be supported on the ground of re-establishment in Iran (Article 1C(4)). The recommendation dealt with this claim independently of the re-availment claim under Article 1C(1) as was plainly open. No particular complaint under s 476 is made about this aspect of the decision. The claimed error in ground 1 is not capable, it seems to me, of vitiating the matters concluded under and by reference to Article 1C(4). Here the delegate concluded, upon the material before her, that taking into account the period of two years in Iran, the applicants having returned for the reasons accepted and found, and having adopted a child through the Iranian legal system, and giving weight to what was found to be untruth or exaggeration on the part of the first

applicant, that the first applicant had re-established himself. All these findings were plainly open.

61 In these circumstances I see no basis for setting aside the decision when clearly whatever might be the difficulty with the decision on the Article 1C(1) ground (which in my view is not the case), Article 1C(4) otherwise fully supports the decision and, if there were to be found a difficulty under Article 1C(1), I would thus still affirm the decision under subs 481(1).

62 Ground 3 is without merit, in my view. First, it has what I think is the insuperable difficulty of para 476(2)(b) of the Act in its path.

63 Secondly, to the extent ground 3 seeks to say that there was a failure to deal with what might be termed jurisdictional facts, I reject it. The delegate's decision and the recommendation upon which it was based reflect a genuine application to the task at hand, which approach is not irrational or unreasonable or unsupported by probative material or logical grounds. In my view the issues raised and mandated by the Act, Regulations and Convention were attended to. There was plainly material before the delegate upon which to found the conclusion. I do not say that if any of these matters had not been present the decision would have been set aside. These matters however appear to encompass what might be said to be the basis of this kind of attack.

64 If the first applicant has a complaint it is that a conclusion was reached as a matter of fact with which he disagrees. This is not a ground of review under Part 8 of the Act.

# The Second Applicant

65 The arguments put forward on behalf of the second applicant in respect of the second ground are both stark and ingenious. I intend no criticism of Mr Jones in that regard. It is fair to say that some aspects of these arguments revealed a malleability during the course of debate. I hope that I shall do them no injustice in dealing with them as I do below.

66 It is necessary to appreciate how the delegate approached the decision as to whether to revoke the cancellation of the visa. First, the view was apparently taken that a separate decision had to be taken in respect of the second applicant. An issue arises in respect of this. Mr Leeming, on behalf of the respondent, says that if the decision in relation to the first applicant's visa is affirmed, the operation of s 140 of the Act is such that the second applicant's visa is cancelled perforce of that section, any error which might otherwise vitiate the separate decision in her case thus being rendered irrelevant. I deal with this threshold decision in a moment.

67 Secondly, the recommendation and decision in respect of the second applicant canvassed the factual background of the couple. It dealt with the migration agent's submission of 23 October 2000. It dealt with the second applicant's interview in person in Tehran. It deals with the other documents

supplied. The focus of the decision in relation to the second applicant was the position of her husband, the first applicant. Under the heading "Issues relating to the cessation of Refugee Status" the following appeared:

Mrs Ghanbarnezhad's visa was cancelled under section 128 of the Migration Act on the basis that a circumstance which permitted the grant of the visa no longer existed. This circumstance in question was being a dependent of a person to whom Australia has protection obligations, her husband. His refugee status was ceased [sic] in compliance with Article 1C of the Convention.

68 The essence of the argument put on her behalf was that having had a protection visa granted to her, albeit by reason of her being a dependent of the first applicant (she putting forward no claims for refugee status under Article 1A(2) in her own right), this visa could not be taken from her just because her husband, the first applicant, ceased to enjoy refugee status by operation of the cessation provisions of Article 1C.

69 Within the argument is the proposition that subclass 866 of Schedule 2 of the Regulations (entitled "Protection") sets out within it criteria for protection visas and also other visas which are not protection visas within the meaning of s 36 of the Act.

