FEDERAL COURT OF AUSTRALIA

IMMIGRATION – *Migration Act* 1958 (Cth) - *Convention relating to the Status of Refugees,* article 1F(b)– whether the appellant disentitled to a protection visa - whether article 1F(b) applies only to “fugitives from justice” - whether article 1F(b) applies to a crime committed (at least in part) or continued in the country of refuge – whether article 1F(b) applies to a crime which could or has been adjudicated in the country of refuge – whether article 1F(b) applies only to conduct that is rendered criminal by the law of the place where it was committed – whether the respondent relying on article 1F(b) must identify with precision and particularity the relevant “serious non-political crime” which was committed outside Australia .

STATUTES – *Vienna Convention on the Law of Treaties* – interpretation of the *Refugees Convention* – proper approach to the interpretation of the international conventions – circumstances in which supplementary means of interpretation ought to be considered – use of the *travaux preparatoires*

Migration Act 1958 (Cth), s 476

Customs Act 1901 (Cth), s 233B(1)

Convention relating to the Status of Refugees, arts 1A(2), 1F(b)

Vienna Convention on the Law of Treaties, arts 31,32,33

Constitution of the International Refugee Organisation

Universal Declaration of Human Rights

Statute of the Office of the United Nations High Commissioner for Refugees

Dhayakpa v Minister for Immigration and Ethnic Affairs (1995) 62 FCR 556, followed

Kamara v Director of Public Prosecutions [1974] AC 104, cited

Gerakiteys v The Queen (1984) 153 CLR 317 at 327, cited

Savvas v The Queen (1995) 183 CLR 1, cited

Canada (Attorney-General) v Ward [1993] 2 SCR 689

Pushpanathan v Canada (Minister of Citizenship and Immigration) (Supreme Court of Canada unreported, 4 June 1998), cited

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

R v Fan (1991) 24 NSWLR 60, cited

Golder v United Kingdom (1975) 1 EHRR 524, cited

Adan v Secretary of State for the Home Department [1998] 2 WLR 702, cited

T v Immigration Officer [1996] AC 742, cited

Liangsiriprasert v Government of the United States [1991] 1 AC 225, cited

A Grahl-Madsen *The Status of Refugees in International Law* (1966)

C Goodwin-Gill *The Refugee in International Law* (1996)

JC Hathaway *The Law of Refugee Status* (1991)

IGOR OVCHARUK v MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS

VG 149 of 1998

VG 150 of 1998

WHITLAM, BRANSON & SACKVILLE JJ

MELBOURNE

16 OCTOBER 1998

IN THE FEDERAL COURT OF AUSTRALIA	
victoria DISTRICT REGISTRY	VG 149 of 1998 VG 150 of 1998

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	igor ovcharuk Appellant
AND:	Minister for Immigration and Multicultural Affairs Respondent

JUDGEs:	WHITLAM, branson & Sackville JJ
DATE OF ORDER:	16 October 1998
WHERE MADE:	melbourne

THE COURT ORDERS THAT:

1. The appeals are dismissed.

2. The appellant pay the respondent's costs.

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

IN THE FEDERAL COURT OF AUSTRALIA

victoria DISTRICT REGISTRY VG 149 of 1998

VG 150 of 1998

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	igor ovcharuk Appellant
AND:	Minister for Immigration and Multicultural Affairs Respondent

JUDGEs:	WHITLAM, branson & Sackville JJ
DATE:	16 october 1998
PLACE:	melbourne

REASONS FOR JUDGMENT

WHITLAM J:

On 19 February 1997 a delegate of the respondent ("the Minister") refused to grant the appellant, Igor Borisevich Ovcharuk, a protection visa under the *Migration Act* 1958 ("the Act"). In doing so, the delegate relied on Art 1F of the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 ("the Refugees Convention"). The Administrative Appeals Tribunal ("the Tribunal") subsequently affirmed the delegate's decision. Mr Ovcharuk then appealed to the Court pursuant to the *Administrative Appeals Tribunal Act* 1975 and also applied to the Court under s 476 of the Act for review of the Tribunal's decision. Marshall J heard both proceedings together. He dismissed, with costs, the appeal and the application for review. Mr Ovcharuk now appeals from the orders of Marshall J.

The delegate, the Tribunal and Marshall J each considered that Mr Ovcharuk's circumstances were relevantly covered by the decision of French J in *Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556. Whilst it is possible to distinguish the facts of that case, counsel for Mr Ovcharuk effectively invite this Full Court to overrule *Dhayakpa.*

Article 1F of the Refugees Convention provides:

"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

The Tribunal found the following facts:

"Ovcharuk was born in Vladivostok, on the eastern seaboard of the Russian Federation on 26 April 1961. He is a merchant seaman. Ovcharuk was a member of the crew of a Russian merchant vessel "Maxim Mikhailov" which had berthed in Melbourne on 28 January 1993. Early the next day Ovcharuk was intercepted by customs officers as he was walking along Coode Road, near the port of Melbourne. He was carrying a bag containing 16 blocks of white powder later found to comprise 5.0507 kilograms of impure heroin (which, on analysis, contained 4.1978 kilograms of pure heroin) and also a package containing 165 grams of cannabis resin. Ovcharuk admitted to his role as courier in importing the prohibited substances. He told Australian Federal Police officers he had been persuaded by another seaman, Nikolai Livitsky, who was not a member of the crew of the "Maxim Mikhailov" but with whom he had served on various vessels in the past, to act as courier for the drugs found in his possession.

Ovcharuk told police that he received the drugs from Livitsky in Vostoshnyi (a seaport near Vladivostok), shortly prior to the "Maxim Mikhailov" commencing its journey to Australia. Ovcharuk hid the drugs inside a wall of his cabin where they remained undetected despite a routine Russian Customs search before leaving port. Livitsky

also gave him a note with the names and telephone numbers of two contacts in Melbourne. The arrangement was for Ovcharuk to be picked up at a telephone box near the port of Melbourne and taken to an address in the Melbourne suburb of Campbellfield where, in exchange for the drugs, he was to be paid $US10,000 for carrying out his role as courier, and $US80,000 for Livitsky.

