FEDERAL COURT OF AUSTRALIA

QAAH of 2004 v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCAFC 136

IMMIGRATION – Refugees – Application for permanent protection visa – Appellant recognised as a refugee and granted a temporary protection visa in March 2000 – Fresh temporary protection visa granted in March 2003 – Application for permanent protection visa rejected in December 2003 – Rejection affirmed by Refugee Review Tribunal – Appeal from decision of a single judge dismissing an application to review Tribunal's decision – Effect on permanent visa decision of the March 2003 decision to grant a second temporary visa – Proper approach to a case of possible cessation of refugee status – Adequacy of Tribunal's consideration of the issue of cessation.

Migration Act 1958 (Cth) s 36

Convention Relating to the Status of Refugees Article 1A(2) and Article 1C(5)

QAAH OF 2004 v MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS

QUD 242 of 2004

WILCOX, MADGWICK and LANDER JJ

27 JULY 2005

SYDNEY (HEARD IN BRISBANE)

IN THE FEDERAL COURT OF AUSTRALIA	
QUEENSLAND DISTRICT REGISTRY	QUD 242 of 2004

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	QAAH OF 2004 APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGES:	WILCOX, MADGWICK and LANDER JJ
DATE OF ORDER:	27 JULY 2005
WHERE MADE:	SYDNEY (HEARD IN BRISBANE)

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by Dowsett J on 11 November 2004 be set aside and, in lieu thereof, it be ordered that:

    (a) the decision of the Refugee Review Tribunal made on 3 May 2004 be quashed;

    (b) the applicant's application for a permanent protection visa be remitted to the said Tribunal for further hearing and determination according to law; and

(c) the respondent, the Minister for Immigration and Multicultural and Indigenous Affairs, pay the costs of the applicant.

3. The said respondent pay the appellant's costs of the appeal.

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

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DATE:	27 JULY 2005
PLACE:	SYDNEY (HEARD IN BRISBANE)

REASONS FOR JUDGMENT

WILCOX J~~RT~~:

1 This is an appeal against orders of a judge of the Court dismissing an application to review a decision of the Refugee Review Tribunal ('the Tribunal')

in respect of the appellant's application for a permanent protection visa. The respondent to the appeal is the Minister for Immigration and Multicultural and Indigenous Affairs ('the Minister').

The March 2000 decision

2 The appellant is a citizen of Afghanistan. He is of the Hazara ethnic group and a Shi'a Muslim. He arrived in Australia without an entry permit on 27 September 1999. He was detained as an unlawful non-citizen. In late November 1999, the appellant applied for a protection visa. On 28 March 2000, a delegate of the then Minister determined that the appellant is 'a person to whom Australia has protection obligations under the Refugees Convention'. The delegate's reference to 'the Refugees Convention' was a reference to the *Convention Relating to the Status of Refugees* adopted at Geneva on 28 July 1951, as amended by the 1967 *Protocol Relating to the Status of Refugees* ('the Convention').

3 In her record of decision, the delegate noted the appellant's claim 'that if he returns to Afghanistan he fears that the Taliban will kill him because he is of Hazara ethnicity'.

4 In setting out her reasons for decision, the delegate noted country information referring to persecution of Shi'a Hazaras by the Taliban. She commented: 'Due to the current situation in Afghanistan, there is no effective government to protect the applicant'. After elaborating that statement, she concluded:

'I accept that the applicant is a 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 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.'

5 The relevance of the delegate's determination that the appellant was a person to whom Australia has protection obligations under the Convention is that this enabled the grant to him of a protection visa: see s 36(2) of the *Migration Act 1958* (Cth) ('the Act'). The delegate went on to grant the appellant a Protection (Class XA) temporary visa. Under the *Migration Regulations 1994* (Cth), at that time, such a visa continued until the end of 36 months from the grant of the visa or earlier determination of the holder's application for a permanent visa. In other words, as the primary judge said, 'the maximum life of the visa was 36 months'.

The March 2003 decision

6 Apparently, the Department of Immigration and Multicultural and Indigenous Affairs ('the Department') experienced delays in processing applications for permanent protection visas. Accordingly, in 2001, the relevant regulation was amended to provide, in effect, that, if the holder of a temporary

(Class XA) visa applied for a permanent protection visa within the 36 month period, the temporary protection visa would continue in force until that application was finally determined.

7 The drafter of the amendment apparently thought the new rule, as framed, would not apply to persons who, at the date of the amendment, had already applied for a permanent visa. For reasons that are not apparent to me, rather than take the seemingly simple course of adding the necessary few words to the amending regulation concerning temporary (Class XA) visas, the drafter created a new species of visa: a Protection (Class XC) visa.

8 A Protection (Class XC) visa is also a temporary visa. It applies only to persons to whom a temporary visa had been granted before 19 September 2001, which had not been cancelled, and who made, or had already made, an application for a permanent protection visa that had not been finally determined.

9 The effect of the decision to create a new type of visa, rather than to extend the operation of the temporary Class XA visa already held by the appellant, was that it was necessary to grant him a fresh visa, if he was to remain lawfully in Australia after 28 March 2003 (the third anniversary of the grant of the temporary Class XA visa).

10 Accordingly, on 27 March 2003, another delegate of the Minister made a further decision in relation to the appellant. The decision was explained in a letter of that date sent to the appellant by an officer of the Department:

'I am writing to advise you that you have been granted a Protection (Class XC) visa (subclass 785 (Temporary Protection) visa).

This Temporary Protection visa is a temporary visa that allows you to remain in, but not re-enter Australia until your application for a Protection (Class XA) visa is finally determined.

Under amendments to the Migration Regulations 1994 which commenced on 1 November 2002, you were deemed to have made an application for this (Protection) (Class XC) visa because you were the holder of a subclass 785 (Temporary Protection) visa granted before 19 September 2001 and you had made an application for a Protection (Class XA) visa.

The Temporary Protection visa allows you to work without restrictions in Australia. You also remain eligible to receive Special Benefits Payment.

…

You cannot apply for any other substantive visa, apart from another protection visa. You are not able to sponsor family members to Australia while the holder of a subclass 785 visa.'

11 The delegate signed a Decision Record in relation to his decision to grant the temporary Class XC visa. In that document, he said:

'I am satisfied that the applicant is a person to whom Australia has protection obligations.'

The delegate said the evidence used by him in making his decision 'is found in the following document'. He identified a departmental record that lists each 'recordable event' pertaining to the appellant. It is common ground that this list includes the material relevant to the March 2000 decision, but does not include any subsequent information that would have allowed a judgment to be made concerning the appellant's vulnerability to persecution as at March 2003, if he returned to Afghanistan.

The Tribunal's decision

12 On 21 November 2003, another delegate of the Minister refused the appellant's application for a permanent protection visa. The appellant sought review of that decision by the Tribunal. On 3 May 2004, the Tribunal made a decision affirming the delegate's decision.

13 In its reasons for decision, the Tribunal noted the terms of Article 1A(2) of the Convention. That clause includes in the definition of 'refugee', for the purposes of the Convention, any person who:

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

14 The Tribunal also noted Article 1C(5) of the Convention. That clause states the Convention 'shall cease to apply to any person falling under the terms of section A' if:

'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.'

15 The Tribunal commented:

'The central issue presented by Article 1C(5) is whether an individual can no longer refuse to avail him or herself of the protection of his or her country because the circumstances in connection with which he or she was recognised as a refugee have ceased to exist. Commentators have expressed the view that for the purposes of the cessation clauses, changes in the refugee's country must be substantial, effective and durable, or profound and durable: see, for example, UNHCR, Guidelines on

International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses), 10 February 2003, JC Hathaway, The Law of Refugee Status, Butterworths, Canada, 1991 at 200-203, G Goodwin-Gill, The Refugee in International Law, 2nd edition, Clarendon Press, Oxford 1996, at 84. However, these expressions do not constitute legal tests. As the High Court has cautioned, it is important to return to the language of the Convention.'

16 The Tribunal added:

'Where an applicant makes claims to be a refugee for reasons unrelated to the circumstances in connection with which he or she was recognised as a refugee, those claims will fall to be assessed under Article 1A(2) of the Convention.'

17 In its statement of findings and reasons, the Tribunal discussed the circumstances under which the appellant was first recognised as a refugee, in March 2000. The Tribunal referred to the claims made by the appellant prior to that decision. He had claimed to live in a 'completely Hazara village' that was under the control of the Wahdat party, which the appellant claimed to have supported, although unwillingly, by giving firewood and helping as a mechanic. The appellant claimed his father had been a truck driver and was killed when the Taliban bombed the truck from helicopters. Later, the appellant said, the Taliban entered his village and fighting ensued. The appellant escaped to Kabul. He lived there, with his sister and her husband, for eight months before leaving Afghanistan. He did not return from Kabul to his village because his mother told him the 'Taliban were very brutal and had different sorts of tortures for the young Hazara men'.

18 The Tribunal noted submissions put to it by a migration agent/solicitor acting on behalf of the appellant. The Tribunal then set out its conclusions regarding the possible application of Article 1C(5) of the Convention:

'It was claimed Afghanistan is still unstable, the interim government is unable to protect the applicant. That the applicant therefore has a "well founded fear for reason of being a Hazara and practising Shi'a and being perceived to be opposed to the Taliban or those aligned with, or previously aligned with, the Taliban and factions of the current Interim Authority and various warlords and governors in positions of power in Afghanistan simply because of ethnicity and religion … and for reasons of his membership of a particular social group."

