# FEDERAL COURT OF AUSTRALIA

Minister for Immigration & Multicultural Affairs v Savvin [2000] FCA 478

**MIGRATION** – protection visa – stateless person – whether definition of "refugee" requires that stateless person be outside country of former habitual residence owing to well-founded fear of persecution for Convention reason – whether 1967 Refugees Protocol amends 1951 Refugees Convention – use of Refugee Handbook in construing Convention and Protocol – applicability to Refugees Convention and Protocol of Vienna Convention on the Law of Treaties – use of implementing legislation of party to Convention or Protocol to construe Convention or Protocol – whether Art 1A(2) of Convention to be construed in light of Arts 1A(1) or 33(1) of Convention

*Migration Act 1958* (Cth), s 36

*Immigration Act*, RSC 1985, c I-2, s 2(1)

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

*Rishmawi v Minister for Immigration and Multicultural Affairs* (1997) 77 FCR 421, discussed

*Joyce v Director of Public Prosecutions* [1946] AC 347, referred to

*Ex parte Lo Pak* (1888) 9 NSWLR 221, referred to

*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, cited

*Adan v Secretary of State for the Home Department* [1999] 1 AC 293, cited

*R v Chief Immigration Officer[,] Gatwick Airport[;] ex parte Harjendar Singh* [1987] Imm AR 346, discussed

*President &c of the Shire of Charlton v Ruse* (1912) 14 CLR 220, discussed

*Peter Pázmány University v Czechoslovakia* (1933) Series A/B, No 61, p 208, discussed

*Re Collins; Ex parte Hockings* (1989) 167 CLR 522, cited

*Hanlon v The Law Society* [1981] AC 124, cited

*Chew v The Queen* (1992) 173 CLR 626, cited

*Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323, cited

*Victrawl Pty Ltd v Telstra Corporation Ltd* (1995) 183 CLR 595, cited

*Haris v Minister for Immigration and Multicultural Affairs* (FCA: Moore J, unreported, 12 February 1998), discussed

*Al-Anezi v Minister for Immigration and Multicultural Affairs* [1999] FCA 355 (Lehane J, unreported, 1 April 1999); [1999] FCA 556 (Lehane J, unreported, 5 May 1999), discussed

*Diatlov v Minister for Immigration and Multicultural Affairs* (1999) 167 ALR 313, discussed

*Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, cited

*Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100, followed

*Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 401, followed

*Rocklea Spinning Mills Pty Limited v Anti-Dumping Authority* (1995) 56 FCR 406, followed

James Hathaway, *The Law of Refugee Status*, Butterworths 1991

Frances Nicholson & Patrick Twomey ed, *Refugee Rights and Realities*, Cambridge University Press 1999

Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, 1992

Canadian Council for Refugees, *Statelessness - Addressing the Issues*, November 1996

1951 Convention Relating to the Status of Refugees

1954 Convention Relating to the Status of Stateless Persons

1969 Vienna Convention on the Law of Treaties

1967 Protocl Relating to the Status of Refugees

**THE HONOURABLE PHILLIP RUDDOCK, MP, MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS v VIATCHESLAV SAVVIN, LIOUBOV SAVVINA, JANNA SAVVINA AND OLGA SAVVINA BY HER NEXT FRIEND VIATCHESLAV SAVVIN**

**Q 238 OF 1999**

**SPENDER, DRUMMOND AND KATZ JJ**

**12 APRIL 2000**

**BRISBANE**

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| IN THE FEDERAL COURT OF AUSTRALIA | |
| QUEENSLAND DISTRICT REGISTRY | Q 238 OF 1999 |

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

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| BETWEEN: | THE HONOURABLE PHILLIP RUDDOCK, MP, MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS<br><br>APPELLANT |
| AND: | VIATCHESLAV SAVVIN<br><br>FIRST RESPONDENT<br><br>LIOUBOV SAVVINA<br><br>SECOND RESPONDENT |

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| | JANNA SAVVINA<br><br>THIRD RESPONDENT<br><br><br>OLGA SAVVINA by her next friend VIATCHESLAV SAVVIN<br><br>FOURTH RESPONDENT |

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| JUDGES: | SPENDER, DRUMMOND AND KATZ JJ |
| DATE OF ORDER: | 12 APRIL 2000 |
| WHERE MADE: | BRISBANE |

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders of the primary Judge be set aside; in place of those orders, it be ordered that the application for review be dismissed with costs.

3. The respondents pay the costs of the present appeal.

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

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| IN THE FEDERAL COURT OF AUSTRALIA | |
| QUEENSLAND DISTRICT REGISTRY | Q 238 OF 1999 |

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| JUDGES: | SPENDER, DRUMMOND AND KATZ JJ |
| DATE: | 12 APRIL 2000 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

**SPENDER J**:

1 This appeal raises the question of whether a stateless person presently unable to return to that person's country of former habitual residence is entitled to the status of refugee, or whether there is an additional requirement that the person have a well-founded fear of being persecuted for

reasons of race, religion, nationality, membership of a political social group or political opinion. That question depends on the proper construction of Article 1A(2) of the Convention relating to the status of refugees done at Geneva on 28 July 1951.

2 I have had the benefit of reading the reasons for judgment in draft form of Katz J. I agree with the orders his Honour proposes. Since I am disagreeing with the view of the learned primary Judge I want shortly to state my own reasons.

3 Article 1A(2) of the Convention is not happily expressed, as the cases referred to by Katz J make plain. The treaty was the result of compromise and diplomatic tradeoffs, and it is not surprising that the treaty as finally formulated lacks the precision of, say, domestic legislation. If a camel is a horse designed by a committee, it is unremarkable, given the development of the treaty, that there should be serious problems of interpretation as to its intended operation.

4 Simon Brown LJ in *Adan v Secretary of State for the Home Department* [1997] 1 WLR 1107 said at 1117:

"So far as the stateless are concerned,…the latter part of article 1A(2)…construed literally, requires of those presently unable to return home nothing more…."

5 The view of the learned primary Judge in the present case is in accordance with that literal construction.

6 Clearly, Article 1 concerns two categories of persons: those outside that person's country of nationality, and those who did not have a nationality and are outside the country of former habitual residence.

7 If inability to return is sufficient for a stateless person (i.e. a fear of persecution is not necessary) the words "*such fear*" are inappropriately included after the semicolon. The presence of that phrase indicates to me that the fear of being persecuted for a Convention reason is the talisman of the definition, and applies to both categories of persons to whom the definition is directed. This accords with the definition of "refugee" proposed in the draft Refugee Convention annexed to the report of the first Ad Hoc Committee on statelessness and Related Problems, dated 17 February 1950 which is set out in the reasons for judgment of Drummond J.

8 I respectfully agree with the reasoning of Cooper J in *Rishmawi v Minister for Immigration and Multicultural Affairs* [1997] 77 FCR 421, and in particular with his conclusion that Article 1A(2) is not be construed literally but in accordance with the object and purpose of the Convention as disclosed by the preparatory work for the 1951 version of it and with the context in which Article 1A(2) appears. The conclusion is that Article 1A(2) is to be construed as including the requirement that a stateless person, being outside the country of his former habitual residence, have a well-founded fear of being persecuted for a Convention reason.

9 As earlier indicated, I agree with the orders proposed by Katz J.

I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Spender.

Associate:

Dated: 12 April 2000

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| IN THE FEDERAL COURT OF AUSTRALIA | |
| QUEENSLAND DISTRICT REGISTRY | Q 238 OF 1999 |

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

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| | OLGA SAVVINA by her next friend VIATCHESLAV SAVVIN |
| | FOURTH RESPONDENT |

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| JUDGES: | SPENDER, DRUMMOND AND KATZ JJ |
| DATE: | 12 APRIL 2000 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

**DRUMMOND J**:

10 I have had the advantage of reading in draft the reasons of Katz J. I agree with the orders his Honour proposes and, subject to what follows, with his reasons.

11 There is, in my opinion, much to commend the conclusion reached by the learned primary judge. "(R)efugee law is designed to interpose the protection of the international community only in situations where there is no reasonable expectation that adequate national protection of core human rights will be forthcoming." James Hathaway, *The Law of Refugee Status*, Butterworths 1991, at p 124.

12 A person is entitled to call on the state of his nationality for protection. Only if he has good reason for not being held to his national state as his protector should he be entitled to claim the protection of another state, that has agreed to be bound by the 1951 Convention Relating to the Status of Refugees ("the Refugees Convention"), by being recognised as a refugee by that other state. Article 1A(2) of the Refugee Convention accepts that good reason to claim refugee status exists in the case of a national if he is outside his national state owing to well-founded fear of persecution and is either unable to avail himself of the protection of his nation state or unwilling, owing to such fear, to do that. A stateless person, however, has no state to which he can look for protection (though the general rule of international law, reflected in domestic laws, is that an alien resident in a country is entitled while so resident, to the protection of that country's laws: see Art 2 of the Refugees Convention and Art 2 of the Convention Relating to the Status of Stateless Persons and *Joyce v Director of Public Prosecutions* [1946] AC 347 at 374; *Ex parte Lo Pak* (1888) 9 NSWLR 221 at 236, 245). If a stateless person is outside his country of habitual residence and is unwilling, due to fear of persecution, to return to that country, then there is good reason for according

him refugee status. And, if a stateless person is outside his country of habitual residence and is unable, ie, unable for reasons extraneous to himself, to return to that country, he, too, might be thought by reason of his unprotected status to have a good claim to be a refugee though he has not faced and will not face persecution there. Moreover, Art 1A(1) shows that the Convention does treat as refugees certain stateless persons not subject to Convention persecution.

13 Katz J gives convincing reasons for concluding that the Protocol Relating to the Status of Refugees 1967 did not amend the 1951 Refugee Convention: each, as originally formulated, remains incorporated in Australian municipal law. The full text of the definition of "refugee" in the 1951 Refugee Convention is set out in par 118 of Katz J's reasons.

14 The various members of the High Court in *Applicant A v Minister for Immigration & Ethnic Affairs* (1997) 190 CLR 225 discussed the proper application of the 1969 Vienna Convention on the Law of Treaties ("the Vienna Convention") to the task of interpreting treaties, including treaty provisions transposed into domestic law. For the reasons given by Katz J, the Vienna Convention is not directly available as a guide to the interpretation of the 1951 Refugee Convention. But as his Honour also demonstrates, the principles of interpretation in the Vienna Convention are but a re-statement of the rules of customary public international law for the interpretation of treaties.

15 In my respectful opinion, Gummow J accurately summarised these rules of interpretation, as re-stated in Art 31, "General Rule of Interpretation" and Art 32 "Supplementary Means of Interpretation" of the Vienna Convention, when he said in *Applicant A* at 277:

"It is necessary to begin with the construction of the definition as it appears in the Convention and Protocol. Regard primarily is to be had to the ordinary meaning of the terms used therein, albeit in their context and in the light of the object and purpose of the Convention. Recourse may also be had to the preparatory work for the treaty and the circumstances of its conclusion, whether to confirm the meaning derived by the above means or to determine a meaning so as to avoid obscurity, ambiguity or manifestly absurd or unreasonable results."

16 In *Refugee Rights and Realities*, edited by Frances Nicholson & Patrick Twomey, Cambridge University Press 1999, it is said at p 19:

"For a number of reasons, interpretation of the refugee definition [in the 1951 Convention] needs to look to the Convention and Protocol's object and purpose. One is that the text cannot otherwise be fully understood, as the Vienna Convention recognises and as case law illustrates. Secondly, an exclusively textual interpretation may undermine the important normative concerns embodied in the refugee definition. Thirdly, the Convention refugee definition is both a product and a part of the history of the twentieth century, and an excessively literal textual approach runs the risk of ignoring that history."

17 I think it important in order to arrive at a correct understanding of Article 1A(2) of the 1951 Refugee Convention to identify what is referred to by the opening words: “As a result of events occurring before 1 January 1951 and …”. This, in terms, is not a simple limitation provision whose sole operation before the 1967 Protocol was to bar claims to refugee status under the Refugee Convention which arose by reason of events occurring after 1 January 1951. It did operate as such a bar but is also an expression identifying the historical events that resulted in the class of person within the definition of “refugee” in Art 1A(2) coming into existence.

