FEDERAL COURT OF AUSTRALIA

NBGM v Minister for Immigration & Multicultural & Indigenous Affairs

[2006] FCAFC 60

IMMIGRATION – Refugees – Application for a permanent protection visa – Appellant recognised as a refugee – Temporary protection visa granted – Permanent protection visa refused – Judicial review – Appeal – Proper approach to determine whether Australia has protection obligations to appellant – Whether Australia taken not to have protection obligations unless decision-maker satisfied that appellant has current well-founded fear of persecution pursuant to sub-ss 36(3) and (4) of *Migration Act* – Whether circumstances in connection with which appellant was recognised as a refugee had ceased to exist pursuant to art 1C(5) of Refugees Convention – Whether appellant continued to have well-founded fear of persecution pursuant to art 1A(2) of Refugees Convention

Migration Act 1958 (Cth), s 36

Migration Regulations 1994 (Cth)

Convention Relating to the Status of Refugees 1951, done at Geneva on 28 July 1951, arts 1A(2), 1C(5)

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

NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 213 ALR 668; (2005) 79 ALJR 609, considered

NBGM v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1373, approved

QAAH v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 145 FCR 363, considered

R (Hoxha) v Special Adjudicator; R (B) v Immigration Appeal Tribunal [2005] 1 WLR 1063, considered

UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*

UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and 1C(6) of the 1951 Convention relating to the Status of Refugees*, 10 February 2003 (HCR/GIP/03/03)

UNHCR, “The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees” (2001) 20 *Refugee Survey Quarterly* 77

NBGM v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS & ANOR

NSD 1643 OF 2004

BLACK CJ, MARSHALL, MANSFIELD, STONE AND ALLSOP JJ

12 MAY 2006

SYDNEY

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NSD 1643 OF 2004

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	NBGM APPELLANT
AND	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS FIRST RESPONDENT
	REFUGEE REVIEW TRIBUNAL SECOND RESPONDENT
COURT:	**BLACK CJ, MARSHALL, MANSFIELD, STONE AND ALLSOP JJ**

DATE OF ORDER:	12 MAY 2006
WHERE MADE:	SYDNEY

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The costs of the appeal be reserved.

3. Any application for costs to be made on notice within seven days of the date of these orders.

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

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NSD 1643 OF 2004

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	NBGM APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

	FIRST RESPONDENT
	REFUGEE REVIEW TRIBUNAL SECOND RESPONDENT

COURT:	**BLACK CJ, MARSHALL, MANSFIELD, STONE AND ALLSOP JJ**
DATE:	12 MAY 2006
PLACE:	SYDNEY

REASONS FOR JUDGMENT

BLACK CJ:

1 This appeal raises two important issues about protection visas. They arise in the context of an application for a protection visa by a person whom Australia has, by granting a *temporary* protection visa, acknowledged as a refugee within the meaning of art 1 of the *Convention Relating to the Status of Refugees 1951*, done at Geneva on 28 July 1951 (the Convention).

2 The first issue, viewed chronologically, concerns the relationship between art 1A(2) of the Convention and art 1C(5). Put shortly, the issue is whether art 1C(5) operates independently of art 1A(2) so that an applicant for a protection visa who has already been acknowledged as a refugee by Australia is to be treated as someone to whom obligations continue to be owed unless and until it is determined that those obligations have come to an end by the application of art 1C(5) to the circumstances of the applicant's case.

3 The second issue is whether s 36 of the *Migration Act 1958* (Cth) (the Act) requires a decision-maker to consider an application for a permanent protection visa solely within the framework established by that section. In the view I take of the second issue, its resolution is necessarily decisive of this appeal.

4 The facts, and the circumstances under which this appeal comes before the Court, are set out in detail in the reasons for judgment of Allsop J which I have had the advantage of reading. It is sufficient therefore to note that the appellant is the holder of a temporary protection visa granted to him in March 2000, the Minister's delegate having been satisfied that he was a person to whom Australia had protection obligations. The delegate was satisfied that the appellant, a national of Afghanistan, feared persecution on the Convention grounds of his ethnicity and his religion.

5 Soon after the grant of the temporary protection visa, the appellant applied for a permanent protection visa. His application was rejected by the Minister's delegate and by the Refugee Review Tribunal (the Tribunal). The Tribunal, affirming the decision not to grant the visa, concluded (relevantly to the first issue on this appeal) that the circumstances in connection with which he had been recognised as a refugee had ceased to exist consequent upon the Taliban being removed from power in Afghanistan. It also concluded (relevantly to the second issue) that the appellant did not then have a well-founded fear of persecution in his country of nationality with the consequence that s 36(3) of the Act applied and Australia was, in the language of the provision, "taken not to have protection obligations" to him.

6 The appellant then sought judicial review of the Tribunal's decision: *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1373. On the first issue, the learned primary judge saw "some symmetry in [the] effect" of arts 1A(2) and 1C(5) of the Convention (at [37]), such that the object of the inquiry in relation to art 1C(5) was whether the applicant for a visa "can still claim to have a well-founded fear of being persecuted, for a Convention Reason" (at [40]) and concluded that "it was open to the Tribunal, on the material before it, to conclude … that the applicant did not … have a well-founded fear of being persecuted" (at [54]). On the second issue the primary judge said that he found it difficult to see what relevance s 36(3) had since, in his Honour's view, if the applicant did not have a well-founded fear of persecution then Australia did not have protection obligations to him in the first place and, on this view, there was no work for s 36(3) to do (at [59]).

7 The appellant then appealed to this Court. The appeal was heard by a bench of three judges but before judgment was delivered one of the judges, Hill J, died and it was necessary to reconstitute the bench.

8 In the view I take of the appeal, it is desirable to consider the second issue at the outset. Section 36 has been amended on several occasions, notably in 1999 when sub-sections (3) to (7) were added. The primary provisions of s 36 are the first two sub-sections, which provide:

(1) There is a class of visas to be known as protection visas.

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

9 In the present case, the Minister was obliged to grant the appellant's application for a permanent protection visa if he was satisfied that the relevant criteria for the visa had been made out: see s 65 of the Act. The relevant criterion was that stated in s 36(2), set out above. That sub-section did not, however, stand alone. Following the 1999 amendments, the section continued:

Protection obligations

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

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

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

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

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;

subsection (3) does not apply in relation to the first-mentioned country.

Determining nationality

(6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

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

10 Section 36(3), to adopt the words of Hill J in *V872/00A v Minister for Immigration and Multicultural Affairs* (2002) 122 FCR 57 at [21]-[22], provides

an automatic disqualification for persons falling [within its terms] from obtaining a protection visa. I use the phrase "automatic disqualification" because that is the consequence of s 36(3). There is no question of discretion; no room for differences of

opinion. A legally enforceable right to enter and reside in a safe third country automatically disqualifies a person from being granted a protection visa in Australia.

That case concerned nationals of Iraq and findings by the Tribunal that each appellant could return to a third country – Syria – a country in which each had previously lived and which each would be able to enter and continue to reside in. There is nothing to suggest that the condition stated by Hill J in the final sentence – "a legally enforceable right to enter and reside in a safe third country" – is exhaustive of the circumstances in which s 36(3) may operate and the correctness of that condition is not directly at issue in this appeal. Subject to the operation of ss 36(4)-(5), I agree with Hill J's conclusions about the consequences that flow from s 36(3) being satisfied.

> 11 In cases where a Convention obligation might otherwise exist, the operation of s 36(3) is such that Australia is, in effect, deemed not to have protection obligations. This was the view expressed by Emmett J, dissenting, in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 46 at [43]. (The construction of s 36(3) was not directly relevant on the appeal to the High Court, which was allowed: *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 79 ALJR 609). I would emphasise that 36(3) does not provide that "Australia does not have protection obligations" in the circumstances outlined, but that Australia "is *taken not to have* protection obligations".
>
> 12 The circumstances in which s 36(3) operates, and particularly the phrase "any country apart from Australia, including countries of which the non-citizen is a national", next needs to be considered. With Mansfield J, I agree that this phrase should be construed according to its ordinary meaning and cannot be confined to situations in which an applicant for a visa could utilise a right to enter and reside in a "third country".
>
> 13 Two arguments were advanced against this conclusion. First, it was said that s 36(3) is only directed to the situation of applicants for "temporary protection visas" and that it has nothing to say in relation to subsequent visa applications. Second, it was contended that the context in which s 36(3) was enacted, and its relationship with s 36(2), demonstrates that it only applies to persons who could have entered and resided in a "third country".
>
> 14 In my view both of these arguments are answered by the express words of the statute, in whose face they must fall. I do not accept that, either individually or collectively, any or all of s 91M of the Act (which was enacted at the same time as ss 36(3)-(7)), or the heading "Amendments to prevent forum shopping" in the amending act, or the Supplementary Explanatory Memorandum may properly be used to narrow, and thereby substantially alter, the plain meaning of the subsection. Sections 36(3)-(7) take their place in a section directed to protection visas generally; these provisions cannot be confined in their operation to only one class of visa. Further, where Parliament intended to refer to "third countries" it has done so expressly, as in s 91M, or by reference to non-citizens who are nationals of two or more countries, as in

s 91N(1); the absence of any such reference in s 36(3) stands in contrast to these specific references elsewhere.

15 It follows that I am unable to agree with the construction adopted by Moore J in *NBKS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1554 at [39] where his Honour said of s 36(3) that it "does not raise for consideration whether the applicant could have entered and resided in the country of nationality or habitual residence, being the country the applicant has fled and about which the well-founded fear of persecution was said to exist".

16 Where the country to which s 36(3) applies is the country in relation to which a visa applicant makes his or her claims of persecution, ss 36(4)-(5) provide the mechanism by which Australia's international obligations under the Refugees Convention are to be met. In *NBLC v Minister for Immigration and Multicultural and Indigenous Affairs; NBLB v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 272 at [2], Wilcox J drew attention to the use of the words "however" and "also" at the commencement of each sub-section. This statutory language affirms the relationship between the sub-sections, which was described by Bennett J in the same case: "s 36(3) is a qualification of s 36(2) and s 36(4) is a qualification to that qualification" (at [17], see also Graham J at [47] describing the criterion in s 36(2) as "significantly qualified" by s 36(3) and at [71]-[72]).

17 Once it is accepted that the entirety of s 36, necessarily of course including ss 36(3)-(5), is applicable to *all* applications for protection visas (whether "temporary" or "permanent") it becomes apparent that the section does effect a change to the manner in which applications for protection visas would otherwise be assessed solely by reference to s 36(2). Mansfield J has pointed to the fact that whilst ss 36(2) and (3) refer to "protection obligations" – which, as the High Court made plain in *NAGV* directs attention to the whole of art 1 of the Refugees Convention – s 36(4) only refers to the concept (stated in art 1A(2)) of a well-founded fear of being persecuted for a Convention reason. As a matter of practice, it may well be that, when a decision-maker is assessing an application for a *temporary* protection visa, s 36(3) adds little to the terms of s 36(2) of the Act where the issue involves the return of the applicant to his country of nationality (see *SWNB v Minister for Immigration and Multicultural Affairs* [2004] FCA 1606 at [12], referring to *NBGM v Minister for Immigration and Multicultural Affairs* [2004] FCA 1373. See also *NBKS v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1554 at [33]). Whether the claims of an applicant for a temporary protection visa are assessed pursuant to s 36(2)(a) (where the reference to "protection obligations" would require the decision-maker to consider art 1A(2) of the Convention) or pursuant to the statutory enactment of the words of art 1A(2) in s 36(4), the result will likely be the same. That proposition does not, however, hold true in relation to a subsequent application for a *permanent* protection visa and, as I have sought to emphasise, the section is plainly intended to cover both classes of visa.

18 An applicant for a permanent protection visa is still applying for a visa and must still satisfy the criteria for that visa. The criterion of Australia having "protection obligations" to the applicant, which is established by s 36(2), is statutorily negated in the circumstances in which s 36(3) applies. When that statutory negation takes effect, it is only undone by the operation of either s 36(4) or s 36(5). That is, the applicant will only be able to make good the criterion in s 36(2) by making out the exception in s 36(4) or (5). And, as I have noted, the statutory language used in s 36(4) is narrower than the concept of "protection obligations", which directs attention to art 1 of the Convention. Section 36(4) does not merely direct attention to art 1A(2); the legislature has laid down the test, as a matter of domestic law, that must be satisfied for the qualification to the qualification of s 36(2) to be made good. The circumstances to be established are presently existing circumstances, as to which the past may well illuminate the present; but the question remains in the present.

19 Whilst s 36(4) requires the presence, as a matter of fact, of a well-founded fear of persecution, it does not follow that the prior recognition of such a fear establishes its presence at a later point of inquiry. Section 36(4) requires a decision-maker to consider whether an applicant for a visa "*has* a well-founded fear" – noting the use of the present tense. A current assessment is required for the purposes of this provision. To my mind, the statutory language does not support the conclusion that the required current assessment is to be made by considering whether a previously established well-founded fear has been brought to an end by changed circumstances.

20 As a final matter of construction, I see no requirement for a decision-maker to be satisfied as to whether or not Australia has "protection obligations" pursuant to s 36(2) before considering the qualification in s 36(3). In an appropriate case, it may indeed be proper for a decision-maker to consider first whether or not Australia is taken not to have protection obligations to the applicant by reason of the operation of s 36(3) (see *NBLC and NBLB* at [48] (Graham J)). Such an approach finds a parallel in the permissible approach to art 1 of the Convention: *NAGV and NAGW of 2002* (2005) 79 ALJR 609 at [47] (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

21 Once the central role of ss 36(3) and (4) is appreciated, it is apparent that the appellant could only succeed in his application for a permanent protection visa if the decision-maker could be satisfied that he then had a well-founded fear of being persecuted in Afghanistan for a Convention reason.

22 Like Mansfield J, I consider that the Tribunal's reasons disclose that it properly addressed its task under s 36(4) of the Act and that it neither misunderstood nor misapplied the law in fulfilling that task. If it be accepted, in conformity with the reasons of Allsop J, that there was jurisdictional error in the Tribunal's failure to make findings sufficient to enliven art 1C(5) of the Convention, the application of s 36 provides an independent foundation for the rejection of the appellant's application for a permanent protection visa.

23 I should briefly state my views as to the first issue in this appeal (which was left to one side at [7] above). Like Mansfield J, I agree with the analysis of the Convention obligations undertaken by Allsop J and with his conclusions about the operation and effect of art 1A(2) and art 1C(5). To my mind, the decisive factor in that finely balanced issue is what I see as important differences in expression, concept and purpose between these two provisions.

24 For the reasons I have given, however, the appeal should be dismissed. Should a costs order be sought, an application should be made on notice within seven days.

25 The members of the Full Court have reached differing conclusions both as to the outcome of the appeal and as to the reasons for the outcome. As a majority would dismiss the appeal, that will be the order of the Court. Given the practical importance of the case, I think it appropriate to observe that whilst there are two lines of reasoning leading to the majority conclusion that the appeal should be dismissed, there is a common conclusion about the task to be performed by the decision-maker on an application for a permanent protection visa where the relevant circumstances are said to have changed since the appellant was granted a temporary protection visa. The majority would agree that s 36 mandates that the decision-maker must be satisfied that, at the time the decision is made, the applicant for a permanent protection visa then has a well-founded fear of persecution for a Convention reason. The circumstance that a previous decision-maker was satisfied that the applicant had such a fear when a temporary protection visa was granted is not sufficient to establish what s 36 requires.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Black.

Associate:

Dated: 12 May 2006

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NSD 1643 OF 2004

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	NBGM APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS FIRST RESPONDENT
	REFUGEE REVIEW TRIBUNAL SECOND RESPONDENT

COURT:	**BLACK CJ, MARSHALL, MANSFIELD, STONE AND ALLSOP JJ**
DATE:	12 MAY 2006
PLACE:	SYDNEY

REASONS FOR JUDGMENT

MARSHALL J:

26 I have had the benefit of reading, in draft form, the judgment of Allsop J and respectfully agree that his proposed orders are appropriate for the reasons given by his Honour.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Marshall.

Associate:

Dated: 12 May 2006

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NSD 1643 OF 2004

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	NBGM APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS FIRST RESPONDENT
	REFUGEE REVIEW TRIBUNAL SECOND RESPONDENT

COURT:	**BLACK CJ, MARSHALL, MANSFIELD, STONE AND ALLSOP JJ**
DATE:	12 MAY 2006
PLACE:	SYDNEY

REASONS FOR JUDGMENT

MANSFIELD J:

27 I have had the benefit of reading the reasons for judgment of Stone J and of Allsop J. I am therefore relieved of the need to set out in detail the appellant's personal circumstances, the context in which the present appeal comes to be heard, or the reasons for decision of the Refugee Review Tribunal (the Tribunal) or of the learned judge at first instance. Nor do I need to set out in detail all the relevant provisions of the *Migration Act 1958* (Cth) (the Act), or of the *Migration Regulations 1994* (Cth) (the Regulations), or of the Refugees Convention as amended by the Refugees Protocol (using the

terms as defined in the Act). I am grateful to adopt their Honours' references to that material. I can therefore briefly state the reasons for my conclusion.

28 At the time applicable to the decision of the High Court in *NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 213 ALR 668; [2005] HCA 6 (*NAGV*), s 36 of the Act provided:

'(1) There is a class of visas to be known as protection visas.

(2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under [the Convention].

See *NAGV* at 670-671, [10] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ. It had been in essence in that form since the *Migration Reform Act 1992* (Cth). Its legislative history is exposed in the joint judgment of their Honours in *NAGV* at 676-677, [37]-[41].

29 Also at the time applicable to that decision, the Regulations prescribed only one class of protection visa. That was the Protection (Class AZ) Subclass 866 Protection visa: see the reg 2.01 and 2.02, Sch 1 Pt 1 item 1126 and Sch 2 item 866 of the Regulations as in force up to 20 October 1999. That class of protection visa was introduced by the *Migration Regulations* (Cth) made on 21 July 1994.

30 Curiously, at all times up to 20 October 1999, the Protection (Class AZ) visa was included in Sch 1 Pt 1 of the Regulations prescribing 'permanent' visas, although cl 866.511 of Sch 2 to the Regulations said the visa permitted the holder to travel and enter Australia for a limited period: four years from the date of the grant of the visa; subsequently changed to five years by cl 141 of the *Migration Regulations (Amendment)* (Cth) (Statutory Rules 1996 No 211), effective from 1 November 1996. The terminology used is inconsistent with s 30(1) of the Act which says a visa permitting the holder to remain indefinitely in Australia is to be known as a permanent visa, and s 30(2) which says that a visa permitting the holder to remain in Australia during a specified period is to be known as a temporary visa.

31 Both s 36 of the Act and the relevant provisions of the Regulations changed before the application for a protection visa by the appellant which is the subject of this appeal.