After being intercepted, Ovcharuk made full admissions to the police and agreed to assist in a controlled delivery of the drugs on the evening of 29 January 1993 by making a call to one of the contact numbers and waiting at the telephone box. The bag was repacked with one of the original blocks of heroin and 15 dummy blocks, and all of the cannabis resin. Ovcharuk handed over the bag to one of the contacts and feigning a need to return to his duties aboard ship, arranged for the sum of $US90,000 to be paid to him in Sydney. Police later intercepted Israel Krasnov and Marc Shlakht in possession of the drugs.

On 18 June 1993 Ovcharuk was sentenced in Melbourne County Court on one count of importing a commercial quantity of heroin and one count of importing a traffickable [sic] quantity of cannabis resin. He pleaded guilty. He was sentenced to six years imprisonment on the first count and two years on the second count, the sentences to be served concurrently. A non-parole period of four and a half years was fixed. The Court took into account his co-operation with authorities and his agreement to give evidence as a prosecution witness, indicating that but for his co-operation he would have been sentenced to nine years imprisonment with a non-parole period of six and a half years.

On 2 February 1995 Krasnov pleaded guilty in the County Court at Melbourne to one count of importing into Australia a commercial quantity of heroin and one count of importing into Australia a traffickable [sic] quantity of cannabis resin. He was sentenced to sixteen years imprisonment on the first count and five years imprisonment on the second count, the sentences to be served concurrently. A non-parole period of fountreen years was fixed. On appeal to the Court of Appeal, the non-parole period was reduced to eleven years. On the same day Shlakht pleaded guilty to one count of having in his possession a traffickable [sic] quality of heroin and one count of having in his possession a traffickable [sic] quality of cannabis resin as prohibited imports without reasonable excuse. Shlakht was sentenced to seven years imprisonment for possessing heroin and two years for possessing cannabis resin, the sentences to be serviced concurrently. A non-parole period of five years was fixed. An appeal against sentence was dismissed.

On 12 November 1996 while serving his sentence, Ovcharuk applied for a protection visa."

It is necessary to note that Mr Ovcharuk pleaded guilty to two offences of importing narcotic goods contrary to par 233B(1)(b) of the *Customs Act* 1901. He was not charged with an offence of conspiring to import such goods under par 233B(1)(cb) of that Act.

His counsel submitted to the Tribunal that Mr Ovcharuk did not fall within the ambit of

Art 1F(b) of the Refugees Convention on the basis that he had not committed a crime outside Australia. The Tribunal noted that Mr Ovcharuk had not been charged with any offences outside Australia in relation to the drug importation. However, the Tribunal said:

"Ovcharuk was a knowing and active participant in the drug trafficking operation. On his own admissions, the arrangements he made with Livitsky in the Russian Federation as recited earlier whereby he agreed to act as courier in the venture, is strong presumptive evidence that elements of the commission of a crime of conspiring to import prohibited substances into Australia were completed outside Australia. The arrangement (of a criminal nature) with Livitsky was made outside Australia, Ovcharuk received the drugs outside Australia and elements of that arrangement (Ovcharuk being in possession of the drugs for the purposes of the importation) continued after he entered Australia. It is sufficient that there be strong presumptive evidence of the commission of the relevant crimes or acts: Dhayakpa v Minister for Immigration and Ethnic Affairs (1995) 62 FCR 556. In my opinion that evidence is available here."

In *Dhayakpa* the applicant had been convicted of three offences under s 233B(1) of the *Customs Act*, namely conspiracy to import under par (cb), importation under par (b) and possession under par (c). The Refugee Review Tribunal found that the arrangement to import narcotics into Australia had been entered into between the applicant and his co-conspirators in Kathmandu, that the conspiracy offence had been committed outside the country of refuge prior to admission, and that the applicant was, therefore, excluded from the protection of the Refugees Convention by virtue of the provisions of Art 1F(b).

French J said (at 564) that the difficulty with a suggested construction that the exemption in Art 1F(b) does not extend to crimes for which punishment had been suffered or which were no longer justiciable was that it imports into the provision limitations not able to be found in its language. His Honour then concluded (at 565):

The primary question for decision in this case is whether the offence of conspiracy for which Dhayakpa was convicted was committed outside Australia within the meaning of Art 1F(b). The elements of that offence were complete when the criminal agreement had been concluded: Kamara v Director of Public Prosecutions [1974] AC 104 at 119; Gerakiteys v The Queen (1984) 153 CLR 317 at 327; Savvas v The Queen (1995) 183 CLR 1 at 8. In the present case the criminal agreement to import heroin into Australia was concluded outside Australia. It continued in effect and the offence thereby continued after the applicant entered Australia. This is reflected in the terms of the indictment which identifies the conspiracy as having taken place "at Perth and other places outside Australia".

The provisions of the Convention are beneficial and are not to be given a narrow construction. The exemption in Art 1F(b), however, is protective of the order and safety of the receiving State. It is not, in my opinion, to be construed so narrowly as to undercut its evident policy. The fact that a crime committed outside the receiving

State is an offence against the laws of that State does not take it out of the ordinary meaning of the words of Art 1F(b). Nor does the fact that the crime has subsequently been punished under the law of the receiving State. The operation of the exemption is not punitive. There can be no question of twice punishing a person for the same offence. Rather it is protective of the interests of the receiving State. The protective function is not limited according to whether or not the punishment has been inflicted in Australia or elsewhere. Nor, on the language of the Article or its evident policy, is it necessary that the disqualifying crime have any connection to the reason for seeking refuge. A person who would otherwise qualify for admission as a refugee may be disqualified by the operation of Art 1F(b) if it were shown that such a person had a record of serious non-political criminal offences whether in the country of origin or elsewhere. In my opinion also it makes no difference that the offence, in this case a continuing offence, was committed both outside and within Australia."

Counsel for the appellant submit that Art 1F(b) is not concerned with conduct which merely constitutes a breach of the law of the country of refuge. Rather, it is said that the Minister must establish that the conduct in question is, or is also, a crime against the law of another country. Otherwise, the protections of Art 33(2), including the requirement of a "conviction", would become illusory.