That said, the applicant was recognised by Australia as a refugee in March 2000 on the basis of circumstances then prevailing in Afghanistan. Therefore, for the purposes of the Refugees Convention, he remains a refugee in relation to those circumstances unless one of the cessation clauses in Article 1C applies. The provision that is relevant to the facts of this case is Article 1C(5). The Tribunal has therefore considered whether, in accordance with Article 1C(5) of the Convention, the applicant can no longer continue to refuse to avail himself of the protection of his country of nationality because the circumstances in connection with which he was recognised as a refugee have ceased to exist.

The circumstances in connection with which the applicant was originally recognised as a refugee in 2000 was that he would be persecuted in Afghanistan by the Taliban authorities because he is a Hazara and a Shi'a Muslim [the Taliban had issued a warrant for his arrest and his property had been confiscated].

However, independent evidence indicates that the Taliban were removed from power in Afghanistan by late 2001. …

The Tribunal accepts that remnants of the Taliban remain active in Afghanistan, particularly in the South and Southeast of the country [US Department of State, Country Reports on Human Rights Practices, Afghanistan, 2003], but the independent information considered in preparing for the hearing in this matter indicated the Taliban no longer existed as a coherent political movement [see US Department of State, Country Reports on Human Rights Practices, Afghanistan, 2003; Human Rights Watch, World Report 2003, Afghanistan; UK Home Office, Afghanistan Country Report, October 2003]. While these armed remnants may cause security problems for the Government and for US troops engaged in combating them, it is now more than two years since the Taliban was removed and the Tribunal does not accept there is any real chance of the Taliban re-emerging as a governing authority in Afghanistan in the reasonably foreseeable future, or otherwise be in a position to exercise control in the manner it did at the time the applicant left Afghanistan.

On the basis of all the material before it concerning the circumstances in connection with which the applicant was recognised as a refugee, the Tribunal finds that he can no longer continue to refuse to avail himself of the protection of Afghanistan because those circumstances have ceased to exist. Therefore, Article 1C((5) of the Convention applies to the Applicant.'

19 The Tribunal realised its finding about Article 1C(5) did not necessarily mean the appellant was 'no longer a refugee under the Convention, because he may still be a refugee for other reasons'. The Tribunal member said the appellant's subsequent claims raised further issues that 'I am satisfied are sufficiently unrelated to the circumstances in connection with which protection obligations were initially determined, and as such they are to be assessed under Article 1A(2) of the Convention'.

20 The Tribunal then discussed claims made by the appellant relating to possible persecution of him, as a Shi'a Hazara, by Pashtuns, Tajiks and Sunni Hazaras. These claims were advanced on the assumption that the appellant would have no option but to return to his village. The Tribunal recorded that the appellant said his 'family no longer has property in Kabul'.

21 In a statutory declaration submitted to the Tribunal, the appellant stated his village was about 4½ hours from Kabul by car. It was necessary to use a donkey to reach the highway from the village.

22 After a lengthy discussion about the matter, the Tribunal said it was not satisfied that the appellant 'would have a prospective real chance [should he return] of being persecuted for a Convention reason by any of the above-named groups, nor anyone else, merely for reasons of being Hazara and Shi'a in his home district'. The Tribunal revealed that a major factor in its readiness to reach that conclusion was the absence of country information indicating the existence of a security problem in that district. The Tribunal member thought it significant that the relevant province had been proposed for entry of a Provincial Reconstruction Team sponsored by a foreign government. Some non-government organisations had been active in the appellant's home district.

23 After dealing with claims that the appellant would be persecuted because of his perceived inclusion in any one of several particular social groups, the Tribunal concluded this section of its reasons by saying:

'Accordingly, I am satisfied the applicant would not have a well founded fear of persecution for any Convention reason should he return to Afghanistan.'

The decision of the primary judge

24 At [15] – [20] of his reasons for judgment, ~~Dowsett J~~the primary judge identified the issues argued before him:

'In the Tribunal and before me, the matter has proceeded upon the basis that the Tribunal had to determine whether or not, in the present case, the cessation clause had been engaged so as to terminate Australia's protection obligations to the applicant. This problem arises in the following way. The applicant's protection (XA) visa was granted in 2000 upon the basis that he had a well-founded fear of persecution for a Convention reason in Afghanistan at the hands of Taliban, which organization was then in de facto control of much of the country. However, by the time at which he was granted the temporary (XC) visa, (27 March 2003), the American-led invasion had removed Taliban from that position. Nonetheless it remained active in some areas. This appears to be the factual basis upon which the Tribunal and the parties have proceeded to date.

The applicant did not actually apply for a temporary (XC) visa; he was deemed to have done so. He therefore did not put any information before the Minister to demonstrate any relevant well-founded fear as at March 2003. Nevertheless, he was granted a temporary (XC) visa, apparently without any actual consideration of the changes in Afghanistan since 2000 or whether the current circumstances justified a different, well-founded fear, sufficient to entitle him to a protection visa. The applicant submits that, as s 36 and the regulations prescribing the criteria for a temporary (XC) visa require that Australia owe him protection obligations as a condition precedent to the grant of such a visa, it must be conclusively assumed that the Minister was satisfied as to the existence of such status at the time of granting the temporary (XC) visa. He alternatively submits that the Minister may not now deny that such obligations existed at that time. The applicant submits that in either case, it must also be accepted that the circumstances as at March 2003 were sufficient to justify the grant of a protection visa and that he continues to be a person to whom Australia

owes protection obligations until those circumstances change in the way contemplated by the cessation clause. It is said that s 36 recognizes that protection obligations continue until the cessation clause is engaged. Thus a protection visa may, and should, be granted upon the basis of a prior determination that the applicant was a refugee and without further enquiry, provided that there has been no change of circumstances sufficient to engage the cessation clause. The effect of the submission must be either that a temporary (XC) visa continues until the cessation clause is engaged, despite the statutory limit on its life, or that there is some obligation to grant a new visa without reference to current circumstances.

The applicant then submits that the Tribunal found that circumstances had changed since the grant of the temporary (XA) visa in 2000 but did not consider whether the circumstances which existed in March 2003 (when the temporary (XC) visa was granted), had changed. This is said to involve an error of law going to jurisdiction and is the first ground of review.

The second ground is that the Tribunal failed to consider whether the applicant presently holds a well-founded fear of persecution for a Convention reason from Taliban or any other group, against which the government of Afghanistan could not, or would not defend him.

Thirdly, it is submitted that the Tribunal failed to consider the consequences for the applicant, were he to return to an area of Afghanistan other than Parwan province from which he came.

Fourthly, it is submitted that the Tribunal's decision was based on no evidence and/or was "Wednesbury unreasonable".'

25 At [21] to [25], his Honour discussed Article 1C(5) of the Convention, in the context of Australia's protection obligations and the Australian system of protection visas. He referred to decisions of the High Court which establish that, for the purposes of the Act, refugee status is to be determined having regard to the position at the date at which the determination is made: *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 *('Chan')* and *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 *('Thiyagarajah')*. His Honour commented:

'This suggests that notwithstanding the determination in March 2000 that the applicant was a person to whom Australia owed protection obligations, the Minister was obliged to re-address that question before granting the temporary (XC) visa and in considering the application for a permanent visa. Obviously, that inference is inconsistent with the applicant's argument.'

26 It is not easy, with respect, to understand his Honour's reference to inconsistency. The proposition expressed in the first sentence of this passage was advanced on behalf of the appellant himself, in support of his submission concerning the significance of the March 2003 decision.

27 At [22] his Honour said:

‘It is arguable that the requirement that Australia owe protection obligations to an applicant as mandated by s 36 may be satisfied by a prior determination to that effect in the course of considering an earlier application for a protection visa, including a temporary protection visa. There are passages in Chan which suggest that refugee status, once established, continues until the cessation clause is engaged. If so then the s 36 test will be satisfied where there is such a prior determination, and the cessation clause has not been engaged. However other passages in Chan suggest that the question for determination is always whether the applicant satisfies the definition of “refugee”. In my view, those latter passages reflect the true intention of the majority in that case.’

28 His Honour thought the majority in *Thiyagarajah* accepted that propositions expressed in *Chan* continue to represent the correct approach, notwithstanding the post-*Chan* insertion of a new s 36 into the Act. Also, he thought that, although *Chan* was concerned with the meaning of the Convention rather than the Act, it was not surprising that the same approach should prevail ‘given that the existence of protection obligations continues to be determined by reference to the Convention’.

29 At [23] to [25] his Honour said:

‘In my view, it follows that the question for the Tribunal in the present case was whether or not, at the time of the decision, the applicant had a well-founded fear of persecution for a Convention reason. It was not strictly relevant that he had previously applied for and received temporary (XA) and temporary (XC) visas. In other words it was not necessary to decide whether or not the cessation clause had been engaged as a result of changed circumstances in Afghanistan. The applicant’s argument to the contrary is that identified by Dawson J in Chan at 398, which argument was, in my view, rejected by the High Court.