32 Section 36 was added to by Pt 6 of Sch 1 to the *Border Protection Legislation Amendment Act 1999* (Cth) (the 1999 Amendment). That Part is headed 'Amendments to prevent forum shopping'. It came into force on 16 December 1999: s 3 and s 2(6) of the 1999 Amendment. Clause 65 of Pt 6 of Sch 1 to the 1999 Amendment added subs (3)-(7) to s 36 of the Act. Those subsections have not since been amended. Both s 36(1) and s 36(2) have since been amended by the *Migration Legislation Amendment Act (No 6) 2001* Cth) and by the *Migration Legislation Amendment (Judicial Review) Act 2001*

(Cth)(the 2001 Amendments). The amendments to s 36(1) and s 36(2) are not of significance to the present appeal.

33 Section 36 now provides, and provided at times relevant to the appeal:

'(1) There is a class of visas to be known as protection visas.

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:

(i) is mentioned in paragraph (a) and

(ii) holds a protection visa.

Protection obligations

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

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

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

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

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;

subsection (3) does not apply in relation to the first-mentioned country.

Determining nationality

(6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

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

34 Generally, where a person comes to Australia from a country where that person has a well-founded fear of persecution for a Convention reason, subject to the exclusions in the Convention, that person will be a refugee as defined in Art 1A(2) of the Convention. Australia in those circumstances has protection obligations to that person under the Convention.

35 As I have noted, for the purposes of this appeal, s 36(2)(a) of the Act has been in essence in the same form since the *Migration Reform Act 1992* (Cth). The 2001 Amendments did not relevantly alter its content. However, for reasons which appear below, I regard subs 36(3)-(5) as of considerable significance to the outcome of this appeal. Clause 70 of Pt 6 of Sch 1 to the 1999 Amendment provides that they apply to visa applications made after the commencement of that Act, namely (as proclaimed) to visa applications made after 16 December 1999. They were, therefore, in force when the appellant applied for a Subclass 866 (Protection) visa on 3 April 2000.

36 The relevant Regulations were also substantially changed in the period before the appellant's relevant application for a protection visa.

37 The *Migration Amendment Regulations 1999 (No 12)* (Statutory Rules 1999 No 243) significantly amended the regime concerning protection visas. They came into force on 20 October 1999 and thus applied to the appellant, as he first applied for a protection visa on 18 November 1999. They established the Protection (Class XA) visa by inserting item 1401 of Sch 1 to the Regulations. Two subclasses of a Protection (Class XA) visa were created: Subclass 785 (Temporary Protection) and Subclass 866 (Protection) visas. At the same time the former Protection (Class AZ) visa was removed from the regulatory scheme.

38 Under the Regulations as so amended, an applicant for a protection visa must first apply for a Subclass 785 (Temporary Protection) visa. Clause 785.211 of Sch 2 of the Regulations requires an applicant for a Subclass 78S (Temporary Protection) visa, at the time of the application, to claim to be a person to whom Australia has protection obligations under the Convention. Clause 785.221 requires that the Minister, at the time of decision, be satisfied that the applicant is a person to whom Australia has protection obligations under the Convention. The applicant has to be in Australia at the time of the grant: cl 785.41. The visa takes effect in the following terms (cl 785.511):

'Temporary visa permitting the holder to remain in, but not re-enter, Australia until:

(a) for the holder of a Subclass 785 (Temporary Protection) (Class XA) visa:

(ii) if the holder applies for a Protection (Class XA) visa after the temporary visa is granted and within 36 months after the grant – the day when the application is finally determined or withdrawn; and

(iii) in any other case – the end of the 36 months; or

(b) for the holder of a Subclass 785 (Temporary Protection) (Class XC) visa – the day when the application mentioned in paragraph 2.08F(1)(d) is finally determined or withdrawn.'

The reference to par 2.08F of the Regulations refers to certain holders of Subclass 785 (Temporary Protection) visas who are taken to have applied for Protection (Class XC) visas if they have, within 36 months after the grant of the temporary protection visa, made an application for a Protection (Class XA) visa which has not been finally determined, or (if in fact no such application has been made) are taken to have made that application on 1 November 2002. It applies only to those persons who hold a Subclass 785 (Temporary Protection) visa that was granted before 19 September 2001.

39 The appellant was granted a Protection (Class XA) Subclass 785 (Temporary Protection) visa (a temporary protection visa) under the Act on 24 March 2000. Thereafter, he applied for a Protection (Class XA) Subclass 866 (Protection) visa (a permanent protection visa) under the Act. His application was refused by a delegate of the first respondent on 16 September 2003. The decision was affirmed by the Tribunal on 5 April 2004. The appellant then applied for orders to quash that decision on the ground of jurisdictional error on the part of the Tribunal. That application was refused by a judge of this Court on 25 October 2004. This is an appeal from that decision.

40 The issue on the appeal is the manner in which, for the purpose of considering the appellant's application for a permanent protection visa, the relevant decision-maker had to be satisfied that the criterion for the grant of the visa specified in s 36 of the Act had been met. There were no other prescribed criteria apparently in issue. If the decision-maker was satisfied that the criterion specified in s 36 was satisfied, s 65(1) of the Act directed the decision-maker to grant the visa.

41 As both Stone J and Allsop J have pointed out, s 36(2)(a) directs attention to the whole of the Convention. That was decided in *NAGV*. If s 36(2)(a) stood alone (as it did prior to the 1999 Amendment), in the particular circumstances of this matter I would agree with the views of Allsop J as to the way in which the Tribunal should have considered whether the appellant is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Convention. That is, I would agree with the views of Allsop J, for the reasons his Honour has given, that it was necessary for the Tribunal to have particular regard to Art 1A(2) and 1C(5) of the Convention in the way his Honour has indicated. I would also agree that, for

the reasons his Honour has given, the Tribunal erred in its consideration of the application of the Convention.

42 However, in my judgment, s 36 of the Act as in force as a consequence of and since the 1999 Amendments leads to a different conclusion.

43 Section 36(2) specifies a criterion for a protection visa, whether a temporary protection visa or a permanent protection visa. The decision-maker must be satisfied that the visa applicant is a person to whom Australia has protection obligations under the Convention. That criterion generally enlivens consideration of the content and operation of Art 1A(2). In the case of an application for a permanent protection visa where the foundation for the claimed well-founded fear of being persecuted for a Convention reason is the same as that upon which the preceding temporary protection visa was granted, it may be seen to enliven consideration of the content and operation of Art 1A(2) and Art 1C(5) of the Convention. However, s 36(3) then prescribes circumstances in which Australia is taken not to have protection obligations to a particular protection visa applicant. That is, if s 36(3) applies in the circumstances, the criterion for a protection visa specified in s 36(2) will not be satisfied notwithstanding that Art 1A(2) and Art 1C(5) of the Convention might otherwise point to the existence of those obligations and so to the satisfaction of that criterion. The use of the expression 'protection obligations' in both s 36(2) and in s 36(3) is not coincidental; the subsections relate to the same topic and are intended to inter-relate. Section 36(3) would make no sense except by its reference to s 36(2).

44 Section 36(3) applies to the appellant if he or she has a right to enter and reside in another country apart from Australia, and if he or she has not taken all possible steps to avail himself or herself of that right. Section 36(3) expressly encompasses the country of nationality as among those in respect of which it can apply. Hence, the country apart from Australia to which it refers may include Afghanistan, the country of which the appellant is a national.

45 The Tribunal found that the appellant is entitled to enter and reside in Afghanistan. It also found that he has not taken all possible steps to avail himself of that right. Those findings are not said, on behalf of the appellant, to involve jurisdictional error on its part.

46 Consequently, subject to consideration of s 36(4) and s 36(5), the application of s 36(3) and the findings of the Tribunal in relation to them would lead to the conclusion that Australia is taken not to have protection obligations to the appellant under the Convention. The criterion for the grant of a permanent protection visa in s 36(2) of the Act would not be satisfied.

47 Section 36(4) and s 36(5) specify circumstances in which s 36(3) of the Act will not apply in relation to a particular country. It is, in the circumstances of this matter, to s 36(4) to which the Tribunal was required to give attention. It was not suggested that s 36(5) was of relevance to the determination of this appeal.

48 Section 36(4) is expressed in terms which largely mirror Art 1A(2) of the Convention. That is by way of contrast to s 36(2), which as both Stone J and Allsop J have pointed out, invites or directs attention to 'protection obligations' under the Convention so that in circumstances such as the present and if s 36(2) stood alone, consideration must be given to the operation of both Art 1A(2) and Art 1C(5) of the Convention.

49 The appellant's contention is nevertheless that s 36(3) and s 36(4) did not fall for consideration in respect of his application for a permanent protection visa.

50 As was the case prior to the 1999 Amendment, a permanent protection visa permits its holder to enter and remain in Australia for a specified term of five years: cl 866.5 of the Regulations. The entitlement is indeterminate in time, but is not permanent. It may cease upon a change of circumstances, as contemplated by Art 1C(5) of the Convention. That is, the Convention itself contemplates that the obligations of a contracting nation under the Convention may cease at a time when the circumstances giving rise to the refugee status have ceased. The process by which a protection visa in such circumstances comes to an end is provided for in the Act and in the Regulations. It is indeterminate in time under the Act because at all times a protection visa has been vulnerable to cancellation by the Minister under s 116(1)(a) of the Act, namely if the Minister is satisfied that any circumstances which permitted the grant of the visa no longer exist. That expression reflects Art 1C(5) of the Convention. It is not necessary on this appeal to explore the extent to which the jurisprudence concerning Art 1C(5) applies to the cancellation of a protection visa under s 116(1)(a). It is significant, however, that the legislature in s 116(1)(a) has adopted a test for cancellation of a visa (including a protection visa) which reflects Art 1C(5) of the Convention, and that in s 36(4) it has by way of contrast adopted a qualifier which reflects Art 1A(2) of the Convention. In my view, the construction of s 36 should have regard to the use by the legislature in different provisions of the Act those expressions which appear to reflect different articles of the Convention, and the use by the legislature of the more general expression 'protection obligations' in s 36(2) and s 36(3) of the Act.

51 Consequently, in my view, the wording of s 36(2) s 36(3) required the Tribunal, on the basis of its findings mentioned above, to address s 36(4) because the facts upon which s 36(3) would direct that Australia be taken not to have protection obligations to the appellant were found to exist. Because s 36(4) is in terms which reflect Art 1A(2) of the Convention, rather than a more generic reference to it such as by use of the words 'protection obligations', s 36(4) then invoked considerations consistent with those applicable to Art 1A(2) and as explained by the High Court in *Chan v Minister for Immigration and ethnic Affairs* (1989) 169 CLR 379; *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1.

52 It is necessary, however, to address the contention of the appellant that s 36(3) and s 36(4) by reason of their context and text did not require their consideration.

53 Part 6 of the 1999 Amendment included the heading 'Amendments to prevent forum shopping'. Section 13 of the *Acts Interpretation Act 1901* (Cth) provides that the heading forms part of the amending Act. The Supplementary Explanatory Memorandum to the *Border Protection Legislation Amendment Bill 1999* (Cth) also makes it clear that the purpose of the amendment was to prevent 'forum shopping' by those entering Australia without a visa and who claimed to be refugees. It is quoted at length by the learned judge at first instance in his reasons at [57].

54 I do not think that material leads to a different conclusion. In my view, there is no ambiguity in the words of s 36(3), (4) and (5). The legislature has expressly included in s 36(3) reference to countries of which the visa applicant is a national. It cannot be confined to 'third countries', i.e. countries other than those of which the applicant is a national. The heading in the Pt 6 of the 1999 Amendment is not inconsistent with the legislative intention to ensure that only those persons who qualify as refugees under the Convention and who need Australia's protection because they cannot safely go to another country, or return to their country of nationality, should be recognised as persons to whom Australia has protection obligations. And, lest there be some scope for uncertainty by the first of those steps (namely that the person must be a refugee as defined under the Convention), s 36(4) directs explicitly in terms which reflect Art 1A(2) of the Convention how that status is to be determined. There is no basis for reading s 36(3) as qualified by s 36(4) so that it does not apply to persons who hold a temporary protection visa, or to persons who by the interaction of Art 1A(2) and Art 1C(5) of the Convention– if s 36(3) did not exist – might otherwise be found to enjoy the continuing status of refugee as defined generally in Art 1 of the Convention. The 1999 Amendment imposed the additional steps upon the determination of whether Australia owes protection obligations to an applicant for a protection visa. That outcome thus has regard to the means by which the legislature sought to implement its objectives: *Municipal Officers' Association of Australia v Lancaster* (1981) 37 ALR 559 at 578-579.

55 That view of the operation of s 36(3) and its qualifiers was also adopted by the Full Court of this Court in *NBLC v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCAFC 272, (Wilcox, Bennett and Graham JJ). The relevant focus in that matter was upon the expression 'all possible steps' in s 36(3), in circumstances where the visa applicant was a North Korean national said to have a right of entry to South Korea so the present issue did not directly fall for consideration. However, Bennett J at [17] said:

'It can be seen that the subject of [section 36] is the person, the applicant. It is not the case that the applicant simply needs to establish a well-founded fear in his or her country of nationality. The "gateway", to adopt the language of Wilcox J, is a composite test that precedes the application of s 36(2). As the primary judge put it at

[38], s 36(3) is a qualification of s 36(2) and s 36(4) is a qualification to that qualification.'

Her Honour's views are consistent with those of the other members of that Full Court. See in particular the observations of Graham J at [47]-[48].

> 56 The appellant points out that the reference to 'a country' and to 'that country' in s 36(4) must refer back to the expression 'any country apart from Australia, including countries of which the non-citizen is a national' in s 36(3). So much is clear. The next step in the appellant's argument is that it would be absurd if s 36(3) were to apply to a country in respect of which an applicant for a protection visa has a well-founded fear of persecution, as that then would require the visa applicant to have taken all possible steps to have availed himself or herself of a right to enter and reside in the country in which 'he or she fears persecution'. The contention, in my view is circular. It does not recognise that s 36 must be read and applied in its full terms. Section 36(2) specifies a criterion for the grant of a protection visa and s 36(3) and its qualifiers then prescribe as a matter of domestic law certain circumstances in which that criterion will not be satisfied. There is no reason, from the words of s 36 or its context, to exclude s 36(3) from consideration or operation in respect of a permanent protection visa application. Section 36(4) by adopting words based upon Art 1A(2) of the Convention indicates when s 36(3) will not be taken to apply. Kirby J in *NAGV* at [88] noted that those subsections 'do demonstrate that legislative techniques are available which might [be] used by the Parliament to limit the scope of the "protection obligations" owed by Australia'.
>
> 57 To reach that conclusion would not result in a person being refouled in breach of Art 33(1) of the Convention. Section 36(4) as a qualifier upon the application of s 36(3) operates so that Australia will not by its domestic legislation act in breach of Art 33(1). Section 36(5) will also operate in that way in circumstances where it applies. Nor do I regard my conclusion as departing from the reasoning of the majority of the Full Court in *QAAH v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 145 FCR 363[2005] FCAFC 136 (*QAAH*) because that decision was not based upon consideration of the provisions of s 36(3) to s 36(5) as well as upon s 36(2).
>
> 58 The Tribunal, in its alternative reasoning for its conclusion, addressed the requirements of s 36(4) and Art 1A(2) of the Convention in appropriate terms. In terms of s 36(4), it found that the appellant did not at the time of the Tribunal's determination have a well-founded fear of being persecuted in Afghanistan for a Convention reason. It correctly addressed the circumstances at the time of its decision. The assessment of satisfaction about the criteria for the grant of a protection visa is made on the basis of circumstances existing at the time of the making of the decision on the visa application: *Minister for Immigration and Ethnic Affairs v Singh* (1997) 74 FCR 553, and see Sch 2 cl 866.221 and cl 785.221 of the Regulations. The Tribunal did not misunderstand or misapply the law in the course of doing so. The appellant's contention does not contend that it did.

59 For those reasons, I would dismiss the appeal. In the circumstances I agree with the observations of the Chief Justice at [25] of his reasons for judgment. I also agree that the parties should be given an opportunity to make such submissions as to the costs of the appeal as they may be advised.

I certify that the preceding thirty-three (33) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:

Dated: 12 May 2006

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NSD 1643 OF 2004

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	NBGM APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS FIRST RESPONDENT
	REFUGEE REVIEW TRIBUNAL SECOND RESPONDENT

COURT:	**BLACK CJ, MARSHALL, MANSFIELD, STONE AND ALLSOP JJ**
DATE:	12 MAY 2006
PLACE:	SYDNEY

REASONS FOR JUDGMENT

STONE J:

Introduction

60 This is an appeal from the decision of a Judge of this Court dismissing an application by the appellant for review of a decision of the Refugee Review Tribunal ('Tribunal') handed down on 29 April 2004. The Tribunal affirmed a decision of a delegate of the first respondent made on 16 September 2003 not to grant the appellant a Protection (Class XA) visa.

61 At the heart of this appeal is the interpretation of certain provisions of the *Migration Act 1958* (Cth) (the 'Migration Act') and of the *Convention relating to the Status of Refugees* done at Geneva on 28 July 1951, as amended by the *Protocol relating to the Status of Refugees* done at New York on 31 January 1967 (together 'the Convention'). For this reason it is convenient to set out the relevant provisions of the Convention and the Migration Act at the outset. All references to statutory provisions in these reasons are to the Migration Act unless otherwise indicated.

Relevant Provisions of The Convention and the Migration Act

The Convention

62 The Convention imposes protection obligations on the Contracting States in respect of refugees; the details are set out in Articles 3-36 and were summarised in *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 ('*Khawar*') per McHugh and Gummow JJ at [42]-[43]. Article 1 of the Convention defines the ambit of those obligations by describing the persons to whom the term 'refugee' shall apply and the circumstances in

which the Convention ceases to apply or does not apply. The circumstances where the Convention does not apply (Articles 1D, 1E and 1F) are not in issue in this appeal. Relevantly, however, Article 1A(2) and Article 1C(5) provide:

‘**Article 1. Definition of the term "refugee"**

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

…

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

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

…

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

…

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

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

63 Two significant obligations accepted by Contracting States to the Convention are found in Articles 32 and 33:

‘**Article 32. Expulsion**

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself,

and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

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

Article 33. Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.'

The Migration Act

64 Section 29 gives the Minister the power to grant a non-citizen permission, known as a visa, to travel to and enter Australia and/or remain in Australia. Section 30 provides that visas may be permanent or temporary; see also reg 2.01 of the Regulations. The exercise of the Minister's power to grant a visa is governed, *inter alia*, by ss 47 and 65 which together provide that the Minister may only consider valid visa applications and that where the Minister is satisfied that the criteria for the grant of the visa have been satisfied he or she (or the Minister's delegate) must grant the visa and must refuse it if not so satisfied; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 617.

65 A non-citizen who wants a visa must apply for a visa of a particular class; s 45(1). Protection visas form one such class and are governed, *inter alia,* by s 36 which, as it applied to the appellant's second visa application, provides:

'36 Protection visas

(1) There is a class of visas to be known as protection visas.

Note: See also Subdivision AL.

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa.

Protection obligations

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

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

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

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

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;

subsection (3) does not apply in relation to the first-mentioned country.