18 The Handbook on Procedures and Criteria for Determining Refugee Status issued by the United Nations High Commissioner for Refugees is a helpful guide to the interpretation of the 1951 Refugee Convention, as Katz J demonstrates. The commentary in the Handbook in par 36 on the phrase “events occurring before 1 January 1951” in Art 1A(2) is as follows:

> “The word ‘events’ is not defined in the 1951 Convention, but was understood to mean ‘happenings of major importance involving territorial or profound political changes as well as systematic programmes of persecution which are after-effects of earlier changes’. (6) The dateline refers to ‘events’ as a result of which, and not to the date on which, a person becomes a refugee, no(r) does it apply to the date on which he left his country.”

19 This suggests that a person could be entitled to refugee status under the 1951 Convention if made stateless by the territorial or political changes mentioned, without necessarily also being a victim of the systematic programs of persecution referred to. “Statelessness appeared as a mass phenomenon after World War I and the revolutionary upheaval that followed, while World War II left even larger numbers of people stateless.”: *Statelessness - Addressing the Issues*, November 1996, Canadian Council for Refugees. But it is nevertheless clear that those involved in the preparatory work for the 1951 Refugee Convention who adopted this expression, “as a result of events …”, intended that a stateless person would be entitled to refugee status only if he was a victim of persecution by reason of events in Europe between the date on which the United Kingdom declared war on Germany and 1 January 1951.

20 The passage quoted in par 36 of the Handbook is, as note (6) shows, taken from UN document E/1618. This is the report of the first Ad Hoc Committee on Statelessness and Related Problems dated 17 February 1950. It is one of the preparatory works for the Convention. This Committee produced a draft refugees’ convention which ultimately evolved into the 1951 Convention. As the name of the Committee suggests, it was set up to give consideration to the status of both refugees and stateless persons. As appears from par 15 of the Committee Report, the Committee decided that “in view of the urgency of the refugee problem and the responsibility of the United Nations in this field”, it would “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”. Annex 1 to this Report contains the Committee’s draft Refugee Convention. Article 1 of this draft

contains the definition of the term “refugee” then proposed. It was intended to apply to certain stateless persons as well as to state nationals. In the notes to this definition in the Report, the Committee made the comment quoted in par 36 of the Handbook and it also observed, in relation to par A(1)(c) of the proposed definition of “refugee”:

“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.”

21 The definition of “refugee” then proposed was:

“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.

…”

22 The three criteria for refugee status here proposed are cumulative. They clearly require, for both nationals and stateless persons, a well-founded fear of persecution for a specified reason as a condition of refugee status.

23 There are good textual reasons given by Katz J for reading Art 1A(2), in so far as it applies to stateless persons, as requiring them to be victims of persecution before they are entitled to the status of refugee under the Convention. The travaux to the Convention to which I have referred show that this was the intention of those involved in the drafting of what became the 1951 Convention. Hathaway propounds the same view of the entitlement of stateless persons to claim refugee status under the Convention: see pp 59 - 63. These considerations are sufficient to displace the considerations which I have referred to above that favour a reading of the definition of “refugee” in the Convention that would extend its reach to stateless persons unable to return to their country of habitual residence even though they never faced possible persecution there.

24 Though I generally agree with what Katz J has written, I doubt that the House of Lords decision in *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 is entitled to the weight his Honour gives to it: Lord Lloyd, at 304, appears to have only been identifying the conclusions that flowed from the view of Art 1A(2) that was common ground in that case. I doubt that his comment is a reasoned consideration of the proper construction of the Article. Though I respectfully agree with much of Katz J's analysis of the text of the definition of "refugee", I do not think that as much weight can be given to the semicolon in the Article as he ascribes to it in the task of interpreting an international treaty. In *Adan*, Lord Lloyd said at 305C:

"… one is more likely to arrive at the true construction of Article 1A(2) by seeking a meaning which makes sense in the light of the Convention as a whole, and the purposes which the framers of the Convention were seeking to achieve, rather than by concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach."

25 In *Applicant A*, Brennan CJ said at 230 - 231:

"If a statute transposes the text of a treaty or a provision of a treaty into the statute so as to enact it as part of domestic law, the prima facie legislative intention is that the transposed text should bear the same meaning in the domestic statute as it bears in the treaty. To give it that meaning, the rules applicable to the interpretation of treaties must be applied to the transposed text and the rules generally applicable to the interpretation of domestic statutes give way.

In interpreting a treaty, it is erroneous to adopt a rigid priority in the application of interpretive rules. The political processes by which a treaty is negotiated to a conclusion preclude such an approach. Rather, for the reasons given by McHugh J, it is necessary to adopt an holistic but ordered approach. The holistic approach to interpretation may require a consideration of both the text and the object and purpose of the treaty in order to ascertain its true meaning. Although the text of a treaty may itself reveal its object and purpose or at least assist in ascertaining its object and purpose, assistance may also be obtained from extrinsic sources. The form in which a treaty is drafted, the subject to which it relates, the mischief that it addresses, the history of its negotiation and comparison with earlier or amending instruments relating to the same subject may warrant consideration in arriving at the true interpretation of its text.

In the present case, I would interpret the definition of 'refugee' in Art 1A(2) of the Convention as amended by the Protocol in the light of the object and purpose appearing in the preamble and the operative text and by reference to the history of the negotiation of the Convention."

26 Dawson J stated, at 240, the correct approach to the interpretation of a domestic statute that incorporates the text of an international treaty in similar terms; he concluded by observing that by reason of this approach:

"… technical principles of common law construction are to be disregarded in construing the text."

27 The most detailed exposition of the proper approach to interpreting treaties, including treaties incorporated into Australian municipal law, is contained in the judgment of McHugh J at 251 - 254. His Honour's conclusion at 254 was that:

"Primacy is to be given to the written text of the Convention but the context, object and purpose of the treaty must also be considered."

28 In the course of explaining what he meant by the need to adopt the "ordered yet holistic approach", his Honour at 255 said:

"… the mandatory requirement [of par 1 of Art 31 of the Vienna Convention] that courts look to the context, object and purpose of treaty provisions as well as the text is consistent with the general principle that international instruments should be interpreted in a more liberal manner than would be adopted if the court was required to construe exclusively domestic legislation."

29 To accord to punctuation marks the dominant weight which they might have in the interpretation of an ordinary domestic statute as pointers to the true meaning of a treaty provision is, in my opinion, inconsistent with these dicta.

I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Drummond.

Associate:

Dated: 12 April 2000

IN THE FEDERAL COURT OF AUSTRALIA

QUEENSLAND DISTRICT REGISTRY Q 238 OF 1999

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

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| JUDGES: | SPENDER, DRUMMOND AND KATZ JJ |
| DATE: | 12 APRIL 2000 |
| PLACE: | BRISBANE |

**REASONS FOR JUDGMENT**

**KATZ J**:

30 This is an appeal from a judgment of a single Judge of this Court, the reasons for which judgment are reported in (1999) 166 ALR 348. It is convenient, by way of introduction, to describe the appeal as raising a

question as to the construction of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 (ATS 1954 No 5), as "*amended*" by the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (ATS 1973 No 37). (The *Migration Act 1958* (Cth) ("the Act") speaks of the 1967 Protocol as having "*amended*" the 1951 Convention (see, for instance, subs 36(2) of the Act, set out in par 38 below), but, for reasons which I will later explain, the Parliament erred when using that terminology. However, until I explain my reasons for that conclusion, I will proceed herein as if the 1967 Protocol did amend the 1951 Convention and describe the 1951 Convention as so amended as "the Convention".)

31 Article 1 of the Convention is headed "*Definition of the term 'Refugee"*". It provides as follows in Section A thereof:

"A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

(1) …

…

(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."

(It will be noticed that the definition which I have just quoted refers in terms to male persons only. Of course, no one would ever suggest, simply because it does not say so in terms, that the definition does not apply to female persons as well as to male persons. However, while not putting out of my mind for present purposes the instinctive ease with which one reads the definition as extending by implication to a class of case to which it does not, in terms, extend, I will, in what follows, simply adopt the terminology actually used in the Convention.)

32 As is apparent from its language, the definition of the term "*refugee*" in Art 1A(2) of the Convention encompasses the cases both of persons who have a nationality and of persons who do not.

33 As to a person having a nationality, there are a number of conditions in Art 1A(2) which he must satisfy before the term "*refugee*" applies to him for the purposes of the Convention. It appears to me to be convenient to express them at this stage of these reasons for judgment in the following way: first, he must be outside the country of his nationality; secondly, his being outside that country must be owing to a well-founded fear of being persecuted for a Convention reason; and, thirdly, he must be either unable or unwilling to avail himself of the protection of that country. Further, if, although able to avail

himself of that protection, he is unwilling to do so, his unwillingness to do so must also be owing to that fear.

34 It will be obvious that, as to a person not having a nationality, it is necessary to express the conditions which he is required to satisfy under Art 1A(2) before the term "*refugee*" applies to him for the purposes of the Convention differently from the conditions which are expressed to be required to be satisfied by a person having a nationality before the term "*refugee*" applies to him for the purposes of the Convention. That Art 1A(2) does, at least by substituting, in the case of a person not having a nationality: first, a reference to his being outside the country of his **former habitual residence** for the reference made, in the case of a person having a nationality, to his being outside the country of his **nationality**; and, secondly, a reference to his inability or, owing to a well-founded fear of being persecuted for a Convention reason, unwillingness to **return to** the country of his former habitual residence for the reference made, in the case of a person having a nationality, to his inability or, owing to a well-founded fear of being persecuted for a Convention reason, unwillingness to **avail himself of the protection of** the country of his nationality.

35 A question may arise, however, whether Art 1A(2) goes further than making the two substitutions to which I have just referred, by intentionally omitting to include among the conditions which must be satisfied by a person not having a nationality before the term "*refugee*" applies to him for the purposes of the Convention the functional equivalent of the second of those conditions which I have set out above as being required to be satisfied by a person having a nationality before the term "*refugee*" applies to him for the purposes of the Convention. That functionally equivalent condition, in the case of a person not having a nationality, is that his being outside the country of his former habitual residence must be owing to a well-founded fear of being persecuted for a Convention reason. (I will often refer to that functionally equivalent condition hereafter in these reasons for judgment as "the disputed condition".)

36 In the matter presently under appeal, the question did arise (and, as will be seen later, not for the first time) whether Art 1A(2) does or does not include the disputed condition. The circumstances in which the question arose may be stated relatively briefly.

37 Mr Viatcheslav Savvin and his wife, Ms Lioubov Savvina, had been, while the Soviet Union remained in existence, Soviet nationals who resided in Latvia, both when Latvia was part of the Soviet Union and later, when it became independent of the Soviet Union. Then, on the collapse of the Soviet Union, they had continued to reside in Latvia, but had become stateless, no longer having Soviet nationality, but not acquiring the nationality either of Latvia or of any of the successor States to the Soviet Union. In 1996, they came to Australia (separately). Shortly after their respective arrivals in Australia, they jointly sought protection visas from the Minister for Immigration and Ethnic Affairs (as the office was then called; now, "Ethnic" is replaced by "Multicultural") ("the Minister").

38 The class of visas known as protection visas is created by subs 36(1) of the Act, while subs 36(2) thereof provides that, *"A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol"*. Since a necessary condition of Australia's having protection obligations under the Convention to a non-citizen in Australia within the meaning of subs 36(2) of the Act is that that non-citizen be a *"refugee"* within the meaning of Art 1 of the Convention, questions as to the construction of Art 1A(2) of the Convention may arise in the course of deciding applications for protection visas or, as happened in the present case, in the course of reviewing such decisions judicially.

39 Mr Savvin's and Ms Savvina's applications for protection visas were refused by a delegate of the Minister and they both appealed that refusal to the Refugee Review Tribunal ("the Tribunal").