It is clear that the Minister, in granting the temporary (XC) visa, did not consider the then current circumstances. If, in failing so to do, the Minister failed to act in accordance with the relevant legislative provisions and regulations, it may be that the grant of that visa was legally defective. Even so, that would offer no justification for the grant of a further visa contrary to the relevant legislative provisions and regulations. I do not wish to be taken as asserting that such grant was in breach of the Migration Act or the Migration Regulations. Clearly, the temporary (XC) visa was intended to be a solution to a temporary and specific problem. It was not intended to be, and could not become, a permanent visa. The decision to grant the temporary (XC) visa was consistent with that intention.

In my view, the applicant’s entitlement to a permanent visa depended upon the circumstances as they were at the time of the Tribunal’s decision, meaning that it was necessary that he then hold a well-founded fear of persecution for a Convention reason. His argument to the contrary is without merit. If I am wrong in my understanding of the decision in Chan, nonetheless, the applicant’s argument would still fail. The cessation clause will be engaged if ‘the circumstances in connexion with which [the applicant] has been recognized as a refugee have ceased to exist’. It cannot be sensibly argued that Australia has ever recognized the applicant as a refugee other than in connection with circumstances as they existed in March 2000.

As I understand it, the applicant accepts that those circumstances have ceased to exist. No recognizable legal basis has been advanced on behalf of the applicant to support the assertion that the grant of the temporary (XC) visa in 2003 raises a conclusive presumption that he was entitled to a visa on the basis of circumstances which then existed. Those circumstances were never identified or relied upon by the applicant and never considered by the Minister. The applicant's argument is without merit.

30 ~~Dowsett J~~The primary judge then considered the Tribunal's approach to the appellant's claim under Article 1A(2) of the Convention. His Honour rejected all the appellant's criticisms of that approach. He concluded the Tribunal's reasons disclose no jurisdictional error and dismissed the appellant's application.

The issues on appeal

31 The appellant's original Notice of Appeal raised a number of grounds of appeal. However, an amended Notice of Appeal, filed in court at the hearing, confined the scope of the appeal to two issues: the effect of the March 2003 decision and the approach which the Tribunal ought to have adopted in relation to Article 1C(5) of the Convention.

The effect of the March 2003 decision

32 Counsel for the appellant, Mr G Hiley QC and Mr M Plunkett, argued the Tribunal failed to take into account the effect of the March 2003 delegate's decision to grant the appellant a temporary Class XC visa. They said this failure constituted a jurisdictional error that vitiated the Tribunal's decision. They took the Court through the statutory and regulatory provisions that together mean it is a condition precedent to the grant of a protection visa (even a temporary protection visa) that the Minister (or her delegate) be satisfied that the relevant person is a 'refugee' within the meaning of the Convention. Counsel for the respondent Minister (Mr S Gageler QC and Mr P Bickford) did not dispute counsel's proposition. The issue between the parties is what flows from it. It will be recalled that ~~Dowsett J~~the primary judge remarked in effect that, if the proposition is correct, 'it may be that the grant of the [temporary (XC) visa] was legally defective' but this would have no bearing on the delegate's (and Tribunal's) decision in respect of the permanent visa application.

33 In answer to a question from the Bench, counsel for the appellant made clear that they did not argue the March 2003 decision operated as some form of estoppel. Any such argument would have encountered several difficulties. Counsel's argument was that, if the Tribunal had considered the fact that the Minister was satisfied in March 2003 that the appellant was a 'refugee', it would have realised that the issue for its consideration was whether there had been any change in relevant circumstances between March 2003 and the date of its own decision; it would not have made a comparison between the circumstances of March 2000 and those at the date of its decision. Counsel asserted there was no evidence supporting the primary

judge's conclusions that, in March 2003, the Minister 'did not consider the then current circumstances' and, consequently, that the March 2003 visa was issued without consideration of changes in Afghanistan between March 2000 and March 2003. Counsel said the then Minister (or his delegate) was bound to consider the position as at March 2003; in the absence of evidence to the contrary, it must be assumed this was done.

34 Counsel for the respondent submitted the evidence shows the circumstances considered in March 2003 were the same as those underlying the March 2000 decision. This is demonstrated by the March 2003 delegate's reference in his Decision Record to the evidence he had considered in making his decision.

35 The respondent's submission on this issue must be accepted. Whether or not the March 2003 decision was legally valid, it clearly was not based upon an assessment of the circumstances existing in Afghanistan in March 2003. Accordingly, it is not possible to regard those circumstances as the 'circumstances in connexion with which he has been recognized as a refugee', within the meaning of Article 1C(5) of the Convention. In the absence of some form of estoppel, it is difficult to see that the March 2003 decision had any bearing on the proper permanent visa decision.

Article 1C(5) of the Convention

(i) The UNHCR material

36 Counsel for the appellant drew attention to some guidelines adopted by the United Nations High Commissioner for Refugees ('UNHCR') on 10 February 2003 and entitled:

'GUIDELINES ON INTERNATIONAL PROTECTION:

Cessation of Refugee Status under Article 1C(5) and (6) of the

1951 Convention relating to the Status of Refugees'

37 At para 6, under the heading 'General Considerations', the document stated these principles:

'When interpreting the cessation clauses, it is important to bear in mind the broad durable solutions context of refugee protection informing the object and purpose of these clauses. Numerous Executive Committee Conclusions affirm that the 1951 Convention and principles of refugee protection look to durable solutions for refugees. Accordingly, cessation practices should be developed in a manner consistent with the goal of durable solutions. Cessation should therefore not result in persons residing in a host State with an uncertain status. It should not result either in persons being compelled to return to a volatile situation, as this would undermine the likelihood of a durable solution and could also cause additional or renewed instability in an otherwise improving situation, thus risking future refugee flows. Acknowledging

these considerations ensures refugees do not face involuntary return to situations that might again produce flight and a need for refugee status. It supports the principle that conditions within the country of origin must have changed in a profound and enduring manner before cessation can be applied.'

38 Under the heading 'Assessment of Change of Circumstances in the Country of Origin' the document said:

'For cessation to apply, the changes need to be of a fundamental nature, such that the refugee "can no longer … continue to refuse to avail himself of the protection of the country of his nationality" (Article 1C(5)) or, if he has no nationality, is "able to return to the country of his former habitual residence" (Article 1C(6)). Cessation based on "ceased circumstances" therefore only comes into play when changes have taken place which address the causes of displacement which led to the recognition of refugee status.

Where indeed a "particular cause of fear of persecution"has been identified, the elimination of that cause carries more weight than a change in other factors. Often, however, circumstances in a country are inter-linked, be these armed conflict, serious violations of human rights, severe discrimination against minorities, or the absence of good governance, with the result that resolution of the one will tend to lead to an improvement in others. All relevant factors must therefore be taken into consideration. An end to hostilities, a complete political change and return to a situation of peace and stability remain the most typical situation in which Article 1C(5) or (6) applies.

Large-scale spontaneous repatriation of refugees may be an indicator of changes that are occurring or have occurred in the country of origin. Where the return of former refugees would be likely to generate fresh tension in the country of origin, however, this itself could signal an absence of effective, fundamental change. Similarly, where the particular circumstances leading to flight or to non-return have changed, only to be replaced by different circumstances which may also give rise to refugee status, Article 1C(5) or (6) cannot be invoked.

Developments which would appear to evidence significant and profound changes should be given time to consolidate before any decision on cessation is made. Occasionally, an evaluation as to whether fundamental changes have taken place on a durable basis can be made after a relatively short time has elapsed. This is so in situations where, for example, the changes are peaceful and take place under a constitutional process, where there are free and fair elections with a real change of government committed to respecting fundamental human rights, and where there is relative political and economic stability in the country.

A longer period of time will need to have elapsed before the durability of change can be tested where the changes have taken place violently, for instance, through the overthrow of a regime. Under the latter circumstances, the human rights situation needs to be especially carefully assessed. The process of national reconstruction must be given sufficient time to take hold and any peace arrangements with opposing militant groups must be carefully monitored. This is particularly relevant after conflicts involving different ethnic groups, since progress towards genuine reconciliation has

often proven difficult in such cases. Unless national reconciliation clearly starts to take root and real peace is restored, political changes which have occurred may not be firmly established.

In determining whether circumstances have changed so as to justify cessation under Article 1C(5) or (6), another crucial question is whether the refugee can effectively re-avail him- or herself of the protection of his or her own country. Such protection must therefore be effective and available. It requires more than mere physical security or safety. It needs to include the existence of a functioning government and basic administrative structures, as evidenced for instance through a functioning system of law and justice, as well as the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood.