Determining nationality

(6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

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

66 Section 46 requires that a valid visa application must comply with the criteria and requirements prescribed in respect of the relevant class of visa. Although it is common to refer to temporary and permanent protection visas, in fact the regulations do not refer to 'permanent' protection visas; they only distinguish between protection visas and temporary protection visas. It is potentially misleading to describe protection visas as 'permanent' as the regulations provide that such a visa has effect only for a period of five years from the date of grant; clause 866.511 of Schedule 2 of the *Migration*

Regulations 1994 (Cth) ('the Regulations'). Section 30 distinguishes between 'permanent' visas (those that permit the holder to remain in Australia indefinitely) and 'temporary' visas that permit the holder to remain during a specified period; or until a specified event happens; or while the holder has a specified status; see also s 82 which stipulates when visas cease to have effect. Despite its limited duration, for convenience I have continued to refer to the Subclass 866 (Protection) visa for which the appellant applied as a 'Permanent Protection Visa' because of the widespread use of this term including in the reasons of the Tribunal and the primary Judge. I will refer to the Subclass 785 (Temporary Protection) visa as a 'Temporary Protection Visa'.

67 Regulation 785.511 of Schedule 2 provides that Temporary Protection Visas permit the holder to remain in, but not re-enter, Australia until:

'(a) for the holder of a Subclass 785 (Temporary Protection) (Class XA) visa:

(i) if the holder applies for a Protection (Class XA) visa after the temporary visa is granted and within 36 months after the grant – the day when the application is finally determined or withdrawn; and

(ii) in any other case – the end of 36 months; or

(b) for the holder of a Subclass 785 (Temporary Protection) (Class XC) visa – the day when the application mentioned in paragraph 2.08F(1)(d) is finally determined or withdrawn.'

The holder of a Temporary Protection Visa cannot apply for a substantive visa other than a protection visa.

68 Clause 866.21 of Schedule 2 of the Regulations details the criteria to be satisfied at the time of application for a Permanent Protection Visa. In addition to making specific claims under the Convention (clause 866.211(a)) and being immigration cleared (clause 866.212(1)(a)), at the time of the application an applicant must, *inter alia*:

(a) have been granted a Temporary Protection Visa, which has not been cancelled, and the applicant must have remained in Australia since the granting of that visa (clause 866.212(2)); or

(b) at the time of their last entry to Australia:

(i) have held a visa that was in effect, not altered or counterfeit and not obtained using a fraudulent document; and

(ii) if the applicant held a valid passport, the passport was issued in the applicant's name (clause 866.212(3)); or

(c) have been granted a Temporary Safe Haven (Class UJ) visa (whether or not the applicant still holds that visa) and the applicant must have remained in Australia since the grant of that visa (clause 866.212(4)).

69 When a decision in relation to an application for a Permanent Protection Visa is made, an applicant who has held a Temporary Protection Visa, (as was the case with the present appellant), must have held that visa, or that visa and another Temporary Protection Visa, for the lesser of a continuous period of 30 months; and any shorter period specified in writing by the Minister in relation to the applicant; clause 866.228.

70 In summary, the legislature has not only made the granting of a Temporary Protection Visa a precondition for the lodging of a valid application for a Permanent Protection Visa, it has further prescribed that a decision on such an application be deferred until the applicant has held a Temporary Protection Visa, or more than one such visa, for a continuous period of 30 months, or less if the Minister so determines.

71 The Migration Act also provides for the cancellation of visas for a variety of reasons; see s 118. The general power to cancel visas set out in s 116 and the qualifications in s 117 are relevant here:

'**116 Power to cancel**

(1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:

(a) any circumstances which permitted the grant of the visa no longer exist; or

(b) its holder has not complied with a condition of the visa; or

(c) another person required to comply with a condition of the visa has not complied with that condition; or

(d) if its holder has not entered Australia or has so entered but has not been immigration cleared—it would be liable to be cancelled under Subdivision C (incorrect information given by holder) if its holder had so entered and been immigration cleared; or

(e) the presence of its holder in Australia is, or would be, a risk to the health, safety or good order of the Australian community; or

(f) the visa should not have been granted because the application for it or its grant was in contravention of this Act or of another law of the Commonwealth; or

…

(g) a prescribed ground for cancelling a visa applies to the holder.

(1A) The regulations may prescribe matters to which the Minister may have regard in determining whether he or she is satisfied as mentioned in paragraph (1)(fa). Such regulations do not limit the matters to which the Minister may have regard for that purpose.

(2) The Minister is not to cancel a visa if there exist prescribed circumstances in which a visa is not to be cancelled.

(3) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled.'

'**117 When visa may be cancelled**

(1) Subject to subsection (2), a visa held by a non-citizen may be cancelled under section 116:

(a) before the non-citizen enters Australia; or

(b) when the non-citizen is in immigration clearance (see section 172); or

(c) when the non-citizen leaves Australia; or

(d) while the non-citizen is in the migration zone.

(2) A permanent visa cannot be cancelled under section 116 if the holder of the visa:

(a) is in the migration zone; and

(b) was immigration cleared on last entering Australia.'

The Appellant's Background

72 The appellant is a citizen of Afghanistan of Hazara ethnicity and is a Shi'ite (Shia) Muslim. He was born in a village called Tabquz (also translated as Tapqus) in the Jaghori district of Ghazni province where he lived until he left Afghanistan to come to Australia in August 1999. The appellant arrived in Australia on 7 October 1999 without a passport or visa.

Grant of a Temporary Protection Visa

73 Shortly after his arrival in Australia the appellant applied for a Subclass 866 (Protection) visa ('Permanent Protection Visa'). He claimed to fear persecution in Afghanistan from the Taliban on account of his ethnicity and religion. In a statement dated 18 November 1999, accompanying this application, the appellant claimed:

(b) the Taliban had captured Jaghori 'one year ago'; that is, in late 1998;

(c) the Taliban had come to Tabquz and raided houses in search of weapons and young Hazara men;

(d) one of his cousins, a member of the Wahdat Party, was taken by the Taliban and the appellant did not know what had happened to him;

(e) another cousin was also taken by the Taliban, although on a different occasion, as they suspected him of having weapons;

(f) he was forced to flee to the mountains during daylight hours;

(g) his neighbour was also taken by the Taliban and was shot and killed attempting to escape;

(h) the Taliban came to his house when he was not there and his father, being unable to give them money, was taken away; and

(i) his father was only released after his family paid money to the Taliban.

74 The appellant claimed that as a result of these circumstances his father told him to flee Afghanistan. The appellant therefore arranged to be taken to Pakistan and, eventually, Australia.

75 A delegate of the respondent found that the appellant had a real chance of persecution and that his fear was well-founded. In her Visa Record Decision, the delegate stated:

'I accept that the applicant is a young male from the Hazara ethnic group in Afghanistan, I also accept that if he returns to Afghanistan he has a real chance of being captured by the Taliban and forced to fight or be killed by them. I accept that the applicant has not been active in the Wahdat party and has fought or killed any other person. I accept that the Taliban control large areas in Afghanistan, and there are no areas that the applicant could be safe in Afghanistan, as he is readily identifiable as an ethnic Hazara from his physical appearance and his language.'

76 On this basis the delegate concluded that the appellant was a person to whom Australia had protection obligations under the Convention. On 24 March 2000, the appellant was granted a Temporary Protection Visa.

Application for a Permanent Protection Visa

77 On 3 April 2000, the appellant applied for a Permanent Protection Visa. Because of the operation of clause 866.228 of Schedule 2 of the Regulations the appellant was not, at that time, eligible for the grant of a Permanent Protection Visa and therefore a decision on this second application was deferred until 2003.

78 On 16 September 2003, a delegate of the first respondent refused to grant the appellant a Permanent Protection Visa. The delegate found that the appellant was not a person to whom Australia had protection obligations. On 2 October 2003 the appellant applied to the Tribunal for review of the delegate's

decision and on 5 April 2004, the Tribunal affirmed the delegate's decision and refused to grant the appellant a Permanent Protection Visa.

79 On 19 May 2004 the appellant commenced proceedings in this Court under s 39B of the *Judiciary Act 1903* (Cth) seeking Constitutional writ relief in respect of the Tribunal's decision.

The Decisions of the Tribunal and the Primary Judge

80 Ultimately the Tribunal concluded that the appellant did not have a well founded fear of persecution for a Convention reason. There were two aspects to this decision: first the Tribunal decided that the circumstances in connection with which he was recognised as a refugee when he was granted the temporary protection visa had ceased to exist; and secondly there was no other basis on which he could be held to have a well founded fear of persecution for a Convention reason. In relation to the first aspect of the decision the Tribunal relied on Article 1C(5) of the Convention and s 36(3) of the Migration Act. In relation to the second aspect of the decision the Tribunal relied on Article 1A(2) of the Convention and s 36(2) of the Migration Act.

81 The primary Judge held that the appellant had not demonstrated any jurisdictional error on the part of the Tribunal that would render its decision 'something other than a decision under the Act'. His Honour therefore dismissed the application.

Article 1C(5) of the Convention

82 In considering the political situation in Afghanistan, the Tribunal accepted that the Taliban were removed from power by mid-November 2001 and found that while remnants of it remained, the Taliban no longer existed as a political movement. Although the appellant acknowledged that the Taliban were no longer in power he argued that they still posed a threat to Hazaras. He referred to 12 Hazaras having been killed before Christmas (presumably Christmas 2003) and said that three of them were from Jaghori district. The appellant also said that eight people from the international forces had been killed in the Hazara areas of Ghazni province and that this sort killing was going on every day.

83 The Tribunal did not accept these submissions but relied on independent country information indicating that the Taliban and al Qa'ida did not pose a direct threat to the civilian population, their targets currently being Coalition and Afghani Government security forces and international aid workers. The Tribunal also noted that the United Nations High Commissioner for Refugees ('UNHCR') had advised that the strengthening of the Taliban remnants in Zabul province had not reached the Hazara areas of Jaghori district and they were unlikely to do so without open conflict with the Hezb-e-Wahdat. The Tribunal did not accept that there was a real chance that the

appellant, as a Hazara, would be persecuted by the Taliban if he were to return to his home area in Afghanistan either then or in the 'reasonably foreseeable future'. It followed that, in accordance with Article 1C(5) of the Convention, the circumstances in connection with which the appellant had been recognised as a refugee had ceased to exist and therefore, as a national of Afghanistan, he could no longer refuse to avail himself of the protection of that country.

84 The primary Judge considered that Articles 33(1), 1A(2) and 1C(5) of the Convention are all based on the same notion; that is, protection is afforded to those persons in relevant need who do not have access to protection apart from the Convention. The Convention was not designed to provide protection to people who do not have a well-founded fear of persecution, for a Convention reason, in the country, or countries, in respect of which that person has right or ability to access. His Honour noted the practical consideration that the places for, and resources available to, refugees are limited.

85 The primary Judge held that as Article 1C(5) refers to the circumstances in connection with which a person has been recognised as a refugee, it necessarily refers back to the requirement that the person has a well-founded fear of persecution for a Convention reason and is therefore unable, or owing to such fear, unwilling, to avail himself of the protection of his own country. His Honour expressed the view that Articles 1A(2) and 1C(5) should be construed as having some symmetry in their effect, commenting at [38]:

'Thus, the circumstances in connection with which a person who is outside the country of his or her nationality will be recognised as a refugee by a Contracting State are that, owing to well-founded fear of being persecuted for Conventions Reasons, the person is unable or, owing to such fear, is unwilling, to avail himself of the protection of that country. When Article 1C(5) speaks of a person no longer being able to continue to refuse to avail himself of the protection of the country of his nationality, it refers back to the prerequisite of Article 1A(2) that the person be unable or unwilling to avail himself of the protection of that country because of a well-founded fear of persecution for a Convention Reason. There is no reason for construing Article 1C(5) as contemplating anything more or less than the negativing of the circumstances that led to the conclusion that a person was a refugee within the meaning of Article 1A(2).'

86 The primary Judge held that despite a certain lack of symmetry in the actual language of Articles 1A(2), 1C(5) and 33(1), there is a rationale underlying the basic object and scheme of the Convention. His Honour described this rationale as:

'…so long as the relevant well-founded fear exists, such that a person is unable or unwilling to avail himself or herself of the protection of the country of his or her nationality, he or she will be permitted to remain in the Contracting State. However, if circumstances change, such that it can no longer be said that the person is unable to avail himself or herself of the protection of his or her country of nationality owing to well-founded fear of persecution for Convention Reasons, the Contracting State's

obligation of protection comes to an end. That is to say, the obligations to a person that arise under, inter alia, Articles 32.1 and 33.1 continue only for so long as the person is a refugee within the meaning of Article 1A(2).'

'Substantial, effective and durable'

87 The primary Judge accepted that it may be appropriate, in considering the application of Article 1C(5), to assess whether any change in circumstances can be characterised as:

- substantial, in the sense that the power structure under which persecution was deemed a real possibility no longer exists;

- effective, in the sense that they exist in fact, rather than simply promise, and reflect a genuine ability and willingness on the part of the home country's authorities to protect the refugee; and

- durable, rather than transitory shifts which last only a few weeks or months.

88 However, as noted above, his Honour considered that the object of the enquiry under Article 1C(5) is to determine whether there has been a change such that a person no longer has a well-founded fear of being persecuted, for a Convention reason, in their country of nationality such that they are unable or unwilling to avail themselves of the protection of that country. The primary Judge also noted that Article 1C(5) does not actually refer to the characteristics of 'substantial, effective and durable', simply to particular circumstances ceasing to exist.

89 In respect of the Tribunal's decision before him, the primary Judge held that while there was material before the Tribunal that may have given rise to a conclusion contrary to that reached by the Tribunal in relation to the change in circumstances in Afghanistan, there was other material within the same reports relied on by the appellant to support the Tribunal's findings. His Honour commented at [54]:

'It is not for the Court to second guess the significance attached by the Tribunal to the evidentiary material before it. That, in essence, is what the applicant has asked the Court to do. It was open to the Tribunal, on the material before it, to conclude, as it did, that the applicant did not, as April 2004, have a **well-found[ed]** fear of being persecuted for one of the Convention Reasons if he returns to Afghanistan now or in the reasonably foreseeable future.'

(emphasis in original)

Section 36(3) of the Migration Act

90 Against the possibility that it was wrong to apply Article 1C(5) to the present case, the Tribunal also considered whether ss 36(3) and (4) applied to the appellant; that is, at the date of its decision, did the appellant have a well-founded fear of persecution on the basis of the circumstances that had led to him being recognised as a refugee. In view of the Tribunal's findings set out above, it is not surprising that the Tribunal concluded that the appellant no longer had a well-founded fear of persecution in Afghanistan and had not taken all possible steps to avail himself of a right to enter and reside in Afghanistan. It followed therefore that s 36(3) would apply independently of the operation of Article 1C(5) and Australia was not taken to have protection obligations to the appellant in relation to the circumstances in connection with which he was originally recognised as a refugee.

91 Before the primary Judge the appellant contended that the Tribunal erred in applying ss 36(3) and submitted that s 36(3) does not operate at all in relation to a person who has already obtained a protection visa. The appellant argued that s 36(3) only applies to persons who come to Australia seeking protection, in circumstances where there are other countries where those persons could have sought protection. The basis for the appellant's argument was described by his Honour at [56]:

'The applicant says that, while the Taliban have ceased to be in power, there has not been a change sufficient to satisfy Article 1C(5). If Article 1C(5) does not apply, then, according to Article 1A(2), the applicant is a person to whom Australia owes protection obligations and, because he is already in Australia and has been recognised as a refugee, the provisions of Section 36(3) have no operation because no question of 'forum shopping' arises. The reference to 'forum shopping' arises from the explanatory memorandum published in explanatory memorandum published in connection with the Bill for the amendments that were made to the Act to insert ss 36(3), (4) and (5).'

92 Sections 36(3), (4) and (5) were inserted by the *Border Protection Legislation Amendment Act 1999* (Cth) ('the Amendment Act'). The Supplementary Explanatory Memorandum in respect of the Bill for the Amendment Act made reference to the problem of 'forum shopping' and stated that the purpose of the new provisions was 'to prevent the misuse of Australia's asylum processes by "forum shoppers"'.

93 The primary Judge held that the Supplementary Explanatory Memorandum only had relevance to the construction of ss 36(3), (4) and (5) in the event of ambiguity. His Honour commented that it is difficult to see any ambiguity and noted that the provisions make no reference to forum shopping. In any event, his Honour held that in the appellant's circumstances, it was difficult to see the relevance of s 36(3) where the appellant was found not to have a well-founded fear of persecution for a Convention reason and the criterion in s 36(2) would not be satisfied. As such, there would be no need to consider if the appellant had taken all steps required by s 36(3).

Article 1A(2) of the Convention – additional matters raised by the appellant

94 Despite its conclusions as to the operation of Article 1C(5) and s 36(3), the Tribunal held that it was necessary to consider whether the appellant met the definition of 'refugee' in Article 1A(2) of the Convention. This required it to determine whether the appellant had a well-founded fear of being persecuted for a Convention reason, having regard to the situation in Afghanistan at the time of its decision, but unrelated to the circumstances in connection with which he was originally recognised as a refugee. This necessarily entailed consideration of the additional issues that the appellant raised before the Tribunal.

95 At the hearing before the Tribunal, the appellant claimed for the first time that his uncle, a religious leader, was a member of the Sepah faction of the Hezb-e-Wahdat and he believed that another of his uncles had also been involved with the same faction. The appellant also claimed that people thought his father was a part of the Sepah faction because of his father's brothers' involvement. The appellant stated that because his uncle was a member of the Sepah faction people would regard him as being also a member of the Sepah faction.

96 In a statement received by the Department on 8 October 2002 in support of his application for a Permanent Protection Visa, the appellant claimed that before the Taliban had taken control of his village, there were two different Wahdat groups that opposed each other and often fought for control over various things. He stated:

'Neither my father or myself or any of my brothers was ever involved with either Wahdat. …

I am told that the Taleban [sic] is no longer in control of the area my village is in. I believe that my village and surrounding areas is now being fought over by various Wahdat groups. I fear that it is not safe in my village. I fear that if I return I will be forced to join one of the Wahdat groups and will have to fight and kill for them. I do not want to fight. I can not kill another person. I do not want to join any of those groups. I do not believe in what they are fighting for, which is control of all of the surrounding areas. I disagree with the way they fight each other, by using torture, by killing and hurting people. If I refuse to fight for a group I fear that they will accuse me of supporting one of the other groups and will kill me.'

97 The Tribunal did not accept that members of the appellant's family were in the Sepah faction, or that the appellant or other members of his immediate family were regarded as members of that faction. The Tribunal considered that the appellant had ample opportunity to make this claim when interviewed by the delegate in relation to his second visa application and if there were any truth in the claim the appellant would have made it then. The Tribunal went on to state:

'The Applicant referred at that interview [before the delegate in respect of his second application] to fighting between the Nasr and Sepah factions but he did not claim that members of his family were associated with the Sepah faction and that he feared that he would be targeted by the dominant Nasr faction as a result. The applicant said that he had contacted his father after the interview with the primary decision-maker

and it had only been then that his father had told him why it would not be safe for him to return to Afghanistan. However, as I put to the Applicant, he had mentioned at the interview that he had contacted his father before the interview. Since I do not accept that the Applicant or members of his family are associated with, or perceived as being associated with, the Sepah faction of the Hezb-e-Wahdat, I do not accept that there is a real chance that the Applicant will be persecuted by the opposing Nasr faction because of his real or perceived association with the Sepah faction.'