40 On appeal, the Tribunal accepted that, for the purposes of Art 1A(2) of the Convention, Mr Savvin and Ms Savvina were persons not having a nationality whose country of former habitual residence was Latvia. Proceeding, however, on the basis that no claim to refugee status under Art 1A(2) can succeed unless, among other things, the claimant therefor has a well-founded fear of being persecuted for a Convention reason, the Tribunal rejected the claims of Mr Savvin and Ms Savvina to be refugees for the purposes of the Convention. It did so because it was not satisfied that either of them had such fear.

41 (I should perhaps mention here that Mr Savvin and Ms Savvina have two daughters who had also come to Australia in 1996 (separately) and had also jointly sought protection visas, relying on their parents' having made specific claims under the Convention and on their familial relationship to their parents. The daughters' applications necessarily suffered the same fate as did their parents' applications.)

42 Mr Savvin and Ms Savvina (and their daughters) next sought review of the Tribunal's decision in this Court.

43 In the judgment now under appeal, the primary Judge concluded that the Tribunal had committed no reviewable error by finding that neither Mr Savvin nor Ms Savvina had a well-founded fear of being persecuted for a Convention reason: see at 355, [22]. However, the primary Judge construed Art 1A(2) as intentionally omitting to include the disputed condition among the conditions which must be satisfied by a person not having a nationality before the term "*refugee*" applies to him for the purposes of the Convention. That meant that if Mr Savvin and Ms Savvina had been unable to return to Latvia at the time of the Tribunal's decision, they should, without more, have been treated by it as refugees. According to the primary Judge, the Tribunal had been required to reach, but had failed to reach, a conclusion on that "inability" question (see at 372, [90]) and he therefore set aside the Tribunal's decision and remitted the matter to the Tribunal for further consideration. He intended that, on its further consideration of the matter, the Tribunal would decide the

question of Mr Savvin's and Ms Savvina's ability to return to Latvia, the answer to which question would, in all probability, be determinative of their (and their daughters') applications for protection visas.

44 (I say "*in all probability*", because the primary Judge was also of the view that the Tribunal had been required to reach, but had failed to reach, a conclusion on the question whether Mr Savvin and Ms Savvina had a nationality: see at 349, [3], 356, [24] and 372, [90]. As to that matter, however, the Tribunal had said, in the very first sentence of its statement of findings and reasons, that Mr Savvin and Ms Savvina were "*stateless*" and had later said, "*In accordance with the Convention definition of 'refugee' the applicant's [that is, Mr Savvin's] application must be assessed against his country of former habitual residence. This is Latvia*". The Tribunal had taken a similar approach to Ms Savvina's application. Assessment of a refugee claimant's application against the country of his former habitual residence is, of course, only appropriate in the case of a stateless person, a category into which the Tribunal had already explicitly said that Mr Savvin and Ms Savvina fell. Thus, in deciding that the Tribunal had failed to reach a conclusion on the "nationality" question, the primary Judge plainly erred. However, the primary Judge's error in that respect is immaterial for present purposes.)

45 In construing Art 1A(2) as intentionally omitting to include the disputed condition among the conditions which must be satisfied by a person not having a nationality before the term "*refugee*" applies to him for the purposes of the Convention, the primary Judge was giving effect to what he described as the "*natural*" meaning of the definition: see for instance, the quotation in the next paragraph of these reasons for judgment.

46 In concluding what that "*natural*" meaning of the definition was, the primary Judge appears to have been much influenced by the definition's punctuation, in particular, by the presence in it of a semicolon. He first said (relevantly) (at 356, [26]-[27]),

"The definition appears to fall conveniently into two parts, the first (preceding the semicolon) relating to persons having nationality, and the second (following the semicolon) relating to persons not having nationality. If this is so, then the natural meaning is that a person without nationality is a refugee if he or she is outside the country of former habitual residence; and is either:

- unable; or
- owing to 'such fear', unwilling to return to it.

The reference to 'such fear' is to well-founded fear of persecution for a Convention reason."

47 Then (at 361, [47]), he said that "*the definition is in two parts—that preceding the semicolon and that following it*" (a statement which he repeated in substance at 361, [48]).

48 Next (at 362, [51]), he said,

"I would have thought it beyond argument that the words preceding the semicolon deal with persons having nationality and those following the semicolon deal with persons without nationality. If so**,** it follows that in order to satisfy the definition, a person without nationality must be outside the country of his former habitual residence (for whatever reason) and either:

- unable to return thereto for any reason; or
- unwilling to return because of well-founded fear of persecution for a Convention reason."

49 Finally, he referred (at 368, [75]) to what he perceived to have been a failure by the author of the *Handbook on Procedures and Criteria for Determining Refugee Status* ("the Handbook"), published by the Office of the United Nations High Commissioner for Refugees, to,

"… come to grips with the problem of construction which emerges from the location of the words relating to stateless persons after the semicolon and the absence of any repetition of the reference to persecution as a necessary cause of such a person being outside of the country of former habitual residence."

50 In reaching his conclusion as to the correct construction of Art 1A(2), the primary Judge had not been persuaded that recourse to: either the object and purpose of the Convention, particularly as disclosed by the preparatory work for the 1951 version thereof; the context of the definition, particularly Art 1C(4) of the Convention; or subsequent practice in the application of the Convention, particularly as disclosed by the Handbook; should lead him to construe the definition in a way which contradicted what he considered to be its "*natural*" meaning: see at 364, [57], 362, [51], 372, [89].

51 At the time at which the primary Judge made his decision, the question whether Art 1A(2) includes the disputed condition had been the subject of consideration in decisions made both by other single Judges of this Court and by English courts and the primary Judge made reference in his reasons for judgment to the existence of all but the earliest of those decisions. Further, since the primary Judge's decision, the question has again been the subject of consideration by a single Judge of this Court. (I note that both the appellant and the respondents on the present appeal were unaware, as am I, of there being any relevant judicial decisions from countries other than Australia and England.)

52 It is convenient to say something now of the judicial decisions existing at the time at which the primary Judge made his decision in which the question whether Art 1A(2) includes the disputed condition had been the subject of consideration, dealing with those decisions, for the most part, in chronological order.

53 The earliest of them was *R v Chief Immigration Officer[,] Gatwick Airport[;] ex parte Harjendar Singh* [1987] Imm AR 346, a decision of Nolan J of the English Queen's Bench Division, in which his Lordship gave *ex tempore* reasons for judgment which are not always easy to follow.

54 Mr Singh had applied to quash a decision refusing him leave to enter the United Kingdom. His personal circumstances were relevantly as follows: he had been born in what later became Tanzania while it still remained under British control, but had moved to India before Tanzanian independence. He had then resided in India for many years. He was, however, a citizen neither of India nor of Tanzania. On a particular occasion, he had travelled from India to Dubai on a short business trip and had then sought to return to India, but had been refused re-entry by the Indian authorities. He had then been returned to Dubai, which had also refused him re-entry, and had ultimately been sent to the United Kingdom. It appears that, although he had no factual connection with the United Kingdom, the reason why he had been sent there was simply because he had the status under British law of a "British Protected Person" (presumably, because of his birth in what later became Tanzania while it still remained under British control) and was the holder of a British passport. On his arrival in the United Kingdom, he had sought leave to enter.

55 His primary argument before Nolan J (which was ultimately rejected) appears to have been that his possession of the status under British law of a "British Protected Person" had the effect, according to the rules of public international law, that he had British nationality and that the British authorities had therefore been obliged to give him leave to enter the United Kingdom when he arrived there, even if he otherwise had no entitlement to such leave under British domestic law. The British authorities appear to have resisted that argument by submitting, among other things, that Mr Singh's status was not the equivalent, according to the rules of public international law, of British nationality. That argument appears in turn to have provoked the response by Mr Singh that, on the British authorities' argument, he must therefore be a stateless person, it being common ground that he did not have the nationality of any country other than the United Kingdom. Further, the authorities of India (where, as I have already mentioned, he had resided for many years) had refused to permit him to return to that country. Therefore, the British authorities should have considered when deciding whether to grant him leave to enter the United Kingdom, but had failed to do so, the question whether he was a refugee within the meaning of Art 1A(2) of the Convention. According to Nolan J (at 357),

"This argument of Mr Friel's [that is, Mr Singh's counsel] relating to stateless persons and refugees required recourse to the terms of the Convention itself. It was while the terms of the Convention were being read out by Mr Sankey [that is, the British authorities' counsel] in the course of his reply that the proposition emerged that the applicant was a refugee as defined.

…

… The second part [of the definition in Art 1A(2)] would, on the undisputed facts, govern the case of the applicant, as someone who, not having a nationality, was outside the country of his former habitual residence, namely India, and is unable to return to it…."

It appears that, confronted at a late stage of the proceedings with a fresh argument on Mr Singh's behalf, counsel for the British authorities had not submitted that Art 1A(2) includes the disputed condition, but had merely argued that, while Mr Singh was not in truth a British national, he was to be treated as if he were a British national for the purposes of the Convention, so that Art 1A(2), as it applies to persons not having a nationality, was irrelevant in his circumstances. That argument was rejected by Nolan J, who accordingly referred the matter back to the British authorities to determine whether Mr Singh was a refugee.

> 56 It is apparent that the circumstances under which Nolan J construed Art 1A(2) of the Convention in its application to persons not having a nationality were such that little assistance is to be gained from his decision on the question whether the definition should be construed as including the disputed condition, nor, as I have already foreshadowed, was his decision relied on or even referred to by the primary Judge in the present matter in his reasons for judgment. (That was not because the primary Judge was unaware of the decision; he was aware of it, it having been referred to in one of the cases to which he referred in his reasons for judgment.)
>
> 57 The next relevant decision was that of the English Court of Appeal in *Adan v Secretary of State for the Home Department* [1997] 1 WLR 1107. The case was concerned with a question of construction of Art 1A(2) other than the one presently under discussion (on which question it is unnecessary to elaborate for present purposes). However, in the course of dealing with that other question of construction, Simon Brown LJ did make reference to the question of the construction of Art 1A(2) as it applies to persons not having a nationality, saying (at 1117) as he did so, however, "*The position, however, with regard to the stateless, is, as I recognise, of only marginal relevance in all this….*" His Lordship began his treatment of the matter (at 1114-15) by saying,

"I return, therefore, to article 1A(2) itself. This provision, although already set out in extenso above, I now propose to break down into a series of clauses which for convenience I shall also number. A refugee is someone who: 1(a) owing to well founded fear of being persecuted for [a Convention reason] is outside the country of his nationality, and (b)(i) is unable to avail himself of the protection of that country, or (ii) owing to such fear, is unwilling to avail himself of the protection of that country; or who; 2(a) not having a nationality and being outside the country of his former habitual residence, (b)(i) is unable to return to it, or (ii) owing to a well founded fear of being persecuted for [a Convention reason] is unwilling to return to it."

> 58 It is convenient to note now that, although the primary Judge in the present matter did not, in construing Art 1A(2), seek to rely in any way on what Simon Brown LJ had said in *Adan* about the position of persons not having a nationality, the submission was made by the respondents to the present appeal that Simon Brown LJ had afforded to Art 1A(2) the same construction

as that later given to it by the primary Judge in the present matter. Reliance was placed in making that submission on what had been said by Simon Brown LJ in the passage which I have just quoted.

59 I reject that submission. I do not understand Simon Brown LJ to have to been attempting to construe Art 1A(2) in the passage which I have just quoted, but merely to have been breaking the definition down into a series of numbered clauses for ease of subsequent reference. That his Lordship was not attempting in the quoted passage to construe Art 1A(2), particularly in so far as it relates to persons not having a nationality, was made clear by certain things said by him subsequently. First, at 1116, his Lordship pointed out that "*a discrete difficulty of interpretation arises under article 1A(2)*" in relation to the stateless. Then, at 1117, his Lordship made clear what that discrete difficulty of interpretation was, saying,

"So far as the stateless are concerned, … the latter part of article 1A(2) (my clauses 2(a) and 2(b)(i)), construed literally, requires of those presently unable to return home nothing more…. The position, however, with regard to the stateless is, as I recognise, of only marginal relevance in all this and, indeed, as Mr. Pannick [that is, counsel for the Minister] points out, my clause 2(a) has been construed by the Canadians as if in fact it were qualified (as clause 1(a) is) by a requirement to be 'outside' for fear of Convention prosecution [sic]: see the relevant Canadian legislation (enacted no doubt in the light of Canada's construction of the Convention)…."