An important indicator in this respect is the general human rights situation in the country. Factors which have special weight for its assessment are the level of democratic development in the country, including the holding of free and fair elections, adherence to international human rights instruments, and access for independent national or international organisations freely to verify respect for human rights. There is no requirement that the standards of human rights achieved must be exemplary. What matters is that significant improvements have been made, as illustrated at least by respect for the right to life and liberty and the prohibition of torture; marked progress in establishing an independent judiciary, fair trials and access to courts: as well as protection amongst others of the fundamental rights to freedom of expression, association and religion. Important, more specific indicators include declarations of amnesties, the repeal of oppressive laws, and the dismantling of former security services.' (subheadings and footnotes omitted)

39 Counsel for the respondent referred to another UNHCR publication, published slightly earlier, in April 2001: a 'note' entitled *The International Protection of Refugees: Interpreting Article 1 of the [Convention]'*. The purpose of the note was said to be 'to elucidate contemporary issues in the interpretation of the terms of Article 1' of the Convention. Paragraph 7 made a point emphasised by counsel for the respondent:

'The Article 1 definition can, and for purposes of analysis should, be broken down into its constituent elements. Nevertheless, it comprises only **one** holistic test. This has been recognised and reflected in various formulations of the "test" for refugee status. The key to the characterisation of a person as a refugee is risk of persecution for a Convention reason.' (Footnotes omitted, original emphasis)

40 In para 10, dealing with the burden and standard of proof, the following passage appears:

'in accordance with general principles of the law of evidence, the burden of proof lies on the person who makes the assertion – in the case of refugee claims, on the asylum-seeker. This burden is discharged by providing a truthful account of relevant facts so that, based on the facts, a proper decision may be reached. The asylum-seeker must also be provided an adequate opportunity to present evidence to support his or her claim. However, because of the particularly vulnerable situation of asylum-seekers and refugees, the responsibility to ascertain and evaluate the

evidence is shared also by the decision-maker. In the context of exclusion and cessation, it is the authorities who assert the applicability of these clauses, therefore the onus is on them to establish the reasons justifying exclusion or cessation.' (Footnotes omitted)

41 Counsel referred us to a section of the note devoted to cessation of status. This section includes the following material:

'… refugee status, which affords its beneficiaries international protection in the absence of national protection, is foreseen to last only as long as that surrogate protection is needed. Article 1C of the Convention sets out in some detail the circumstances under which refugee status ceases. As with all provisions which take away rights or status, the cessation clauses must be carefully applied, after a thorough assessment, to ensure that in fact refugee protection is no longer necessary.

…

With respect to the grounds which arise as a result of actions by the refugee him or herself, these actions must be truly **voluntary** on the part of the refugee, and must result in him or her in fact being able to benefit from effective and durable national protection. Unless this is so, refugee status does not cease.

Relatively more difficult interpretation issues arise, however, with respect to the cessation ground which relates to changes in circumstances in the country of origin such that the reasons for which refugee protection was required no longer exist. In interpreting this clause there has been some question about the nature and degree of change necessary. UNHCR's Executive Committee has stated that the changes must be fundamental, stable, durable and relevant to the refugees' fear of persecution. 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. Recognising this link, and exploiting it to understand whether the changes in circumstance are relevant and fundamental to the causes of flight, will serve to elucidate circumstances which should lead to cessation of status. This is particularly important with respect to individual cessation.' (Footnotes omitted, original emphasis)

42 A question arises as to the use of this type of material. Counsel for the appellant argued that the Tribunal was bound to have regard to UNHCR publications in determining whether Article 1C(5) of the Convention applied to the appellant. They pointed out that, in *Chan*, some members of the High Court relied, *inter alia*, on a UNHCR Handbook for guidance as to the date at which refugee status is to be determined: see Dawson J at 397, Toohey J at 405 and Gaudron J at 414.

43 The other two members of the *Chan* High Court do not appear to have used the Handbook for this purpose, but both accepted that this would be a permissible course of action. At 392, Mason CJ said:

'Without wishing to deny the usefulness or the admissibility of extrinsic materials of this kind in deciding questions as to the content of concepts of customary international law and as to the meaning of provisions of treaties … I regard the Handbook more as a practical guide for the use of those who are required to determine whether or not a person is a refugee than as a document purporting to interpret the meaning of the relevant parts of the Convention.'

44 McHugh J described the Handbook, at 424, as a work published 'to assist member States to carry out their obligations under the Protocol'. He referred to it at some length.

45 The Tribunal referred to the 2003 Guidelines (see para 15 above) but stated the opinions expressed in them 'do not constitute legal tests … it is important to return to the language of the Convention'.

46 I agree with the Tribunal that statements made in the 2003 Guidelines (and the 2001 note) should not be regarded as rules of law. To the extent they may be inconsistent with anything said in either the Act or the Convention, they must be put aside. However, subject to that qualification, these statements should be taken into account by anybody who is required to determine whether a particular person should be recognized as a refugee, for the first time, or whether a previously recognized person has ceased to be a refugee. Like the UNHCR Handbook mentioned in *Chan*, these are documents prepared by experts published to assist States (including Australia) to carry out their obligations under the Convention.

(ii) Identification of the circumstances underlying the appellant's recognition as a refugee

47 At para [25] of his reasons, quoted at para 29 above, the primary judge stated that the appellant accepted that the March 2000 circumstances 'have ceased to exist'. With respect, that was too broad a statement. The appellant certainly accepted, both before the Tribunal and before his Honour, that the Taliban no longer formed the central government of Afghanistan. That was an important change of circumstance. However, the claim made by the appellant, at the time of his original application, did not depend upon the fact that the Taliban was in government in late 1999; if that is, in fact, an accurate way of describing the then situation. As noted at para 3 above, the appellant had expressed a fear 'that the Taliban will kill him because he is of Hazara ethnicity'. At the Tribunal hearing, he continued to express that fear, although he accepted that the Taliban were in a less powerful position than in late 1999 or early 2000.

48 As recounted at para 4 above, the delegate who made the March 2000 decision accepted that, if the appellant returned to Afghanistan, 'he has a real chance of being captured by the Taliban and forced to fight or be killed by them'. That was the critical circumstance causing the appellant to be recognised as a refugee. It is against that background that the parties' arguments on this ground of appeal must be evaluated.

(iii) The proper approach to Article 1C(5)

49 Counsel for the appellant argued that the primary judge erred in holding that 'it was not necessary to decide whether or not the cessation clause had been engaged as a result of changed circumstances in Afghanistan': see para 29 above. Counsel for the respondent defended this statement. They contended that the issue before the Tribunal was exactly the same as if the appellant was making his first application for recognition as a refugee. In the course of his oral submissions, Mr Gageler said:

'Article 1C(5), on its proper construction, poses the same question in substance as Article 1A(2). That is, although it uses slightly different words it comes at the same substantive issue simply from a different time perspective and whether one asks the big question through Article 1A(2) or Article 1C(5) the question is always the same and the question is, does this person now have a well-founded fear of persecution for a Convention reason should he or she return to the country of nationality? If yes, the person is now a refugee whether or not previously recognised as a refugee. If no, the person is not now a refugee whether or not previously recognised as a refugee.'

50 Mr Gageler referred to a decision of Emmett J: *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1373. That case also concerned a Shi'a Hazara of Afghan nationality who was granted a temporary protection visa in March 2000 but was denied a permanent protection visa, first by a delegate of the Minister (September 2003) and then by the Tribunal (October 2003). The applicant's case before the Tribunal was that, although the Taliban had been removed from power, Taliban remnants were still active and had recently killed 12 Hazaras, some from his home district.

51 In his reasons for judgment, Emmett J noted that the applicant before him had contended the Tribunal committed jurisdictional error, *inter alia*, in the following respects:

'The Tribunal erred in purporting to apply Art 1C(5) in circumstances where it failed:

(a) to identify the circumstances that gave rise to the applicant's well-founded fear of persecution, being fear arising from the beliefs and attitudes of the Taliban;

(b) to consider whether there had been such a material change in the beliefs and attitudes of the Taliban and the risk posed by the Taliban that those circumstances had relevantly "ceased to exist";

(c) to assess whether the change that had occurred constituted a substantial, effective and durable change.'

…

‘The Tribunal failed to consider whether the government of Afghanistan was both willing and able to provide the necessary level of protection to the applicant against threats of persecution by non-State agents, including the Taliban.’

52 In discussing the relationship between Article 1A(2) and Article 1C(5) of the Convention, Emmett J also mentioned Article 33.1 of the Convention, which prohibits a Contracting State from expelling or returning a refugee to a territory where his or her life or freedom would be threatened for a Convention reason. Emmett J said at [34] to [40]:

‘Articles 33.1, 1A(2) and 1C(5) of the Refugees Convention turn upon the same basic notion; protection is afforded to persons in relevant need, who do not have access to protection, apart from the Refugees Convention. A person is relevantly in need of protection if that person has a well-founded fear of being persecuted, for Convention Reasons, in the country, or countries, in respect of which the person has a right or ability to access. On the other hand, the Refugees Convention is not designed to provide protection to those with no such need. In practical terms, the limited places for, and resources available to, refugees are to be given to those in need and not to those who either can access protection elsewhere or are no longer in need of international protection.

A critical object of the Refugees Convention is that Contracting States will not expel or return a person to a country if that person has a well-founded fear of persecution for Convention Reasons. The relationship between Arts 1A(2) and 33.1 is to be understood in that context, having regard to the adoption of similar language in both provisions …

When Article 33.1 speaks in terms of a territory where the life or freedom of a person would be threatened **on account of Convention Reasons**, while the language is not identical, the concept is intended to correspond with the concept that underlies Art 1A(2). That is to say, where a person, owing to well founded fear of being persecuted for Convention Reasons is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, a Contracting State must not expel or return that person to another territory where he or she would have a well founded fear of being persecuted for Convention Reasons namely, his or her life or freedom would be threatened on account of any Convention Reasons.