98 In addition, the Tribunal noted that while local commanders prey upon the local people, there was nothing to suggest that they singled out Hazaras. The Tribunal referred to UNHCR advice that, as at September 2003, there was no fighting between the factions in Jaghori. The appellant responded that the sort of fighting he was referring to was that during the night some of the military factions might come and take people from their homes. He contended that the UN would not be aware of this.

99 The Tribunal did not accept that there was a real chance that the appellant would be forcibly recruited or that he would be forced to kill or be killed. It accepted the UNHCR advice referred to in [83] above. The Tribunal also noted that it considered that the UNHCR would be aware if forcible recruitment had been going on in the Jaghori district because it was monitoring the situation in this area. The Tribunal continued:

'…the evidence available to me indicates that any discrimination against Hazaras falls short of what is required to constitute persecution for the purposes of the Refugees Convention. … I do not accept on the evidence before me that there is a real chance that the Applicant will be persecuted for reasons of his race (Hazara) if he returns to Afghanistan now or in the reasonably foreseeable future.'

100 The Tribunal also addressed the appellant's claims of persecution on account of his religion, being a Shia Muslim. The Tribunal noted that independent country information indicated that the situation of Shia Muslims in Afghanistan was generally good at the time of its decision and concluded that there was not a real chance of persecution on this basis.

101 Finally, the Tribunal considered the appellant's claim that outside Kabul it was very hard for Hazara people to live and even in Kabul Hazaras had problems. The Tribunal noted that prior to the Taliban coming to power the appellant's family did very well and referred to independent country information that indicated that people returning from the West were not being targeted merely for having resided in the West. The Tribunal did not accept that if returned to Afghanistan the appellant would be unable to run a shop, referring to the fact that he had assisted his brother in doing so before coming to Australia.

102 The Tribunal concluded by stating:

'I have considered the totality of the Applicant's circumstances as a Hazara, a Shia Muslim, and someone who will be returning to Afghanistan from a Western country. However, even taking into account the cumulative effect of all these circumstances, I am not satisfied that the Applicant has a well-founded fear of being persecuted for a

Convention reason if he returns to Afghanistan now or in the reasonably foreseeable future. It follows that he is not a person to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol. Consequently the Applicant does not satisfy the criterion set out in subsection 36(2) of the Migration Act for the grant of a protection visa.'

103 In reviewing this aspect of the Tribunal's decision the primary Judge commented that the possibility of temporary protection being made available by the grant of a Temporary Protection Visa is not expressly contemplated by the Convention and that the legislative scheme, whereby a fresh application is required for a visa to continue protection after the expiry of the temporary visa, does not sit comfortably with the framework of the Convention. His Honour continued at [61]-[63]:

'Nevertheless, the scheme of the Act is unambiguous in requiring a fresh application for a protection visa on the part of a person who wishes to remain in Australia after the expiration of a temporary protection visa.

The Tribunal was not considering the revocation of a protection visa. Nor was the Tribunal considering an application for the extension of a **temporary** protection visa. The Tribunal was considering a fresh application for the grant of a **permanent** protection visa. That required, under s 36(2), that the Tribunal, standing in the shoes of the Minister be satisfied, that the applicant is, at the time of the decision, a person to whom Australia has protection obligations under the Refugees Convention.

On one view, Article 1C(5) had no part to play in that question. The only question was whether, at the time of the Tribunal's decision, the applicant was a person who, owing to a well-founded fear of being persecuted for Convention Reasons, was unable, or owing to such fear, unwilling to avail himself of the protection of Afghanistan. Even if, as at December 1999 the applicant had been a person to whom the term 'refugee' within the meaning of the Refugee Convention applied, the question before the Tribunal was whether that term applied to the applicant as at April 2004. The Tribunal concluded that the applicant was not, as at that time, a person to whom the term refugee, as defined in the Refugees Convention, applied. There was no error in its reasoning in doing so.'

(emphasis in original)

104 For the primary Judge, there was no jurisdictional error in the Tribunal first considering whether the circumstances in connection with which the appellant was originally recognised as a refugee had ceased to exist. As it found that the Taliban had been removed from power and were no longer in a position to massacre Hazaras or Shia Muslims in the manner found by the delegate in December 1999, the Tribunal turned to whether the appellant had a well-founded fear of persecution by remnants of the Taliban. It found he did not. It was for this reason that the Tribunal found the circumstances in connection with which the appellant was recognised as a refugee had ceased to exist. His Honour held that there was no jurisdictional error in this approach and dismissed the application for review.

This Appeal

105 The claims made in the notice of appeal in these proceedings are quite detailed and take issue with the Tribunal's findings of fact as well as with the reasoning of the Tribunal and the primary Judge on points of law. The submissions made in the appeal, as in the proceedings before the primary Judge, did not entirely coincide with the grounds set out in the notice of appeal. It is hardly necessary to say that where the appellant takes issue with the Tribunal's findings of fact, he invites the Court to trespass on ground where it has no jurisdiction. In disposing of this appeal it will be sufficient to deal with the written and oral submissions made on behalf of the appellant.

106 The appeal involves consideration of both the legislative scheme adopted by Australia to give effect to its obligations under the Convention and the appropriate construction of the Convention itself. As senior counsel for the appellant, Mr G Lindsay SC, submitted, the essential question is what effect, if any, is given to Article 1C(5) of the Convention in the context of Article 1A(2) and s 36(3). Before considering this question it is appropriate to consider the principles of construction that apply to the Convention and to the statutory provisions that comprise the legislative scheme.

Principles of Construction

107 It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless the provisions of the treaty have been validly incorporated into domestic law by statute; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 ('*Teoh*') per Mason CJ and Deane J at 287. It follows that the Convention does not directly apply within Australia; it has effect only through the relevant provisions of the Migration Act and therefore the fundamental question in this appeal must be the proper construction of the Migration Act.

108 That being said however, the proper construction of the Convention is highly relevant to this appeal because, as the High Court has held, the use in s 36(2) of the phrase, 'to whom Australia has protection obligations under [the Convention]' incorporated into Australian domestic law the whole of the definition of 'refugee' contained in Article 1 of the Convention; that is, for present purposes, it picks up both Article 1A(2) and Article 1C(5); see *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 213 ALR 668 ('*NAGV and NAGW of 2002*') per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ at [33], [42]. In *NAGV and NAGW of 2002*, the High Court considered s 36(2) as it stood prior to the amendments introduced by the Amendment Act (see [92] above) and as is relevant to this appeal.

109 While *NAGV and NAGW of 2002* establishes that the whole of Article 1 is incorporated into Australian law, it does not direct this Court as to the approach to be taken in construing, and reconciling, its provisions as incorporated in the Migration Act. There are, however, certain general principles that provide guidance as to the approach to be taken in construing international treaties and their Australian statutory embodiment.

110 In *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 ('*Koowarta*'), Brennan J stated at 265:

'When Parliament chooses to implement a treaty by a statute which uses the same words as the treaty, it is reasonable to assume that Parliament intended to import into municipal law a provision having the same effect as the corresponding provision in the treaty (cf. Shipping Corporation of India Ltd. v. Gamlen Chemical Co. (A/asia) Pty. Ltd. [(1980) 147 C.L.R. 142, at p.159]; Reg. v. Chief Immigration Officier; Ex parte Bibi [[1976] 1 W.L.R. 979, at p. 984 [1976] All E.R. 843, at p.847]. A statutory provision corresponding with a provision in a treaty which the statute is enacted to implement should be construed by municipal courts in accordance with the meaning to be attributed to the treaty provision in international law (Quazi v. Quazi [[1980] A.C. 744, at p.808, 822]. …

The method of construction of such a statute is therefore the method applicable to the construction of the corresponding words in the treaty.'

111 In *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 ('*Applicant A*'), the High Court was concerned with the precursor to s 36(2) of the Act which defined 'refugee' as having the same meaning as in Article 1 of the Convention. Dawson J, in relation to the construction of a domestic statute that incorporates a definition found in an international treaty, agreed with the above comments of Brennan J in *Koowarta* adding at 239-240:

'Such a provision, whether it is a definition or otherwise, should ordinarily be construed in accordance with the meaning to be attributed to the treaty provision in international law. By transposing the provision of the treaty, the legislature discloses the prima facie intention that it have the same meaning in the statute as it does in the treaty. Absent a contrary intention, and there is none in this case, such a statutory provision is to be construed according to the method applicable to the construction of the corresponding words in the treaty.'

(footnote omitted)

112 At 230-231, Brennan CJ reiterated the approach he took in *Koowarta* commenting that:

'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.'

(footnotes omitted)

113 McHugh J held, at 251-252, that the correct approach to the construction of such provisions incorporated into Australian law was in accordance with the general rule of interpretation contained in Article 31 of the Vienna Convention on the Law of Treaties. His Honour stated at 252 that paragraph 1 of Article 31 contained three separate but related principles:

‘First, an interpretation must be in good faith, which flows directly from the rule pacta sunt servanta. Second, the ordinary meaning of the words of the treaty are presumed to be the authentic representation of the parties’ intentions. This principle has been described as the “very essence” of a textual approach to treaty interpretation. Third, the ordinary meaning of the words are not to be determined in a vacuum removed from the context of the treaty or its object or purpose.’

(footnotes omitted)

114 This approach was approved by the other members of the High Court in *Applicant A*: see the comments of Brennan CJ at 230-231, Dawson J at 240, Gummow J at 277 and Kirby J at 292, 294. See also, *Morrison v Peacock* (2002) 210 CLR 274 per Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ at [16]. More recently, in *Khawar*, McHugh and Gummow JJ (at [45]) specifically commented on the proper approach to the interpretation of the Convention and its incorporation into the Migration Act:

‘Several further points should be made here. The first is that the Act is not concerned to enact in Australian municipal law the various protection obligations of Contracting States found in Chs II, III and IV of the Convention. The scope of the Act is much narrower. In providing for protection visas whereby persons may either or both travel to and enter Australia, or remain in this country, the Act focuses upon the definition in Art 1 of the Convention as the criterion of operation of the protection visa system.

Secondly, the drawing of the definition of "refugee" into municipal law itself involves the construction of that definition and that in turn may require attention to the text, scope and purpose of the Convention as a whole. In particular, it would be erroneous to construe the passage set out above from sub-s (2) of s A of Art 1 in isolation from the rest of the Convention.

Thirdly, the Convention is not to be approached with any preconceptions as to the preference of a "broad" to a "narrow" construction, or vice versa. …’

115 Their Honours also made the point that the scope of the Convention was ‘deliberately confined’ and in relation to this fourth point, quoted observations made by Gummow J in *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1. His Honour, with whom Gleeson CJ and Hayne J agreed at [1] and [203] respectively, said at [143]:

‘The provisions in the Act respecting protection visas have to be construed in the context of the legislation as a whole. This shows that the provisions in question are not the only mechanism for giving effect to the calls of international humanitarianism. Further, the Convention was adopted against a particular background of customary international law concerning the consequences of delinquency in the exercise of State responsibility for the welfare of its own nationals and the acceptance by asylum States of responsibilities under their municipal laws towards those they accepted as refugees. The Convention was not designed to confer any general right of asylum upon classes or groups of persons suffering hardship and was deliberately confined in its scope. Whether there is a need for revision of the Convention and whether this should be promoted by the other branches of government is not a matter that arises for this Court. Its mandate is to construe and apply the Act. The interpretation of the protection visa provisions in the Act should not be strained to meet a judicially

perceived mischief in the delayed development of customary or other international law.'

116 The importance of context in the second point made by McHugh and Gummow JJ was also stressed in *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 ('*Adan*') by Lord Lloyd of Berwick who, in considering the construction of Article 1A(2), said at 305:

'I return to the argument on construction. Mr Pannick points out that we are here concerned with the meaning of an international Convention. Inevitably the final text will have been the product of a long period of negotiation and compromise. One cannot expect to find the same precision of language as one does in an Act of Parliament drafted by parliamentary counsel. I agree. It follows that one is more likely to arrive at the true construction of article 1A(2) by seeking a meaning which makes sense in 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.'

117 Although Lord Lloyd went on to say that 'a broad approach is needed, rather than a narrow linguistic approach', I do not understand his Lordship to be advocating an approach in any way at odds with that approved in *Khawar*; the distinction between the 'broad approach' and a 'narrow linguistic approach' indicates that his Lordship was merely emphasising the importance of context.

118 On numerous occasions the High Court has articulated the principle that, subject to any contrary legislative intention, domestic legislation intended to give effect to Australia's obligations under the Convention will ordinarily be construed such that Australia's international obligations are carried into full effect: see *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 per Brennan, Deane and Dawson JJ at 38; *Teoh* per Mason CJ and Deane J at 287; *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 per Gleeson CJ at [29]; *Coleman v Power* (2004) 209 ALR 182 per Gleeson CJ at [17]-[24] and Kirby J at [240]-[249]; and *NAGV and NAGW of 2002* per Kirby J at [89].

119 The contrary legislative intent referred to above may be express or implied. Statutory provisions that incorporate the Convention provisions also have their own context which may, in turn, be crucial to the construction of the statute, especially where the statute goes beyond the Convention. As Stephen J pointed out in *Simsek v Macphee* (1982) 148 CLR 636 at 643, the Convention does not establish any particular procedure for determining the status of a putative refugee; it leaves this task to the Contracting States. Generally speaking, Parliament has chosen to require that putative refugees who, like the appellant, enter Australia without a visa, must apply for a Temporary Protection Visa before a Permanent Protection Visa. The limited duration of a Temporary Protection Visa has the consequence that the holder of such a visa must apply for a further visa in order to remain in Australia lawfully, although, as explained above at [66], even that further visa does not give an indefinite or 'permanent' right to remain in Australia.

120 The legislature has further stipulated that in order for an application for a Permanent Protection Visa to be valid such that it may (and must) be considered by the Minister, or the Minister's delegate, the applicant generally must have held a Temporary Protection Visa for 30 months. Moreover, s 36(2) is clear in its requirement that an applicant for a protection visa must be 'a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations' under the Convention.

121 These requirements are so clear and precise that any inconsistency between them and the Convention, properly interpreted, would have to be resolved in favour of the statutory scheme. In my view, however, there is no inconsistency despite the limited duration of both Temporary and Permanent Protection Visas. The legislation does not suggest that the recognition of the appellant as a person to whom Australia has protection obligations is temporally limited; nor is it a provisional recognition. The fact that the limited duration of the Temporary Protection Visa granted to the appellant necessitated a further application does not indicate that the legislation was intended to give anything less than full effect to Australia's obligations under the Convention.

122 That being said, in the context of the present appeal it is difficult to see a material difference between the principles governing the interpretation of international treaties and those ordinarily adopted in respect of domestic legislation. For instance, in *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384, Brennan CJ, Dawson, Toohey and Gummow JJ stated at 408:

It is well settled that at common law, apart from any reliance upon s 15AB of the Acts Interpretation Act 1901 (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure [Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg Aktiengesellschaft [1975] AC 591 at 614, 629, 638; Wacando v The Commonwealth (1981) 148 CLR 1 at 25-26; Pepper v Hart [1993] AC 593 at 630.] **Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy** [Attorney-General v Prince Ernest Augustus of Hanover [1957] AC 436 at 461, cited in K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 157 CLR 309 at 312, 315.]. Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in Isherwood v Butler Pollnow Pty Ltd [(1986) 6 NSWLR 363 at 388], if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent [Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297 at 320-321.].'

(emphasis added)

123 See also, *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 205 ALR 1 per McHugh ACJ, Gummow and Hayne JJ at [11] and s 15AA of the *Acts Interpretation Act 1901* (Cth).

Interpretation of Article 1 of the Convention

124 The interpretation of Article 1 of the Convention, including the interaction between Articles 1A(2) and 1C(5), has been considered in a number of cases. In *Adan* the issue beforethe House of Lords was whether Article 1A(2) of the Convention required that a person demonstrate a current well-founded fear of persecution for a Convention reason, or whether a 'historic' fear of such persecution was sufficient. Their Lordships held that it is not sufficient for a person to have a well-founded fear of persecution for a Convention reason when leaving the country of his or her nationality; rather it is necessary to have such a fear at the time the refugee claim is determined.

125 Lord Slynn of Hadley distinguished between Articles 1A(2) and 1C(5) stating, at 302:

'Reference has been made in argument to article 1C(5) of the Convention. That paragraph of the article is, however, dealing only with the situation where a person has qualified as a refugee but (a) the circumstances have changed so that he has no longer a well-founded fear of persecution for a Convention reason, and (b) the protection of the country of his nationality is available. If (a) is satisfied then he cannot say that he is unwilling because of the previous fear to accept the protection of his country of nationality.'

126 Lord Lloyd of Berwick, with whom Lord Goff of Chieveley, Lord Nolan and Lord Hope of Craighead agreed, observed at 304 that Article 1A(2) covers four categories of refugee:

'(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.

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.'

127 Counsel for the appellant in *Adan*, Mr Blake, submitted that the appellant fell within the first of the four categories identified above. In addressing this submission his Lordship said at 306:

‘I had at first thought that article 1C(5) provided a complete answer to Mr. Blake’s argument. If a present fear of persecution is an essential condition of remaining a refugee, it must also be an essential condition for becoming a refugee. But it was pointed out in the course of argument that article 1C(5) only applies to refugees in category (2). It does not help directly as to refugees in category (1). This is true. But the proviso does shed at least some light on the intended contrast between article 1A(1) and 1A(2). Article 1A(1) is concerned with historic persecutions. It covers those who qualified as refugees under previous Conventions. They are not affected by article 1C(5) if they can show compelling reasons arising out of previous persecution for refusing to avail themselves of the protection of their country. It would point the contrast with article 1A(1), and make good sense, to hold that article 1A(2) is concerned, not with previous persecution at all, but with current persecution, in which case article 1C(5) would take effect naturally when, owing to a change of circumstance, the refugee ceases to have a fear of current persecution.’

128 Article 1C(5) was also considered by the House of Lords in *R (Hoxha) v Special Adjudicator; Regina (B) v Immigration Appeal Tribunal* [2005] 1 WLR 1063 (‘*Hoxha*’). In *Hoxha*, the appellants were ethnic Albanians from Kosovo who had suffered gross ill-treatment at the hands of Serbian authorities prior to the Serbian army being removed from Kosovo and replaced by international peace-keeping forces. The appellants entered the United Kingdom and claimed asylum on arrival. Their claims were refused and subsequent appeals were unsuccessful. Before the House of Lords, the appellants argued that (a) they had been ‘recognised’ as refugees within the meaning of Article 1C(5) simply by virtue of having at some time in the past fulfilled the criteria in Article 1A(2) and (b) that the proviso in Article 1C(5) applied to refugees recognised under Article 1A(2) in addition to Article 1A(1) refugees. The House of Lords held that the appellants had not been recognised as refugees as they claimed and secondly that the proviso in Article 1C(5) only applied to Article 1A(1) refugees.