(I will later make further reference to the Canadian legislation referred to in the passage which I have just quoted.)

60 In light of the passages from his reasons for judgment which I have just quoted, I treat Simon Brown LJ as having taken the same view as the primary Judge afterwards did in the present matter as to the "*literal*" meaning of Art 1A(2) in relation to persons not having a nationality, but as having not committed himself to construing the definition in accordance with what he considered to be that "*literal*" meaning. Instead, he recognised the possibility that the construction of the definition contrary to that afterwards adopted by the primary Judge in the present matter, which contrary construction had already been adopted by Canada, was the correct one and intentionally reserved his own position on the question.

61 Before leaving the Court of Appeal's decision in *Adan*, I should mention two further things about it. First, Simon Brown LJ did not refer in his reasons for judgment to what had earlier been said on the topic by Nolan J in *Singh*. Secondly, it was submitted by the respondents to the present appeal that, not only had Simon Brown LJ afforded to Art 1A(2) the same construction as that later given to it by the primary Judge in the present matter, but, at 1132 of the report, Hutchison LJ had expressed his agreement with Simon Brown LJ in that respect. It appears that the respondents meant 1123 of the report, rather than 1132, because there is nothing relevant at 1132 of the report. At 1123, however, Hutchison LJ did say that he had read Simon Brown LJ's reasons in draft "*and I agree with his conclusions on the issues of law with which he deals*". Whether that expression of agreement was intended to

extend to Simon Brown LJ's refusal to reach a conclusion on the issue of law presently under consideration is not easy to say. Of course, if it was, it would no more avail the respondents to the present appeal than do the reasons for judgment of Simon Brown LJ themselves.

62 Although to do so now is to depart from strict chronological order, it nevertheless seems convenient to refer at this stage of my discussion of the cases to the decision of the House of Lords on appeal from the Court of Appeal in *Adan v Secretary of State for the Home Department*, reported in [1999] 1 AC 293. In that case, Lord Lloyd of Berwick delivered the principal speech, Lords Goff of Chieveley (at 301), Nolan (at 312) and Hope of Craighead (also at 312) agreeing with him. (It should be noted that Lord Nolan was the same judge who, as Nolan J, had decided *Singh*).

63 In the course of his speech, Lord Lloyd of Berwick said (at 304) that it was "*common ground*" between the parties that Art 1A(2) covered four categories of refugee, which categories were as follows (emphasis added):

"(1) nationals who are outside their country owing to a well-founded fear of persecution for a Convention reason, and are unable to avail themselves of the protection of their country; (2) nationals who are outside their country owing to a well-founded fear of persecution for a Convention reason, and, owing to such fear, are unwilling to avail themselves of the protection of their country; (3) non-nationals who are outside the country of their former habitual residence **owing to a well-founded fear of persecution for a Convention reason** and are unable to return to their country, and (4) non-nationals who are outside the country of their former habitual residence **owing to a well-founded fear of persecution for a Convention reason**, and, owing to such fear, are unwilling to return to their country."

64 It will be seen that, in expressing as he did the third and fourth categories of refugee under Art 1A(2), Lord Lloyd of Berwick was stating the construction of Art 1A(2) contrary to that afterwards adopted by the primary Judge in the present matter.

65 The primary Judge in the present matter dealt with the recording by his Lordship of the view of Art 1A(2) held in common by the parties in the *Adan* case by saying (at 359, [38]), "*Obviously, no significance can be attributed to his Lordship's having recorded this matter without further comment*". However, as I understand his Lordship's speech, he did not merely record the parties' common view of Art 1A(2) without further comment. Having set out what had been common ground between the parties, his Lordship then commented,

"It will be noticed that in each of categories (1) and (2) the asylum-seeker must satisfy two separate tests: what may, for short, be called 'the fear test' and the 'protection test.' In categories (3) and (4) the protection test, for obvious reasons, is couched in different language."

66 In that further comment, his Lordship appears to me to have been making it plain that he accepted as correct the analysis of Art 1A(2) which he had earlier recorded as having been the common view of the parties,

including, given his specific reference to the couching in different language of the protection test (but **not** the fear test) in categories (3) and (4), accepting as correct the parties' analysis of Art 1A(2) in relation to persons not having a nationality.

67 Obviously, his Lordship's apparent acceptance of that analysis of Art 1A(2) in so far as it concerns persons not having a nationality does not carry the same persuasive weight as it would have done had the issue arisen for decision in the case and the contrary position been submitted by one of the parties. Nevertheless, that apparent acceptance does not, merely because of the absence of those circumstances, seem to me to be entirely devoid of such weight, appearing, as it does, in a considered decision made by the ultimate English appellate court.

68 The decision of the House of Lords to which I have just referred is the most recent of the relevant English decisions and I can therefore now sum up as follows my understanding of the development of the English position: in 1987, Nolan J answered the question of construction which arises on this appeal in the same way as the primary Judge in the present matter afterwards did, doing so in circumstances which rendered that answer of so little persuasive force that the primary Judge in the present matter did not consider it helpful to refer to it in his reasons for judgment in support of the construction which he favoured; then, in 1997, Simon Brown LJ intentionally reserved his position on the question, recognising that the construction contrary to that afterwards adopted by the primary Judge in the present matter might be the correct one, as was already considered to be the case by Canada; and, finally, in 1998, the House of Lords adopted a view on the question which was opposed to the construction afterwards adopted by the primary Judge in the present matter, Lord Nolan necessarily resiling, in joining in that adoption, from the answer which he had given to the question eleven years earlier as Nolan J. The House of Lords' view was neither necessary to the decision of the case before it nor reached after argument to the contrary, but is nevertheless entitled to be accorded a certain persuasive weight on the construction question.

69 I turn now to the decisions of single Judges of this Court existing at the time at which the primary Judge made his decision in the present matter in which the question whether Art 1A(2) includes the disputed condition had been the subject of consideration. Unlike the English decisions to which I have just referred, those decisions of single Judges of this Court are notable for their agreement on the question of construction now under consideration. Both of them gave to Art 1A(2) the construction contrary to that afterwards adopted by the primary Judge in the present matter (as has the one relevant decision of a single Judge of this Court made since the decision of the primary Judge in the present matter).

70 The first of those decisions was that of Cooper J in *Rishmawi v Minister for Immigration and Multicultural Affairs* (1997) 77 FCR 421, which decision was made after the decision of the Court of Appeal, but before the decision of the House of Lords, in *Adan*.

71 I will begin my discussion of the reasons for judgment of Cooper J by summarising those reasons. I will then immediately discuss in greater detail the first two matters set out in that summary.

72 I summarise those reasons in the following way: first, construed literally, Art 1A(2) of the Convention does not include the disputed condition; secondly, the Vienna Convention on the Law of Treaties done at Vienna on 23 May 1969 (ATS 1974 No 2) ("the Vienna Convention") is, however, applicable in the construction of Art 1A(2) of the Convention; thirdly, in accordance with the Vienna Convention, Art 1A(2) should not be construed literally if a literal construction would defeat the object and purpose of the Convention or be inconsistent with the context in which Art 1A(2) appears; fourthly, the object and purpose of the Convention may be inferred from its preparatory work; fifthly, the preparatory work for the 1951 version of the Convention discloses an intention both that stateless persons not be treated in Art 1A(2) more favourably than persons with a nationality and that that provision not have the effect that sanctuary may be provided for persons who do not have a well-founded fear of persecution for a Convention reason; sixthly, Art 1C(4) of the Convention is part of the context in which Art 1A(2) appears; seventhly, the language of Art 1C(4) reinforces the conclusion that, in order to be a "*refugee*" under Art 1A(2) for the purposes of the Convention, not only persons having a nationality, but also persons not having a nationality, must be outside their relevant country (whether of nationality or of former habitual residence) owing to a well-founded fear of being persecuted for a Convention reason; and, finally, Art 1A(2) is therefore not to be construed literally, but, in accordance with the object and purpose of the Convention as disclosed by the preparatory work for the 1951 version thereof and with the context in which Art 1A(2) appears, is to be construed as including the disputed condition.

73 (I should note now that I have not included in my summary of the reasons for judgment of Cooper J reliance by him on the terms of the Handbook, since, on my reading of his Honour's reasons, although he referred to the Handbook, he did not ultimately rely on it in support of his construction of Art 1A(2) as including the disputed condition. Others, however, including the primary Judge in the present matter, have construed the reasons of Cooper J differently. I will therefore discuss below what the primary Judge in the present matter said about the Handbook in his reasons for judgment.)

74 It will be seen from the summary which I have just given of his reasons for judgment that Cooper J, like the primary Judge in the present matter, began the process of construing Art 1A(2) by attributing to it a "*natural*" or "*literal*" meaning which did not include the disputed condition. Where Cooper J differed from the primary Judge in the present matter was, of course, in concluding that, for the reasons which he gave, Art 1A(2) should not be construed in accordance with that "*natural*" or "*literal*" meaning. Like the primary Judge in the present matter, Cooper J appears to have been much influenced in reaching a conclusion that, literally speaking, Art 1A(2) did not include the disputed condition by the presence in the provision of the semicolon.

75 However, it appears to me that a real question arises whether Art 1A(2) does in fact have the natural or literal meaning which has thus far been attributed to it in the cases. As to that question, for reasons which I will now give, I do not attribute to the presence in Art 1A(2) of the semicolon the significance which has thus far been attributed to it. Further, giving to the semicolon that significance which I consider appropriate and construing Art 1A(2) accordingly, it appears to me that the preferable view is that, on the natural or literal meaning of Art 1A(2), it does include the disputed condition.

76 I begin by pointing out that, in the construction of legal instruments, there existed in earlier times a hesitant attitude on the part of the judiciary to the use of punctuation marks as a constructional aid.

77 A case which is representative of that earlier attitude, at least so far as the construction of domestic legislation by national courts was concerned, is *President &c of the Shire of Charlton v Ruse* (1912) 14 CLR 220. In that case, Sir Samuel Griffith, with whom Barton J relevantly agreed (at 227), began his reasons for judgment by saying (at 222), "*The principal question debated in this case may be called the question of a semicolon*". Later, Sir Samuel said (at 225) that punctuation marks, "*which may be due to a printer's or proof reader's error, ought not to control the sense if the meaning is otherwise tolerably clear*", while Isaacs J said (at 229) that it was generally "*unsafe to allow*" punctuation marks "*to govern the construction*" of statutory provisions. Consistent with those expressions of attitude, the High Court in *Charlton* ignored the presence of a semicolon in the statutory provision the construction of which was there under consideration.

78 However, the earlier attitude to which I have just referred appears to me by no means to have been limited to national courts construing domestic legislation; I infer that it extended also to international courts construing international agreements.

79 In *Peter Pázmány University v Czechoslovakia*, PCIJ (1933) Series A/B, No 61, p. 208, the Permanent Court of International Justice was concerned, not with the punctuation of an international agreement, but rather with the related matter of its paragraphing. The Court was there called on to construe subpar 2 of par 3 of a protocol to the Treaty of Trianon of 1920, which subparagraph was expressed as an exception. The question was whether the subparagraph was to be construed as an exception to all of the other provisions of the protocol or, as was submitted by Czechoslovakia, was to be construed merely to be an exception to subpar 1 of par 3 of the protocol. The Court said that, for a number of reasons, it was unable to accept the Czechoslovak submission. The first reason which it gave (at 247) was that, "*It appears difficult to attach such momentous consequences to the system of numbering employed—especially as that system may, according to the information given by the Parties, have been merely accidental….*" I infer that the Court would have taken a similar attitude to a punctuation issue.