There is a similar relationship between Arts 1A(2) and 1C(5). Thus, the latter refers to the circumstances in connection with which a person has been recognised as a refugee. That refers back to the concept that the person has a well founded fear of **being persecuted for Convention Reasons** and is therefore unable, or owing to such fear, unwilling, to avail himself of the protection of his own country. The two provisions should be construed as having some symmetry in their effect.

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 Art 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 Art 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 Art 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 Art 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 …

It may be appropriate, when considering the possible application of Art 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.' (Original emphasis)

> 53 Counsel for the respondent submitted that Emmett J's approach was supported by a recent decision of the House of Lords, *Regina (Hoxha) v Special Adjudicator* [2005] UKLR 19;[2005] 1 WLR 1063 (*'Hoxha'*).
>
> 54 *Hoxha* concerned the operation of Article 1C(5) of the Convention in relation to people who had not been recognised as refugees in the United Kingdom. The prosecutors had failed to make out a case of a well-founded fear of future persecution if they returned to their homes in Kosovo, in the Federal Republic of Serbia. They each established reluctance to return to Kosovo which was thought to be justified by the continuing physical and psychological effects of persecution there suffered by them and family members. However, continuing effect of past persecution is insufficient to satisfy Article 1A(2) of the Convention.
>
> 55 Although the relationship between Article 1A(2) and Article 1C(5) of the Convention was not an issue in the appeal, two members of the House referred to it. At [13] Lord Hope of Craigend referred to a passage in the speech of Lord Lloyd of Berwick, in *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 at 306, concerning the relationship between Article 1A(1), Article 1A(2) and Article 1C(5). Lord Lloyd said:

'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.'

56 Lord Brown of Eaton-under-Heywood also noted Lord Lloyd's statement which, he said at [56]:

'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.'

57 Lord Brown said:

'**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.

61. 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."

62. 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.

63. 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".

64. 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."

65. 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).' (Original emphasis)

> 58 It will be noted that the person being considered in [60] of this passage is a person who was, in fact, a refugee before his or her status came to be determined, but who has not yet been recognised as a refugee; in other words, a person in the same position as Mr Chan, when his case was before the High Court. When Lord Brown dealt with the case of a person who had already been recognised as a refugee, at [62] and following, he stated that the inquiry should take place under Article 1C(5), rather than Article 1A(2). He also recognised and emphasised ~~the~~the heavy burden resting on a State which contends that a person who has been recognised as a refugee has ceased to have that status. His conclusion was that '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)'.
>
> 59 I make one other observation about *Hoxha*. All three members of the House who wrote substantial judgments (Lord Hope, Baroness Hale of Richmond and Lord Brown) made extensive use of UNHCR material in guiding

their interpretation of the Convention. Their action endorses the approach advocated at para 46 above.

60 Lord Brown's comment, in *Hoxha* at [65], about a recognised refugee not being stripped of that status 'save for demonstrably good and sufficient reason' echoes the insistence of the UNHCR publications upon the need for the State arguing cessation to establish fundamental and durable changes in the refugee's country of nationality. That insistence is consistent with comments in accepted textbooks on refugee law, including *Hathaway* and *Goodwin-Hill*, noted by the Tribunal in this case: see para 15 above. For example, *Hathaway*, at 200-203, identified three requirements that should exist 'before the consideration of cessation is warranted':

(i) 'the change must be of substantial political significance, in the sense that the power structure under which persecution was deemed a real possibility no longer exists';

(ii) 'there must be reason to believe that the substantial political change is truly effective'; it cannot be said 'there has truly been a fundamental change of circumstances when the police or military establishments have yet fully to comply with the dictates of democracy and respect for human rights'; mere progress towards respect is not enough; and

(iii) 'the change of circumstances must be shown to be durable'.

(iv) the relationship between the Convention and the Act

61 Section 36(1) of the Act says '[t]here is a class of visas to be known as protection visas'. Section 36(2)(a) provides one 'criterion for a protection visa', namely that the applicant is: '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.'

62 Subsection (2) of s 36 is qualified by subs (3), relating to a person who had the opportunity to obtain protection in another country. It is not suggested this qualification is relevant to the present case.

63 The criterion in s 36(2) of the Act directly reflects Australia's protection obligations under the Convention. The evident intention of Parliament was to facilitate fulfilment of those obligations. A visa of the class under discussion in s 36 (a protection visa) was to be provided, on application, to any non-citizen in Australia to whom Australia had Convention obligations.

64 In *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 6, Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ discussed the relationship between s 36(2) of the Act and the Convention. They pointed out, at [27], that s 36(2) is 'awkwardly drawn' in that Australia owes obligations under the Convention to

the other Contracting States, rather than to individuals. However, after considering the context of s 36(2) and its legislative history, their Honours concluded, at [42], that 'the adjectival phrase in the subsection "to whom Australia has protection obligations under [the Convention]" describes no more than a person who is a refugee within the meaning of Art 1 of the Convention'.

65 It follows that, although, literally, s 36(2)(a) poses the question to be determined by the Minister (or her delegate) or, on review, the Tribunal as being whether Australia has protection obligations, to the particular applicant, under the Convention, the real question is whether the person falls within the Convention's definition of 'refugee'. As Lord Brown explained, if the person has not previously been recognised as a refugee, the inquiry required by the definition will be whether the person satisfies Article 1A(2) of the Convention; only if the person satisfies Article 1A(2) will Australia have any protection obligation to him or her. If the person has previously been recognised as a refugee in Australia, again as explained by Lord Brown, Australia has a protection obligation to that person, by force of the Convention itself, unless and until Article 1C(5) has caused cessation of that obligation.

66 Interpreted in this way, there is a symmetry between Australia's Convention obligations and the availability of protection visas. That would not be the case if the present issue was resolved in the manner suggested by counsel for the Minister. If an already-recognised refugee was in the same position, in relation to a permanent protection visa application, as a person who had not previously been recognised as a refugee, a person might fail to satisfy the decision-maker of facts bringing his or her case within Article 1A(2), and so be denied a permanent protection visa, yet there had been no cessation of Australia's protection obligations to him or her, Article 1C(5) not having been applied to the case. Once the temporary protection visa expired, the person would be left without protection despite that person's continuing status as a refugee.

67 It seems inherently unlikely that Parliament would have intended to leave such a potentially embarrassing lacuna in Australia's ability to fulfil its international obligations.

(v) My conclusion about the approach of the primary judge

~~6~~168 The decision of Emmett J in *NBGM* predated the House of Lords' decision in *Hoxha*. His Honour did not have Lord Brown's analysis of the relationship between Article 1A(2) and Article 1C(5). Neither did the primary judge, in deciding the case now before us. I am not sure to what extent either judge had the benefit of considering the UNHCR material to which we were referred. Certainly neither judge dealt with it.

~~6~~269 With the advantage of considering all that material, I have reached the respectful conclusion that the primary judge was wrong in saying that 'it was not strictly relevant that he had previously applied for and received temporary (XA) and temporary (XC) visas'. On the contrary, that fact was of critical importance. The circumstance that the appellant had previously been

recognised as a refugee was the starting point for consideration of his permanent visa application. The circumstance had considerable practical importance; it affected what might loosely be called the burden of proof. I accept that, in a technical sense, no burden of proof rests on any party in relation to review of an administrative decision: see *McDonald v Director-General of Social Security* (1984) 1 FCR 354; see also Mary Crock *Immigration and Refugee Law in Australia*, The Federation Press, Sydney, 1998 at 138 and 262 and the authorities there cited. However, it matters to the parties which one of them fails if the evidence is inconclusive, as may well happen when (as here) the critical question concerns conditions in a remote part of a foreign country. In an original application for refugee status, relying on Article 1A(2), the Minister (or her delegate or the Tribunal) must be satisfied of facts that support the inference that the applicant has a well-founded fear (including that there is a real chance) of persecution for a Convention reason if returned to his or her country of nationality. If the facts do not go so far, the claim for a protection visa will fail. The situation is different in relation to an inquiry under Article 1C(5) as to possible cessation of refugee status. If the facts are insufficiently elucidated for a confident finding to be made, the claim of cessation will fail and the person will remain recognised as a refugee.

6370 The primary judge referred to *Chan*, in rejecting the appellant's argument that it had been necessary for the Tribunal to consider the application to him of Article 1C(5): see para 29 above. However, *Chan* furnishes no support for his Honour's position. *Chan* arose under Article 1A(2) of the Convention, not Article 1C(5). Mr Chan had not previously been recognised as a refugee. At the point of Dawson J's judgment identified by the primary judge, his Honour was dealing with the question whether Article 1A(2) requires refugee status to be determined 'as at the time when the test laid down by the Convention is first satisfied so that it ceases only in accordance with [Article 1C(5)], or whether refugee status is to be determined at the time when it arises for determination'. In common with the remainder of the Court, Dawson J held the latter situation was correct. His Honour was saying nothing about the operation of Article 1C(5) in circumstances where, not only was the test satisfied, but recognition had been granted.