129 Lord Brown of Eaton-under-Heywood, with whom Lord Nicholls of Birkenhead, Lord Steyn, Lord Hope of Craighead and Baroness Hale of Richmond agreed, described the appellants’ position at [56] as follows:

‘Their case comes to this. To qualify for refugee status they have to satisfy the requirements of 1A(2). This they seek to do – in the face of Adan's requirement that they demonstrate a current well-founded fear—by resort to a cessation provision, 1C(5). 1C(5), quite apart from appearing to apply not when first an asylum seeker's refugee status is determined but only in connection with its possible later loss, in any event appears not to solve but to compound the appellants' difficulties, expressly postulating as it does that the circumstances earlier giving rise to refugee status "have ceased to exist" **i.e. that by now they no longer have a well-founded fear**. To escape this further difficulty, however, the appellants seek to invoke the "compelling reasons" proviso notwithstanding its apparent limitation to 1A(1) refugees. Putting it another way, the appellants seek by way of the proviso to disapply a cessation provision which, were it to apply, would itself take effect not to confer on them but rather to deny them refugee protection ("This Convention shall cease to apply"). Quite how the disapplication of a provision itself otherwise disapplying the Convention can assist an asylum-seeker to qualify for Convention protection in the first place is not altogether easy to understand. Plainly, moreover,

the argument is irreconcilable with the passage already cited from Lord Lloyd's speech in Adan [1999] 1 AC 293, 306, where he points to the contrast logically and intentionally struck in 1C(5) between on the one hand 1A(1) refugees, who have already been "considered" refugees (and thus recognised as such) and who, although potentially amenable to the loss of that status under 1C(5), will not in fact lose it if they can show "compelling reasons", and on the other hand 1A(2) refugees who must demonstrate a current well-founded fear of persecution not only when first seeking recognition of their status but also thereafter in order not to lose it.'

(emphasis added)

130 Lord Brown continued at [60]-[62]:

'The whole scheme of the Convention points irresistibly towards a two-stage rather than composite approach to 1A(2) and 1C(5). Stage 1, the formal determination of an asylum-seeker's refugee status, dictates whether a 1A(2) applicant …is to be recognised as a refugee. 1C(5), a cessation clause, simply has no application at that stage, indeed no application at any stage unless and until it is invoked by the State against the refugee in order to deprive him of the refugee status previously accorded to him.

…

Many other of the documents and writings put before your Lordships point the same way. And so, of course, does the language of 1C(5) itself. The words "the circumstances in connection with which he has been recognised as a refugee" could hardly be clearer. They expressly postulate that the person concerned "has been recognised as a refugee", not that he became or "was" a refugee.'

131 Lord Hope stated at [13]:

'… As Lord Lloyd of Berwick observed in Adan v Secretary of State for the Home Department [1999] 1 AC 293, 306G, **the cessation provision in article 1C(5) takes effect naturally when the refugee ceases to have a current well-founded fear. This is in symmetry with the definition in article 1A(2).** The words "no longer", which were taken from the cessation provisions in paragraph 6A of the Statute, support that interpretation. On this approach the appellants are unable to bring themselves within the opening words of article 1C(5).'

(emphasis added)

132 While the comments of Lord Brown and Lord Hope make clear the fundamental difference between the position of the appellants in *Hoxha* and the present appellant, with respect I agree with their construction of Article 1 of the Convention and, in particular, with Lord Brown's observation that the Convention adopts a two-stage rather than composite approach to 1A(2) and 1C(5). The recognition stage under Article 1A(2) is distinct from the cessation stage under Article 1C(5). Plainly Article 1C(5) is predicated on the previous 'recognition' of the person as a refugee. Relevantly, that recognition is based on the person having a well-founded fear of persecution for a Convention reason thus satisfying the requirements of Article 1A(2).

133 If the circumstances that gave rise to the well-founded fear subsequently cease to exist and the person continues to refuse to avail himself or herself of the protection of the country of nationality then, pursuant to Article 1C(5), the Convention ceases to apply to that person; that is, Australia no longer has protection obligations to that person. That is what Article 1C(5) says and, given the humanitarian and human rights background to the Convention, it follows that the cessation clause, as Lord Brown called it, should only be invoked where the change in circumstances is fundamental and durable. To say this, however, is not to put a gloss on the words of Article 1C(5) but merely to elucidate what is meant by the requirement that for Article 1C(5) to apply, the relevant circumstances must have ceased to exist. It would be difficult to reach that conclusion with confidence if the change in circumstances were merely transitory and could not be described as fundamental and durable. That being said, it may assist to avoid error if one focuses on the actual words used in Article 1C(5) and the change to which they refer. Furthermore, I do not accept that the standard of proof required for the Minister (or her delegate) to be satisfied that the relevant circumstances have ceased to exist is any higher than for any other aspect of the determination that the Minister must make in deciding if Australia is obliged under the Convention to protect the applicant. There is nothing in Article 1 or in the statutory scheme to support this submission.

134 Under Australian law the mechanism by which a person in the position of the appellant is recognised as a refugee is, at least initially, the grant of a Temporary Protection Visa. The appellant submits that once there has been that recognition the finding that the person is a refugee is not to be revisited at the stage of application for a Permanent Protection Visa. Rather, he submits, the Minister must proceed inexorably to Article 1C(5) and ignore any factual change that is not the subject of the question arising under that Article. I have difficulty, however, in reconciling this approach with the words of the Migration Act and the Regulations.

135 The appellant's submission overlooks the statutory context of the recognition process set up under the Migration Act and the Regulations. That recognition process has two phases – first a Temporary Protection Visa of limited duration and then a Permanent Protection Visa which continues for five years. The appellant does not dispute that a decision that the applicant is a refugee within the meaning of Article 1A(2) is required for the grant of a temporary visa; for reasons identified by Lord Brown (see [130] above) Article 1C(5) can have no relevance at that stage.

136 As previously mentioned (see [119] above) the Convention does not specify the procedure by which recognition as a refugee should be determined. It is for the Contracting States to devise their own process. There is nothing in the Convention that precludes a Contracting State from reviewing that determination from time to time. In fact the terms of Article 1C(5) assume the propriety of such a course. There is also nothing in the Convention that determines the process by which the protection obligations that it imposes should be discharged. In particular, it does not preclude the question whether a person is a refugee from being asked at both the temporary and the

permanent visa stage. There is no question here of cancelling a visa or stripping the appellant of a status that he has previously achieved.

137 The High Court has said that s 36(2) incorporates the whole of Article 1; see [108] above. The thrust of Article 1 of the Convention read as a whole is that, with limited exceptions not relevant here, a person who is a refugee should be protected. The Convention was not designed to protect a person who does not have a well-founded fear of persecution, for a Convention reason, in the country, or countries, in respect of which he or she has a right or ability to access. Correspondingly, the thrust of the statutory provisions governing the issue of protection visas (temporary and permanent) is that, in accordance with Australia's international obligations, a person who is a refugee should be protected and should be given a visa. Under a normal reading of the relevant statutory provisions the question whether Australia has protection obligations to a person applying for a Permanent Protection Visa would require, to the extent that it is applicable, consideration of the whole of Article 1; specifically, Articles 1A(2) and 1C(5). In that way the decision of the High Court in *NAGV and NAGW of 2002* is given effect. If Article 1A(2) does not apply **or** if Article 1C(5) does apply then Australia is not obliged by the Convention to protect that person and that person would not qualify for a Permanent Protection Visa. There is a clear connection between Articles 1A(2) and 1C(5). A person who is unable or unwilling to take advantage of the protection of the country of his or her nationality may be recognised as a refugee under Article 1A(2) only if he or she has a well-founded fear of persecution for a Convention reason. Without that well-founded fear, mere unwillingness, or inability, to take advantage of the protection of one's country of nationality is insufficient.

138 Against that background, when Article 1C(5) provides that the protection obligations under the Convention cease to apply when the 'circumstances in connexion with which he has been recognised as a refugee cease to exist', it is referring, in the case of a person recognised as a refugee under Article 1A(2), to the circumstances which led to the conclusion that the person had a well-founded fear of persecution for a Convention reason. If Article 1C(5) only referred back to Article 1A(2) one might expect its expression to be more specific. Article 1C(5), however, refers not just to persons recognised as refugees under 1A(2) but 'to any person falling under the terms of section A'. This includes, as senior counsel for the first respondent, Mr Williams SC, submitted, persons recognised under Article 1A(1) (concerning historic persecutions in respect of which the proviso to Article 1C(5) applies) and Article 1A(2) (with which we are presently concerned).

139 For this reason, the application of Article 1C(5) to persons who have been recognised under Article 1A(2), necessarily involves determining whether the person continues to have a well-founded fear of persecution on the basis he or she was recognised as a refugee previously. The 'circumstances' referred to in Article 1C(5) are those that led to the requirements of Article 1A(2) being satisfied.

140 If the appellant's submissions were correct then, if the circumstances in the relevant country had not changed, even if, for some reason or other, the person ceased to have a subjective fear of persecution they would still be a person to whom Australia has protection obligations under the Convention. This is not consonant with the purpose and meaning of the Convention or of the statutory scheme set up under the Migration Act and Regulations. Theoretically both articles must be considered although the circumstances of an individual case may be such that it is evident from the outset that one or other can be given cursory attention. For this reason there is no necessary order in which the decision-maker must consider these articles.

141 The appellant contends that Article 1C(5) is otiose on the construction given by the primary Judge. I do not accept this submission. Although not precisely a mirror image, Article 1C(5) rounds out the concept of the Contracting States' protection obligations arising under Article 1A(2). The UNHCR had expressed its view in (2001) 20 *Refugee Survey Quarterly* 77 at 93, as follows:

'Cessation of refugee status may be understood as, essentially, the mirror of the reasons for granting such status found in the inclusion elements of Article 1A(2). When those reasons disappear, in most cases so too will the need for international protection.'

142 Although both Temporary and Permanent Protection Visas are for prescribed durations, should the circumstances predicated in Article 1C(5) occur, the cancellation provisions of the Migration Act allow for their cancellation within those periods; the provisions are set out at [71] above. Subject to s 117, s 116(1)(a) provides the Minister with a power to cancel a visa where any circumstances which permitted the grant of the visa no longer exist. In the context of a protection visa this could involve consideration of Article 1C of the Convention; see, for instance, *Rezaei v Minister for Immigration and Multicultural Affairs* [2001] FCA 1294 in relation to Articles 1C(1) and 1C(4); see also *Zhang Jia Qing v Minister for Immigration and Multicultural Affairs* (1997) 149 ALR 519 at 528 per Burchett J and, on appeal, *Minister for Immigration and Multicultural Affairs v Zhang Jia Qing* (1999) 53 ALD 261 at [63] per Merkel J and at [54] per French and North JJ.

143 In my view, the Tribunal's reasons concerning the application of Article 1C(5) to the appellant's case do not reveal jurisdictional error. There was, as the primary Judge noted, material capable of giving rise to a contrary conclusion to that reached by the Tribunal. However, there was other material to support its findings on the application of Article 1C(5). The Tribunal rejected the former and accepted the latter. Thus, it found that the circumstances in connection with the appellant's original recognition had ceased to exist and Article 1C(5) applied. While the Tribunal's reasons in this context are not expressed in terms of satisfaction as to the application of Article 1C(5), in my view it is tolerably clear that the Tribunal was satisfied that the appellant no longer had a well-founded fear of persecution on the basis upon which he was originally granted a Temporary Protection Visa.

144 It follows from the views I have expressed as to the correct interpretation of the Convention and the statutory scheme for its implementation in the Migration Act and the Regulations that I agree with the judgment of the primary Judge. The appellant points however to the recently published judgment in *QAAH of 2004 v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 145 FCR 363('*QAAH*') as a reason for upholding the appeal irrespective of these views.

145 The appeal in *QAAH* concerned facts not relevantly different from those in this appeal and raised the same issues concerning the interpretation of the Convention and the Migration Act and Regulations. The Full Court, (Wilcox and Madgwick JJ, Lander J dissenting) allowed the appeal from Dowsett J who had expressed similar views to those of the primary Judge in these proceedings, Emmett J. In *QAAH,* Lander J also accepted the views of Emmett J and referred to a number of first instance decisions in this Court which have taken the same approach; *SWNB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1606; *SVYB v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 15; *Minister for Immigration & Multicultural & Indigenous Affairs v SWZB* [2005] FCA 53, *NBEM v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 161, *QAAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 968.

146 The appellant submits nevertheless that the reasoning of the majority in *QAAH* is correct and therefore this Full Court should follow *QAAH.* It is further submitted that even if this is not so, the reasoning could not be regarded as clearly wrong and therefore the earlier Full Court decision should be followed, leaving the High Court to resolve the issue. As it happens, the High Court granted special leave to appeal in *QAAH* on 16 December 2005.

147 In separate judgments in *QAAH*, Wilcox J and Madgwick J expressed similar views. It is not necessary for me to canvass those views in any detail. While I do not believe that the decision in *QAAH* can be said to be clearly wrong, in my view it does not sufficiently take into account the effect of the legislative scheme found in the Migration Act and the Regulations. On balance I think, with respect, it is wrong. In my view the statutory provisions mandate that the requirements of Article 1A(2) be taken into account in determining an application for a Permanent Protection Visa. As I have explained above, this interpretation is entirely consistent with the incorporation of the whole of Article 1 into s 36(2) and, to the extent it is applicable, the whole of the article must be taken into account in determining the question of protection obligations.

148 In the normal course of events a Full Court of this Court would follow the decision of an earlier Full Court unless the earlier decision is held to be clearly wrong. The need for certainty and security in the law is a powerful reason for a later Full Court following the decision of an earlier. In *Minister for Immigration & Multicultural & Indigenous Affairs v Hicks* (2004) 138 FCR 475 at [33]-[35] Carr J pointed out that where both appeals have been heard at about the same time and the question of which decision is to be followed depends which Full Court publishes its judgment first, is quite different from

the normal case where considerable time separates the two Full Court decisions and the earlier decision is regarded as having settled the law. In this case the fact that the High Court has given leave to appeal in *QAAH* is another argument against the law being seen as settled. I do not think the same reticence to express a different view need apply in this case. I would therefore dismiss the appeal in this case.

149 Since writing the above I have had the opportunity to read, in draft, the reasons of the Chief Justice and I specifically note my agreement with his Honour's comments in paragraph 25 concerning the task to be performed by the decision-maker in relation to an application for a permanent protection visa in the circumstances indicated. I also agree with his Honour's order as to costs.

I certify that the preceding ninety (90) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Stone.

Associate:
Dated: 12 May 2006

IN THE FEDERAL COURT OF AUSTRALIA	
NEW SOUTH WALES DISTRICT REGISTRY	NSD 1643 OF 2004

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	NBGM APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS FIRST RESPONDENT
	REFUGEE REVIEW TRIBUNAL SECOND RESPONDENT

COURT:	**BLACK CJ, MARSHALL, MANSFIELD, STONE AND ALLSOP JJ**
DATE:	12 MAY 2006
PLACE:	SYDNEY

REASONS FOR JUDGMENT

ALLSOP J:

150 This is an appeal from orders made by a Judge of the Court dismissing an application to review a decision of the Refugee Review Tribunal (the "Tribunal") which affirmed a decision of a delegate of the first respondent (the "Minister") not to grant a permanent protection visa.

151 The appellant is a 26 year old Hazara from the Jaghori district of Ghazni province in Afghanistan. He arrived in Australia in October 1999. Shortly after arrival, he applied for a protection visa. On 28 March 2000, he was granted a temporary protection visa by a delegate of the Minister. Shortly thereafter, he applied for a permanent visa. On 16 September 2003 this application was refused by a delegate of the Minister. The decision of the Tribunal to affirm that decision was the subject of the application to this Court dealt with by the primary judge.

152 The appeal raises important questions about the operation of the *Convention relating to the Status of Refugees* done at Geneva on 28 July 1951, as amended by the *Protocol relating to the Status of Refugees* done at New York on 31 January 1967 (together the "Convention"), the interpretation of the Convention, the inter-relationship between the Convention and its operation (on the one hand) and the *Migration Act 1958* (Cth) (the "Act") and the Regulations made thereunder (on the other hand), and the operation of the Act and the Regulations. In particular, the appeal raises the question of the proper approach under the Act and Regulations to the assessment of the position of a person after that person has been "recognised as a refugee" (as that phrase is used in Article 1C(5) of the Convention) and whether there is any difference (either of a theoretical or practical kind) between the application of Article 1C(5) or Article 1A(2) of the Convention to the circumstances of a person who claims protection thereunder.

153 Similar issues (though not all the issues raised in this appeal) were dealt with by a Full Court of this Court in *QAAH of 2004 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 145 FCR 363. *QAAH* was heard in the May 2005 Full Court sittings at the same time as the appeal in this matter. After this matter was reserved, Hill J died. The bench was reconstituted to rehear the appeal. Two other appeals raising the same issue were heard in the May Full Court sittings by Marshall, Mansfield and Stone JJ (*SWNB v Minister for Immigration and Multicultural and Indigenous Affairs* and *SVYB v Minister for Immigration and Multicultural and Indigenous Affairs*). Those matters are reserved. A question arises as to whether *QAAH* should simply be followed, to the extent that it is relevant to this appeal, by reason of the principles in *Chamberlain v The Queen* (1983) 72 FLR 1 at 8-9 and *Transurban City Link v Allan* (1999) 95 FCR 553 at [26]–[31]. Notwithstanding this question, I have considered the relevant issues afresh

and have come to views substantially in accordance with the majority in *QAAH*.

154 Before dealing with the reasons of the primary judge and the terms of the decision of the Tribunal, it is necessary to deal with certain matters which provide the proper framework for that analysis.

The relevant provisions of the Convention

155 Article 1 of the Convention deals with the definition of the term "refugee". Section A deals with application. Relevantly, it contains paragraph (2) which is in the following terms:

> A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:
>
> …
>
> (2) …owing to a 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.
>
> …

Section C deals with the cessation of the application of the Convention to a person falling within section A. It provides as follows:

> C: This Convention shall cease to apply to any person falling under the terms of Section A if:
>
> (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
>
> (2) Having lost his nationality, he has voluntarily reacquired it; or
>
> (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
>
> (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
>
> (5) He can no longer, because the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

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

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

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

Sections D and E provide for the non-application of the Convention in certain circumstances dealing with provision of alternative assistance and rights in a country of residence. Section F provides for the non-application of the Convention by reference to the commission of acts of disentitling conduct.

The proper construction of the Convention

156 The meaning of an international instrument is to be ascertained by giving primacy to the text and structure of the instrument, but also by considering the context, objects and purposes of the instrument. The interpretative process is a liberal one made on broad principles of general acceptation. This is reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* done at Vienna on 23 May 1969 (the "Vienna Convention") which can be accepted as an authoritative statement of customary international law and as the expression of the broad principles of general acceptation: *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338 at 356; *Commonwealth v Tasmania* (1983) 158 CLR 1 at 193-4 and 222; *Victrawl Pty Ltd v Telstra Corp Pty Ltd* (1995) 183 CLR 595 at 622; and *CMA CGM SA v Classica Shipping Co Ltd* [2004] 1 Lloyd's Rep 460 at [10], and so relevant to the interpretation of the (earlier made) Convention. In relation to the above propositions, see generally the High Court cases and other cases referred to in *El Greco (Australia) Pty Ltd v Mediterranean Shipping Co SA* (2004) 140 FCR 296 at [142]-[144].