Article 33 of the Refugees Convention provides:

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

> 2. The benefit of the present provison may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

Counsel for the appellant also rely on dicta in two cases in the Supreme Court of Canada. In *Canada (Attorney-General) v Ward* [1993] 2 SCR 689, La Forest J noted (at 743) that an interpretation of Art 1F(b) confining it to persons who are fugitives from prosecution seemed to be consistent with the views expressed in the *travaux preparatoires* for the Refugees Convention. He also pointed out that the interpretation of the provision had not, however, been argued in that case.

The other Canadian case is *Pushpanathan v Canada (Minister for Citizenship and Immigration)*, (Supreme Court of Canada, 4 June 1998, unreported), which involved interpretation of the phrase "purposes and principles of the United Nations" in Art 1F(c) of the Refugees Convention. Basterache J said (para 58) that the terms of Art 1F(b) evidenced "geographical limitations". Later he said (para 73) that "Art 1F(b) is

generally meant to prevent ordinary criminals extraditable by treaty from seeking refugee status, but that this is limited to serious crimes committed before entry in the state of asylum." In that case the appellant's offence under the Canadian *Criminal Code* of conspiracy to traffic in a narcotic does not appear to have involved conduct on his part outside Canada.

It is also submitted by counsel for the appellant that the introductory words employed in

Art 1F, "serious reasons for considering", suggest that the provision is concerned with unconvicted and unpunished persons rather than persons who have already been convicted and punished. The language in this provision of the Refugees Convention may be contrasted with the use of the word "convicted" in Art 33(2).

Counsel for the respondent accepts, of course, that Art 1F(b) contemplates a crime "committed . . . outside the country of refuge". He submits that the "crime" referred to in par (b) may, however, include an offence under the law of the country of refuge. Article 1F(b), it is said, does not restrict the law pursuant to which the nature of the relevant acts is assessed to the criminal law of another country. So long as the acts outside the country of refuge constitute a crime, the provisions of Art 1F(b) are satisfied.

In the present case, when the Tribunal stated that "elements of the commission of a crime . . . were completed outside Australia" it must be taken, by its earlier reference to the arrangements concluded in Russia, to have meant that all the necessary ingredients of an offence of conspiracy were complete. So much is clear from the purported application of the decision in *Dhayakpa.*

The question for determination in these appeals is, therefore, whether *Dhayakpa* was correctly decided. I derive no assistance from the Canadian cases. The statutory framework is that country is quite different to Australia and, further, the construction of Art 1F(b) was not an issue in either case.

The construction of the Refugees Convention is required by the *Migration Regulations.* The legislative framework is explained in *Dhayakpa* at 562. *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 contains a variety of observations upon the interpretation of treaties. McHugh J discussed (at 251-256) the interpretative principles. His Honour considered an "ordered yet holistic approach" to be correct. He concluded that Art 31 of the so-called Vienna Convention required Australian courts, when faced with a question of treaty interpretation, to examine both the "ordinary meaning" and the "context . . . object and purpose" of a treaty.

In my opinion, the ordinary meaning of the words used in Art 1F(b) does not suggest the qualification contended for by the appellant's counsel. What is most striking to me about

Art 1F is the plain, matter-of-fact requirement that there should be "serious reasons for considering that" a person "has committed" a specified type of crime - pars (a) and (b), or "has been guilty" of the proscribed acts - par (c). Charges or convictions are not required. Indeed, in some cases, even though a person claiming to be a refugee has been charged with or convicted of an offence, it may be perfectly clear that there are no serious reasons to consider that person has committed a crime. In other cases, such facts may be strongly probative of such serious reasons. It all depends on the facts of the particular case. Certainly the language may also apply to fugitives from prosecution or, for that matter, punishment. But there is no obvious reason to confine the plain meaning of the words to that category of persons or to those in respect of whom an extradition request may be made to the country of refuge.

It must be accepted that a country of refuge, such as Australia, may proscribe as criminal conduct that takes place abroad: *R v Fan* (1991) 24 NSWLR 60. Why should it be supposed that a country of refuge would then deny itself the benefit of Art 1F(b) in discharging its obligations under the Refugees Convention? No good reason has been suggested. On the contrary, the obviously humanitarian object and purpose of the Refugees Convention do not require that a country of refuge should accord refugee status to a person where it has serious reasons for considering that person has committed outside that country a serious crime against one of its own laws. Article 33 only applies once a person has been granted refugee status. The benefit of its prohibition of expulsion or return is removed in strictly limited circumstances. A country of refuge surely cannot be required at the stage where it first considers a person's claims to be a refugee to ignore serious reasons of the type to which par (b) of Art 1F is directed. A contrary construction would not be reasonable and the context certainly does not suggest it.

Counsel for the appellant criticize French J's identification of the "evident policy" of

Art 1F(b). They say his description of that policy reflects that which his Honour had earlier noted (at 564) was set out in the 1992 UNHCR *Handbook.* However, his Honour expressly observed subsequently (at 565) that the *Handbook* is not a document which purports to interpret the Convention. In any event, I respectfully agree with French J that the transparent policy of Art 1F(b) is to protect the order and safety of the receiving State. That is why par (b) deals with topics that are very different to pars (a) and (c) in Art 1F.

The appellant cannot wish away the fact that a nation's laws may have extraterritorial effect. The Refugees Convention must be construed against a dynamic system of law. In *Pushpanathan* Bastarache J acknowledged (para 70) that the future adoption of an international treaty might bring drug trafficking within the scope of Art 1F(c) as involving a serious violation of human rights.

In the course of oral argument and in extensive written submissions filed subsequently, we were referred to voluminous extrinsic materials. Such recourse is only warranted where it is necessary to determine the meaning of Art 1F(b). In my opinion, there is nothing ambiguous, obscure or absurd about the plain meaning of the words of that provision. I do not think that in this case it is necessary to have regard to such supplementary means of interpretation.

In my opinion, *Dhayakpa* was correctly decided. No error of law on the part of the Tribunal has thus been demonstrated in the present case. The appeals should be dismissed with costs.