80 However, at the present day, the hesitant judicial attitude to the use of punctuation marks as a constructional aid suggested by the *Charlton* and

*Peter Pázmány University* cases is on the wane, certainly so far as the construction of domestic legislation by national courts is concerned. For instance, in *Re Collins; Ex parte Hockings* (1989) 167 CLR 522 at 525, Toohey and McHugh JJ said in joint reasons for judgment that there was "*no reason*" why a comma used after certain words in a statutory provision "*should be discarded or thought to serve no purpose in the construction of*" the provision concerned. Earlier, in *Hanlon v The Law Society* [1981] AC 124 at 198, Lord Lowry had said,

"I consider that not to take account of punctuation disregards the reality that literate people, such as Parliamentary draftsmen, punctuate what they write, if not identically, at least in accordance with grammatical principles. Why should not other literate people, such as judges, look at the punctuation in order to interpret the meaning of the legislation as accepted by Parliament?"

81 I see no reason not to adopt a similar attitude at the present day to the punctuation of international agreements.

82 It is therefore not because I take the view that one should ignore the existence of the semicolon in construing Art 1A(2) of the Convention that I reject the correctness of the view earlier expressed in the cases as to the natural or literal meaning of that definition. It is because, even giving the semicolon its full weight as a constructional aid, I take the view that, in accordance with accepted grammatical principles, the semicolon does not do the work of dividing the definition into two independent parts, as has thus far been concluded.

83 The use of semicolons is discussed by Quirk and others in their authoritative work, *A Comprehensive Grammar of the English Language* (1985) (note the work's use by Mason CJ and Brennan, Gaudron and McHugh JJ in *Chew v The Queen* (1992) 173 CLR 626 at 630-31 and its use by Gaudron J in *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 362). The authors point out (at 1622) that, typically, the semicolon is used as a replacement for the word "*and*", in order to show that "*two independent clauses are regarded as being sufficiently related to belong to one sentence*". They further point out, however (at 1623), that the use of a semicolon may sometimes be followed by the use of the word "*and*", "*but*" or "*or*". As to the use of the semicolon in the latter circumstances, they say (emphasis added),

"Such a use (**in effect, replacing a comma**) is chiefly found in rather formal writing and in sentences whose complexity already involves the use of one or more commas and whose major divisions call for a hierarchically superior punctuation mark if the reader is not to be momentarily puzzled or misled."

84 Once it is recognised that the semicolon in Art 1A(2), preceding, as it does, the use of the word "*or*", has the effect, according to accepted grammatical principles, merely of a comma, rather than that of showing that what follows it is an independent clause, then it appears to me that,

"… the problem of construction which emerges from the location of the words relating to stateless persons after the semicolon and the absence of any repetition of the reference to persecution as a necessary cause of such a person being outside of the country of former habitual residence …"

(to quote (again) something said by the primary Judge in the present matter), is to be resolved in a manner different from that in which it has thus far been resolved in the cases.

85 When one reads the words which relate to stateless persons in the later part of Art 1A(2) as being part of one complete clause, rather than as comprising in themselves an independent clause, then I consider that the appropriate way to approach their construction is as follows: it is apparent that those words describe a person whose circumstances are to be contrasted with those of the person described in the earlier part of the clause. So much is apparent from the first six of those words, "*or who, not having a nationality*". However, not only do the words in the later part of Art 1A(2) describe a person of contrasting circumstances to the person described in the earlier part of the clause. They also suggest naturally a particular point in the description of the first person's circumstances at which the reader is to begin to mark that contrast of circumstances. That point in the description of the first person's circumstances is at the words, "*is outside the country of his nationality*" **and not earlier**. That that is the particular point in the description of the first person's circumstances at which the reader is to begin to mark the contrast of circumstances is demonstrated by the use in the later part of Art 1A(2) of the words, "*or who, not having a nationality and being outside the country of his former habitual residence, is …*" The form of words which I have just quoted, beginning the contrast of circumstances between the two classes of person part way through the description of the first person's circumstances, avoids the necessity, in what is already a very long clause, to repeat, so far as a stateless person is concerned, the phrase, "*Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*", which opens the clause. That opening phrase is instead taken to be impliedly applicable to a stateless person simply by reason of the form of words used in relation to such a person in the later part of the clause.

86 I find the reading which I have just given to Art 1A(2) to be an entirely satisfying one linguistically and I therefore consider that that reading, rather than the reading given to the provision both by Cooper J and by the primary Judge in the present matter (heavily influenced as that reading appears to have been in both cases by an erroneous view as to the effect of the presence in the provision of the semicolon), represents its true "*natural*" meaning.

87 Having now concluded my discussion in detail of the first of the matters set out in my summary of the reasons for judgment of Cooper J, I turn to the second of those matters.

88 Accepting that the natural meaning of Art 1A(2) is as I have expressed it above to be, namely, that it includes the disputed condition, the question

next arises as to the Court's obligation to look beyond the text of Art 1A(2) in order to determine whether that natural meaning of the provision represents the construction which should be given to it. As I have already made plain above, Cooper J began the process of construing Art 1A(2) with a natural meaning which did not include the disputed condition, but ended it with a construction which did include it. As I have also already made plain above, he did so because he considered that he was obliged by the Vienna Convention to look beyond the text of Art 1A(2) in order to arrive at its correct construction: see at 422F, 424F, 428D and 429B. (It is noteworthy that, while, given his starting point, Cooper J treated what he found outside the text of Art 1A(2) as requiring departure from the natural meaning of that text in construing the provision, such things, provided they were appropriately relied on by him, would instead confirm the natural meaning which I attribute to the text.)

89 In proceeding on the basis that it was the Vienna Convention which obliged him to look beyond the text of Art 1A(2) in order to arrive at its correct construction, Cooper J erred, although such error was an immaterial one.

90 The Vienna Convention is not applicable in the construction of the Convention, since Art 4 of the Vienna Convention renders that Convention applicable only to "*treaties which are concluded by States after the entry into force of the present Convention with regard to such States*". The Vienna Convention entered into force generally (and also with regard to Australia) as late as 27 January 1980 (*Australian Treaty List* ("ATL"), ATS 1989 No 38, p. 518), but the Refugees Convention of 1951 had entered into force generally (and also with regard to Australia) on 22 April 1954 (ATL, p. 445), while the Refugees Protocol of 1967 had entered into force generally on 4 October 1967 and with regard to Australia particularly on 13 December 1973 (ATL, p. 507). In those circumstances, neither the 1951 Convention nor the 1967 Protocol can be said to have been "*concluded*" by Australia after the entry into force of the Vienna Convention with regard to Australia (or with regard to any other State, for that matter), whatever meaning may be given to the term "*concluded*" in Art 4 of the Vienna Convention. (For a discussion of the meaning of that term in Art 4, see *Victrawl Pty Ltd v Telstra Corporation Ltd* (1995) 183 CLR 595 at 622, n 106 (Deane, Dawson, Toohey and Gaudron JJ)).

91 However, even though the Vienna Convention is not applicable in the construction of the Convention, still the Vienna Convention "*constitutes an authoritative statement of customary international law*" (see *Victrawl* at 622), including the customary public international law of the interpretation of treaties, and it was those rules of customary public international law, rather than the Vienna Convention itself, which obliged Cooper J to look beyond the text of Art 1A(2) in order to arrive at its correct construction. (At the same time, however, I should say that it is, no doubt, because the Vienna Convention does constitute an authoritative statement of the customary public international law rules for the interpretation of treaties that its relevant provisions relating to the interpretation of treaties are referred to on occasions in Australian courts as if they were applicable in construing the Convention: see, for example, various of the sets of reasons for judgment in *Applicant A v Minister for Immigration*

*and Ethnic Affairs* (1997) 190 CLR 225, but note that at 277, n 189, Gummow J, having set out the appropriate rules of interpretation of the Convention, said, "*These rules of interpretation are applicable both under customary international law and as it is now stated in the Vienna Convention on the Law of Treaties*".)

92 I turn now to the second of the two decisions of single Judges of this Court existing at the time at which the primary Judge made his decision in the present matter which gave to Art 1A(2) the construction contrary to that afterwards adopted by the primary Judge in the present matter. I can deal with that decision briefly. It was *Haris v Minister for Immigration and Multicultural Affairs* (Moore J; unreported; 12 February 1998). Like *Rishmawi*, it was a decision made after the decision of the Court of Appeal, but before the decision of the House of Lords, in *Adan*. The primary Judge in the present matter (at 356, [28]) described Moore J as having, in *Haris*, "*adopted the reasoning of Cooper J*", although it should, perhaps, be added that Moore J had expressed himself (at 5) as doing so because "*I am not satisfied that Cooper J's judgment is obviously incorrect*". In so proceeding, Moore J had been acting in accordance with the approach usually taken, as a matter of comity, by single Judges of this Court to the decisions of other single Judges of this Court, namely, that such earlier decisions, when considered to be applicable, are followed unless also considered to have been plainly wrongly made.

93 As well as referring to *Rishmawi* and *Haris*, I should also mention now one more case heard by a single Judge of this Court which was concluded before the decision presently under appeal, namely, *Al-Anezi v Minister for Immigration and Multicultural Affairs*. In that case, Lehane J delivered two sets of reasons for judgment, which sets of reasons must be read together: see [1999] FCA 355 (unreported; 1 April 1999) and [1999] FCA 556 (unreported; 5 May 1999).

94 In the present matter, the primary Judge said (at 356, [28]) that, in *Al-Anezi*, *"Lehane J referred to* Rishmawi*, but did not rely upon its correctness in reaching his decision. See his Honour's supplementary reasons for judgment at [1999] FCA 556"*. It is true that in his second set of reasons for judgment in *Al-Anezi*, Lehane J did say (at [3]) that, *"… the conclusion which I reached [in my first set of reasons for judgment] does not depend upon the correctness of the view expressed by Cooper J"*. However, Lehane J was there speaking about a view expressed by Cooper J in *Rishmawi* on a particular question different from the question whether Art 1A(2) includes the disputed condition (on which particular question it is not necessary to elaborate for present purposes). On the other hand, in his first set of reasons for judgment, Lehane J had quoted (at [19]) the following statement which had been made by Cooper J in *Rishmawi*,

"[I]t 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."

Lehane J had then continued (at [20]) "*I respectfully agree with that conclusion and with the reasons which led his Honour to it*". Presumably, the conclusion with which Lehane J had been specifically agreeing was Cooper J's conclusion 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, because Lehane J had then acted upon that view expressed by Cooper J in determining the question of construction of Art 1A(2) with which he was concerned (on which question it is not necessary to elaborate for present purposes). I can find no indication in Lehane J's second set of reasons for judgment of an intention to resile from his expression of agreement in his first set of reasons for judgment with the passage from the reasons for judgment of Cooper J which I have quoted above. Thus, contrary to the view expressed by the primary Judge in the present matter that, in *Al-Anezi*, Lehane J referred to *Rishmawi*, but did not rely upon its correctness in reaching his decision, Lehane J not only relied on *Rishmawi*'s correctness, but did so regarding an aspect of *Rishmawi* relevant for present purposes, namely, the apparent intended symmetry in the Convention, so far as possible, between the situations of stateless persons and nationals so far as refugee status is concerned.

95 I come now to the judgment presently under appeal. As I have already made plain above, the reasons for that judgment had two essential features.

96 First, there was the attribution to Art 1A(2) of a "*natural*" meaning contrary to the one which I favour and which I have already sought to justify above. As to the question of the natural meaning of Art 1A(2), I have nothing to add to what I have said above. In my view, the primary Judge erred as to that natural meaning.

97 Secondly, there was the failure to be persuaded that recourse to: either the object and purpose of the Convention, particularly as disclosed by the preparatory work for the 1951 version thereof; the context of the definition, particularly Art 1C(4) of the Convention; or subsequent practice in the application of the Convention, particularly as disclosed by the Handbook; should lead to a construction of Art 1A(2) which contradicted its supposed "*natural*" meaning. In that respect, the primary Judge's approach was mainly reactive; it dealt with the reasons for judgment of Cooper J in *Rishmawi* and sought to repel the effect attributed (or, in the case of the Handbook, thought to have been attributed) to certain matters in those reasons.