(vi) The Tribunal's treatment of the Article 1C(5) issue

6471 In the present case, the Tribunal did advert to Article 1C(5). At para 15 above, I noted the Tribunal's self-direction of law concerning the application of that clause to the case then under consideration. The appellant does not complain about the content of that self-direction. However, his counsel submitted that the Tribunal failed to apply it. It will be recalled the Tribunal said that 'changes in the refugee's country must be substantial, effective and durable or profound and durable'. That statement is supported by the references cited by the Tribunal and also, now, by Lord Brown's observations in *Hoxha*.

6572 At para 18 above, I set out the Tribunal's findings and reasons in relation to cessation. It will be noted that the Tribunal described the circumstances in which the appellant was originally recognised (in March

2000) as a refugee as being 'that he would be persecuted in Afghanistan by the Taliban authorities because he is a Hazara and a Shi'a Muslim'. The Tribunal's focus was upon the Taliban's position as the government of Afghanistan, or at least that part of Afghanistan in which the appellant had resided. This focus is reflected in the critical factual finding of the Tribunal that there was not, in May 2004, 'any real chance of the Taliban re-emerging as a governing authority in Afghanistan in the reasonably foreseeable future, or otherwise be in a position to exercise control in the manner it did at the time the applicant left Afghanistan'.

~~66~~73 However, as appears from paras 3-4 above, the circumstances that underlay the March 2000 recognition of the appellant as a refugee were not dependent upon the Taliban's status as a governing authority in Afghanistan. The appellant had not based his claim on that status, but merely a fear 'that the Taliban will kill him because he is of Hazara ethnicity'. The March 2000 delegate understood that. She accepted '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'. The issue for the Tribunal, in relation to the cessation clause, was whether the Tribunal could be satisfied there was now no such chance.

~~67~~74 It is true that the March 2000 delegate referred to the fact that 'the Taliban control large areas in Afghanistan'. Perhaps that is no longer so, a circumstance that raises the possibility of a cessation case under Article 1C(5) being made out. However, for that to happen, the Tribunal would need to be satisfied of much more than the fact that there is no real chance of the Taliban re-emerging as a governing authority or exercising the same type of control as it did in 1999. The Tribunal would need to investigate, and make findings about, the extent of Taliban activity in the Afghan countryside, especially in the appellant's home district. The Tribunal would also have to consider the durability of the present situation.

75 It is not necessary in the present case to consider whether, and if so how, the relocation doctrine might interact with Article 1C(5). The Tribunal assumed the present appellant would have no option but to return to his home village, if he was removed to Afghanistan. Issues surrounding possible relocation elsewhere in Afghanistan did not arise.

76 In the passage in its reasons quoted at para 18 above, the Tribunal accepted 'that remnants of the Taliban remain active in Afghanistan'. The Tribunal seems also to have accepted the appellant's claims that 'Afghanistan is still unstable' and that 'the interim government is unable to protect [him]'. It noted the appellant's claim of a well-founded fear of persecution, at the hands of the Taliban or factions of the Interim Authority – apparently factions sympathetic to the Taliban - and various warlords and governors. However, all this was put aside because the Tribunal limited the circumstances underlying the March 2000 recognition to the fact that the Taliban was then in government, or at least 'a governing authority'. That limitation was unjustified and it resulted in the Tribunal failing to give proper consideration to the issue it was required to determine.

77 If, as claimed, Afghanistan is still unstable and the interim government would be unable to protect the appellant from the Taliban and Taliban sympathisers, it is impossible sensibly to say there has been a cessation of the circumstances in connection with which the applicant was recognised as a refugee. The details of the picture may have changed since 2000, but the threat would still exist. In my opinion, it was necessary for the Tribunal to address the appellant's claims of instability and lack of protection before it could reach a conclusion that Article 1C(5) applied to this case. If the Tribunal found that these claims were unjustified, under present conditions, the Tribunal would have needed to consider the durability of those conditions. It did not do so.

78 At para 23 above, I noted a statement by the Tribunal that 'the applicant would not have a well-founded fear of persecution for any Convention reason should he return to Afghanistan'. In oral submissions, Mr Gageler argued this furnished a complete answer to the appellant's case, even in relation to Article 1C(5). However, I do not read the statement in that way. The statement is not framed in terms of cessation of earlier circumstances. It appears as a conclusion to that part of the Tribunal's reasons that deals with the appellant's various Article 1A(2) claims. I think the statement should be understood as a summary of the Tribunal's rejection of those claims, not as one referring back to the earlier part of its reasons dealing with cessation. Of course, as the Tribunal explained, its decision in relation to the Article 1A(2) claims was influenced by an absence of information about ongoing problems in the appellant's home district. That may have been a rational approach for the Tribunal to adopt. However, an acceptable Article 1C(5) decision could not be based on an absence of information about problems; there would have to be positive information demonstrating a settled and durable situation in that district that was incompatible with a real chance of future Taliban persecution of the appellant.

79 In my opinion, the appellant's second point is made good. The Tribunal's failure properly to address the cessation issue constituted a jurisdictional error in relation to which the appellant is entitled to relief.

Disposition

80 The appeal should be upheld and the orders made by the primary judge set aside. In lieu thereof, it should be ordered that the decision made by the Tribunal be quashed and the appellant's application for a permanent protection visa be remitted to the Tribunal for further hearing and determination according to law. It will be for the Presiding Member of the Tribunal to determine whether a different Tribunal member should undertake the rehearing.

81 The Minister should pay the appellant's costs of this appeal and the proceeding before the primary judge.

Postscript

82 Since writing the above, I have seen drafts of the judgments prepared by Madgwick and Lander JJ. I wish specifically to adopt what Madgwick J says about the principles that govern interpretation of the Convention. I also agree with a large proportion of what is said by Lander J. The point of difference between myself and Lander J is really quite narrow.

83 It is important to distinguish between recognition of a person as a 'refugee', within the meaning of the Convention, and the grant to that person of protection. Recognition is a function of the Convention; protection is a function of the Act. Recognition is necessarily of indefinite duration; protection may be for a limited period, or until the happening of a particular event. A person may continue to have refugee status (because the person has successfully invoked Article 1A(2) and Article 1C(5) has not yet operated against him or her) notwithstanding the expiration of a temporary protection visa.

84 It seems to me, with great respect, that Lander J, and those who have shared his view, have overlooked the significance of the distinction just made. They interpret the requirement of s 36(2)(a) of the Act (and reg 866.221), that the Minister be 'satisfied Australia has protection obligations' under the Convention, as necessarily requiring the Minister (or her delegate or the Tribunal) to make a *de novo* decision that the particular applicant for a permanent visa then satisfies Article 1A(2) of the Convention; even though that applicant might have obtained such a decision at an earlier point of time, and thus achieved the status of being a 'refugee' within the meaning of the Convention, and that status has not ceased pursuant to Article 1C(5) of the Convention.

85 Although this might have led to failure by Australia to give full effect to its Convention obligations, it would have been constitutionally possible for the Parliament to have enacted such a requirement. However, it chose not to do this. Parliament chose, in s 36(2)(a) of the Act (and reg 866.221), to tie the selected criterion directly to Australia's protection obligations to the person.

86 As a matter of logic, it seems to me, the Minister (or her delegate or the Tribunal) might become satisfied that Australia has protection obligations to a person in either of two ways:

(i) because the decision-maker is satisfied, as a result of a *de novo* inquiry, that the applicant is a person who falls, at that time, within Article 1A(2) of the Convention; or

(ii) because the decision-maker is satisfied that the person has already been recognised as a refugee under Article 1A(2) of the Convention and is not satisfied that this status has ceased under Article 1C(5).

87 The approach adopted by Lander J (and the other judges to whom he refers) effectively eliminates the second alternative. It recasts the scheme of s 36(2)(a) (and reg 866.221) to make the requirement for grant of a protection visa, not the selected question whether Australia has protection obligations to

the person but the narrower question whether the person can bring himself or herself within Article 1A(2) at that time. Despite my great respect for all those who have adopted that approach, it seems to me plainly to be wrong.

I certify that the preceding eighty-seven (87) numbered paragraphs are a true copy of the Reasons for Judgment herein of Justice Wilcox.

Associate:

Dated: 27 July 2005

IN THE FEDERAL COURT OF AUSTRALIA	
QUEENSLAND DISTRICT REGISTRY	Q 242 OF 2004

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	QAAH OF 2004 APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	WILCOX, MADGWICK AND LANDER JJ
DATE:	27 JULY 2005
PLACE:	SYDNEY (HEARD IN BRISBANE)

REASONS FOR JUDGMENT

Madgwick J:

88 I agree with Wilcox J's conclusions and with his reasons, and add some further observations.

Australia's protection obligation

89 Section 36 and the Regulations establishing protection visa criteria set up, as a criterion for a protection visa, the Minister's satisfaction that 'Australia has protection obligations under the Refugees Convention …'.