I certify that this and the preceding seven (7) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Whitlam

Associate:

Dated:

IN THE FEDERAL COURT OF AUSTRALIA	
victoria DISTRICT REGISTRY	VG 149 of 1998 VG 150 of 1998

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	IGOR OVCHARUK AppELLant

AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent	
JUDGE(S):	WHITLAM, BRANSON & SACKVILLE JJ	
DATE OF ORDER:	16 October 1998	
WHERE MADE:	MELBOURNE	

THE COURT ORDERS THAT:

1. The appeals be dismissed with costs

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

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIAN DISTRICT REGISTRY	VG149 of 1998 vg150 of 1998

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	IGOR OVCHARUK AppELLant
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGE(S):	WHITLAM, BRANSON & SACKVILLE JJ
DATE:	16 October 1998
PLACE:	MELBOURNE

REASONS FOR JUDGMENT

BRANSON J:

INTRODUCTION

These appeals are concerned with the proper construction of what Professor James Hathaway in his book *The Law of Refugee Status* (1991) at p 221 describes as "[t]he common law criminality exclusion" contained in Article IF(b) 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 ("the Refugees Convention").

There are formally two appeals before the Court from decisions of a judge of this Court. By the first decision the judge dismissed an appeal from a decision of the Administrative Appeals Tribunal ("the AAT") to affirm a decision of a delegate of the respondent to refuse the appellant a protection visa; by the second decision the judge dismissed an application under s 476 of the *Migration Act* 1958 (Cth) ("the Migration Act") for review by the Court of the same decision of the delegate of the respondent.

BACKGROUND FACTS

The factual background to these appeals is adequately summarised in the following passage from the reasons for decision of the AAT:

"Ovcharuk was born in Vladivostok, on the eastern seaboard of the Russian Federation on 26 April 1961. He is a merchant seaman. Ovcharuk was a member of the crew of a Russian merchant vessel "Maxim Mikhailov" which had berthed in Melbourne on 28 January 1993. Early the next day Ovcharuk was intercepted by customs officers as he was walking along Coode Road, near the port of Melbourne. He was carrying a bag containing 16 blocks of white powder later found to comprise 5.0507 kilograms of impure heroin (which, on analysis, contained 4.1978 kilograms of pure heroin) and also a package containing 165 grams of cannabis resin. Ovcharuk admitted to his role as courier in importing the prohibited substances. He told Australian Federal Police officers he had been persuaded by another seaman, Nikolai Livitsky, who was not a member of the crew of the "Maxim Mikhailov" but with whom he had served on various vessels in the past, to act as courier for the drugs found in his possession.

Ovcharuk told police that he received the drugs from Livitsky in Vostoshnyi (a seaport near Vladivostok), shortly prior to the "Maxim Mikhailov" commencing its journey to Australia. Ovcharuk hid the drugs inside a wall of his cabin where they remained undetected despite a routine Russian Customs search before leaving port. Livitsky also gave him a note with the names and telephone numbers of two contacts in Melbourne. The arrangement was for Ovcharuk to be picked up at a telephone box near the port of Melbourne and taken to an address in the Melbourne suburb of Campbellfield where, in exchange for the drugs, he was to be paid $US10,000 for carrying out his role as courier, and $US80,000 for Livitsky.

After being intercepted, Ovcharuk made full admissions to the police and agreed to assist in a controlled delivery of the drugs on the evening of 29 January 1993 by making a call to one of the contact numbers and waiting at the telephone box. The

bag was repacked with one of the original blocks of heroin and 15 dummy blocks, and all of the cannabis resin. Ovcharuk handed over the bag to one of the contacts and feigning a need to return to his duties aboard ship, arranged for the sum of $US90,000 to be paid to him in Sydney. Police later intercepted Israel Krasnov and Marc Shlakht in possession of the drugs.

On 18 June 1993 Ovcharuk was sentenced in the Melbourne County Court on one count of importing a commercial quantity of heroin and one count of importing a traffickable quantity of cannabis resin. He pleaded guilty. He was sentenced to six years imprisonment on the first count and two years on the second count, the sentences to be served concurrently. A non-parole period of four and a half years was fixed. The Court took into account his co-operation with authorities and his agreement to give evidence as a prosecution witness, indicating that but for his co-operation he would have been sentenced to nine years imprisonment with a non-parole period of six and a half years.

On 2 February 1995 Krasnov pleaded guilty in the County Court at Melbourne to one count of importing into Australia a commercial quantity of heroin and one count of importing into Australia a traffickable quantity of cannabis resin. He was sentenced to sixteen years imprisonment on the first count and five years imprisonment on the second count, the sentences to be served concurrently. A non-parole period of fourteen years was fixed. On appeal to the Court of Appeal, the non-parole period was reduced to eleven years. On the same day Shlakht pleaded guilty to one count of having in his possession a traffickable quantity of heroin and one count of having in his possession a traffickable quantity of cannabis resin as prohibited imports without reasonable excuse. Shlakht was sentenced to seven years imprisonment for possessing heroin and two years for possessing cannabis resin, the sentences to be served concurrently. A non-parole period of five years was fixed. An appeal against sentence was dismissed.

On 12 November 1996 while serving his sentence, Ovcharuk applied for a protection visa."

MIGRATION ACT

Section 36 of the Migration Act provides for a class of visas to be known as protection visas. Section 36(2) provides as follows:

> "(2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations

under the Refugees Convention as amended by the Refugees Protocol."

REFUGEES CONVENTION

Article 1A(2) of the Refugees Convention provides that the term "refugee" shall apply to any person who:

"… 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 …."

The operation of Article 1A(2), of the Refugees Convention is, however, limited by amongst other articles, Article 1F, which provides:

"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

Article 33 of the Refugees Convention is concerned with the expulsion or return of a refugee. It provides as follows:

“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 judgment of a particularly serious crime, constitutes a danger to the community of that country.”

GROUNDS OF APPEAL

The appeals were brought on the following, to some extent alternative, grounds:

(1) that Article 1F(b) of the Refugees Convention applies only to “fugitives from justice”; that is to persons who have committed serious crimes overseas and are seeking to escape criminal liability by claiming refugee status;

(2) that Article 1F(b) does not apply to a crime which may have its origins overseas, but was committed (at least in part) or continued in the country of refuge and which could be or has been adjudicated in the country of refuge;

(3) that Article 1F(b) applies only to conduct that is rendered criminal by the law of the place where it was committed, being also a crime which is regarded or treated by that law (or alternatively by international law) as a serious crime and which remains justiciable and likely to be prosecuted in that place;

(4) that where the respondent relies on Article 1F(b), the respondent must identify with precision and particularity the relevant “serious non-political crime” which was committed outside Australia and must show that there are “serious reasons for considering” that the applicant has committed that crime;

(5) that on the undisputed facts, it should have been held that Article 1F(b) of the Refugees Convention had no application to the appellant and did not disentitle him to a protection visa.