70 The argument, especially that contained in the written submissions dated 28 May 2001, entertained some complexity. It is sufficient to say that it appears to rest variously on the following propositions:

a) That subclause 866 contains a class of visa not hinged on the existence of protection obligations.

b) That there is no class of protection visa which is founded derivatively on the existence of protection obligations to another.

c) Once the second applicant was granted a visa under cl 866.222 because:

   i) the Minister was satisfied (that is in the simple past tense) in 1998 that the second applicant was a member of the same family unit as the first applicant who had made specific claims; and

   ii) that claimant has been granted (that is in the perfect tense) a protection visa

the only circumstance which could be said to no longer exist for the purposes of para 116(1)(a) (the granting of the protection visa to the first applicant in the past being an historical fact incapable of being seen as no longer in existence) was her status as part of the family unit. So, as long as she was still the first applicant's wife she could not have her visa cancelled, irrespective of any question of Australia continuing to owe the first applicant protection obligations.

d) Somewhat inconsistently with the above, it was said that the delegate misdirected herself in the passage referred to at paragraph [67] above because she should have said that the relevant circumstance in this case was the wife no longer being a person to whom Australia owed protection obligations.

71 I reject these submissions. Subclause 866 is plainly directed to protection visas. Regulation 2.01 deals with visas otherwise than those created by the Act. Protection visas are created by s 36 of the Act. Regulation 2.03 provides for criteria for the grant of visas for the purposes of subs 31(3), which includes visas of a class created by s 36.

72 One goes then to Schedule 2 to the Regulations for prescribed criteria for the purpose of subs 31(3). Subclause 866 is entitled "Protection". It deals with the Convention. It is plainly intended to be the place where one finds, for the purposes of ss 31, 36 and 65, the criteria to be fulfilled for protection visas and for no other kinds of visas.

73 It is also plain that cl 866.222 is not freestanding. In terms it refers to para 866.211(b). Clause 866.211 contemplates that Australia will have protection obligations to people who make specific claims under the Convention, that is, broadly, people who claim to be refugees under Article 1A(2) and *also* to people who are members of the same family unit of such claimants.

74 This second category of persons to whom Australia will owe protection obligations is reflective of the principle of family unity recognised by States in connection with the Convention: Grahl-Madsen *op cit* vol 1 pp 412 ff. The Final Act of the Conference of Plenipotentiaries and the travaux préparatoires in relation thereto make abundantly plain the concern for the family unit. The first group of recommendations of The Holy See were, slightly amended, adopted unanimously by the Conference of Plenipotentiaries:

The Conference

Considering that the unity of the family the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and

Noting with satisfaction that according to the official comments of the ad hoc Committee, [E/1618, p.40] the rights granted to the refugee are extended to the members of his family,

Recommends governments to take the necessary measures for the protection of the refugee's family, especially with a view to:

1) ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country;

2) providing special protection to refugees who are minor, in particular unaccompanied children and girls, with special reference to guardianship and adoption.

See generally Weis (ed) *The Refugee Convention, 1951* (travaux préparatoires, Cambridge University Press, 1995) p 378 – 383, and paragraphs 181 – 188 of the UNHCR Handbook.

75 The terms of subclass 866 reflect Australia's adoption of this approach.

76 Thus, it is a mistake to view the existence of protection obligations as solely founded on satisfaction of the requirement for the status of a refugee for Art 1A(2) or as somehow derivative or not primary obligations if arising under cl 866.211(b). The protection obligations owed to the second applicant are hers for the purpose of 866.221, although they are founded on the specific claims of another (her husband) to be a refugee under Art 1A(2) and upon the continuing legitimacy of those specific claims.

77 The clear purpose of para 116(1)(a) is to allow the cancellation of a visa if the relevant circumstances which permitted the grant no longer exist.

78 The circumstances which permitted the second applicant the grant of her protection visa were:

a) the membership of a family unit of someone who had made specific claims; and

b) that such claimant had at that time been granted a protection visa.

