FEDERAL COURT OF AUSTRALIA

MIGRATION - Application for review of decision of Refugee Review Tribunal - 1951 Convention relating to the Status of Refugees as amended by 1967 Protocol relating to the Status of Refugees - whether Tribunal erred in interpretation of “refugee” under that Convention - whether stateless applicant must be outside country of former habitual residence as a result of persecution for a Convention reason or whether statelessness alone is sufficient - interpretation of Convention - correct approach to be taken in interpretation of international treaty

Migration Act 1938 (Cth) - ss36, 476

Applicant A v Minister for Immigration and Ethnic Affairs (1997) 71 ALJR 381 *Appl*

Adan v. Secretary of State for the Home Department [1997] 1 WLR 1107 *Refd*

Desai v. Canada (Minister of Citizenship and Immigration) [1994] FCJ No 2032 *Refd*

Minister for Immigration and Ethnic Affairs v. Guo; High Court of Australia 13 June 1997 unreported *Refd*

R v Chief Immigration Officer, Gatwick Airport, ex parte Harjendar Singh [1987] Imm AR 346 *Not Foll*

Re Attorney General of Canada v Ward (1993) 103 DLR (4th) 1 *Refd*

HANNAH RISHMAWI v THE HONOURABLE PHILIP MAXWELL RUDDOCK, MP, MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

No QG 83 of 1996

Cooper J

Brisbane

15 August 1997

IN THE FEDERAL COURT OF AUSTRALIA	**)**
	)

QUEENSLAND DISTRICT REGISTRY	**)**	**QG83 of 1996**
	)	
GENERAL DIVISION	**)**	

	BETWEEN:	**HANNAH RISHMAWI** **Applicant**
	AND:	**THE HONOURABLE PHILIP MAXWELL RUDDOCK, MP, MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS** **Respondent**

JUDGE:	**COOPER J**
PLACE:	**BRISBANE**
DATED:	**15 AUGUST 1997**

MINUTES OF ORDER

THE COURT ORDERS THAT:

1. The decision of the Refugee Review Tribunal dated 9 May 1996 affirming the decision of the primary decision maker not to grant a protection visa to the applicant be set aside.

2. The matter be remitted to the Tribunal to be determined in accordance with these reasons and law.

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

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REASONS FOR JUDGMENT

Introduction

This is an application for an order of review pursuant to s 476 of the *Migration Act 1938* (Cth) ("the Act") of a decision of the Refugee Review Tribunal ("the Tribunal") affirming the decision of the primary decisionmaker not to grant to the applicant a protection visa as provided for in s 36 of the Act. A protection visa under that section was introduced on 1 September 1994 for persons seeking protection as refugees who satisfy the criteria for a grant of such a visa contained in Part 866 of Schedule 2 of the *Migration Regulations*. One of the criterion contained in Part 866 is that the applicant be a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees ("the Convention") as amended by the 1967 Protocol relating to the Status of Refugees ("the Protocol").

The Tribunal affirmed the decision of the delegate of the Minister for Immigration and Multicultural Affairs on the ground that although the applicant was a stateless person, she was not a refugee to whom Australia has protection obligations.

The Grounds Relied Upon

The grounds relied upon by the applicant are :-

> "(a) the Tribunal erred in construing the definition of 'refugee' in the 1951 Convention as amended by the 1967 Protocol as made applicable for the purposes of the Act by clause 866.111 of Schedule 2 of the Regulations such that all applicants claiming that status had to have a well founded fear of persecution;
>
> (b) if not, the Tribunal erred in concluding that the Tribunal's (sic) acknowledged fear could not be well founded because she was unable to return to her former country of habitual residence;
>
> (c) having regard to its findings of fact that, at the time when it made its decision :-
>
> (i) the Applicant was stateless and without nationality;
>
> (ii) her country of former habitual residence was Israel;
>
> (iii) she was unable to return to Israel (to re-enter the West Bank);
>
> the Tribunal was obliged in law to hold that the Applicant was a refugee as so defined and, hence, a person to whom Australia had protection obligations."