90 The obligations under the Convention are those contained in the Convention read as a whole: *NAGV and NAGW of 2002 v Minister for*

Immigration & Multicultural & Indigenous Affairs [2005] HCA 6; 213 ALR 668, at [31] and [84]. Unquestionably, Article 1 – headed 'Definition of the term "refugee" ' – must be read as a whole. Article 1C(5) applies when a person 'has been recognized as a refugee'. It was common ground that the appellant had been so recognized. The Tribunal therefore had to consider and give proper effect to Article 1C(5). That provision plainly implies that, once a person has been recognized as a refugee he or she 'can … continue to refuse to avail himself of the protection of his country of nationality' until such time as 'the circumstances in connection with which he has been recognized as a refugee have ceased to exist.' That is, the recognized person should be regarded as having a 'right' (as explained in *NAGV* at [27]) to 'continue to refuse to avail himself of the protection' of his country of nationality. The effect of the Act and the Convention, therefore, on an application for a 'permanent' protection visa, where an applicant has previously been recognized in Australia as a refugee, is to require a decision-maker to consider whether such cessation has occurred.

Interpretative principle and the Convention

91 The Convention is itself a treaty subject to another international treaty specifically dealing with the interpretation of treaties: the *Vienna Convention on the Law of Treaties*, opened for signature 23 April 1969, 1165 UNTS 331 (entry into force 27 January 1980). It provides:

'Article 31

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 connexion with the conclusion of the treaty;

   (b) any instrument which was made by one or more parties in connexion 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
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.' (Emphasis added.)

92 These provisions (which themselves did not commence to operate until after the Refugees Convention and did not have retroactive effect – see Art 4) are, nevertheless an authoritative statement of customary international law: *Victrawl Pty Ltd v Telstra Corporation Ltd* (1995) 183 CLR 595, 622.

93 McHugh J's observations in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 on the correct approach, an 'ordered, yet holistic' one, to the interpretation of treaties (including the instant one) achieved general acceptance in the High Court. His Honour referred to 'the general principle that international instruments should be interpreted in a more liberal manner than … exclusively domestic legislation' and concluded (at 256):

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

94 Other members of the Court specifically supported McHugh J's 'holistic but ordered' approach: see pp 231, 240, 277 and 292. In particular, Brennan CJ wrote (at 231):

'In interpreting a treaty, it is erroneous to adopt a rigid priority in the application of interpretative rules. The political processes by which a treaty is negotiated to a conclusion preclude such an approach. Rather, for the reasons given by McHugh J, it is necessary to adopt an holistic but ordered approach. The holistic approach to

interpretation may require a consideration of both the text and the object and purpose of the treaty in order to ascertain its true meaning. Although the text of a treaty may itself reveal its object and purpose or at least assist in ascertaining its object and purpose, assistance may also be obtained from extrinsic sources. The form in which a treaty is drafted, the subject to which it relates, the mischief that it addresses, the history of its negotiation and comparison with earlier or amending instruments relating to the same subject may warrant consideration in arriving at the true interpretation of its text.'

95 The effect of McHugh and Brennan JJ's observations is that a wider range of extrinsic sources may be referred to than in the case of domestic statutes and they are not only legitimately considered **after** some ambiguity has been discovered. The point of the 'holistic' approach is to enable a simultaneous consideration of the treaty text and useful and valid extrinsic materials elucidating it.

96 This approach was affirmed in Morrison v Peacock (2002) 210 CLR 274 at 279 (and subsequently followed by this Court: see Minister for Immigration and Multicultural Affairs v WABQ [2002] FCAFC 329; McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation [2005] FCAFC 67 at [38]).

Justification for recognizing a requirement for a State (by its decision-maker) asserting cessation of circumstances to make good the assertion

97 The observations of the expert bodies cited by Wilcox J and by Lord Brown in *Hoxha* are not merely expert as to refugee law and practice but, in my respectful opinion, legally valid as being in accordance with Australian judicial, interpretative norms and other common law conceptions.

(i) Relevance of probable circumstances of persons recognized as refugees

98 Where statutory decisions have direct, personal and familial consequences, those consequences can imply necessary considerations for decision-makers beyond those expressed by the legislative instrument in question. For example, Australian courts at all levels routinely regard personal and familial hardship and potential deprivation of livelihood as relevant factors to be taken into account when considering appeals from the grant, refusal or withdrawal of licences of various kinds, though no such relevance is expressly accorded those factors by the governing legislation.

99 In relation to the *Migration Act* itself, in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 304 – 305, Gaudron J offered, as an alternative to the espousal by Mason CJ and Deane J of a legitimate expectation in a potential deportee, that Australia's international obligations under a treaty, not enacted into domestic law, to treat the interests of a child

as a primary consideration, would be taken into account in a decision on whether to deport him for reasons of bad character. (McHugh J's vigorous dissent has been influential – see *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 27 ff). Her Honour viewed the reasonable demands of generally accepted standards of humane values and conduct as decisive, regardless of any treaty (at 304):

'Quite apart from the Convention or its ratification, any reasonable person who considered the matter would, in my view, assume that the best interests of the child would be a primary consideration in all administrative decisions which directly affect children as individuals and which have consequences for their future welfare. Further, they would assume or expect that the interests of the child would be taken into account in that way as a matter of course and without any need for the issue to be raised with the decision-maker. They would make that assumption or have that expectation because of the special vulnerability of children, particularly where the break-up of the family unit is, or may be, involved, and because of their expectation that a civilised society would be alert to its responsibilities to children who are, or may be, in need of protection.'

100 Callinan J observed of this in *Sanders v Snell* (1998) 196 CLR 329, 351 (at fn 65) that, in *Teoh*, the Court was 'dealing … with a case in which the interests of children were in issue, matters in respect of which any civilised person would hold expectations, whether referable to a United Nations Convention or otherwise'.

101 Any reasonable, civilised person or State party to the Refugees Convention would, in my opinion, understand the contracting States' obligations to refugees in the context of the likely circumstances of refugees. Refugees recognized as such are people who have found themselves outside their country of nationality and have been found rationally to fear persecution if they are returned there. The context includes their probable dislocation and consequent special need to re-establish a degree of stability in their and, often, their families' lives. In interpreting the Convention, the possible burden to the States of providing more than protection for the least possible period strictly necessary must be balanced against the demands of humane treatment of the people concerned and the hardships of returning them to places where, or of which, they have held genuine and serious fear, unless their future safety is reasonably assured.

(ii) Relevance to decision-making process of recognized refugee's circumstances

102 It is also well recognized in Australian law that the matters at stake can and should affect the fact-finding processes of decision-makers. Dixon J's remarks in *Briginshaw v Briginshaw* (1938) 60 CLR 336, 361 – 362 and 368 bear revisiting. His Honour said:

'The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be

found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. … But reasonable **satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved**. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.

…

Upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact. Further, circumstantial evidence cannot satisfy a sound judgment of a state of facts if it is susceptible of some other not improbable explanation.' (Emphasis added.)

> 103 In 1938, to be labelled an adulterer was a serious matter. Nevertheless, wrongly to be deprived of protection after being recognized as a refugee might be thought rather more serious.
>
> 104 In Australia, a decision-maker considering the case of a previously recognized refugee would, as indicated above (at [3]), ordinarily be 'satisfied', within the meaning of s 65 of the Act, that the relevant protection criterion prescribed for a 'permanent' protection visa had itself been satisfied by the mere showing that there had been such recognition and the application in favour of the refugee of his right, granted by Art 1C(5) of the Convention (see [4] above), to rely on that recognition. For that right to be negated, the decision-maker would need to be satisfied that a positive and different state of affairs, namely cessation of the relevant circumstances, now existed. That there is no onus, in the legal sense, on anyone to satisfy the Minister, delegate or Tribunal about that possible state of affairs does not diminish the good sense or justice of interpreting the Convention so as to ascribe to it the effect that, because of the importance and gravity of the question for the person concerned, indefinite evidence in favour of his or her future safety will not be taken as sufficient to deprive the person of the protection and measure of stability he or she presently enjoys.
>
> 105 The text of the Convention must nevertheless be amenable to such an approach. In my opinion, it is. Such an approach is entirely conformable with the text, as I proceed to indicate.

(iii) Implications of the Convention's text

106 The Preamble to the Convention in general locates the Convention in the context of international human rights law: the U.N. Charter and the Universal Declaration of Human Rights were considered by the States parties (in the first placitum of the Preamble) to 'have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination'. The plight of persons who have become refugees is also stressed: the second placitum speaks of the U.N.'s 'preferred concern' for refugees and its endeavour 'to **assure** refugees the widest possible exercises of [the] fundamental rights and freedoms' referred to in the first placitum (emphasis added). Further, the fifth placitum recognizes that 'the problem of refugees' was of a 'social and humanitarian nature' with the potential for it to become a cause of tension between States. None of this suggests a reading of the Convention apt to require a ready, second uprooting of people who have achieved a measure of asylum on the strength of their recognition as refugees.

107 That impression is, in my opinion, confirmed in the substantive provisions of the Convention.

108 Firstly, the entire concept of a '**well-founded fear of persecution**', which no doubt is the central underlying concept in the Convention (as counsel for the Minister argued), focuses on an objective justification for a fear of very serious consequences. It is inescapable that examining future possibilities over a very short, future time frame is not likely to suffice to dispel the justification for a well-founded fear harboured in the recent past. The requirement (rightly conceded by counsel for the Minister to exist) that the decision-maker should prognosticate the situation into the reasonably foreseeable future carries with it the necessity that the decision-maker bear that in mind. In the present case, for example, it would appear to be necessary to estimate how confidently any non-Taliban settlement can be predicted to endure, on a widespread basis, for a period of some years. The Tribunal did examine that question in a manner that does not attract review by way of the constitutional writs. But that is not the end of the matter.