98 As to Cooper J's reliance on the object and purpose of the Convention, particularly as disclosed by the preparatory work for the 1951 version thereof, the primary Judge in the present matter was not persuaded that any clear understanding of the correct construction of the Convention could be derived from that material: see at 362, [51], 372, [89]. In taking that view, the primary Judge was differing, not only from the view of Cooper J, but also from that of Lehane J (see par 94 above) and (presumably) that of Moore

J (see par 92 above), that that material did sufficiently clearly disclose an intention to equate, so far as possible, the position of stateless persons with that of nationals for the purpose of Art 1A(2). (I should perhaps add here that, in the one decision of a single Judge of this Court since the decision presently under appeal in which the question whether Art 1A(2) includes the disputed condition was in issue, Sackville J, having had the opportunity to consider the criticisms by the primary Judge in the present matter of Cooper J's use of the preparatory work for the 1951 version of the Convention in construing Art 1A(2), expressed the view that that preparatory work "*seem[ed]*" to him to support the construction of Art 1A(2) as including the disputed condition: see *Diatlov v Minister for Immigration and Multicultural Affairs* (1999) 167 ALR 313 at 322, [31]. Sackville J, for that and for other reasons, then construed Art 1A(2) as including the disputed condition, as had Cooper and Moore JJ.)

99 As to Cooper J's reliance on the context of Art 1A(2), particularly Art 1C(4), again, the primary Judge considered the latter provision equivocal on the construction of the former: see at 364, [57]. (As I have not so far set out the terms of Art 1C(4), I should do so now, for the sake of completeness. It provides, "*This Convention shall cease to apply to any person falling under the terms of Section A if … [h]e has voluntarily re-established himself in the country which he left or outside of which he remained owing to fear of persecution….*")

100 I do not find it necessary for present purposes to reach a conclusion on the questions whether either the preparatory work for the 1951 version of the Convention or Art 1C(4) or both do support the construction of Art 1A(2) as including the disputed condition or are instead, as the primary Judge thought, equivocal in that respect. It is sufficient for my purposes to proceed herein on the basis that both of those matters are equivocal. (I may add that, so far as the preparatory work for the 1951 version of the Convention is concerned, the respondents to the present appeal urged on this Court that it should proceed on the basis that that work provided no assistance on the question whether Art 1A(2) does or does not include the disputed condition. They certainly did not suggest that anything in that work favoured a construction of Art 1A(2) as not including the disputed condition.)

101 I turn now to the approach taken to the Handbook by the primary Judge in the present matter, repeating before doing so that while, on my reading of the reasons for judgment of Cooper J in *Rishmawi*, his Honour did not ultimately rely on the Handbook in construing Art 1A(2) as including the disputed condition, the primary Judge in the present matter read the reasons for judgment of Cooper J differently.

102 It is convenient to set out immediately the relevant portion of the Handbook. It is as follows (footnote omitted):

"(6) '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'

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. [T]hey 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'.

104. A stateless person may have more than one country of former habitual residence, and he may have a fear of persecution in relation to more than one of them. The definition does not require that he satisfies the criteria in relation to all of them.

105. Once a stateless person has been determined a refugee in relation to 'the country of his former habitual residence', any further change of country of habitual residence will not affect his refugee status."

> 103 The primary Judge in the present matter first introduced the topic of the Handbook by referring (at 358, [34]-[35]) to the reasons for judgment of Mason CJ in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 392. The primary Judge quoted Mason CJ's statements in that case that he had not found the Handbook "*especially useful in the interpretation of the definition of 'refugee'*" and that he regarded 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*". The primary Judge then said that a number of the other members of the Court in *Chan* (namely, Dawson, Toohey, Gaudron and McHugh JJ) had "*declined to accept the 'Handbook construction' of the relevant provision*". Next, the primary Judge said that Simon Brown LJ had made "*similar comments concerning the use of extrinsic material*" in the Court of Appeal in *Adan*, as had Lord Lloyd of Berwick in the House of Lords in that case. Next, the primary Judge invited attention to an observation of Dawson J in *Applicant A*. Then, by way of summary of the cases to which he had referred, the primary Judge said, "*This general lack of enthusiasm for using the Handbook and other external materials to contradict the plain words of the Convention suggests that a certain conservatism should attend such usage*".

104 Later (at 369, [78]), the primary Judge said, *"I am inclined to adopt the same attitude to the Handbook as was expressly adopted by Mason CJ and implicitly adopted by other members of the Court in* Chan*, that it is unlikely to be of much assistance on matters of construction".*

105 I do not find in the cases referred to by the primary Judge the same general lack of enthusiasm for using the Handbook, whether to contradict the plain words of the Convention or otherwise, which the primary Judge found.

106 First, as to *Chan*, it is instructive to compare the primary Judge's treatment of what was done by the High Court in that case regarding the Handbook with the treatment of that topic by Gummow J in *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100 at 117 and by Lockhart J in *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 401 at 414.

107 In *Somaghi*, Gummow J said,

"In deciding questions as to the meaning of provisions of treaties which arise in a matter before this Court, it is permissible to have regard, inter alia, to the commentaries of learned authors and the decisions of foreign courts as aids to interpretation: see Fothergill v Monarch Airlines Ltd [1981] AC 251 at 294-295. The High Court judgments in Chan illustrate this practice. In particular, in that case Dawson J (at 396-397, 399-400), Gaudron J (at 416), McHugh J (at 430) and Toohey J (at 405), in addition to considering the writings of various learned authors, also had regard to the handbook issued by the office of the United Nations High Commissioner for Refugees under the title Handbook on Procedures and Criteria for Determining Refugee Status (1979). (Mason CJ (at 392) inclined to the view that the Handbook should not be treated as providing an interpretation of the meaning of relevant parts of the Convention.)"

It is apparent that Gummow J considered what had been done by the High Court in *Chan* as justifying reliance on the Handbook for the purpose of construing the Convention, because, immediately after the passage which I have just quoted, his Honour then quoted a number of paragraphs from the Handbook for the purpose of supporting a conclusion that the concept of a "*refugee*" under Art 1A(2) of the Convention includes a refugee "*sur place*".

108 In *Morato*, Lockhart J said, *"It is plain from the judgments of the members of the High Court in* Chan *that the Handbook may be considered for the purpose of determining the meaning of 'refugee'; but it is simply one element for courts to consider on this question".*

109 Next, as to *Adan*, what Simon Brown LJ said (at 1114) in the Court of Appeal in that case was as follows:

"There being, of course, no international tribunal empowered to rule authoritatively upon the Convention … it is left to the courts of each contracting state to construe it as best they can with such assistance as may be found in the travaux preparatoires

…, legal commentaries past and present, the … Handbook … and, of course, the decisions of other contracting states.

I have to say that, promising although some of this material appeared at various stages during the course of argument, in the end I have found it of precious little help in resolving the core issue."

In the House of Lords, Lord Lloyd of Berwick (at 304-05), although he made reference to the lack of utility of the Convention's preparatory work in resolving the particular issue there under consideration, made no reference at all to the Handbook.

> 110 Finally, in *Applicant A*, what Dawson J said (at 248; footnote omitted) was that, *"the travaux préparatoires and the circumstances of conclusion of the treaty do not, in my view, shed any real light on the problems raised by this appeal".* His Honour made no reference at all to the Handbook.
>
> 111 As to the cases just discussed, I put aside for present purposes what was said by Lord Lloyd of Berwick in *Adan* and Dawson J in *Applicant A*, because neither of those judges referred to the Handbook. As to *Chan*, I prefer the analysis of that case by Gummow J in *Somaghi* and by Lockhart J in *Morato* to that of the primary Judge in the present matter. As to Simon Brown LJ in *Adan*, I read his Lordship as having been more than willing to use the Handbook as an aid to construing the Convention and as having been disappointed that it had turned out to be of no assistance in the particular circumstances of the case before him. Accordingly, apart from the reasons for judgment of Mason CJ in *Chan*, nothing said in any of the cases referred to by the primary Judge suggests to me that a "*certain conservatism*" should attend the use of the Handbook as an aid to construing the Convention. Of course, what the Handbook says on any matter cannot be treated as conclusive, but, that said, it may nevertheless be a useful constructional aid, depending on the circumstances; it is simply an element for courts to consider, as Lockhart J said in *Morato*.
>
> 112 Also in his reasons for judgment (at 367-69, [74]-[77]), the primary Judge dealt with the question of the use of the Handbook, specifically for the purpose of determining whether Art 1A(2) of the Convention includes the disputed condition. He began that discussion by saying (at 367, [74]), "*It is true that paras 101, 102 and 103 of the Handbook suggest an interpretation of the definition which is at odds with that which I favour*". (I would add that par 104, in so far as it includes a reference to a "*fear of persecution*", appears to me to do likewise.)
>
> 113 Having made that concession, the primary Judge then sought to explain why the Handbook nevertheless should be rejected in that respect. I set out immediately below a lengthy explanatory paragraph from his reasons for judgment (at 367-68, [75]), which I will, for ease of reference, divide into three:

"[A.] It is not clear what is meant by the expression 'for the reasons indicated in the definition' where it occurs in para 101. In the Handbook this paragraph follows an

extract from the Convention definition which includes the words ‘as a result of such events’ which were deleted by the 1967 Protocol. It will be recalled that these words referred back to the phrase ‘events occurring before 1 January 1951’ which was also deleted by the Protocol. Cooper J has reproduced this error in Rishmawi (at FCR 424). It is at least possible that the reference in para 101 to ‘the reasons indicated in the definition’ is to the words ‘as a result of such events’. It may be that the author assumed that they referred to ‘events’ leading to a well-founded fear of persecution. Alternatively, the author may have understood that the reference was to events prior to 1 January 1951 and believed that such events were still relevant. In either case, it is difficult to accord respect to the author’s view when it seems to be based upon defective knowledge of the text.

[B.] Even if these observations are rejected, the point remains that the author does not come to grips with the problem of construction which emerges from the location of the words relating to stateless persons after the semicolon and the absence of any repetition of the reference to persecution as a necessary cause of such a person being outside of the country of former habitual residence. The express reference [in Art 1A(2)] to fear of persecution in connection with unwillingness to return highlights the problem.

[C.] Similar comments apply to para 102.”

114 As to the paragraph which I have lettered “C”, it is unnecessary for me to comment. As to the paragraph which I have lettered “B”, I have already twice quoted its first sentence and made such comments on that paragraph as I wish to make when discussing what the true natural meaning of Art 1A(2) of the Convention is. As to the paragraph which I have lettered “A”, however, considerable comment is necessary.

115 The purport of the paragraph which I have lettered “A” is that it is “*difficult to accord respect*” to what is said in the Handbook about the conditions in Art 1A(2) which are required to be satisfied by a stateless person before the term “*refugee*” applies to him for the purposes of the Convention, because the Handbook’s author had a “*defective knowledge of the text*” of the Convention. That defect in the author’s knowledge of the text of the Convention was a lack of awareness that certain words had been “*deleted*” from Art 1A(2) thereof by the 1967 Protocol and that lack of awareness was demonstrated by the fact that the statement in the Handbook of the words in Art 1A(2) applicable to stateless persons, which statement had preceded the commentary thereon, had included the “*deleted*” words.

116 Those criticisms by the primary Judge of the author of the Handbook were unjustified. They were based, first, on the same misunderstanding by the primary Judge as to the relationship between the 1951 Convention and the 1967 Protocol as was exhibited by the Parliament in the Act and, secondly, on a failure to pay heed to the expressed intention of the author of the Handbook.

117 As to the question of the relationship between the 1951 Convention and the 1967 Protocol, just as it was wrong of the Parliament to say in the Act that the 1967 Protocol had “*amended*” the 1951 Convention, it was wrong of

the primary Judge to say that the author of the Handbook had erred by setting out therein certain words which had appeared in the 1951 Convention, but which words had been "*deleted*" by the 1967 Protocol. The true position is as I set it out below.

118 When it entered into force, Art 1A(2) of the 1951 Convention had provided as follows (emphasis added):

"A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

(1) …

…

(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."