Ground 1

The definition of the term “refugee” is contained in Article 1 of the Convention as amended by the Protocol. Although the term must be interpreted by reference to the article as a whole, it is paragraph (2) of Section A of Article 1 with which this application is concerned. That paragraph itself is to be construed as a whole adopting an holistic but ordered approach having regard to the ordinary meaning of the text and the context, object and purpose of the Convention as an international treaty (*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 71 ALJR 381 at 382 - 383; 394 - 397, 408 - 410).

Article 31 of the Vienna Convention on the Law of Treaties (“the Vienna Convention”) dealing with the interpretation of treaties requires as its starting point the text of the treaty. Although primacy be given to the text, the requirement that the terms of the treaty be construed in their context, and in the light of the object and purpose of the treaty precludes the adoption of a literal construction which would defeat the object or purpose or be inconsistent with the context in which they appear (*Applicant A* at 383, 388, 396 - 397, 409 - 410, 419).

Article 1 of the Convention as amended by the Protocol, so far as is presently relevant, states :-

“A. For the purposes of the present Convention, the term ‘refugee’ shall apply to a 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."

The applicant submits that the definition of a refugee who is stateless is fully contained in the provisions appearing after the semi colon following the word "country". The applicant submits that the words appearing before the semi colon are a separate and distinct definition of a refugee who has a nationality. So construed, the applicant submits that the relevant definition to be applied to her situation as a stateless person, is :-

" ... the term 'refugee' shall apply to any person who:

> not having a nationality and being outside the country of his former habitual residence is unable or, owing to such [well-founded] fear [of being persecuted for a Convention reason] is unwilling to return to it."

The applicant further submits that the presence outside the country of former habitual residence as a result of persecution for a Convention reason is not a requirement where the claimant is stateless. This is because the requirement of causative persecution for a Convention reason only appears in the definition of a refugee who is a person with a nationality and not in the definition applicable to a stateless person.

Finally, the applicant submits that the phrase "owing to such fear" only qualifies an unwillingness to return to the country of former habitual residence, and that inability to return need only be established as an objective fact irrespective of the reason for such inability.

The respondent submits that properly construed the definition of a refugee who is also a stateless person requires that the claimant be out of the country of his or her former habitual residence for a Convention reason and also be unable to return to it for such a reason.

If the construction contended for by the applicant is correct, then applying the words literally a person who is stateless and outside his or her country of former habitual residence and who is unable for whatever reason to return to it is, by the definition, a refugee. This would be so notwithstanding that the presence outside the country of former habitual residence was not caused by a well founded fear on the part of the claimant of persecution for a Convention reason in that country and the inability to return to that country is not caused by such a fear.

The construction for which the applicant contends has been applied by the Tribunal in decision N94/05035 given on 16 November 1994. It gains some support from *Halsbury's Laws of England 4th Edition* (1992) where the statement is made that "a stateless person who is unable to return to the country of his former habitual residence falls within the definition of a refugee: *R v Chief Immigration Officer, Gatwick Airport, ex parte Harjendar Singh* [1987] Imm AR 346; *Convention and Protocol Relating to the Status of Refugees* **..."** (Vol 4 (2) para 66 n5). Additionally, the English Court of Appeal in an observation which is obiter dicta construed the definition of a refugee under Article 1A(2) where the claimant is a stateless person as occurring after the semi colon and being self contained (*Adan v. Secretary of State for the Home Department* [1997] 1 WLR 1107 at 1115, 1117 per Simon Brown LJ with whom Hutchinson LJ agreed at 1132).