CONSIDERATION

Each of the grounds of appeal requires consideration to be given to the proper construction of Article 1F(b) of the Refugees Convention.

In *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 the High Court gave consideration to the principles which govern the interpretation of the Refugees Convention. Such principles are to be found in Articles 31 and 32 of *the Vienna Convention on the Law of Treaties* (“the Vienna Convention”).

Article 31 of the Vienna Convention provides as follows:

General rule of interpretation

(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

(3) There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

(4) A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 provides as follows:

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

In *Applicant A's* case, McHugh J, with whom Brennan CJ and Gummow J agreed in this regard, at 254-256 expressed his approval of the approach adopted by Judge Zekia in the European Court of Human Rights in *Golder v United Kingdom* (1975) 1 EHRR 524 to Article 31 of the Vienna Convention.

McHugh J said at 254:

"Judge Zekia emphasised an ordered yet holistic approach. Primacy is to be given to the written text of the Convention but the context, object and purpose of the treaty must also be considered."

At 256 McHugh J observed:

"The lack of precision in treaties confirms the need to adopt interpretive principles, like those pronounced by Judge Zekia, which are founded on the view that treaties "cannot be expected to be applied with taut logical precision".

Accordingly, in my opinion, Art 31 of the Vienna Convention requires the courts of this country when faced with a question of treaty interpretations to examine both the "ordinary meaning" and the "context … object and purpose" of a treaty". (footnotes omitted).

No submission was advanced in this case that calls for the consideration to be given to paragraphs (2),(3) or (4) of Article 31 of the Vienna Convention.

Article 1F(b) of the Refugee Convention has received judicial and academic consideration. La Forest J of the Supreme Court of Canada in *Canada (Attorney-*

General) v Ward (1993) 2 SCR 689 at 743 said of Article 1F(b) of the Refugees Convention:

"Hathaway … at p 221, interprets this exclusion to embrace "persons who are liable to sanctions in another state for having committed a genuine, serious crime, and who seek to escape legitimate criminal liability by claiming refugee status". In other words, Hathaway would appear to confine paragraph (b) to accused persons who are fugitives from prosecution. …I note … that Professor Hathaway's interpretation seems to be consistent with the views expressed in the Travaux préparatoires, regarding the need for congruence between the Convention and extradition law …. As such, Ward would still not be excluded on this basis, having already been convicted of his crimes and having already served his sentence."

In *Pushpanathan v Canada (Minister of Citizenship and Immigration)* (Supreme Court of Canada unreported, 4 June 1998) Bastarache J observed that:

"[i]t is quite clear that Article 1F(b) is generally meant to prevent ordinary criminals extraditable by treaty from seeking refugee status, but that this exclusion is limited to serious crimes committed before entry in the state of asylum …. Article 1F(b) identifies non-political crimes committed outside the country of refuge, while Article 33(2) addresses non-political crimes committed within the country of refuge."

By contrast, French J in *Dhayakpa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556 observed that:

"The provisions of the Convention are beneficial and are not to be given a narrow construction. The exemption in Art 1F(b), however, is protective of the order and safety of the receiving State. It is not, in my opinion, to be construed so narrowly as to undercut its evident policy. The fact that a crime committed outside the receiving State is an offence against the laws of that State does not take it out of the ordinary meaning of the words of Art 1F(b). Nor does the fact that the crime has subsequently been punished under the law of the receiving State. The operation of the exemption is not punitive. There can be no question of twice punishing a person for the same

offence. Rather it is protective of the interests of the receiving State. The protective function is not limited according to whether or not the punishment has been inflicted in Australia or elsewhere. Nor, on the language of the Article or its evident policy, is it necessary that the disqualifying crime have any connection to the reason for seeking refuge. …In my opinion also it makes no difference that the offence, in this case a continuing offence, was committed both outside and within Australia."

To turn to academic writings, Grahl-Madsen, *The Status of Refugees in International Law* (1966) vol 1 at 290-292 states:

"As Article 1F(b) is worded it is clear that it does not matter whether the person concerned is actually wanted for any specific crime, and it matters even less whether there exists any extradition treaty between the countries in question under which his extradition may be requested. …

Keeping in mind that we are here concerned with persons who – were it not for Article 1F(b)- would have a perfect claim to refugeehood by virtue of Article 1A and B, it stands to reason to submit that crimes for which punishment has been suffered, as well as crimes which are either too unimportant to warrant extradition or no longer justiciable, should not be held against persons seeking recognition as refugees."

Professor Hathaway, in *The Law of Refugee Status* (1991) at p 221 observes:

"The common law criminality exclusion disallows the claims of persons who are liable to sanctions in another state for having committed a genuine, serious crime, and who seek to escape legitimate criminal liability by claiming refugee status. This exclusion clause is not a means of bypassing ordinary criminal due process for acts committed in a state of refuge, nor a pretext for ignoring the protection needs of those whose transgressions abroad are of a comparatively minor nature. Rather, it is simply a means of bringing refugee law into line with the basis principles of extradition law, by ensuring that important fugitives from justice are not able to avoid the jurisdiction of a state in which they may lawfully face punishment …"

Where an Australian court is concerned to identify the true construction of international convention, guidance may usefully be obtained from the decisions of courts of another country (*Applicant A's* case per Kirby J, in particular, at 296). The views of leading figures in the academic field may also be of importance (*Adan v Secretary of State for the Home Department* [1998] 2 WLR 702 per Lord Lloyd of Berwick at 709). However, as Kirby J observed in *Applicant A's* case at 296:

"Whilst the search for a uniform and, if possible, consistent and international approach to the meaning of a part of the definition of "refugee in the Convention is desirable, so that it is helpful to have regard to United States, Canadian and other foreign authority on the point, care must be observed in the use of such authority. Sometimes it can only really be understood in the context of the background of constitutional rights and statutory provisions which affect the courts and tribunals involved and the approaches which they take."