79 It is an unrealistic and overly narrow construction of cl 866.222 and para 116(1)(a) to say of that event occurring and ending (that is the grant of the protection visa to the specific claimant) that it cannot be a continuing circumstance which can no longer exist for the purposes of para 116(1)(a). The phrase "has been granted" is intended plainly to mean and contain within it the notion of holding such a visa. The protection obligations which are owed to the second applicant necessarily depend on the continuing existence of protection obligations being owed to the person who, successfully, made specific claims, as long as the second applicant is and continues to be a member of the family unit of the specific claimant. The criteria are continuing and cumulative. In so far as the submissions identify the subject matter in para 866.211(a) as being able to be continuing, but not those in 816.211(b), they are overly narrow, mechanical and contrary to the plain intention of subclause 866 when read with para 116(1)(a) of the Act.

80 To accept the complaint about the way the delegate expressed the crucial issue as set out in paragraph [67] above is to read the decision with an eye too keenly attuned to the perception of error, contrary to the injunction of the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271-72. The passage in question was only, technically, incorrect because of the lack of the words emphasised below:

This circumstance in question was her being a dependent of a person to whom Australia has protection obligations, her husband, **and thereby undermining the circumstances in which Australia owed her protection obligations** …

81 It is plainly what the delegate intended and contained no error.

82 For the above reasons I reject the attack on the decision in relation to the second applicant contained in ground 2.

83 Another basis for rejecting the attack contained in ground 2 is the resolution of the question raised by Mr Leeming, who appeared for the Minister, that the decision of the delegate about the second applicant was in fact unnecessary because a valid cancellation of the first respondent's protection visa, by force of subs 140(1), also cancelled the second respondent's visa.

84 Section 116 grants a power to the Minister to cancel a visa. Section 128 grants a power to the Minister to cancel certain visas without notice, if, amongst other things, there is a ground for cancellation under s 116. The Act contained other grants of power of cancellation of visas: ss 109, 134, 500A, 501, 501A or 501B: see s 118.

85 Section 118 made, and makes, plain, it seems to me, that the various cancellation powers are to be viewed independently of each other.

86 The first applicant's visa was cancelled under s 128. If that were not so the notice of cancellation for s 129 did not have to be given. The cancellation of the visa under s 128, necessitated the existence of a ground for cancellation unders 116.

87 Each of subss 140(1) and (2) deals with circumstances where cancellations have occurred under ss 109 and 116. Subsection 140(3) deals with cancellations under any provision of the Act (including s 128).

88 This analysis, thus far made, which tends to the conclusion that subs 140(1) is *not* directed to a cancellation under s 128, must be viewed in the light of subs 140(4). Subsection 140(4), and especially para 140(4)(b), deals with the effect of revocation of cancellation under s 131. That revocation power has relevance only to a cancellation effected without notice under s 128. Subsection 140(3) in terms is plainly wide enough to cover cancellation

under s 128. If subs 140(1) and (2) were not intended to cover cancellation under s 128 then the reference to subs 140(1) and (2) in subs 140(4) would be surplusage. However, those references are not surplusage if the reference to "under s 116" is interpreted as including "under s 128" since a precondition of the operation of s 128 is the existence of a ground under s 116.

89 Mr Jones accepted that if subss 140(1) and (2) did not include cancellation under s 128 there was a drafting error in subs 140(4) by inclusion of reference to subs 140(1) and (2).

90 While it is true that s 118 ensures, amongst other things, an independent role for subdivision F: *Cheaib v Minister for Immigration and Multicultural Affairs* (1997) 75 FCR 308, 314, in construing s 140 and giving its words sensible operation, the reference to cancellation under s 116 can be seen as satisfied by a cancellation under s 128 when, subject to an overriding consideration of appropriateness (para 128(1)(a)(ii)), cancellation under s 128 is in effect the same as cancellation under s 116 although in circumstances when the person is overseas; and, in these circumstances, a regime of notice and revocation of cancellation is set out.