157 This is not to require a broad *meaning* to be given to any convention, or to the Convention (see *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 17, [47]). Rather, it is to recognise the need for the *process of interpretation* to be broad and liberal, for the reasons expressed by Lord Diplock in *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 281-82 and Lord Lloyd of Berwick in *Adan v Home Secretary* [1999] 1 AC 293 at 305. This approach to the process of interpretation has been stated clearly by the High Court in the cases referred to in *El Greco* at [142], most recently by

Gleeson CJ, McHugh J, Gummow J, Kirby J and Hayne J in *Morrison v Peacock* (2002)210 CLR 274 at 279, [16], where their Honours said:

…[T]reaties should be interpreted in a more liberal manner than that ordinarily adopted by a court construing exclusively domestic legislation.

158 Considered decisions of foreign courts, in particular appellate decisions, should be treated as persuasive in order to strive for uniformity of interpretation of international conventions: *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The 'Muncaster Castle')* [1961] AC 807 at 840 and 869; *Brown Boveri (Aust) Pty Ltd v Baltic Shipping Co* (1989) 15 NSWLR 448 at 453; and *Effort Shipping Co Ltd v Linden Management SA* [1998] AC 605 at 615. There is no principled reason to limit this approach to international agreements dealing with commercial transactions. It is desirable that obligations of the host States under an instrument such as the Convention be consistently interpreted in order that there be uniformity of approach not only as to host State rights and obligations, but also as to the derivative legal position of refugees thereunder.

159 The extent to which the process of interpretation of international agreements is different to the modern approach of the Australian common law of statutory construction set out in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1995) 187 CLR 384 at 408, *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 112 and *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 218 CLR 273 at [11] may not be great. It is unnecessary to explore that question. Any similarity, however, does not narrow the approach to the interpretation of international instruments.

160 Within this liberal process of interpretation, whilst giving primacy to the words of the Convention, regard may be had to contemporary preparatory work (*travaux préparatoires)*, the commentaries of learned authors, past and present (*la doctrine*), and the decisions of foreign courts: *Fothergill* at 279 and 294-95; *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100 at 117; and *Adan v Secretary of State for the Home Department* [1997] 1 WLR 1107 at 1114, and on appeal (which otherwise reversed the Court of Appeal) [1999] 1 AC 293 at 307-308. The United States Supreme Court described the use of learned authors in *The 'Paquete Habana'* 175 US 677 at 700 (1900) as follows:

Where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilised nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subject of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their author concerning what the law ought to be, but for trust-worthy evidence of what the law really is.

161 Courts (including the High Court in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 392, 396-97, 399-400, 405, 414-416 and 424-430 and *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533 at 545 at [21] and the House of Lords, most recently in *R (Hoxha) v Secretary of State* [2005] 1 WLR 1063) have had regard, in the process of interpretation, to the *Handbook on Procedures and Criteria for Determining Refugee Status* issued by the Office of the United Nations High Commissioner for Refugees (the "Handbook"). One clear basis for that consideration is to treat the Handbook as one would the work of learned jurists. On this basis, a court may have regard not only to the Handbook, but also guidelines issued by the same Office, for interpretive guidance. Relevant in this respect are the Guidelines on the Cessation of Refugee Status Under Article 1C(5) and (6) issued in 1999 and, in a superseding form, issued in 2003 (the "Guidelines"). Another possible basis for the use of such material is the understanding of state practice in the application of the Convention. (See Article 31(3)(b) of the Vienna Convention, in particular in the light of the terms of Article 35 of the Convention.) This second basis was put forward by counsel for the United Nations High Commissioner for Refugees intervening in *R v Home Secretary; Ex parte Sivakumaran* [1988] AC 958 at 981. However, there are difficulties with this approach: see O'Connell *International Law* (1970, 2nd edn) Vol 1 pp 261-62 and the cases in the International Court of Justice there cited. It is sufficient for present purposes to recognise the former basis for the assistance of such material.

162 Caution has been expressed by some as to the use of the Handbook: for example, see Hill J in *Barzideh v Minister for Immigration and Ethnic Affairs* (1996) 69 FCR 417 at 427; *Eshetu v Minister for Immigration and Ethnic Affairs* (1997) 142 ALR 474 at 485; Mason CJ in *Chan* at 392; and Dowsett J in *Savvin v Minister for Immigration and Multicultural Affairs* (1999) 166 ALR 348 at 358, [35]. Such caution can be seen to be directed to ensuring that reference to the Handbook is not taken to be determinative of any question of interpretation, or as a substitute for the words of the Convention interpreted in the liberal fashion referred to earlier, or to be more than a secondary source as an aid to interpretation akin to the work of jurists. As Lockhart J said in *Morato v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 39 FCR 401 at 414:

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 such courts to consider on this question.

163 That the expressions of caution as to the use of such materials can be seen as warnings about their use beyond the use that the work of learned jurists can be put is seen most clearly by the references of Mason CJ in *Chan* at 392 to *Fothergill* at 274, 279, 290-291 and 294-96 (dealing with the availability in interpretation of international instruments of, amongst other things, the writings of jurists) and to O'Connell *op cit* vol 1 pp 261-62 (dealing with the lack of equation of an organ of the United Nations with the practice of

the parties (cf. Article 31(3)(b) of the Vienna Convention) even when they comprise a large part of the organisation's membership).

The interpretation of the Act and Regulations

164 Subject to a revealed contrary intention, the Act and delegated legislation thereunder are to be construed conformably with the carrying into effect of Australia's international obligations within the Convention: *Plaintiff S157 of 2002 v Commonwealth* (2003) 211 CLR 476 at 492, [29]; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 38; and *Coleman v Power* (2004) 220 CLR 1 at [17]-[24] and [240]-[249]. This is especially so when the Act places the Convention at the fulcrum of its operation in relation to protection visas: ss 36 and 65, in particular by the use of the phrase "to whom Australia has protection obligations under [the Convention]" as referring to the whole of Article 1, and not merely Section A thereof: *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 213 ALR 668at [27], [32]-[33], [42]-[43] and [47].

165 Thus, in construing the Act and Regulations and in understanding their operation, it is of central importance to appreciate the content and intended operation of the Convention.

The proper interpretation of Sections A(2) and C(5) of Article 1

166 Section C(5) assumes an existing recognition of the applicant as a refugee. It deals with the cessation of the circumstances which led to the recognition of Section A(2) applying to the applicant such that the applicant cannot continue to refuse to avail himself or herself of the protection of the country of his or her nationality. The considerations to which Section C(5) is addressed can be seen as the mirror, or converse, of the reasons for granting refugee status. The passages in the speeches of Lord Lloyd of Berwick in *Adan* at 306 and of Lord Brown of Eaton-under-Heywood in *Hoxha* at [56] cited by Wilcox J in *QAAH* at [55] and [56] support this approach. This accords with the views of learned jurists: Robinson *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (1953) p 60 and Grahl-Madsen A, *The Status of Refugees in International Law* (1966) Vol 1 pp 399-401; and the views expressed in the Handbook at [135].

167 The terms of Sections A(2) and C(5) draw a distinction between the application of the term "refugee" to someone who falls within Section A(2), on the one hand, and the cessation of the application of the Convention to someone who has been recognised as a refugee, on the other.

168 The text of Section C(5), that the person who has been recognised as a refugee cannot "*continue to refuse* to avail himself [or herself] of the protection of the country of his [or her] nationality" (emphasis added), provides the foundation for what Lord Brown said in *Hoxha* at [60]:

True it is that 1C(5), no less than 1A(2), appears in the Convention under the heading "Definition of the Term `Refugee'". True it is, too, as para 28 of the [UNHCR] Handbook neatly points out, that someone recognised to be a refugee must by definition have been one before his refugee status has been determined. But it by no means follows that, because someone has been a refugee before his status comes to be determined, any change in circumstances in his home country falls to be considered under 1C(5) rather than under 1A(2). Quite the contrary. As has been seen, the Handbook is replete with references to the "determination" of a person's refugee status and his "recognition" as such. Article 9 of the Convention itself, indeed, allows certain provisional measures to be taken "pending a determination by the Contracting State that that person is in fact a refugee**". The whole scheme of the Convention points irresistibly towards a two-stage rather than composite approach to 1A(2) and 1C(5). Stage 1, the formal determination of an asylum-seeker's refugee status, dictates whether a 1A(2) applicant ... is to be recognised as a refugee. 1C(5), a cessation clause, simply has no application at that stage, indeed no application at any stage unless and until it is invoked by the State against the refugee in order to deprive him of the refugee status previously accorded to him.**

[emphasis added]

> 169 This paragraph should be read with [61] to [65] of his Lordship's reasons and which were set out in full by Wilcox J in *QAAH* at [57]. They were as follows:

Para 112 of the Handbook makes all this perfectly plain. So too, more recently, did the UNHCR Lisbon Roundtable Meeting of Experts held in May 2001 in their Summary Conclusions:

> 26. In principle, refugee status determination and cessation procedures should be seen as separate and distinct processes, and which should not be confused.

Many other of the documents and writings put before your Lordships point the same way. And so, of course, does the language of 1C(5) itself. The words "the circumstances in connection with which he has been recognised as a refugee" could hardly be clearer. They expressly postulate that the person concerned "has been recognised as a refugee", not that he "became" or "was" a refugee.

This provision, it shall be borne in mind, is one calculated, if invoked, to redound to the refugee's disadvantage, not his benefit. Small wonder, therefore, that all the emphasis in paras 112 and 135 of the Handbook is upon the importance of ensuring that his recognised refugee status will not be taken from him save upon a fundamental change of circumstances in his home country. As the Lisbon Conference put it in para 27 of their conclusions: "... the asylum authorities should bear the burden of proof that such changes are indeed fundamental and durable".

Many other UNHCR publications are to similar effect. A single further instance will suffice, taken from the April 1999 Guidelines on the application of the cessation clauses:

> 2. The cessation clauses set out the only situations in which refugee status properly and legitimately granted comes to an end. This means that once an individual is determined to be a refugee, his/her status is maintained until he/she falls within the terms of one of the cessation clauses. This strict approach is important since refugees should not be subjected to constant review of their refugee status. In addition, since the application of the cessation clauses in effect operates as a formal loss of refugee status, a restrictive and well-balanced approach should be adopted in their interpretation.

The reason for applying a "strict" and "restrictive" approach to the cessation clauses in general and 1C(5) in particular is surely plain. Once an asylum application has been formally determined and refugee status officially granted, with all the benefits both under the Convention and under national law which that carried with it, the refugee has the assurance of a secure future in the host country and a legitimate expectation that he will not henceforth be stripped of this save for demonstrably good and sufficient reason. That assurance and expectation simply does not arise in the earlier period whilst the refugee's claim for asylum is under consideration and before it is granted. Logically, therefore, the approach to the grant of refugee status under 1A(2) does not precisely mirror the approach to its prospective subsequent withdrawal under 1C(5).

> 170 The views expressed by Lord Brown in [60] to [65] in *Hoxha* were reached with the assistance of the Handbook and other UNHCR material. However, the same conclusions can be seen to arise from the text of the Convention against the background of the fundamental humanitarian purposes which informed it and which are expressed in the Preamble to it. The recognition of the application of the term “refugee” to a person, in effect the recognition by the host State of that person as a refugee, engages the various obligations within the Convention upon the host State as a Contracting Party to the Convention. Upon the engagement of those obligations, the host State will be expected to provide, by relevant domestic law, a measure of safety and security to the refugee. Such matters include freedom of religion (Article 4), juridical status (chapter II), gainful employment (chapter III), welfare, including education (chapter IV), administrative measures, including travel documents and non-refoulement (chapter V).
>
> 171 The cessation of the Convention, and the cessation of the obligations of the host State to afford the person the benefits and protections provided for by the Convention (through its domestic law) can be seen to be a matter of great seriousness, and likely finality. The circumstances which have given rise to the recognition of the person as a refugee may raise matters of life and death. Section C(5) can be seen to operate to the disadvantage of someone who has been recognised as a refugee, in a way which can be seen to be final and irrevocable: “he can no longer … continue to refuse” the protection of his country of nationality.

172 In a convention whose purpose is avowedly humanitarian and protective, the process by which the protections of the Convention are to be seen as over, likely forever, (having already been recognised as available) should be one which recognises the necessity for the grounds for concluding that cessation has occurred to be clear and lasting. Such is only to recognise the content of Section C(5). The use of language by the UNHCR in the Handbook and the Guidelines that the change in circumstances must be "fundamental and durable" or "enduring" reflect those elements that arise from the text and purpose of the Convention. See also Grahl-Madsen *op cit* vol 1 p 401. The need for the demonstration, with clarity, of the lasting nature of the changes in circumstances arises naturally from the gravity and likely permanence of the consequences of applying Section C(5) against the person hitherto recognised as a refugee. To repeat part of what Lord Brown said in *Hoxha* at [65]:

Logically, therefore, the approach to the grant of refugee status under 1A (2) does not precisely mirror the approach to its prospective subsequentwithdrawal under 1C (5).

173 The nature of the recognition of the person as a refugee is sometimes referred to as the recognition of a "status": see, for example, Lord Brown above, the Handbook, Goodwin-Gill, G *The Refugee in International Law* (2nd Ed) ch 3, and Grahl-Madsen *op cit* vol 1 ch IV. The limits of the expression were discussed by Mason J, Deane J and Dawson J in *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 298-300. That said, it is not to be lost sight of that the Convention is one "relating to the **Status** of Refugees". See also the Convention relating to the International **Status** of Refugees of 28 October 1933 and the Convention concerning the **Status** of Refugees coming from Germany of 10 February 1938. As a shorthand for the position or legal position of the applicant after recognition as such by a host State, little danger lurks in the use of the word. The fact that recognition is determined at a particular time does not mean that the consequences of recognition are somehow made ephemeral or evanescent by that temporal link. It is clear from the text and structure of the Convention that recognition of the applicant as a refugee, that is as a person who satisfies Section A(2), brings upon the host State the obligations under international law provided for in the Convention. The relationship between the refugee and the host State upon the occurrence of that recognition by the host State that is contemplated by the Convention has an important degree of mutuality: see for examples Article 2 as to obligations upon the refugee.

174 As Lord Brown set out in [65] in *Hoxha,* the two stage approach to the operation of Sections A(2) and C(5) contemplates the possibility of cessation. It does not contemplate, within its terms, multiple determinations of the application of Section A(2). Domestic law could, of course, provide for recognition of application of Section A(2) to lapse and for such recognition to be reapplied for. It might provide for yearly, monthly, weekly or even daily reassessments in which, on each occasion, the applicant would be required to

make out afresh his or her claims for protection. The Convention does not contemplate that. It contemplates recognition as a refugee (with the engagement thereupon of the Convention) and cessation of the application of the Convention thus recognised, in circumstances provided for in Section C, one of those being Section C(5).

175 This two stage operation of the Convention, based, relevantly, on recognition and cessation, arises from the text, structure and purposes of the Convention. A convention with clearly humanitarian aims and purposes dealing with persons who are dislocated from their countries of nationality and providing for host State protection interpreted liberally is unlikely to admit of a construction providing for the uncertainty that might be seen to be produced by requiring the applicant to make out afresh, from time to time, his or her claims for recognition by the application of Section A(2). The Convention can be seen naturally and comfortably to contemplate review of the currency of the recognition of the applicability of Article 1 and the obligations of protection. So much comes naturally from the text, and place in the Convention, of Section C(5). The approach to that question of review is to be understood by the application of Section C(5), not by requiring the applicant to make out afresh his or her claim for recognition of the application of Section A(2).

176 That framework was described by Lord Brown in *Hoxha*. Though strictly *obiter dicta,* the considered views of Lord Brown with which Lord Nicholls of Birkenhead, Lord Steyn, Lord Hope of Craighead and Baroness Hale of Richmond agreed, should be treated as highly persuasive as to the operation of an important international convention in this respect: see the cases at [9] above.

177 Grahl-Madsen *op cit* vol 1 at 369-70 cited German and French jurisprudence of the day (up to 1966) in support of the following:

It is generally agreed that the enumeration of cessation clauses in Article 1 C of the Refugee Convention and in the second section of Paragraph 6 A of the UNHCR Statute is exhaustive. In other words, once a person has become a refugee as defined in Article 1 of the Convention or Paragraph 6 A of the Statute, he continues to be a refugee until he falls under any of those cessation clauses.

178 The Handbook states the following at [112]:

Once a person’s status as a refugee has been determined, it is maintained unless he comes within the terms of one of the cessation clauses. This strict approach towards the determination of refugee status results from the need to provide refugees with the assurance that their status will not be subject to constant review in the light of temporary changes not of a fundamental character in the situation prevailing in their country of origin.

179 These remarks in the Handbook are given additional force when one appreciates that in the day to day administration of decision-making in this

area each individual determination as to the application of Section A(2) can be highly judgmental, whatever procedure for assessment the host State might adopt.

180 It is undoubted that it is for the host State to determine its own procedure to assess the question of the recognition of the application of Section A(2): see *Simsek v MacPhee* (1982) 148 CLR 636 at 642-43. The procedure involved in the host State's approach to recognition is a subject upon which the Convention is silent. However, the Convention is not silent as to the relationship between recognition and cessation. A requirement for an applicant to re-assert his or her claim for the application of Section A(2) is contrary to the structure and terms of the Convention.

181 The text and purposes of the Convention, reinforced by the views of jurists (based, in part, on international jurisprudence), the Handbook viewed as the work of jurists, and the unanimous view of the House of Lords all point to the same way of viewing the Convention. Once the host State recognises the application of Section A(2) that the applicant is a refugee, the protection provided for by the Convention is engaged and is only lost by an application of a cessation clause, here Section C(5). Nothing in *Mayer* or *Simsek* is to the contrary of this.

182 The context of domestic law in Australia is, however, somewhat different: the division of types of available visas into temporary and permanent is a matter to which I will come. Nevertheless, the force of the reasoning reflected in the reasons of Lord Brown in *Hoxha* supports, in understanding the operation of the Convention, the difference in approach to a question under Section A(2) compared to a question under Section C(5). Although Sections A(2) and C(5) deal with issues which may be seen to mirror each other, that is the existence of a well-founded fear of persecution for a relevant reason, the approach to the determination of the question whether the applicant is a refugee can be seen to be importantly different from the approach to the removal of the protections afforded by, and recognised to have been previously available under, the Convention. In the former, as was said by Gummow J and Hayne J in *Abebe v Commonwealth* (1999) 197 CLR 510 at 576, [187]:

…The proceedings before the Tribunal are inquisitorial and the Tribunal is not in the position of a contradictor. It is for the applicant to advance whatever evidence or argument she wishes to advance in support of her contention that she has a well-founded fear of persecution for a Convention reason. The Tribunal must then decide **whether that claim is made out**.