As Whitlam J has pointed out in his reasons for judgment in this case, which I have had the advantage of reading in draft, limited assistance in the circumstances of this case can be obtained from the above Canadian authorities because of the statutory framework against which they were decided, and the matters in issue in those proceedings.

Article 1F(b) is, as French J pointed out in *Dhayakpa's* case, intended to be "protective of the order and safety of the receiving State". On this basis there is every reason for considering, in my view, that the question of whether there are serious reasons for considering that a person "has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee" may be answered by reference to notions of serious criminality accepted within the receiving State. Certainly, it cannot be seen to be within the object and purpose of the Convention that the question of whether conduct undertaken in a country from which refuge is sought amounts to "a serious non-political crime" should be answered solely by reference to the notions of serious criminality accepted within that country. So to construe the Convention would remove from its protection many persons with legitimate claims to be accepted as refugees and who would not be likely to pose any threat to the order and safety of a receiving State. One needs only to bring to mind regimes under which conduct such as peaceful political dissent, the possession of alcohol and the "immodest" dress of women is regarded as seriously criminal.

I agree with the reasons adopted by Whitlam J for concluding that nothing in Article 33 of the Refugees Convention requires that Article 1F(b) should be construed so as to exclude from its terms a person who there are serious reasons for concluding has committed a serious non-political crime for which he or she is open to be convicted in the country in which refuge is sought.

Nothing in the context, object and purpose of the Refugees Convention, in my view, requires that Article 1F(b) should be construed other than according to the ordinary meaning of the words of the article. According to such ordinary meaning, the article is not confined in its operation to fugitives from foreign justice. I am content to adopt the observations of French J in *Dhayakpa's* case, which are set out above, as to the evident policy of Article 1F(b) of the Refugees Convention.

In my view, the application of Article 31 of the Vienna Convention does not leave the meaning of Article 1F(b) of the Refugees Convention ambiguous or obscure or lead to a result which is manifestly absurd or undesirable. Recourse to the *travaux préparatoires* to determine the meaning of Article 1F(b) is thus unnecessary (Article 32 of the Vienna Convention).

I have discussed above the proper construction of the expression "serious non-political crime". The expression, in the context in which it is found, does not, in my opinion, require the identification of a crime committed outside of Australia which is justiciable according to the law of the foreign jurisdiction in which it was committed. There is nothing in the language of Article 1F(b) which suggests that a person with respect to whom there are serious reasons for concluding that he or she has committed, outside of Australia, a crime justiciable under Australian law which is of a serious non-political character, does not fall within its terms. It is not necessary in this proceeding to seek to determine exhaustively the categories of conduct capable of amounting to a "crime" within the meaning of Article 1F(b).

In my opinion, the terms of Article 1F(b) suggest against a requirement that every element of an identified offence must be able to be identified and particularised before the article may be relied upon. What is required is that "there are serious reasons for considering" that the person seeking refuge "has committed a serious non-political crime outside the country of refuge prior to his admission to that country". Whether there are serious reasons for so considering will depend upon the whole of the evidence and other material before the decision-maker.

Mr Ovcharuk, a Russian seaman, brought into Australia a large quantity of heroin. He acted as a courier for the heroin at the request of another Russian seaman from whom he received the heroin in Russia. There was material before the AAT upon which it was justified in concluding, according to Australian principles of criminal law, that there are serious reasons for considering that Mr Ovcharuk conspired in Russia with another Russian seaman to import a large quantity of heroin into Australia (*Gerakiteys v The Queen* (1984) 153 CLR 317 at 327). Although such offence continued so long as the two seamen intended to carry out their design (*Savvas v The Queen* (1995) 183 CLR 1 at 8) (ie. the offence continued beyond the time when Mr Ovcharuk entered Australia) it was open to the AAT to conclude that, within the meaning of Article 1F(b), Mr Ovcharuk had "committed a serious non-political crime" outside of Australia.

In my opinion, the appeals should be dismissed, with costs.

I certify that this and the
preceding ten (10) pages are a
true copy of the Reasons for
Judgment herein of the
Honourable Justice Branson

Associate:

Dated:

IN THE FEDERAL COURT OF AUSTRALIA	
VICTORIA DISTRICT REGISTRY	VG 149 OF 1998 VG 150 of 1998

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	IGOR OVCHARUK AppELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS Respondent

JUDGES:	whitlam, branson & SACKVILLE Jj
DATE:	16 OCTOBER 1998
PLACE:	MELBOURNE

REASONS FOR JUDGMENT

SACKVILLE J:

I agree with the conclusion reached by Whitlam and Branson JJ, whose judgments I have had the advantage of reading. I also agree generally with the reasoning of Branson J, but I wish to add some observations of my own.

Since Whitlam and Branson JJ have set out the facts and the relevant provisions of the *Migration Act* 1958 (Cth) and the *Refugees Convention,* there is no need for me to repeat what they have said.

Should the Language of Article 1F(b) Be Qualified?

Like many multilateral Conventions, the *Refugees Convention* contains language that is imprecise and not capable of application with "taut logical precision" (*Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, at 256, per McHugh J, approving of the approach taken in *Golder v United Kingdom* (1975) 1 EHRR 524, at 544, 547). As Grahl-Madsen points out (*The Status of Refugees in International Law* (1966), vol 1, at 289), Article 1F(b) of the *Refugees Convention*:

"contains a number of ambiguous words and phrases, to wit:

(1) 'serious reasons for considering';

(2) 'serious non-political crime';

(3) 'outside the country of refuge';

(4) 'prior to his admission…as a refugee'."

The appellant's first argument is that the expression "serious non-political crime" in Article 1F(b), on its proper construction, is confined to persons who are fleeing from, or otherwise seeking to avoid prosecution for offences committed outside the country of refuge. Branson J has explained why there is nothing either in the text of Article 1F(b) or in the policy underlying that provision which supports such a narrow construction. I agree with what her Honour has said on these matters.

The appellant's argument rested in part on the contention that the *travaux preparatoires* supported a restrictive construction of Article 1F(b). This aspect of the argument relied heavily on the analysis put forward by Grahl-Madsen, at 290-292. That analysis, in turn, attempts to link the concerns expressed in contemporary

international instruments with the intended operation of Article 1F(b). According to Grahl-Madsen, the international community was principally concerned to ensure that persons seeking to escape prosecution for serious crimes should not be entitled to asylum or to protection from international organisations.