The respondent in support of its construction relied upon the Handbook on Procedures and Criteria for Determining Refugee Status issued by the Office of the United Nations High Commissioner for Refugees in 1988 ("the Handbook"). The Handbook breaks the definition into a number of phrases and provides commentary in respect of each phrase. As to the phrase "or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable, or owing to such fear, is unwilling to return to it" the Handbook says (at p 23 - 24) :-

"101. This phrase, which relates to stateless refugees, is parallel to the preceding phrase, which concerns refugees who have a nationality. In the case of stateless refugees, the 'country of nationality' is replaced by 'the country of his former habitual residence', and the expression 'unwilling to avail himself of the protection ...' is replaced by the words 'unwilling to return to it'. In the case of a stateless refugee, the question of 'availment of protection' of the country of his former habitual residence does not, of course, arise. Moreover, once a stateless person has abandoned the country of his former habitual residence for the reasons indicated in the definition, he is usually unable to return.

102. It will be noted that not all stateless persons are refugees. They must be outside the country of their former habitual residence for the reasons indicated in the definition. Where these reasons do not exist, the stateless person is not a refugee.

103. Such reasons must be examined in relation to the country of 'former habitual residence' in regard to which fear is alleged. This was defined by the drafters of the 1951 Convention as 'the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned'."

The citation referred to in paragraph 103 of the Handbook is to the first report of the Ad Hoc Committee on Statelessness and Related Problems dated 17 February 1950

(UNDoc E/1618). (The Collected Travaux Préparatoires of the 1951 Geneva Convention relating to the Status of Refugees ("Travaux") Vol I p 405).

The definition of "former habitual residence" appears in the comments of the Ad Hoc Committee on the draft of Article 1, the proposed definition of refugee, and was the working definition underlying the draft Article 1 (Travaux Vol I p 415). It was not carried into the body of the Convention in that form. However it underlay the future use of the term in the documents leading to the Convention and is evident in Article 1C(4) of the Convention.

Recourse to the Travaux and the Handbook is permitted as part of the context (Article 31(2)) and subsequent international practice (Article 31(3)(b)) which Article 31 of the Vienna Convention requires to be taken into account. The Ad Hoc Committee said in its report (Travaux p 407) :-

"15. In view of the urgency of the refugee problem and the responsibility of the United Nations in this field, the Committee decided to address itself first to the problem of refugees, whether stateless or not, and to leave to later stages of its deliberations the problems of stateless persons who are not refugees.

...

17. The Committee prepared a draft Convention relating to the status of refugees (annex I); observations and comments relating thereto (annex II); a draft protocol relating to the status of stateless persons (annex III); and observations thereon (annex IV).

18. Having discharged these responsibilities, the Committee turned to the problem of the elimination of statelessness. After careful examination, it reached the decision that it was not practicable at this stage for it to examine this complex problem in great detail or to draft a convention on the subject. It prepared a draft resolution on this subject, however, for the consideration of the Economic and Social Council (see chapter IV, paragraph 26)."

Article 1 of the draft Convention provided (Travaux p 408) :-

"A. For the purposes of this Convention, the term 'refugee' shall apply to:

1. Any person who:

(a) As a result of events in Europe after 3 September 1939 and before 1 January 1951 has well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion; and

(b) Has left or, owing to such fear, is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence; and

(c) Is unable or, owing to such fear, unwilling to avail himself of the protection of the country of his nationality."

In Annexure II to the report (Travaux p 415) the Ad Hoc Committee said :-

"'Former habitual residence' (A-1(b)) of a refugee, for the purpose of this convention, means the country in which he had resided and where he had suffered or fears he would suffer persecution if he returned.

Sub-paragraph A-1(c).

The Committee agreed that for the purposes of this sub-paragraph and sub-paragraph A-2(c) and therefore for the draft convention as a whole, 'unable' refers primarily to stateless refugees, but includes also refugees possessing a nationality who are refused passports or other protection by their own government. 'Unwilling' refers to refugees who refuse to accept the protection of the government of their nationality."

The Ad Hoc Committee prepared in August 1950 a second report (UNDoc E/1850) after the receipt of comments on the first draft. The second report contained a new draft of the definition of refugee. So far as is relevant for present purposes the draft stated (Travaux Vol II p 209):-

“A. For the purposes of this Convention, the term ‘refugee’ shall apply to any person :-

...