[emphasis added]

In the latter, the issue is the recognition or not of the cessation, likely forever, of the obligations of the host State under the Convention in respect of the person already recognised as someone who has made out his or her well-founded fear of

persecution and thereby gained the protections afforded by the Convention. In that process, the need for demonstrable clarity in the durability of change in the relevant circumstances to warrant the likely permanent loss of the protection of the Convention can be seen as immanent within the text of Section C(5).

183 This is not to engage in a process of implication of words into the Convention. Rather, it is the process of interpreting or construing the language used, in accordance with the principles discussed, to reveal the content of the Convention: cf *Martin-Baker Aircraft Co Ltd v Canadian Flight Equipment Ltd* [1955] 2 QB 556 at 578. Nor is it a question of onus or burden of proof. It is a description of the measure and nature of the task in the assessment of the cessation of the application of the Convention.

184 The enquiry under Section C(5) is whether the circumstances in connection with which the applicant has been recognised as a refugee have ceased to exist. The approach is not to ask whether a claim of such a well-founded fear has been made out, but to ask whether, in respect of someone who has been recognised as a refugee (that is who has made out that claim), circumstances have so changed as to warrant the conclusion that the well-founded fear which previously existed can no longer be maintained as a basis for refusing to avail himself or herself of the protection of the country of nationality and, so, that the protection of the Convention should cease. A lack of demonstrable clarity in the reality and durability of the change in relevant circumstances will lead to the grounds for cessation not being established.

185 This structure and content of the Convention is the framework against which the Act and delegated legislation under the Act must be read.

The legislative framework applying to the appellant

186 Section 36 of the Act provides for protection visas. Section 36(2) provides as follows:

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(b) a non-citizen in Australia who is the spouse or a dependant of a non-citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa.

187 As the High Court made clear in *NAGV and NAGW of 2002* the terms of s 36(2) pick up the whole of Article 1 of the Convention.

188 Thus, s 36(2) can be seen to place the operation of Article 1 of the Convention (properly interpreted and understood) at the centre of the operation of the Act in determining the entitlement of an applicant for a protection visa. Thus, to understand the operation of the Act and Regulations in relation to protection visas the ***first step*** is to understand the proper interpretation and operation of the Convention.

189 Sections 30, 31 and 40 of the Act provide for kinds and classes of visa and circumstances for granting a visa. Sections 30, 31(3) and 40(1) are in the following terms:

30(1) A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a permanent visa, to remain indefinitely.

(2) A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a temporary visa, to remain:

(a) during a specified period; or

(b) until a specified event happens; or

(c) while the holder has a specified status.

31(3) The regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37 or 37A but not by section 33, 34, 35 or 38).

…

40(1) The regulations may provide that visas or visas of a specified class may only be granted in specified circumstances.

190 The Regulations and Schedule 2 set out the subclasses of protection visas provided for by s 36: subclass 785 (“Temporary Protection”) and subclass 866 (“Protection”).

191 The appellant was not entitled to apply for a subclass 866 visa in 1999 because he was not “immigration cleared”.

192 The temporary protection visa had expiry dates provided for in Regulation 785.5 – relevantly here, where an application for a permanent protection visa is made, upon the determination of that application; in other cases, after 36 months.

193 Regulation 785.2 dealt with primary criteria for the grant of a temporary protection visa. Regulation 785.211, in dealing with criteria that must be satisfied at the time of the application, required that the applicant claim to be "a person to whom Australia has protection obligations under the Refugees Convention". Regulation 785.221, in dealing with criteria that must be satisfied at the time of the decision, required that the Minister be satisfied that the applicant is "a person to whom Australia has protection obligations under the Refugees Convention".

194 Regulation 866.5 provided for a period of five years for a permanent protection visa.

195 Regulation 866.2 dealt with primary criteria for the grant of a permanent protection visa. Regulation 866.211, in dealing with criteria that must be satisfied at the time of the application, required that the applicant claim to be "a person to whom Australia has protection obligations under the Refugees Convention". Regulation 866.221, in dealing with criteria that must be satisfied at the time of the decision, required that the Minister be satisfied that the applicant is "a person to whom Australia has protection obligations under the Refugees Convention".

196 Thus, read together, s 36(2) and the Regulations place Article 1 (as a whole) at the centre of the granting of both temporary and permanent protection visas. Importantly, the Regulations themselves, in terms, require the decision-maker to assess, by reference to the Convention (properly interpreted), whether Australia has protection obligations at the time of the decision. Thus, both the Act and the Regulations require the assessment of the relevant question (the existence of protection obligations at the time of decision) to be undertaken according to the Convention and its operation based on its proper interpretation.

197 The Minister was satisfied that the term "refugee" applied to the appellant for the purposes of the application of Article 1A(2) of the Convention, thereby (in the absence of relevance of any other part of Article 1) meeting the relevant primary criterion for the grant of the temporary protection visa. For the purposes of the Convention, this was a recognition of the applicability of Article 1A(2) of the Convention. The visa being applied for had its limitations, but the recognition of the applicant as a refugee was not in terms of the Act or Regulations an interim, provisional, interlocutory or temporally limited recognition. Through the Minister's decision, the applicant was recognised by Australia as a refugee. There is nothing in the Act or Regulations to the effect that that recognition lapsed or ceased to be relevant at any particular point in time, or, perhaps more importantly, that the recognition had a more limited effect or consequence than contemplated by the Convention. The legislative regime provided for the further application for a permanent visa. It is important

to ascertain whether this regime is to be seen as intended to operate differently to the operation of the Convention and, in particular, Article 1 as a whole. There was a need, or opportunity, to apply for a different and longer protection visa (5 years – Regulation 866.511). The temporary protection visa would expire in the context of that further application.

198 The whole of Article 1 was at the centre of both applications (for a temporary protection visa and a permanent protection visa) as providing the content for the phrase “a person to whom Australia has protection obligations under the Refugees Convention”. At the time of the determination of his application for a permanent protection visa, the appellant had been recognised as a refugee. He was not a claimant seeking recognition of the application of Section A(2). He had that recognition. No provision of the Act or Regulations stated that that recognition ceased to have relevance to the operation of the Convention and to the question whether Australia had protection obligations to him under the Convention (though indirectly as obligations under international law as a host State) and under the Act and Regulations.

199 Thus, one can see the framework of temporary and permanent applications as operating conformably with the terms and operation of Article 1 of the Convention. At the point of decision in respect of an application for a temporary visa, the relevant issue (absent other matters arising under Article 1) involved in the Minister being satisfied, or not, that Australia had protection obligations to the person was whether the applicant had a relevant well-founded fear of persecution for the application of Section A(2). If the Minister was satisfied of this (subject to the satisfaction of any other criteria) a temporary visa was granted. At this point the host State can be seen as having recognised the applicant as a refugee. Another visa was then sought. Once again, the relevant criterion was the Minister being satisfied that Australia had protection obligations to the person. There was an existing recognition of the applicant as a refugee, that is as someone who had the relevant well-founded fear of persecution. That was not a binding conclusion in the nature of *res judicata.* But it was a recognition of the applicability of Article 1A(2) for the engagement and the operation of the Convention. In the context of the assessment of the Minister as to Australia’s obligations to this person derived from the Convention, it cannot be ignored. It may be that the Convention should cease to apply under Section C(5). That would be a reason why one could not be satisfied that Australia had protection obligations to the person. At the stage of the decision whether to grant a permanent visa, the relevant analysis or approach as to whether the Minister was satisfied that Australia had protection obligations would be (assuming that there are no fresh claims to be assessed under Section A(2)) whether the Minister was satisfied that the Convention had ceased to apply by reason of Section C(5). This question and the determination of this state of satisfaction would be approached in the way I have identified: requiring clarity in the durability of relevant change of circumstances. Central to this approach is the understanding that the question whether Australia has protection obligations is to be answered by reference to the proper operation of the whole of Article 1, not merely Section A(2).

200 A different approach and the one propounded by the first respondent would be to require the person to bring forward his or her claims that Section A(2) applies to him or her in both applications, and to treat the approach as identical in both applications. Under this approach, the satisfaction of the Minister at the time of the decision on the temporary visa that Section A(2) applied to the person would be, at the point of decision for the permanent visa, a matter of historical interest only. The applicant, to paraphrase the words of Gummow J and Hayne J in *Abebe*, would have to make out his or her claim afresh.

201 In my view, the first of these two approaches accords with the operation of the Convention. It is consistent with the terms of s 36(2) and the relevant Regulations. The second seems to me not to be in accordance with the Convention. It requires something contrary to the operation of the Convention: the lapsing of recognition of the applicant as a refugee, and the requirement upon the applicant to reassert a claim for recognition as a refugee under Section A(2), absent the operation of the cessation provisions in Section C. Not only is that contrary to the Convention, it is inconsistent with the clear requirement of the Regulations themselves which is to assess whether Australia has protection obligations under the Convention (properly interpreted).

202 At the times of decision for the two visas (temporary and permanent protection visas) the reaching of states of satisfaction (or not) of the existence of protection obligations may involve different approaches conformable with the operation of the Convention, even though underlying any such assessments will be the issue of the existence or continued existence of a well-founded fear of persecution. Thus, it can be accepted readily (as Lord Brown and Lord Hope did in *Hoxha*) that each of Sections A(2) and C(5) is a mirror of the other. The important thing to understand, however, is that the similar issue is to be approached by answering different questions in different circumstances. The question under Section C(5) is as to whether protection should cease in the context of a previous and existing recognition that the applicant is or was a refugee.

203 This approach to the protection visa regime based on “temporary” and “permanent” protection visas does not deprive this regime of content or purpose. The system provides a fixed and clear regime for the Minister to be satisfied, after the expiry of an initial period, that Australia has protection obligations. The capacity to review *ad hoc* remains, as it would if there were only one class of protection visa. The system of two visas, apart from other considerations, provides a clear fixed time and context for the consideration of the question whether Australia has protection obligations under Article 1 of the Convention. (It is to be recalled that the “permanent” protection visa is not of indefinite duration, but lasts for five years.)

204 Thus, in my view, subject to the impact of s 36(3) to (5), in circumstances where the applicant has been recognised as a refugee by the Minister being previously satisfied that Section A(2) applied to him or her, the proper approach of the Minister (or here the Tribunal) to reach a state of

satisfaction as to Australia having protection obligations to the applicant, involves the Minister (or here the Tribunal) being satisfied that, by reference to Article 1C(5), a conclusion can be drawn that the Convention should cease to apply to the applicant. That task should be approached in the way that I have identified requiring clarity in the durability of the relevant changes.

205 It is necessary to have regard to s 36(3) to (5) of the Act and to consider whether the terms of those sub-sections, and the whole of s 36 influenced by their presence, alter this approach.

206 Sub-sections 36(3) to (5) are in the following terms:

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

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

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

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

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;

subsection (3) does not apply in relation to the first-mentioned country.

207 These provisions were touched on, but not considered in detail, in *NAGV and NAGW of 2002* at [87]-[88]. The background to their introduction into the Act was discussed in *V856/00A v Minister for Immigration and Multicultural Affairs* (2001) 114 FCR 408 at 416, [24]. The Supplementary Explanatory Memorandum was referred to by the primary judge at [57] of his reasons. One way of looking at sub-ss 36(3) to (5) (introduced, as they were, to deal with what was referred to in the Supplementary Explanatory Memorandum as forum shopping) is to see them as directed to the application in which the person is attempting to show that he or she is a person to whom Article 1A(2) applies, that is, here, only in the context of the application for a temporary visa. That the provisions were intended to deal with circumstances of attempts to choose Australia as a preferred place of asylum over other

places in which, in the relevant sense, the applicant would have no well-founded fear, can be accepted. The provisions were not, however, directed towards any change to the operation of the Convention in respect of the relationship between recognition and cessation of refugee status. Nevertheless, the words of Parliament are clear that Australia is not taken to have protection obligations if the provisions of sub-ss 36(3) to (5) apply.

208 It is to be noted that sub-ss 36(4) and (5) do not deal with the satisfaction of the Minister (or the Tribunal). They deal with the fact of a well-founded fear. Also, it is to be noted that the language of Section A(2) is used.

209 The issue arises whether these provisions are contrary to the scheme of Article 1 and the operation of Sections A(2) and C(5) of the Convention in the manner discussed earlier. I do not think that they are. As Lord Brown said in *Hoxha,* the subject matter of Sections A(2) and C(5) is the same: the notion of the well-founded fear of persecution. Thus, the fact that sub-ss 36(4) and (5) use language taken from Section A(2) does not lead to the conclusion that Parliament was intending to vary the operation of the Convention and dispense with the approach to Section C(5) to which I have referred. Nor does the fact that sub-ss 36(4) and (5) deal with the fact, rather than a state of satisfaction, lead to that conclusion. Where there has been a recognition of the applicant's position as a refugee by the applicability of Section A(2), to the requisite state of satisfaction, that fact can be recognised to exist, unless the Convention ceases to apply by the operation of Section C(5).

210 No doubt sub-s 36(3), as qualified by sub-ss 36(4) and (5), was intended to narrow the operation of the Convention by limiting the availability of protection in Australia by reference to rights that the applicant had in relation to other countries. The terms of sub-ss 36(3) to (5) are apt to refer not only to so-called third countries, but also the country of origin of the applicant. That plain intention to narrow the operation of the Convention did not extend to a change to the operation of the Convention in how it dealt with the relationship between recognition and cessation of an applicant's position as a refugee. I do not discern any intention from the words of sub-ss 36(3), (4) and (5), or the context of, or secondary material surrounding, their enactment to change the operation of the Convention in respect of the relationship between recognition and cessation of the applicant's position as a refugee. Thus, applying the principles of statutory interpretation to which I have earlier referred, to the extent that sub-ss 36(3), (4) and (5) can be read conformably with the Convention and its operation, they should be.

211 I have approached the question of the operation of s 36 as a whole. Subsection 36(2) places the Convention at the centre of the operation of the Act. Subsections 36(3) to (5) plainly modify its operation. But, these subsections, looked at individually (at the time of their insertion by the relevant amending Act) and the Act as a whole after their insertion, do not deal with the consequences of recognition of the application of Section A(2) or with the relationship between such recognition and cessation in Section C(5). Nothing that I have said undermines or detracts from the operation of sub-s 36(3), qualified as it is by sub-ss 36(4) and (5). There is no intractability of language

to be overcome. By the operation of the Act and the Convention sub-s 36(4) is satisfied, thereby making sub-s 36(3) irrelevant.

212 Thus, unless and until the Convention ceases to apply by operation of Section C(5), subs-s 36(3) does not operate in respect of the appellant because sub-s 36(4) makes it inapplicable, there being an existing recognition of the matters with which sub-s 36(4) is concerned.

213 With this background it is now necessary to turn to the decision of the Tribunal and the primary judge's view that it disclosed no jurisdictional error.

The Tribunal decision and the reasons of the primary judge

214 There are a number of errors in the approach of the Tribunal which amount in my view to a failure to direct itself to the correct question. The primary judge erred in failing to recognise those matters. I should note, however, that at the time of the primary judge's decision his Honour did not have the advantage of either *NAGV and NAGW* of 2002 or *Hoxha*.

215 The primary error of the Tribunal was in its application of Article 1C(5). The Tribunal, correctly, identified the first question before it as whether circumstances in connection with which the applicant had been recognised as a refugee had ceased to exist. A number of complaints were made in argument about an inadequacy of attention by the Tribunal to the detail of the particular circumstances of the appellant. It is unnecessary to deal with these matters. The flaw in the approach of the Tribunal was its failure to recognise the characteristics of the task before it in assessing whether Section C(5) led to the cessation of the application of the Convention. The Tribunal did not direct itself to, or deal with, the matter exhibiting an appreciation of the need to be satisfied that there had been made out a demonstrably clear and durable change of circumstances to warrant the likely permanent cessation of application of the Convention. This is best revealed by how it treated the killing and beheading of 12 Hazaras by the Taliban in late 2003. The Taliban, it would appear, were still an operating threat in a neighbouring district. The Tribunal's essential reasoning can be seen from the following:

I find on the basis of the evidence referred to above that the Taliban have been removed from power in Afghanistan (US State Department, Country Reports on Human Rights Practices for 2002 in relation to Afghanistan, Introduction). They are no longer in a position to massacre Hazaras or Shia Muslims in the manner referred to by the delegate of the Minister in the decision granting the Applicant a Subclass 785 (Temporary Protection) visa. I do not accept on the evidence before me that there is a real chance of the Taliban re-emerging as a viable political movement in Afghanistan in the reasonably foreseeable future (Danish Immigration Service, 'The Political, Security and Human Rights Situation in Afghanistan', Copenhagen, March 2003, page 14).

Notwithstanding isolated examples such as the killing of 12 Hazaras which some sources attribute to the Taliban, I do not accept on the evidence before me that the Taliban remnants remaining in Afghanistan are targeting civilians. I find that their targets are members of the Coalition and Government security forces and international aid workers (DFAT Country Information Report No. 127/03, dated 30 September 2003, CX86321). I note also in this context the advice of UNHCR that the strengthening of the Taliban remnants in Zabul province does not reach the Hazara areas of Jaghori district and is unlikely to do so without open conflict with the Hezb-e-Wahdat (UNHCR, 'Compilation of COI from Kabul in response to RO queries', 10 January 2004, CX 88041). I do not accept on the evidence before me that there is a real chance that the Applicant will be persecuted by the remnants of the Taliban because he is a Hazara if he returns to his home area of Afghanistan now or in the reasonably foreseeable future. I find that, because the circumstances in connection with which the Applicant was recognised as a refugee have ceased to exist, he can no longer continue to refuse to avail himself of the protection of his country of nationality for those reasons. Therefore, Article 1C(5) of the Convention applies to the Applicant.

> 216 The reasons of the Tribunal do not disclose a direction to itself as to the clarity with which it must be satisfied of the change of circumstances. The reasons give no cause to think that the Tribunal's decision would have been the same had it correctly directed itself. Further, they exhibit an approach whereby it was for the applicant to show that there was a real chance of persecution, rather than it being necessary for the Tribunal to be satisfied that durable change in the relevant circumstances had been revealed with the necessary clarity.
>
> 217 The primary judge discussed the inter-relationship of Article 1A(2) and C(5) at [38]-[40] as follows:

Thus, the circumstances in connection with which a person who is outside the country of his or her nationality will be recognised as a refugee by a Contracting State are that, owing to well-founded fear of being persecuted for Convention Reasons, the person is unable or, owing to such fear, is unwilling, to avail himself of the protection of that country. When Article 1C(5) speaks of a person no longer being able to continue to refuse to avail himself of the protection of the country of his nationality, it refers back to the prerequisite of Article 1A(2) that the person be unable or unwilling to avail himself of the protection of that country because of a well-founded fear of persecution for a Convention Reason. There is no reason for construing Article 1C(5) as contemplating anything more or less than the negativing of the circumstances that led to the conclusion that a person was a refugee within the meaning of Article 1A(2).