119 Further, the 1951 Convention had included a specific provision, Art 45, dealing with the Convention's revision.

120 However, the 1967 Protocol, in spite of bearing that name (and thereby implying that it operated as an amendment of the 1951 Convention (see, for example, McNair, *The Law of Treaties*, 1961 at p. 23)), was not brought into existence pursuant to Art 45 of the 1951 Convention. As explained by Weis, "*The 1967 Protocol relating to the Status of Refugees and Some Questions relating to the Law of Treaties*" (1967) 42 BYIL 39 at 59-60 (footnote omitted),

"The procedure for revision of the 1951 Convention, as provided for in its terms, was not resorted to in view of the urgency of extending its personal scope to new groups of refugees and of the fact that the amended treaty would have required fresh consent by the States parties to the Convention. Instead, a new instrument, the 1967 Protocol relating to the Status of Refugees, was established which does not amend the 1951 Convention and modifies it only in the sense that States acceding to the Protocol accept the material obligations of the Convention in respect of a wider group of persons. As between the States parties to the Convention, it constitutes an inter se agreement by which they undertake obligations identical ratione materiae with those provided for in the Convention for additional groups of refugees not covered by the Convention on account of the dateline of 1 January 1951. As regards States not parties to the Convention, it constitutes a separate treaty under which they assume the material obligations laid down in the Convention in respect of refugees defined in Article 1 of the Protocol, namely those covered by Article 1 of the Convention and those not covered by reason of the dateline….

With the entry into force of the Protocol there exist, in fact, two treaties dealing with the same subject matter…."

121 The accuracy of Weis's account of the matter is confirmed by examining certain provisions of the 1967 Protocol.

122 First, Art 5 thereof expressly permitted accession to the 1967 Protocol, not only by States which were parties to the 1951 Convention, but also by States which were not. In fact, as of 9 September 1999, there were a number of States which were parties to the 1967 Protocol, but not to the 1951 Convention, most notably, the United States of America (see www.unhcr.ch/refworld/refworld/legal/instrume/asylum/51engsp.htm (Web page accessed 9 March 2000)).

123 Secondly, any State which did accede to the 1967 Protocol, whether or not already a party to the 1951 Convention, undertook in Art 1(1) thereof "*to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined*". Then, Art 1(2) of the Protocol provided (emphasis added),

"2. For the purpose of the present Protocol, the term 'refugee' shall … 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."

(The words which I have just emphasised are the same words as those which I emphasised when setting out Art 1A(2) of the 1951 Convention in par 118 above.)

124 Thus, any State acceding to the 1967 Protocol, whether or not already a party to the 1951 Convention, was, as a result of Art 1 thereof, doing two things. First, it was undertaking certain obligations identical to those which were imposed on it by the 1951 Convention (or would have been imposed on it, had it been a party thereto). Secondly, it was agreeing that those obligations were to be undertaken in respect of a class of persons defined by reference to the definition included in the 1951 Convention, but incorporating that definition by reference into the 1967 Protocol as if certain words were omitted from it.

125 In light of the above, for the Parliament to describe the 1951 Convention as having been "*amended*" by the 1967 Protocol is inaccurate. At the same time, however, for a State like Australia, which was already bound by the 1951 Convention before acceding to the 1967 Protocol, the error is one of no practical significance for present purposes. Furthermore, although, no doubt influenced by Parliament's usage, it is usual in Australia to speak of Australia's using the definition of the term "*refugee*" contained in Art 1 of the Convention and, in particular, in Art 1A(2) thereof, and then to set out Art 1A(2) as though it did not include certain words, such an approach is, strictly speaking, inaccurate. It would instead be accurate to say that Australia uses both the definition of the term "*refugee*" contained in Art 1(2) of the 1967 Protocol (which definition incorporates by reference much of the definition of the same term contained in Art 1A(2) of the 1951 Convention) and the definition of the term "*refugee*" contained in Art 1A(2) of the 1951 Convention.

Since, however, the latter definition is subsumed within the former, the latter definition can be ignored. Again, the error is one of no practical significance for present purposes. (Having now explained the error involved in speaking of Australia's using the definition of "*refugee*" contained in Art 1A(2) and in then setting out Art 1A(2) as though it did not include certain words, I will now generally return in these reasons for judgment to repeating that error.)

126 More significant for present purposes, however, than the errors which I have been describing above was the primary Judge's dismissal of what had been said in the Handbook about the conditions required to be satisfied by a stateless person before the term "*refugee*" applies to him for the purposes of the Convention on the basis that the author of the Handbook had exhibited a "*defective knowledge of the text*" of the Convention, being unaware that certain words had been "*deleted*" from Art 1A(2) thereof. In fact, no words have ever been deleted from Art 1A(2) of the 1951 Convention and, particularly for those States which are parties to the 1951 Convention, but not to the 1967 Protocol (for a list of such States as of 9 September 1999, see the Web page referred to in par 122 above), Art 1A(2) of the 1951 Convention continues to have the same legal significance as it has had ever since it first entered in force with regard to them.

127 Furthermore, it is plain that the author of the Handbook correctly understood the true relationship between the 1951 Convention and the 1967 Protocol and structured the Handbook accordingly. In par 9 of the Handbook it was said,

"9. By accession to the 1967 Protocol, States undertake to apply the substantive provisions of the 1951 Convention to refugees as defined in the Convention, but without the 1951 dateline. Although related to the Convention in this way, the Protocol is an independent instrument, accession to which is not limited to States parties to the Convention."

It is also plain from the Handbook that the author of it specifically set for him/herself the task of dealing with the criteria for determination of refugee status under the 1951 Convention, rather than under the 1967 Protocol: see pars 30 and 34 thereof; being aware at the same time of the difference between the relevant definitions in the 1951 Convention and the 1967 Protocol: see par 35 thereof, as well as par 9, just quoted. It was for that reason that the author used the words which led the primary Judge mistakenly to accuse him/her of a defective knowledge of the text of the Convention.

128 In the circumstances, the primary Judge's attempt to diminish, by reference to the Handbook's having repeated the words of Art 1A(2) of the 1951 Convention, the significance of the fact that the Handbook suggests a construction of the definition of "*refugee*" which includes the disputed condition must be rejected.

129 The primary Judge also attempted (at 368-69, [76]-[77]) to diminish the significance of the fact that the Handbook suggests a construction of Art 1A(2) which includes the disputed condition by referring to the fact that, in par 103 thereof, it had been stated that the phrase "*former habitual residence*" had

been 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*" and by then pointing out, in substance, that that definition had not been carried into the Convention. However, I am unable to attribute to the Handbook's inclusion of that statement any great significance so far as the correctness of its suggested construction of Art 1A(2) is concerned.

130 In the result, it is my view, contrary to that of the primary Judge in the present matter, that reliance on the Handbook as supporting the construction of Art 1A(2) of the Convention which includes the disputed condition is entirely appropriate.

131 Having now concluded my discussion of the judgment under appeal, I should state expressly what will already be apparent. In my view, on its proper construction, Art 1A(2) of the Convention does include the disputed condition. Obviously, the fact that that construction of the provision accords with what I consider to be its natural meaning is very powerfully persuasive for me (as it was for the primary Judge in the present matter, although, of course, his view of the provision's natural meaning was contrary to my own): as to the need to give primacy to the written text of the Convention in the process of its construction, see *Applicant A*, at 254 (McHugh J); and 277 (Gummow J). Furthermore, even proceeding on the basis that the preparatory work for the 1951 version of the Convention and Art 1C(4) are equivocal on the question, the construction which I favour is supported, I consider, by the Handbook.

132 It is also supported by two further matters to which I now turn.

133 First, it is apparent that the construction given to the Convention by non-Australian courts should, so far as possible, be given weight by Australian courts, in an attempt to promote international uniformity in the operation of the Convention. As was said by a Full Court of this Court (Spender, Einfeld and Tamberlin JJ) in *Rocklea Spinning Mills Pty Limited v Anti-Dumping Authority* (1995) 56 FCR 406 at 421,

"[I]t is obviously desirable that expressions used in international agreements should be construed, so far as possible, in a uniform and consistent manner by both municipal Courts and international Courts … to avoid a multitude of divergent approaches in the territories of the contracting parties on the same subject matter."

134 In that respect, the decision of the House of Lords in *Adan* must, it appears to me, be taken into account. The failure of the primary Judge in the present matter to do so was, as I have already explained above, based on what appears to me to have been a misreading of the speech of Lord Lloyd of Berwick. What was said in that case reinforces my conclusion that Art 1A(2) should be construed as including the disputed condition.

135 Secondly, according to McNair, 426, *"Legislation subsequently enacted by the parties to a treaty for the purpose of giving effect to it can afford evidence of the meaning attached by them to the provisions of the*

*treaty".* It is apparent that such evidence should, so far as possible, be given weight by Australian courts, in an attempt to promote international uniformity in the operation of the Convention, in the same way that they should give weight to the construction of the Convention by non-Australian courts.

136 It will be recalled that, in *Adan*, Simon Brown LJ in the Court of Appeal had referred to "*the relevant Canadian legislation (enacted no doubt in light of Canada's construction of the Convention)*". The relevant Canadian legislation is s 2(1) of the *Immigration Act* (RSC 1985, c I-2), which provides as follows:

"'Convention refugee' means any person who

(a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or

(ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country …"

It is apparent that, in that definition, Canada has given effect to what I have expressed above to be the natural meaning of the definition in Art 1A(2).

137 In his reasons for judgment in the present matter, the primary Judge referred to that Canadian definition, saying (at 365, [63]) that it "*contains a redrafted form of the Convention definition*". In so saying, however, it is apparent that he had given no consideration to the question whether the form of that Canadian definition should legitimately influence him in the construction which he gave to Art 1A(2). For the reasons which I have already given, it is my view that he should have considered that question; having done so, he should then have been influenced by that Canadian legislation, as I am, in favour of the construction of Art 1A(2) which includes the disputed condition, rather than merely dismissing the Canadian legislation as a "*redrafting*" of the Convention definition.

138 Having now explained the reasons for my adherence to the construction of Art 1A(2) which includes the disputed condition, it remains only to mention four matters put forward by the parties on the present appeal as matters which should lead to a construction of Art 1A(2) either as including (in the case of the appellant) or as not including (in the case of the respondents) the disputed condition and to explain why I have not found those four matters persuasive.

139 As to the first of those four matters, there was an attempt by the appellant to rely on the terms of Art 33(1) of the Convention. Article 33(1)

provides that no contracting State shall expel or return (refouler) a refugee to the frontiers of territories where his life or freedom would be threatened on account of a Convention reason. The appellant submitted in effect that, since the Art 33(1) obligation not to expel or return (refouler) a refugee to the frontiers of territories only applied in cases where otherwise the refugee would be at risk of being persecuted for a Convention reason, it followed that no one could be a "*refugee*" within the meaning of Art 1A(2) unless he well-foundedly feared such persecution. Since that would be so even in the case of a person without a nationality who was outside the country of his former habitual residence and unable to return to that country, it must therefore follow that Art 1A(2) includes the disputed condition.

140 As I have already foreshadowed, I reject that submission. In *Adan*, a submission was also made that Art 1A(2) should be construed in a particular respect by reference to the terms of Art 33(1). In the Court of Appeal, Simon Brown LJ, Hutchison LJ agreeing (at 1123), said (at 1116),

"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….

Article 33 … to my mind provides no help in construing article 1A(2)."

Although the Court of Appeal was reversed in the House of Lords on the particular question of construction of Art 1A(2) under consideration in *Adan*, Lord Lloyd of Berwick, Lords Goff of Chieveley (at 301), Nolan (at 312) and Hope of Craighead (also at 312) agreeing, said (at 306),

"Mr. Pannick also founded an argument on article 33. But for my part I found the argument unconvincing. As Simon Brown L.J. said in the Court of Appeal [1997] 1 W.L.R. 1107, 1116, it approaches the question from the wrong end. It [that is, Art 33(1)] throws no light on the definition of refugee in article 1A(2)."

It was not submitted by the appellant on the present appeal that there existed any decision: first, of the High Court of Australia, binding this Court to reach a conclusion contrary to that reached in *Adan* on the question of the ability to use Art 33(1) in construing Art 1A(2); secondly, of a Full Court of this Court, dealing squarely with that question and binding this Court (unless it deliberately chose not to follow that decision) to reach a conclusion contrary to that reached in *Adan* on the question; or, thirdly, of the national courts of any State a party to the Convention other than Australia or the United Kingdom, reaching a conclusion contrary to that reached in *Adan* on the question. In those circumstances and for the reason which I have already given (see par 133 above), I adopt the approach to the question taken by the English courts in *Adan*.