(3) who has had, or has, well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion, as a result of events in Europe before 1 January 1951, or circumstances directly resulting from such events, and owing to such fear, has had to leave, shall leave, or remains outside the country of his nationality, before or after 1 January 1951, and is unable, or owing to such fear or for reasons other than personal convenience unwilling, to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, has left, shall leave, or remains outside the country of his former habitual residence.”

On 19 December 1950, the General Assembly of the United Nations at its Fifth Session by resolution 429 on the “Draft Convention Relating to the Status of Refugees” adopted the following definition of refugee (Travaux Vol 2 p242):-

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

...

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable, or owing to such fear or for reasons other than personal convenience 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 or for reasons other than personal convenience, is unwilling to return to it;”

The General Assembly also resolved to convene a conference of plenipotentiaries to complete the drafting and to agree a Convention.

The conference of plenipotentiaries met in Geneva 2 - 25 June 1951 and adopted Article 1, so far as is relevant, in the following form :-

"(2) As a result of events occurring before 1 January 1951 and 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it. ..."

In his commentary to the Convention published in New York in 1953, Nehemiah

Robinson said (at p 44 - p 45) :-

"The conditions prescribed in par A(2) are fourfold:

(a) If the person claiming the status of a refugee has a nationality, he must be outside the country of his nationality; if he has no nationality, he must be outside the country of his habitual residence.

(b) If the person in question has a nationality, he must be outside the country of his nationality owing to well-founded fear of being persecuted for specific reasons, viz, of race, religion, nationality, membership of a particular social group, or of political opinion. Although par A(2) does not say so explicitly, it is obvious that a person without nationality must be outside the country of his habitual residence for the same reasons (footnote 20) because otherwise he could not be unable to return thereto.

(c) If the person in question has a nationality, he must be unable or, because of fear of persecution, unwilling to avail himself of the protection of his government. If the person is stateless, he must be unable or, because of the same fear, unwilling to return to the country of his former habitual residence.

(d) The fear of persecution in both cases must be based on events which occurred before January 1, 1951."

In footnote 20 he makes the following observation :-

"20 See Art. 1, par. A(3) of the draft as adopted by the Ad Hoc Committee, Second Session, which reads as follows :

'who has had ... habitual residence.'

> The General Assembly improved on the text but there is no reason to assume that it intended to do more than improve the language.
>
> The British representative was of the wrong opinion that the subpar 2, as drafted by the General Assembly, provided for two different types of conditions, viz, one referring to persons with a nationality and the other to stateless persons: in his view, under a literal interpretation of this subpar, the requirements that the events took place before Jan 1, 1951, and that the departure from his home country happened for fear of persecution did not apply to stateless persons (SR 23, p8)."

On 31 January 1967 the Protocol was adopted. The preamble to the Protocol states

:-

"The State Parties to the present Protocol,

Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,

Have agreed as follows :"

Article 1 of the Protocol, which is the relevant Article for present purposes provided :-

"1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

2. For the purposes of the present Protocol, the term 'refugee' shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words 'As a result of events occurring before 1 January 1951 and ...' and the words '... as a result of such events', in Article 1A(2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1B(1)(a) of the Convention, shall, unless extended under article 1B(2) thereof, apply also under the present Protocol."

It is clear from the documents in the Travaux that the Convention was not intended to deal with stateless persons who were not also refugees. Further it is apparent that the object of the Convention was to treat uniformly persons seeking refugee status, so far as was possible, whether or not those persons had a nationality. This equality of treatment is seen in the equation of country of nationality with country of former habitual residence and in the inability or unwillingness to obtain the protection of the country of nationality with the inability or unwillingness to return to the country of former habitual residence. And finally, the object of the draft Convention was to provide sanctuary to persons who had a well founded fear of persecution for a Convention reason and not for any other reason.