While there is a certain lack of symmetry in the actual language of the three provisions, there is a rationale underlying the basic object and scheme of the Refugees Convention. That rationale is that, so long as the relevant well-founded

fear exists, such that a person is unable or unwilling to avail himself or herself of the protection of the country of his or her nationality, he or she will be permitted to remain in the Contracting State. However, if circumstances change, such that it can no longer be said that the person is unable to avail himself or herself of the protection of his or her country of nationality owing to well-founded fear of persecution for Convention Reasons, the Contracting State´s obligation of protection comes to an end. That is to say, the obligations to a person that arise under, inter alia, Articles 32.1 and 33.1 continue only for so long as the person is a refugee within the meaning of Article 1A(2).

It may be appropriate, when considering the possible application of Article 1C(5), to assess whether a change in circumstances in the country of nationality is such as can properly be characterised as `substantial, effective and durable´. However, the object of the enquiry is to determine whether the person who has been recognised as a refugee can still claim to have a well-founded fear of being persecuted, for a Convention Reason, in his or her country of nationality such that there is justification for his or her being unable or unwilling to avail himself or herself of the protection of that country.

218 The primary judge recorded the submission of the appellant as to the approach to Section C(5) in [43] of his reasons:

The applicant contends that, once a person has been recognised by a Contracting State as a refugee within the meaning of Article 1A(2), the person is entitled to continue to be treated by that Contracting State as having that status unless there are changes in the country of nationality that are ` substantial, effective and durable´. He says that such change requires authoritative evidence that the changes are:

- substantial, in the sense that the power structure under which persecution was deemed a real possibility no longer exists;
- effective, in the sense that they exist in fact, rather than simply promise, and reflect a genuine ability and willingness on the part of the home country´s authorities to protect the refugee; and
- durable, rather than transitory shifts which last only a few weeks or months.

219 The primary judge was not assisted by submissions based on the Handbook. Rather he was referred to an internal document of the Minister. Nor did the primary judge have the benefit of the speeches of their Lordships in *Hoxha*. The primary judge said the following at [44]:

The applicant adopts that language from a paper prepared by the Minister´s Department `Interpreting the Refugees Convention - an Australian Contribution´ , Department of Immigration and Multicultural and Indigenous Affairs, Canberra 2002. However, care must be taken to ensure that the language of the Refugees Convention is applied rather than being replaced by substituted language: see Minister for Immigration and Ethnic Affairs v Guo (1997) 191 CLR 559 at 572-573. The Refugees Convention does not actually refer to a change in circumstances that is `substantial, effective and durable´. Rather, it refers simply to particular circumstances ceasing to exist.

> 220 For the reasons I have given, the correct approach to a decision as to whether Section C(5) leads to the cessation of application of the Convention requires a demonstrable clarity of durable change. That approach is to be found in the text and structure of the Convention. With respect, his Honour erred in not so concluding.
>
> 221 By reason of his Honour's view, reflected in [44] of his reasons, he rejected the complaints as to the findings of the Tribunal in respect of Section C(5) as factual debates. His Honour embarked on this issue at [54] as follows:

It is not for the Court to second guess the significance attached by the Tribunal to the evidentiary material before it. That, in essence, is what the applicant has asked the Court to do. It was open to the Tribunal, on the material before it, to conclude, as it did, that the applicant did not, at April 2004, have a **well-founded** fear of being persecuted for one of the Convention Reasons if he returns to Afghanistan now or in the reasonably foreseeable future.

[emphasis in original]

> 222 With respect, this paragraph and the approach taken by the primary judge at [37] to [40] overstates the effect of the underlying symmetry of subject matter in Sections A(2) and C(5). Each deals with the same notions, but the approach to the dealing with these notions is importantly different in the way discussed above.
>
> 223 The primary judge then dealt with the operation of sub-ss 36(3) to (5) of the Act, his Honour stated the following at [55] to [59]:

The applicant also complains about the operation given by the Tribunal to ss 36(3), (4) and (5) of the Act. The applicant submits that s 36(3) does not have any relevant operation in the present case. He contends that s 36(3) does not operate **at all** in relation to a person who has already obtained a protection visa. Rather, it is submitted that the section is directed to a person who has come to Australia to seek protection, in circumstances where there are other countries where that person could have sought protection, whether those countries were visited on the way to Australia,

or were countries where the person had a right to enter and reside, whether temporarily or permanently.

> The applicant says that, while the Taliban have ceased to be in power, there has not been a change sufficient to satisfy Article 1C(5). If Article 1C(5) does not apply, then, according to Article 1A(2), the applicant is a person to whom Australia owes protection obligations and, because he is already in Australia and has been recognised as a refugee, the provisions of Section 36(3) have no operation because no question of `forum shopping´ arises. The reference to `forum shopping´ arises from the explanatory memorandum published in connection with the Bill for the amendments that were made to the Act to insert ss 36(3), (4) and (5).

Those amendments were made by the Border Protection Legislation Amendment Act 1999 (Cth). In the supplementary explanatory memorandum circulated by the Minister in connection with the Bill for that Act, the following observations appear:

> `***Overview***
>
> *Australia has comprehensive refugee determination processes in place to fulfil its obligations under the [Refugees Convention]. A significant number of persons seeking asylum in Australia are nationals of more than one country, or have rights of return or entry to another country, where they may reside free from persecution or forced return to the country where they claim they will be persecuted. These persons attempt to use refugee processes as a means of by passing general immigration requirements to obtain residence in Australia. This practice of seeking protection elsewhere, widely referred to as " forum shopping", represents and increasing problem faced by Australia and other countries viewed desirable migration destinations. The government believes that Australia´s obligations do not require these persons to be permitted to reside in Australia when they have protection from persecution in another country.*
>
> *The purpose of these amendments is to prevent the misuse of Australia´s asylum processes by "forum shoppers". These amendments will ensure that persons who are nationals of more than one country, or who have a right to enter and reside in another country where they will be protected, have an obligation to avail themselves of the protection of that other country.´*

Whatever may have been in the contemplation of the author of the explanatory memorandum, it only has relevance to the construction of ss 36(3), (4) and (5) in the event of ambiguity. It is difficult to see any ambiguity. Those provisions do not actually refer to forum shopping.

In any event, it is difficult to see what relevance s 36(3) has in the present circumstances. If the applicant does not have a well-founded fear of persecution for one of the Convention Reasons, the criterion in s 36(2) would not be satisfied because Australia would not have protection obligations under the Refugees Convention. There would be no need to consider, as the Tribunal did, whether the applicant had taken all possible steps to avail himself of a right to enter and reside in his country of nationality, namely, Afghanistan. Section 36(3) is directed to the same concern that is addressed by Article 1E, although their operation is not co-extensive. Article 1E refers only to a country where a person `has taken residence´. Section 36(3), as qualified by ss 36(4) and 36(5), is not limited to a country in which a person has taken residence. It applies in relation to any country in which the person has a right to enter and reside.

[emphasis in original]

224 For the reasons that I have identified, sub-ss 36(3) to (5) are not to be taken as altering the approach found in the Convention.

225 Further, the primary judge stated the following at [58]:

Whatever may have been in the contemplation of the author of the explanatory memorandum, it only has relevance to the construction of ss 36(3), (4) and (5) in the event of ambiguity. It is difficult to see any ambiguity. Those provisions do not actually refer to forum shopping.

226 With respect, that is not the approach as expounded by the High Court in the cases referred to at [10] above. In *Network Ten* the proper approach was summarised as follows by McHugh ACJ, Gummow J and Hayne J at [11]:

In Newcastle City v GIO General Ltd, … McHugh J observed:

> *[A] court is permitted to have regard to the words used by the legislature in their legal and historical context and, in appropriate cases, to give them a meaning that will give effect to any purpose of the legislation that can be deduced from that context.*
>
> *His Honour went on to refer to what had been said in the joint judgment in* CIC Insurance Ltd v Bankstown Football Club Ltd*. ... There, Brennan CJ, Dawson, Toohey and Gummow JJ said: ...*
>
> ***It is well settled that at common law**, apart from any reliance upon s 15AB of the* Acts Interpretation Act 1901 *(Cth), **the court may have regard to reports of law reform bodies to ascertain the mischief***

> ***which a statute is intended to cure. ... Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.****...Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in* Isherwood v Butler Pollnow Pty Ltd*,... if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent... .*

[emphasis added]

227 Finally, the primary judge saw the division of visas into temporary and permanent, as exhibiting an intention to renew the requirement to satisfy Article 1A(2). His Honour said at [60]-[64]:

There may be many reasons why a Contracting State would invoke Article 1C(5) sparingly. The reasons might include a desire to maintain a degree of stability for refugees. Frequent review of the status of a person who has been recognised as a refugee could be detrimental to a sense of security that the Refugees Convention is designed to provide. The Refugees Convention does not provide any requirement for systematic review of status to determine whether particular circumstances have ceased to exist.

To that extent, the possibility of temporary protection that would arise by the grant of a temporary protection visa under the Act is not expressly contemplated by the Refugees Convention. The scheme of the Act in requiring a fresh application following the expiration of a temporary protection visa does not necessarily sit comfortably with the framework of the Refugees Convention. Nevertheless, the scheme of the Act is unambiguous in requiring a fresh application for a protection visa on the part of a person who wishes to remain in Australia after the expiration of a temporary protection visa.

The Tribunal was not considering the revocation of a protection visa. Nor was the Tribunal considering an application for the extension of a **temporary** protection visa. The Tribunal was considering a fresh application for the grant of a **permanent** protection visa. That required, under s 36(2), that the Tribunal, standing in the shoes

of the Minister be satisfied, that the applicant is, at the time of the decision, a person to whom Australia has protection obligations under the Refugees Convention.

On one view, Article 1C(5) had no part to play in that question. The only question was whether, at the time of the Tribunal´s decision, the applicant was a person who, owing to a well-founded fear of being persecuted for Convention Reasons, was unable, or owing to such fear, unwilling to avail himself of the protection of Afghanistan. Even if, as at December 1999 the applicant had been a person to whom the term `refugee´ within the meaning of the Refugee Convention applied, the question before the Tribunal was whether that term applied to the applicant as at April 2004. The Tribunal concluded that the applicant was not, as at that time, a person to whom the term refugee, as defined in the Refugees Convention, applied. There was no error in its reasoning in doing so.

In reaching its conclusion, it was necessary for the Tribunal to have regard to all of the applicant´s claims, whether they were made in connection with his original application or his subsequent application. The Tribunal did so. It is not the Court´s function to second guess the Tribunal´s conclusion in relation to the assessment of the material before it in that regard.

[emphasis in original]

> 228 With respect, I cannot agree. The protection obligations referred to at [62] of the primary judge's reasons derive from the whole of Article 1: *NAGV and NAGW of 2002.* That includes Sections A(2) and C(5). The structure sits comfortably with the framework of Article 1. At the time of decision as to the temporary visa, the Minister must be satisfied of the application of Article 1A(2) (together with any other relevant aspect, such as Section F). At the time of decision as to the permanent visa, if no other or different questions arise under Section A(2), the Minister must be satisfied of the matters in Section C(5) with the necessary degree of clarity in the durability of change as to warrant the cessation of the Convention. That is another aspect of whether Australia has (or continues to have) "protection obligations" to the person under the Convention. The key to his Honour's concern as to the disconformity between the Act and the Convention was the implicit equation of protection obligations with the satisfaction of Section A(2). As *NAGV and NAGW of 2002* made clear (after the primary judge dealt with the matter) that is too narrow a focus. There is no disconformity between the Convention and the Act.

The arguments of the parties and the decision in QAAH

> 229 It is necessary to deal with some of the submissions of the parties not otherwise adequately dealt with above and with the decision of the Full Court in *QAAH*.

230 The parties each put submissions as to what the relevant "circumstances" were here for the operation of Section C(5). The appellant submitted that the circumstances were the precise factual matters that had comprised the factual foundations of the appellant's claim. The first respondent submitted that the circumstances were merely the claim as to the well-founded fear of persecution. The latter is perhaps too general a meaning. The former is perhaps probably too narrow. The terms of Section C(5) are straightforward and contain a degree of flexibility adaptable to the individual case. What must cease to exist are "the circumstances in connection with which [the applicant] has been recognised as a refugee": that is, where that recognition has arisen because the applicant is a person described in Section A(2), the circumstances in connection with which the applicant has been recognised as having a well-founded fear of persecution for a relevant reason. The identification of the extent of what has to be assessed as having ceased will depend upon the nature of the claims made, their basis or bases and extent, and all the surrounding circumstances. If a person's claims (found previously to be valid) can be seen to be narrowly based on certain facts, it may be enough that those underlying facts no longer exist. If those facts, however, are only indicative of a more broadly based fear, the circumstances giving rise to that more broadly based fear will need to be examined. Thus, here, if the well-founded fear was based on feared persecution for relevant reasons by the Taliban, the circumstance that the Taliban had ceased to be the State authority may not lead to the conclusion that the circumstance of possible persecution for relevant reasons by the Taliban (though now as a non-State party or force) had ceased to exist. Normally, the relevant circumstances will be the general political conditions in the person's country of origin which have caused him or her to become a refugee: Grahl-Madsen *op cit* pp 400-401. However, the circumstances referred to in Section C(5) include both the objective facts giving rise to the fear held by the applicant and the subjective fear of the applicant himself or herself.

231 Here, the Tribunal did not otherwise address the matter in the correct way and thus it is unnecessary to comment further on its fact finding.

232 The first respondent submitted that the views of the majority in *QAAH* were wrong, and plainly wrong. For the above reasons I reject that submission. It is necessary, however, to make the following comments on *QAAH*.

233 In *QAAH*, Wilcox J at [36] to [46] described the use to be made of the Handbook. His Honour's views, as I read them, accord with my views at [7] to [14] above.

234 It is to be recognised that the fundamental argument addressed in *QAAH* was the view of the primary judge in that case and maintained by the Minister in argument that it was unnecessary at the point of consideration of the application for a permanent protection visa to deal with Section C(5). It was a fresh application as if it was the applicant's first application for recognition as a refugee: see *QAAH* at [49]. That submission was essentially maintained on this appeal. It highlights, in my view, the disconformity of the

submission with the proper operation of the Convention and therefore with the Act and the Regulations themselves.

235 The discussion by Wilcox J at [61] to [67] of the relationship between the Convention and the Act accords with my view.

236 I agree with the reasons of Wilcox J at [68] to [70] as to the error of the primary judge in that case and the irrelevance of *Chan* to the relationship between Sections A(2) and C(5) and their respective operations. No submissions based on *Chan* were put on this appeal.

237 Some criticism was made in argument before us of [69] of Wilcox J's reasons. It was submitted that his Honour failed to recognise the relevance and importance of the matters in *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220, especially at 239 ff. I do not agree. In the last four sentences of [69], his Honour was simply pointing out that despite the similarity of the underlying issue to both Sections A(2) and C(5), that is, the existence or not of a well-founded fear of persecution for a relevant reason, the answer to an enquiry under one could be different from the answer to an enquiry under the other because of the perspective and context in which the different questions are asked and because of the need for clarity and durability in the changed circumstances for an enquiry under Section C(5). The fact that the two questions may not always (though they may often) elicit the same answers highlights the importance of asking the correct question.

238 Wilcox J in [83] of his reasons illuminated the central consideration which I have otherwise attempted to express in my own words. Central to understanding the operation of Article 1, and in particular Section A(2) and C(5), is the place of recognition of the applicant as a refugee and the loss of that position and the protection accorded through the Convention by the operations of Article 1C, and here Section C(5).

239 Wilcox J at [84] to [86] (if I may say so) lucidly summed up the issue. In my view, the approach preferred by Wilcox J is correct. It is one which is founded on an interpretation of the Convention that accords with the text, structure and purposes of the Convention, with the views of scholars and jurists and with the highly persuasive views of a unanimous House of Lords. Once that foundation of the meaning of the Convention is recognised, where there is any ambiguity in the meaning of relevant domestic legislation, a construction favouring the operation of the Convention properly interpreted should be given, rather than one contrary to its operation: see the cases at [164] above. Here, an interpretation of delegated legislation, that the claimant must reassert his or her claim for recognition as a refugee at the point of application for a permanent protection visa would be contrary to the Convention and its intended operation. Therefore the approach favoured by Wilcox J at [86(ii)] should be preferred. I do not, however, think that there is any ambiguity in the domestic law. Both the Act and Regulations direct one to a question that is to be assessed by the application of the Convention. It is the proper understanding of that instrument which guides and forms the approach to the domestic law both because of the principles of interpretation of domestic

law against the background of a treaty and because of the very terms of the Act and Regulations themselves.

240 If it be the case that the revealed intention of the relevant Regulations was that described in [86(i)] of Wilcox J's reasons an issue may arise (which it is unnecessary to discuss) as to whether such regulations were repugnant to the Act, in particular s 36(2).

241 It is clear, I hope, from what I have already said that I do not see the clarity and durability of change required by Section C(5) to be a question of onus. It is a question of the Minister, her delegate or the Tribunal as part of the Executive, recognising the nature of the decision-making task.

242 Respectfully, I cannot agree with the views of Lander J in *QAAH* that *Mayer, Chan, NAGV and NAGW of 2002, Minister for Immigration and Ethnic Affairs v Singh* (1997) 72 FCR 288 and *Minister for Immigration and Ethnic Affairs v Singh* (1997) 74 FCR 553 require the conclusion that a fresh and second assertion of recognition be undertaken at the stage of the application for a permanent visa. Those cases make clear the importance of the present tense in the expression of the relevant provision concerning the timing of the assessment for the asserted recognition. They say nothing about whether repeated assertions of recognition were intended by these Regulations. It goes without saying that the time by reference to which the question whether Australia has protection obligations is to be assessed is identified by the terms of the relevant Regulation. That does not, however, require a further assessment as to whether the applicant should be recognised as a refugee under Section A(2) at that time. The question under s36(2) and the Regulation is whether Australia has protection obligations **under the Convention** at that time. This will be answered by the **proper operation of the Convention** by assessing whether Section C(5) operates to bring about a cessation of the protection obligations already engaged by the existing recognition that Section A(2) applied to the applicant.

243 Finally, to say that it is a matter for the host State to provide for how protection is to be afforded does not assist in construing and interpreting the means in fact employed by Australia in its domestic law by reference to accepted canons of construction and interpretation of international conventions and domestic legislation in relation thereto.

244 For the above reasons I would make the following orders:

1. The appeal be allowed.

2. The orders of the Court made on 25 October 2004 be set aside.

3. In lieu of the orders made on 25 October 2004 the following orders be made:

(a) a writ of certiorari be directed to the second respondent quashing the decision of the second respondent made on 5 April 2004 and handed down on 29 April 2004 in matter number N03/47465;

(b) a writ of mandamus be directed to the second respondent requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent dated 16 September 2003; and

(c) the first respondent pay the costs of the applicant.

4. The first respondent pay the appellant's costs of the appeal.

I certify that the preceding ninety-five (95) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Allsop.

Associate:

Dated: 12 May 2006

Counsel for the Appellant:	G C Lindsay SC and L J Karp
Solicitor for the Appellant:	Legal Aid Commission of NSW
Counsel for the Respondent:	N Williams SC and S Lloyd
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	3 May 2005 and 1 December 2005 (by the reconstituted bench)
Date of Judgment:	12 May 2006