141 As to the second of the four matters to which I referred in par 138 above, there was an attempt by the respondents to rely on the terms of Art 1A(1) of the Convention, which provision deals with those persons often referred to as "statutory" refugees. Article 1A(1) provides:

"A. For the purposes of the present Convention, the term 'refugee' shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization…."

142 In *Applicant A*, Gummow J made specific reference to Art 1A(1) of the Convention. He pointed out (at 278) that,

"The international instruments identified in par (1) of s A [of Art 1] of the Convention attempted to deal with particular hardships consequent upon the collapse of the Russian and Ottoman Empires, and the advent of the Bolshevik and later the National Socialist regimes."

He then referred in particular to the definition of the term "*refugee*" appearing in resolution (2) of the Arrangement of 12 May 1926, so far as that definition applied to Russians. That definition was, "*any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Soviet Socialist Republics and who has not acquired another nationality*".

143 The respondents submitted that the position in which they found themselves was a mirror image of that described in the definition which I have just set out. They were persons of Soviet origin who did not enjoy the protection of any government which had succeeded to that of the Soviet Union and who had not acquired another nationality than their Soviet one. Why, they then asked rhetorically, should Art 1A(2) not be construed as applying to their case? To construe Art 1A(2) as applying to their case would be to achieve "*contemporary symmetry with the ends addressed by the international instruments identified in Art. 1A(1)*".

144 The respondents' Art 1A(1) argument was, in essence, a "context" argument and furthermore, given what I consider to be the natural meaning of Art 1A(2), an argument that that natural meaning should be departed from by reason of the context in which Art 1A(2) appears.

145 As I have already foreshadowed, I reject that argument. I am not persuaded by the terms of Art 1A(1) that I should depart from what I consider to be the natural meaning of Art 1A(2). The definitions in pars (1) and (2) of Art 1A are so different in character from one another that Art 1A(1) is unhelpful for present purposes.

146 First, I point out that the definition of "*refugee*" in Art 1A(1) does not incorporate by reference the definitions of "*refugee*" used in the "statutes" to which it refers; it merely defines as a "*refugee*" a person who "***has been considered*** *a refugee under*" those "statutes" (emphasis added). Thus, it is merely a type of "grandfather" clause, unlike Art 1A(2), which contains a definition of the term "*refugee*" consisting of elements independent of the state of mind of any relevant decision-maker.

147 Secondly, as Gummow J pointed out in *Applicant A* (at 278), international instruments such as the 12 May 1926 Arrangement were created to deal with "*particular hardships*" and, specifically in the case of that Arrangement, "*particular hardships consequent upon the collapse of the Russian … Empire[ ], and the advent of the Bolshevik … regime[ ]*". Article 1A(2), on the other hand, does not focus on any specific occasion of State succession and the problems caused thereby, but applies both universally and irrespective of whether any State succession has occurred. Even more importantly, as Gummow J also pointed out in *Applicant A* (at 279), membership of the classes of refugees created by international instruments such as the 12 May 1926 Arrangement was determined by "*group rather than individual characteristics*" (and see also Goodwin-Gill, *The Refugee in International Law*, 2nd ed. 1996 at pp. 4 & 6). Article 1A(2), on the other hand, focuses on individual characteristics.

148 The fact that persons in the respondents' position could have been refugees if a definition had been specifically inserted into the Convention based both on the collapse of the Soviet Empire and its replacement by a number of successor regimes and on group characteristics does not persuade me to strain what I consider to be the natural meaning of Art 1A(2) in order to include such persons. As Gummow J said in *Applicant A* (at 278), obviously with particular reference to Art 1A(2) of the Convention, "*[C]are is needed in resolving any apparent obscurity in the text of the definition by seeing the definition as reflecting, in a broad sense, humanitarian concerns for displaced persons*".

149 As to the third of the four matters to which I referred in par138 above, there was an attempt by the respondents to rely on the form which Art 1A(2) takes in the 1951 Convention, which form I have already set out in par 118 above.

150 Although the respondents did not refer to it in the course of their argument before this Court, it is necessary, when considering Art 1A(2) in the form which it takes in the 1951 Convention, to have regard also to Art 1B(1). I therefore set it out below:

"B. (1) For the purposes of this Convention, the words 'events occurring before I January 1951' in Article 1, Section A, shall be understood to mean either

(a) 'events occurring in Europe before I January 1951'; or

(b) 'events occurring in Europe or elsewhere before I January 1951';

and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of it [sic] obligations under this Convention."

It is apparent from the terms of Art 1B(1) of the Convention that no State could become a party to the 1951 Convention without declaring at the time which of the two

possible meanings it chose to give to the words "*events occurring before I January 1951*" appearing in Art 1A(2).

151 It was the respondents' submission, based on the presence in Art 1A(2) of the 1951 Convention of the words "*as a result of such events*", but the absence of the repetition after those words of the words "*and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*", that the disputed condition had not, in the 1951 version of Art 1A(2), been included among the conditions which were required to be satisfied by a person not having a nationality before the term "*refugee*" applied to him for the purposes of the Convention. It was further submitted that it had not been the effect of the 1967 Protocol, by "*removing*" from Art 1A(2) reference to pre-1951 events, to add to Art 1A(2) the disputed condition.

152 As to the first of those two submissions, it is by no means clear that the proper inference from the presence in the original version of Art 1A(2) of the words "*as a result of such events*", but the absence of the repetition after those words of the words "*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 that the disputed condition had not, in the original version of Art 1A(2), been included among the conditions which were required to be satisfied by a person not having a nationality before the term "*refugee*" applied to him for the purposes of the Convention. Certainly, no such inference appears to have been drawn in the relevant paragraphs of the Handbook, which, as I have already pointed out, were intentionally discussing the original version of Art 1A(2).

153 In any event, it appears to me that it may well be that the drafters thought it necessary to include the words "*as a result of such events*" in connection with a person not having a nationality in order to make it plain that the choice made by a State party under the unusual provision contained in Art 1B(1) of the Convention applied just as much in connection with a person not having a nationality as it did in connection with a person having a nationality. There was no equivalent necessity for repeating, in connection with a person not having a nationality, the disputed condition.

154 As to the second of those two submissions (and whatever be the acceptability of the first of them), to speak of the 1967 Protocol as having "*removed*" from Art 1A(2) reference to pre-1951 events is to exhibit the "amendment" fallacy which I have earlier discussed. However, even if one were to ignore that problem, there would remain a further problem with the submission.

155 I have already mentioned that accession to the 1967 Protocol was not dependent upon being a party to the 1951 Convention. For a State such as the United States of America, which had chosen not to be bound by the 1951 Convention, it is difficult to see how, by choosing to be bound by the 1967 Protocol, it was intending to agree to be bound by a meaning of the new version of Art 1A(2) which was affected by the meaning which the old version

of Art 1A(2) had had. Surely, the obvious inference is that it was simply intending to be bound by the natural meaning of the words of the new version of Art 1A(2). And if that be so for States such as the United States of America, then that desirable uniformity in the construction of international agreements of which this Court spoke in *Rocklea Spinning Mills* (see par 133 above) can only be achieved by not construing the new version of Art 1A(2) by reference to the meaning which the old version of Art 1A(2) had.

156 For the reasons which I have just given, I am not persuaded that the form of the 1951 version of Art 1A(2) should cause me to depart from what I consider to be the provision's natural meaning, supported as that natural meaning is by the Handbook, the House of Lords in *Adan* and the Canadian implementing legislation.

157 As to the fourth of the four matters to which I referred in par 138 above, there was a half-hearted attempt by the respondents to rely on the existence of the Convention relating to the Status of Stateless Persons done at New York on 28 September 1954 (ATS 1974 No 20).

158 As to the respondents' reliance on that matter, it is appropriate first to provide some background.

159 I infer that neither side of the record had relied on the Stateless Persons Convention in argument before the primary Judge in the present matter. Certainly, the primary Judge did not refer to the existence of that Convention in his reasons for judgment.

160 Then, in *Diatlov*, in which Sackville J chose to follow the decision of Cooper J in *Rishmawi* in preference to the decision of the primary Judge in the present matter on the question whether Art 1A(2) of the Convention includes the disputed condition, Sackville J considered that the Stateless Persons Convention formed part of the context for the purpose of construing Art 1A(2) of the Convention in its post-1967 form and considered further that the existence of that Convention supported the construction of Art 1A(2) which he favoured. In his view, to construe Art 1A(2) as not including the disputed condition (which would have the effect that a stateless person who was outside the country of his former habitual residence for any reason whatever and unable to return to that country was automatically a refugee for the purposes of the Convention) "*would be to render superfluous much of the Stateless Persons Convention*" (at 321, [29]). He then continued (at 321, [30]),

"The existence of the Stateless Persons Conventionalso overcomes a difficulty that troubled Dowsett J in Savvin. His Honour pointed out that a stateless person might face many problems for which no solution is offered by the Refugees Convention. He gave as examples discrimination against stateless people falling short of persecutory conduct and the denial of travel documents to such people. There is no doubt that these problems might be very serious indeed, and that they are not addressed by the Refugees Convention(if Cooper J's construction of Art 1A(2) is correct). But the very point of the Stateless Persons Conventionwas to address these problems: see, for example, Arts 3, 4, 7, 13, 15, 16, 17, 18, 19, 20, 22, 27, 28. It is simply not the case

that, unless stateless persons are covered by the Refugees Conventionin the manner suggested in Savvin they will be denied protection under international law. They have the protection afforded by the Stateless Persons Convention."

161 It was in that setting that the respondents to the present appeal submitted in their written submissions that the existence of the Stateless Persons Convention "*support[ed], rather than detract[ed] from*", the construction of Art 1A(2) which does not include the disputed condition. Their written submission on the matter said the following:

"The preamble to the Stateless Persons Convention recognises that there are stateless persons who [sic] whom the Refugees Convention 1951 does apply. Unlike the Refugees Convention 1951, the Stateless Persons Convention is unconcerned with whether a person is unable or unwilling to return to a country of former habitual residence, much less for what reason a stateless person may be unable or unwilling to return. Rather, it seeks to confer rights on a stateless person resident in a contracting country even if that person is able to return to a country of former habitual residence. It does so (Article 5) without seeking to impair any rights and benefits granted to a stateless person by a contracting country apart from the Stateless Persons Convention. Such latter rights could, for example, be afforded to a stateless person because he also satisfied the requirements of the Refugees Convention."

162 Accepting for the sake of the present argument the accuracy of everything said in the passage which I have just quoted, I am quite unable to see how any of it supports a construction of Art 1A(2) of the Convention as not including the disputed condition. Nor, it appears to me, did the respondents to the appeal ultimately submit that it did. In oral submissions, their counsel's ultimate submission as to the significance of the existence of the Stateless Persons Convention was as follows: "*So in my respectful submission the Stateless Persons Convention, the presence of it, doesn't particularly assist the resolution of why it is that the approach which accords with the literal meaning of the text should not be followed*".

163 As with the preparatory work for the 1951 version of the Convention and with Art 1C(4), I do not find it necessary for present purposes to reach a conclusion on the question whether the existence of the Stateless Persons Convention does support the construction of Art 1A(2) as including the disputed condition. It is sufficient for my purposes to proceed herein on the basis ultimately put forward by the respondents to the present appeal, namely, that that Convention's existence"*doesn't particularly assist*" on the question whether Art 1A(2) does or does not include the disputed condition. Nevertheless, for the reasons which I have already given, namely, the natural meaning of Art 1A(2) and the views expressed on the question in the Handbook, in the House of Lords in *Adan* and in the Canadian implementing legislation, I construe Art 1A(2) as including the disputed condition.

164 In the circumstances, the appeal should be allowed and the orders of the primary Judge set aside; in place of those orders, it should be ordered that the application for review be dismissed with costs. The respondents should pay the costs of the present appeal.

I certify that the preceding one hundred and thirty-five (135) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Katz.

Associate:

Dated: 12 April 2000

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|---|---|
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| Date of Hearing: | 15 February 2000 |
| Date of Judgment: | 12 April 2000 |