Grahl-Madsen refers, for example, to the *Constitution of the International Refugee Organisation* [*IRO*] (15 December 1946, 18 UNTS 53) which excludes "ordinary criminals who are extraditable by treaty" from those who are to be within the umbrella of the IRO: Annex I, Part II. Article 14(2) of the *Universal Declaration of Human Rights* (1948) removes the right to seek asylum from persecution in "the case of prosecutions genuinely arising from non-political crimes". Article 7(d) of the *Statute of the Office of the United Nations High Commissioner for Refugees* (1950) ("*High Commissioner Statute*") excludes from the competence of the High Commissioner a person

"[i]n respect of whom there are serious reasons for considering that he has committed a crime covered by the provisions of treaties of extradition or a crime mentioned in article 6 of the London Charter of the International Military Tribunal or by the provisions of article 14, paragraph 2, of the Universal Declaration of Human Rights."

I accept that, at the time the *Refugees Convention* was framed, the international community had expressed the view that people seeking to escape prosecution for serious criminal offences should be entitled neither to asylum from persecution, nor to the protection of the IRO. But that fact does not determine whether Article 1F(b) of the *Refugees Convention,* read in context, was intended to exclude **only** such people from the protection afforded by the *Refugees Convention,* as distinct from others who have committed serious crimes outside the country of refuge. As Grahl-Madsen acknowledges (at 290), the wording of Article 1F(b) of the *Refugees Convention* (unlike Article 7(d) of the *High Commissioner Statute*) makes no mention of extradition. Nor does it refer to the existence of any extradition treaty between the countries in question. This contrasts with earlier draft proposals for Refugee Conventions which incorporated express references to Article 14(2) of the *Universal Declaration of Human Rights:* see *Memorandum by the Secretary-General of the United Nations* to the *United Nations Economic and Social Council Ad Hoc Committee on Statelessness and Related Problems,* and the *Draft Convention Relating to the Status of Refugees,* art 3 and Commentary (3 January 1950, UN Doc E/AC. 32/2, at 22); *France: Proposal [to the Ad Hoc Committee] for a Draft Convention*, art 1 (17 January 1950 UN Doc E/AC. 32/L.3, at 3).

The form of what ultimately became Article 1F(b) of the *Refugees Convention* was debated at meetings of the Ad Hoc Committee on Statelessness and Related Problems, held at Lake Success, New York, in January 1950, and at the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons held at Geneva in July 1951. Scrutiny of the debates supports Goodwin-Gill's observation that "the *travaux preparatoires* provide no hard answers" as to the intended scope of Article 1F(b): G Goodwin-Gill, *The Refugee in International Law* (2nd ed 1996), at 104.

While the Ad Hoc Committee discussed the *IRO Constitution* (see Summary Record of Ad Hoc Committee, 18 January 1950 (UN Doc E/AC.32/SR.5, at 5)), delegates to the Conference expressed divergent views about the exclusion of persons who had committed crimes from the protection afforded by the *Refugees Convention.* (See Summary Record of the Conference of Plenipotentiaries, 19 July 1951 (UN Doc A/CONF.2/SR.29)).

The representative of the United Kingdom argued against any proposal to exclude all claimants for refugee status who had committed a non-political crime. He pointed out that this might result in the exclusion of claimants who had committed trivial offences. The Netherlands and French representatives distinguished between the right of asylum, which was the subject matter of Article 14 of the *Universal Declaration of Human Rights,* and the right to refugee status. The French representative stated that his government might be prepared to grant asylum to persons upon whom it would not be prepared to grant refugee status. He therefore argued in favour of a broad exclusion, specifically expressing concern about "crimes committed before entry into the territory of the receiving country" (at 18). The minutes record this contribution from the French representative (at 19):

"To understand the French point of view, it was necessary to imagine oneself in France's situation – that of a country surrounded by States from which refugees might pour in, some of whom might commit crimes. The definition of the term 'refugee' should therefore contain a clause designed to protect his country, to enable it to exercise the right of asylum it had always so liberally granted, without thereby having to grant to the persons enjoying that right the status of refugee. Unless such provision was made, entry would be permitted to refugees whose actions might bring discredit on that status."

In an apparent attempt to achieve a compromise, the Yugoslav representative proposed amendments to the draft definition being considered. The French representative proposed (at 20) a further amendment, by the insertion of the word "serious" before "crime" in the Yugoslav amendment. With that change, pars (b) and (c) of the Yugoslav proposal read as follows (at 21):

"b) he has committed a serious crime under common law outside the country of reception; or

c) he has committed an act contrary to the purposes and principles of the United Nations."

In the course of discussion of these proposals, the UN High Commissioner for Refugees drew attention (at 24) to the language used in the *High Commissioner Statute.* The Belgian representative preferred the expression "serious crimes" to that formulation, pointing out that some extraditable crimes were relatively minor. He supported (at 24) the French position, namely, that:

"the essential point was to give States the power to refuse refugee status to persons who had committed serious crimes before their admission to a receiving country."

Attention then turned to the temporal operation of the proposed draft. The Belgian representative suggested (at 25) a modified version of par (b) of the Yugoslav proposal, as follows:

"he has committed a serious crime under common law outside the receiving country before being admitted to it as a refugee".

This amended proposal, which is very close to the final version of Article 1F(b), was approved by the Conference. (The introduction of the concept of a "**non-political** crime" raises further difficult issues which need not be considered in this case: see *T v Immigration Officer* [1996] AC 742.)

As is so often the case, the text of Article 1F(b) of the *Refugees Convention* represented an accommodation among competing views. One important strand of opinion at the Conference was that the receiving country should not be required to grant refugee status to persons who had committed serious crimes outside that country. The formulation ultimately reflected that strand of opinion. In short, the *travaux preparatoires* do not support the view that Article 1F(b) should be construed so that it is confined to persons who have committed crimes of an extraditable character, or who are fleeing from threatened prosecution. Accordingly, the appellant's first argument should be rejected.

Must the Appellant's Conduct Constitute a Crime under the Law of Russia?