If Robinson is correct, and there seems no reason to doubt his statement, that the change in the text of the draft Article 1 of the Ad Hoc Committee by the General Assembly was textual or stylistic and not substantive, then the reason for the absence of the stateless person from his or her country of former habitual residence was intended to be an element of the definition of a refugee. That reason in respect of both a person having a nationality and a stateless person was persecution or fear of persecution of the type stated in the definition. In the case of a stateless person it was caught up in the working definition of "former habitual residence" used by the Ad Hoc Committee in its first report and draft convention; that working definition underlies the meaning of "former habitual residence" in each subsequent draft.

The Protocol in 1967 was not intended to change the substance of what constituted refugee status. Rather, as the preamble states, the object was to provide for equal status to persons who satisfy the definition of refugee irrespective of whether the events which have caused those persons to become refugees occurred before or after 1 January 1951.

A literal interpretation of Article 1A(2) of the Convention in its original form, or as amended by the Protocol, would mean that a stateless person outside his or her country of former habitual residence for a reason other than a Convention reason and unable to return to it for whatever reason other than a Convention reason would by definition be a refugee. Such a result would be unintended on the part of the framers of the Convention and inconsistent with the object of dealing only with persons who have been or who are being persecuted for a Convention reason or who have a well founded fear of such persecution. It would also treat stateless persons in a substantially more favourable way in respect of obtaining refugee status than persons with a nationality and thus would be inconsistent with the object of equality of treatment to all who claim refugee status.

The approach to the interpretation of Article 1A(2) contended for by the applicant is wrong in principle. It ignores the totality of the words which define a refugee (*Applicant A* at 397). It is in breach of the requirements of Article 31 of the Vienna Convention because it divorces the interpretation of the words from the context, object and purpose of the treaty. And, it also seeks to give the Convention a scope of operation beyond its object and purpose.

The object of the Convention and its scope are limited and it does not provide universal protection for asylum seekers (*Applicant A* at 392, 397, 413). The Convention is limited to persons fleeing or who have fled or remain away because of one or more of the five Convention reasons. In the context of the limitations on the operation of the Convention as they affect the definition of "refugee", Gummow J said in *Applicant A* (at 413) :-

"Moreover, par (2) of section A contains two cumulative conditions which must be satisfied for classification thereunder as a refugee. The first condition contains several elements and the second contains alternatives, one of which refers back to the first condition.

The first condition is that a person be outside the country of nationality by reason of (owing to) a fear of persecution which is well founded both in an objective and subjective sense (Chan v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379. This means that persons who are outside the country of nationality by reason of such causes as natural disasters, war and economic misfortune cannot answer the requirements of par (2).

The second condition is satisfied if a person who meets the first condition is unable to avail himself or herself of the protection of the country of nationality. This meets the case of those who are stateless or otherwise denied the protection of that country and they may be compared with those considered refugees under the treaties specified in par (1) of section A. Alternatively, a person who meets the requirements of the first condition will answer the second condition if, for a particular reason, that person is unwilling to avail himself or herself of the protection of the country of nationality. That reason is the well-founded fear of persecution identified in the first condition.

Thus, the notion of persecution is a necessary component of the first condition and also of one of the alternatives comprising the second condition."

(See to like effect Dawson J at 392 - 393 and McHugh J at 398 - 399).

The decision of the court in *Applicant A* requires a construction of the definition of "refugee" which utilises the totality of the words in Article 1A and one undertaken in conformity with the requirements of Article 31 of the Vienna Convention. So

construed, the words in paragraph (2) appearing after the semi colon do not form a separate and self-contained definition of when a stateless person becomes a refugee. Thus a refugee is :-

(a) any person who owing to a Convention reason is outside the country of his or her nationality or in the case of a stateless person is outside the country of his or her former habitual residence, and

(b) in respect of a person having a nationality is unable or owing to a well founded fear of persecution for a Convention reason is unwilling to avail himself or herself of the protection of the country of nationality, or

(c) in respect of a stateless person is unable or owing to such fear is unwilling to return to the country of his or her former habitual residence.