91 This is made plain, I think, by regard being had to the history of s 140. In its original form as s 50G it lacked the equivalent to subs 140(3). It was in the following terms:

**Cancellation of visa results in other cancellation**

50G.(1) If a person's visa is cancelled under section 45 (incorrect information) of 50AB, a visa held by another person because of being a member of the family unit of the person (within the meaning of the regulations) is also cancelled.

(2) If:

(a) a person's visa is cancelled under section 45 (incorrect information) or 50AB and

(b) another person to whom subsection (1) does not apply holds a visa only because the person whose visa is cancelled held a visa;

the Minister may, without notice to the other person, cancel the other person's visa.

(3) If:

(a) a visa is cancelled under subsection (1) or (2) because another visa is cancelled; and

(b) the cancellation of the other visa is revoked under section 50AQ;

the cancellation under subsection (1) or (2) is revoked.

92 The reference to s 45 was to the equivalent of s 109 and the reference to s 50AB was to the equivalent of s 116. Section 50AN was the equivalent of s 128. Section 50AQ was the equivalent of s 131. If the reference to cancellation "under s 50AB" did not include a reference to cancellation under s 50AN then the whole of the subs 50G(3) had no work to do because of the reference to s 50AQ (referred to in para 50G(3)(b)), being the equivalent of s 131, which was only relevant to cancellations under s 50AN.

93 The relevant guiding principle of statutory interpretation is, I think, as stated by Mason J, as his Honour then was, (the other members of the Court, Barwick CJ and Aickin J, agreeing) in *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 141 CLR 672 at 679:

The courts will as a general rule strive "to adopt that [construction] which would give some effect to the words rather than that which would give none" (Cargo ex "Argos"; Gaudet v Brown) and will endeavour to avoid an interpretation of a statute which renders its words redundant or tautologous (East London Railway Co v Whitechurch).

and see also Gibbs CJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 304 (and Mason and Wilson JJ at 319-321).

94 Last, but far from least, the subdivisional heading to Subdivision F assists in understanding that cancellation under s 128 is a subset of cancellation "under Subdivision D", including under s116, being cancellation of visas of those outside Australia. The heading to Subdivision F (see paragraph [17] above) makes clear that it (Subdivision F) contains provisions dealing with "other procedure for cancelling visas under Subdivision D". Subdivision D contains s 116. So s128 can be seen as an independent power, but also as a mode of procedure of cancellation under s 116.

95 As to the availability of the heading for the purposes of interpretation, see subs 13(1) of the *Acts Interpretation Act 1901,* Pearce and Geddes *Statutory Interpretation in Australia* (4th ed) para [4.35], *K & S Lake City Freighters Pty Ltd v Gordon & Gotch* (1985) 157 CLR 309, *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169CLR 594 and Bennion *Statutory Interpretation* (3rd ed) section 255.

96 For these reasons, in my view, the cancellation of the first applicant's visa under s 128 put an end to the second applicant's visa by force of subs 140(1).

97 As to ground 3, to the extent that s 140 put an end to the second applicant's visa, the decision of the delegate about the second applicant's visa was of no operative effect and so attack under ground 3 can be of no avail.

98 If I am wrong about the construction of s 140, and a decision of the delegate was required, the views I expressed earlier about the first applicant's attack on the decision via ground 3 are equally applicable in so far as ground 3 is directed to the second applicant.

99 For the above reasons the applications should be dismissed with costs.

I certify that the preceding ninety nine (99) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Allsop.

Associate:

Dated: 14 September 2001

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| Solicitor for the Applicant: | Mr M Jones |
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| Solicitor for the Respondent: | Clayton Utz |
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| Date of Hearing: | 24 May, 6 June 2001 |
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| Date of Judgment: | 14 September 2001 |