The appellant also argued that Article 1F(b) could not apply to him in the absence of a finding that his conduct outside Australia constituted a crime under Russian law. He submitted, correctly, that the Administrative Appeals Tribunal ("AAT") had made no finding that his conduct outside Australia had contravened Russian law. It followed (so he argued) that the decision was affected by an error of law and should be set aside.

Article 1F(b) is plainly directed to non-political criminal conduct outside the country of refuge. The *Refugees Convention* draws a clear distinction between such conduct and conduct which results in a conviction within the country of refuge for a "particularly serious crime". In the latter case, provided the convicted person constitutes a danger to the local community, he or she cannot claim the benefit of the prohibition against expulsion or refoulement imposed by Article 33(1): see Article 33(2). The sharp distinction between the commission of a serious crime outside the country of refuge and conviction for a particularly serious crime within the country reflects the approach taken by the representatives at the 1951 Geneva Conference: see generally J C Hathaway, *The Law of Refugee Status* (1991), at 225-226.

The word "crime" in Article 1F(b) on its face is capable of bearing one or more of several meanings. Without necessarily being exhaustive, it could mean conduct outside the country of refuge which:

- was criminal under the law of the country where the conduct occurred;
- was criminal under the law of the country of refuge;
- would have been criminal under the law of the country of refuge had it occurred in that country; or
- is "recognised as criminal by the common consent of nations": *T v Immigration Officer* [1996] AC 742, at 759 per Lord Mustill (a case concerned with whether terrorist actions in Algeria could be described as "non-political").

I think it is necessary to distinguish between two situations. The first is where the conduct outside the country of refuge does not constitute a crime under the law of the receiving country. The second is where the conduct outside the country of refuge does constitute a crime against the law of the receiving country.

In the first case, I do not think that Article 1F(b) is satisfied unless there are serious grounds for considering that the relevant person's conduct was criminal under the laws of the country where the conduct took place. (I leave to one side conduct taking place in two or more countries or outside the territorial limits of any one country.) In other words, it is not enough that the conduct would have been criminal had it taken place within the country of refuge.

This conclusion is supported by the language of Article 1F(b). It refers to the person having "committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee". This is not language which suggests that a notional exercise is to be carried out; the language requires a crime to have been

committed. Furthermore, unless the conduct relied on to invoke Article 1F(b) was criminal under the law of the country where it occurred, a person who acted quite lawfully under that law, and committed no offence under the law of the receiving country, could be found to have committed a "crime", thereby excluding him or her from the protection of the *Refugees Convention.* It is not difficult to imagine conduct that would have been regarded as a crime (and perhaps as a serious crime) had it occurred in the country of refuge, yet was not criminal in the place where it occurred. Examples of such conduct might be sexual relations with persons under a specified age, the use or supply of particular drugs and certain forms of economic activity illegal in some places but not others. It is hardly a beneficial construction of the *Refugees Convention* to exclude a person who has never engaged in conduct for which he or she is liable to prosecution on the ground that he or she has committed a serious crime.

Where the conduct outside the country of refuge constitutes a crime against the law of the receiving country, the position is different. In these circumstances, Article 1F(b) can apply even without a finding that there are serious reasons for considering that the person's conduct was criminal under the law of the country where it occurred. Article 1F(b) does not evince a preference for the application of the law of that country, as distinct from the law of the receiving country. In my opinion, there is no good reason why the word "crime" should be construed as excluding extra-territorial conduct rendered criminal by the receiving country, even if the conduct was not criminal under the law of the country where it occurred. If the law of the receiving country renders criminal conduct which takes place outside its borders, that is sufficient to constitute the conduct a "crime" for the purposes of Article 1F(b).

The appellant, as the AAT found, was convicted of importing heroin and cannabis into Australia, in contravention of s 233B(1)(b) of the *Customs Act* 1901 (Cth). He was not charged with the offence of conspiracy to import a prohibited substance. Nonetheless, the AAT specifically found that the appellant conspired in Russia with his Russian principal to import heroin into Australia. It also found that his conduct amounted to a serious crime of a non-political nature.

In my view, it was open to the AAT to find that the appellant's conduct outside Australia constituted a crime under Australian law. As French J pointed out in *Dhayakapa v Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556, at 565, the elements of the offence of conspiracy under Australian law were complete when the criminal agreement was concluded. That proposition is clearly supported by the authorities: *Liangsiriprasert v Government of the United States* [1991] 1 AC 225 (PC); *Fan v R* (1991) 103 ALR 485 (NSW CCA), at 489. The fact that the conspiracy continued after the appellant entered Australia does not alter the criminal character of his conduct outside Australia.

The question of the seriousness of the criminal conduct outside the receiving country is a matter to be determined by the receiving country, having regard to the circumstances of the particular case. Those circumstances include the expected and

actual consequences of the criminal conduct. There was ample material before the AAT to support the finding that there were serious reasons for considering that the appellant's conduct outside Australia constituted a serious non-political crime.

I should add a comment concerning the fourth of the suggested constructions of Article 1F(b). I think that there are difficulties with the notion (not explored in depth in the argument) that "crime" in Article 1F(b) refers to conduct regarded as criminal by the common consent of nations. Such a construction requires an implicit qualification to be read into the Article 1F(b). The suggested construction seems to give little effect to the word "serious" which is obviously intended (as the drafting history shows) to cut down the reach of Article 1F(b). Furthermore, the language of Article 1F(b) contrasts with that of Article 1F(c) which covers "**acts** contrary to the practices and principles of the United Nations". While recognising the dangers of placing too much reliance on consistency in the drafting of Conventions, if Article 1F(b) had been intended to apply to acts or conduct considered to be criminal by international norms, it is likely that it would have been worded differently. However, since the issue was not debated in full, it is neither necessary nor appropriate to resolve it in the present case.

Conclusion

The appeals should be dismissed, with costs.

I certify that this and the preceding seven (7) pages are a true copy of the Reasons for Judgment herein of the Honourable Justice Sackville.

Associate:

Dated: 16 October 1998

Counsel for the Appellant:	A.L. Cavanough QC with O.P. Holdenson
Solicitor for the Appellant:	Mallesons Stephen Jaques

Counsel for the Respondent:	K.H. Bell QC
Solicitor for the Respondent:	Australian Government Solicitor
Date of Hearing: Written Submissions finalized:	23 July 1998 24 August 1998
Date of Judgment:	16 October 1998.