Such a construction of the definition is supported by the terms of Article 1C(4) of the Convention. Section C provides :-

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

...

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

Paragraph (4) unlike the other paragraphs in Section C draws no distinction between persons who have or who have not a country of nationality. The paragraph addresses cessation of the circumstances which constitute the first of the two cumulative conditions discussed by Gummow J in the quotation from *Applicant A* (at

413), that is, being outside a country for a Convention reason. The “country which he left or outside which he remained owing to fear of persecution” in terms is not limited to country of nationality and reflects the working definition of country of former habitual residence adopted by the Ad Hoc Committee in its first report (UNDoc E/1618; Travaux Vol I p 415). It also is used in contradistinction to “country of his nationality” in paragraphs (1) and (5) and “country of his former habitual residence” in paragraph (6).

Does the first of the two cumulative conditions require that the reason a person is outside his or her country of nationality or former habitual residence is a present, as opposed to a past, well founded fear of persecution for a Convention reason? The respondent submits that a present fear is required and that a past fear, although originally causative of the leaving or remaining outside the country, is not sufficient. The respondent submits that a present fear is necessary because a principal object of the Convention is to protect a refugee from refoulement which, as appears from the terms of Article 33, is concerned with a present threat to life or freedom on account of a Convention reason. Substantially the same argument was put in *Adan v. Secretary of State for the Home Department*. It was rejected by Simon Brown LJ in the following way (at 1116) :-

“It is Mr. Pannick’s submission that article 33 expressly only benefits those who are at present risk of danger on return, that ex hypothesi it does not apply in the circumstances here postulated (i.e. no present fear but an inability to return - or at any rate return safely because of generalised danger), that accordingly the U.K. could properly return home for example these two Somali applicants, and that its very non-application exposes the falsity of Mr. Blake’s argument as to the width of article 1A(2). I unhesitatingly reject this submission. It examines the problem from the wrong end. In my judgment it is article 1 (and for present purposes 1A(2)) which must govern the scope of article 33 rather than the other way round. That approach is to my mind supported, rather than, as Mr. Pannick submitted, contradicted, by the

speeches in Reg. V. Secretary of State for the Home Department; Ex parte Sivakumaran [1988] A.C. 958, a case concerned with whether the well founded fear has to be subjectively or objectively assessed. As Lord Goff of Chieveley said, at p.1001: 'the non-refoulement provision in article 33 was intended to apply to all persons determined to be refugees under article 1 of the Convention.' By the same token, therefore, as article 33 precludes refoulement even of those who face persecution short of threats to 'life or freedom' provided only that it involves serious harm (a position now, we are given to understand, recognised by the Secretary of State despite the provisions of rule 180B(c) in Statement of Changes in Immigration Rules (1993) (H.C. 725) and the suggestions to the contrary in Sandralingam v. Secretary of State for the Home Department, Rajendrakumar v. Secretary of State for the Home Department [1996] Imm.A.R. 97), so too does it forbid returning home anyone who qualifies under article 1A(2) properly construed - or for that matter anyone who may qualify on different grounds under article 1A(1) or the second limb of article 1D."

Hutchinson LJ (at 1132) and Thorpe LJ (at 1133) both agreed with the rejection of the argument for the reasons given by Simon Brown LJ.

I also agree that Article 33 provides no support for the construction contended for by the respondent.

The first of the two part cumulative test is only concerned to limit claimants for refugee status to persons who are outside the country of his or her nationality or former habitual residence for a Convention reason. The second part of the test deals with the present circumstances of the claimant in relation to his or her country of nationality or former habitual residence. If the first test was solely concerned with absence because of a present well founded fear the second test would be otiose. Therefore in my view a past fear as the reason for being outside the former country of nationality or former habitual residence is sufficient. This is the view arrived at by the majority (Simon Brown and Hutchinson LLJ) in *Adan v. Secretary of State* for the same reason.

Does the second part of the test require a present well founded fear in both alternatives? The respondent submits that it does and that “unable” means unable because of a presently held well founded fear of persecution for a Convention reason.

In the context of Article 1A(2) a present well founded fear of persecution for a Convention reason more naturally relates to an unwillingness to return or claim protection which is the alternative second test than to an inability to return or to claim protection. Inability to act is more properly a question of objective fact which operates to deny such a course of action to the claimant. It is to be contrasted with a decision on the part of the claimant not to avail himself or herself of the same course of action. The first report of the Ad Hoc Committee supports a construction which does not limit the word “unable” to an inability because of a presently held fear of persecution for a Convention reason. I agree with Gummow J in *Applicant A* (at 413) that :-

“...the notion of persecution is a necessary component of the first condition and also of one of the alternatives comprising the second condition.”

The condition to which Gummow J refers relates to unwillingness not inability.

The same approach to the meaning of unable in the definition was taken by the Supreme Court of Canada in *Re Attorney General of Canada v Ward* (1993) 103 DLR (4th) 1 at 17-20.

The applicant has failed to make out the first ground of her application.

Ground 2

The Tribunal in finding that the applicant could not have a well founded fear of persecution because she had no right to return to the West Bank or to Israel relied on a proposition of Professor Hathaway that a claimant does not have a country of former habitual residence unless he or she has a legal right to that country. Absent a country of former habitual residence a stateless person cannot satisfy the second limb of the definition in Article 1A(2) on either alternate bases (Hathaway, *The Law of Refugee Status*, (1991) Butterworths at 60-62, esp at 62). The test put forward by Professor Hathaway has been rejected by Professor Goodwin-Gill (Goodwin-Gill, *The Refugee in International Law*, 2ed (1996) Clarendon) and by the Federal Court of Canada (*Desai v. Canada (Minister of Citizenship and Immigration*) [1994] FCJ No 2032 at paras 12-15 and the cases cited there).

The parties on this application are agreed that the Tribunal erred in adopting the Hathaway test and for this reason alone, the matter should be remitted to be determined according to law.

Ground 3

This ground is predicated upon the construction of Article 1A(2) contended for by the applicant being accepted as correct. Absent a finding that the applicant was outside the country of her former habitual residence for a Convention reason, the findings of fact, if made, would not have obliged the Tribunal to find that the applicant was a refugee within Article 1A(2) of the Convention. No question of declaratory relief as

claimed in paragraph (b) of the application therefore arises even if declaratory relief is either available or appropriate in cases such as the present (as to which see *Minister for Immigration and Ethnic Affairs v. Guo*; High Court of Australia 13 June 1997 unreported at 21-33; 46-49).

The applicant therefore fails on the third ground of her application.

Conclusion

The applicant has succeeded on the second ground of her application. She is therefore entitled to have the decision of the Tribunal set aside and the matter remitted to the Tribunal to be determined according to law.

Costs

The applicant has failed on the substantial issue argued on the application. The ground upon which she succeeded was conceded from an early time by the respondent.

The principal issue upon which the applicant failed has not previously been determined in Australia; it is an issue which is both important and complex. Counsel for the applicant submitted that it was in the public interest that the issue be determined and for that reason no order for costs ought to be made against the applicant if she failed on it. Counsel for the respondent offered no submission in opposition to such a course.

In these circumstances I consider that the just result is that no order as to costs be made by the Court.

Orders

The Court orders that :-

1. The decision of the Refugee Review Tribunal dated 9 May 1996 affirming the decision of the primary decision maker not to grant a protection visa to the applicant be set aside.

2. The matter be remitted to the Tribunal to be determined in accordance with these reasons and law.

I certify that this and the preceding nineteen (19) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Cooper

Associate:

Dated: 14 August 1997

Counsel for the Applicant:	J A Logan
Solicitor for the Applicant:	Walsh Halligan Douglas
Counsel for the Respondent:	C E Holmes

Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing:	15 November 1996