109 Secondly, there is no warrant to confine the expression '**the circumstances in connection with which he has been recognized as a refugee**' to a narrow conception of those circumstances. 'In connection with' is generally a phrase of wide import: *Brown v Rezitis* (1970) 127 CLR 157, 165 per Barwick CJ). In *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465, 479 Wilcox J said that the expression has 'a wide connotation requiring merely a relation between one thing and another'. In the present case, it might be surprising if the Taliban, their racism, their extremely intolerant and inflexible view of Sunni Islam and their readiness to resort to violence were not a manifestation of deep tendencies present in Afghani society. Any such tendency, if it carried a real risk of persecution, might also be reasonably thought to be included 'in the circumstances in connection with which' the applicant was recognized as a refugee. The question would then logically arise: if it is true that the Taliban genie has been largely put back in its bottle, will no other similarly violent, racist and/or religiously bigoted manifestation soon enough succeed it? The Tribunal appears, however, to

have considered the ‘circumstances’ without sufficiently apprehending that they were able to be understood more broadly.

110 Thirdly, the Convention notion is that the circumstances should have ‘**ceased to exist**’. The phrase is not ‘abated somewhat’, or even ‘considerably abated’. The implication is that safety from serious harm needs to have been re-established (or, in some instances, established for the first time). In this regard, the Tribunal seems to have considered that the UNHCR and other expert commentators, in insisting on ‘durable’ or ‘profound and durable’ changes, had a view not in accordance with ‘the language of the Convention’. On the contrary, as I have sought to show, the language of the Convention itself mandates such conclusions.

111 Fourthly, it is now trite, in relation to the Convention, that satisfaction that a fear is ‘**well-founded**’ should be reached if there is a real and substantial possibility that the fear might be realised. As a matter of logic, if there is a real and substantial possibility that the feared, persecutory circumstances have not ‘ceased to exist’, it is difficult to see how a decision-maker could justifiably consider that they have so ceased.

The contrary views of the other judges of the Court

112 Lander J has catalogued these. It is only proper to re-examine one’s approach when a number of other judges have expressed a different view, and I have done so. However, with respect, to my mind nothing said by Lander J or any of the other judges persuasively gainsays the central propositions that:

(a) the legislative requirement is that before the relevant temporary visa could be granted, the Australian Government through the agency of the Minister or the latter’s delegate must have determined substantively that Australia owed the appellant protection obligations under the Convention;

(b) thereafter, Australia’s acceptance of the Convention (not in any relevant respect qualified by the Act) means that, having regard to the Act’s own criterion of protection obligations being owed, because of that determination the appellant was to be regarded as a refugee and therefore owed protection obligations until such time as there was a positive determination on behalf of the Australian Government that the circumstances in connection with which the appellant had been recognized as a refugee had ceased to exist: Art 1.C.5; and

(c) the potential consequences of depriving a previously recognized refugee of his or her refugee status properly impact upon the meaning to be ascribed to the notion of the cessation of those circumstances and upon the process of determination of whether such cessation has occurred.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment

herein of the Honourable Justice Madgwick.

Associate:

Dated: 27 July 2005

IN THE FEDERAL COURT OF AUSTRALIA	
QUEENSLAND DISTRICT REGISTRY	QUD 242 OF 2004

ON APPEAL FROM A SINGLE JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	QAAH OF 2004 APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	WILCOX, MADGWICK AND LANDER JJ
DATE:	27 JULY 2005
PLACE:	SYDNEY (HEARD IN BRISBANE)

REASONS FOR JUDGMENT

LANDER J:

113 I have had the advantage of reading in draft the separate reasons for judgment of Wilcox and Madgwick JJ.

114 Unfortunately, I have the misfortune to disagree with their Honours' reasons and conclusions.

THE HISTORY

115 The appellant was born in Afghanistan in 1970. He is a Hazara and a Shi'a Muslim. He left Afghanistan in mid 1999 and arrived in Australia on 27 September 1999.

116 On or about 30 November 1999 the appellant applied for a Subclass 785 (Temporary Protection) visa (Class XA).

117 He claimed that if he returned to Afghanistan that the Taliban would kill him because he is of Hazara ethnicity. The delegate of the Minister observed that the Taliban are generally of Pashtun ethnicity who perceive the Shi'a Hazara as a threat.

118 The appellant also claimed that he would be killed because he is a Shi'ite Muslim and the Taliban are Sunni Muslims. The delegate referred to country information which indicated that the Taliban leader had issued a 'fatwa' (religious ruling) stating that the killing of Shi'a Muslims is not a crime because they are non-believers.

119 The appellant claimed that his father had been killed by the Taliban when the truck in which he was travelling was bombed by a helicopter. The Taliban came to his village and although the villagers defended themselves, the Taliban were too strong. He fled to the mountains with many other Hazara. Eventually, he received a letter from Taliban headquarters stating that he was wanted and that his property was confiscated. He decided to leave Afghanistan.

120 The delegate made two findings which are relevant in a further consideration of this matter. First, she found:

'5.3.4 Due to the current situation in Afghanistan, there is no effective government to protect the applicant. The Taliban are a militant fundamentalist Islamic group seeking legitimacy as a government. They have taken over control of large amounts of territory in Afghanistan militarily, and have set up their own system of control in those areas. This control includes the implementation of strict Sharia law, enforced and carried out by the Taliban themselves. The Taliban have been recognized as the legitimate government of Afghanistan only by Pakistan, Saudi Arabia and the United Arab Emirates, as shown by the UNHCR update paper: …'

121 Secondly, she found:

'5.3.6 I accept that the applicant is a 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 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.'

122 It seems to me that the delegate reached her conclusion because at the time the appellant left Afghanistan and at the time the delegate was called upon to consider the appellant's status, the Taliban mainly controlled Afghanistan and engaged in systemic persecution of Hazara Shi'a Muslims.

123 On 28 March 2000 the delegate of the Minister granted the appellant a Subclass 785 (Temporary Protection) visa (Class XA) which was valid for up to 36 months.

124 On 17 April 2000 he applied for a Subclass 866 (Permanent Protection) visa (Class XA).

125 On 27 March 2003 the appellant was granted a (Temporary Protection) visa (Class XC) which was to continue 'until your application for a protection (Class XA) visa is finally determined'. This, of course, was a reference to the permanent protection visa for which the appellant had applied on 17 April 2000.

126 The application for that Subclass 866 (Permanent Protection) visa (Class XA) was refused by a delegate of the Minister on 21 November 2003. The delegate of the Minister considered the appellant's claim for a permanent protection visa against the test:

'Is the fear of Convention-based persecution well-founded?'

127 The delegate said that in those circumstances he did not think it necessary to make a finding as to whether or not Articles 1C, 1D, 1E or 1F of the Refugees Convention applied.

128 He said in his reasons:

'A new government which replaced the Taliban regime was established on 5 December 2001. The government was formed by a group of persons which represented various ethnic groups in Afghanistan. These persons signed an agreement brokered by the United nations. The agreement provided for the establishment of an interim administration. The interim government was to be headed by a Pashtun named Hamid Karzai. The agreement which led to the formation of the current government in Afghanistan was supported by the Organisation of the Islamic Conference and the UN Security Council. This made the current government internationally recognised.'

129 He said:

'The present situation in Afghanistan is significantly different from that which existed during the time of the Taliban, or that during the two decades of civil wars and Soviet occupation which predated the rise of that regime.

Those changes in the circumstances pertaining to Afghanistan indicate that in numerous cases, people who previously had reason to fear persecution for a reason

(or reasons) connected to the Refugees Convention will no longer have a well founded basis for such fears.'

130 After discussing the appellant's claims, he said:

'There has been a massive number of returnees to Afghanistan since the fall of the Taliban. The applicant's home province of Parwan is one of the most favoured destinations for returning refugees (evidence 14). In October 2002, returnees numbered about 1 million to Kabul and 300 000 to the provinces of Parwan, Baghlan, Kunduz and Kandahar (evidence 15). All these returns are indications of a growing confidence in the general security situation in Parwan province.'

131 He said in relation to the appellant's claim that the appellant feared he would be harmed by the Taliban because he is an Hazara:

'The applicant claims that he departed Afghanistan fearing that he would be harmed by the Taliban because he is an Hazara. The applicant was granted a Protection visa on that basis. I accept that he fled Afghanistan on account of his fear of persecution by the Taliban, and that he had a well-founded fear of harm for that reason. Since the applicant's departure, however, the political situation in Afghanistan has altered considerably from the one that he claims to have experienced prior to leaving the country.

As put to the applicant in country information sent to him before his interview, the Taliban has been removed from power by the US and its allies.'

132 He dealt with and rejected the appellant's claim that he could not return to his village because, even though the Taliban were no longer in authority, the area was currently controlled by other ethnic groups like Tajiks and Pashtuns. He also rejected the appellant's claim that he was at risk of persecution from Sunni Muslims in that area.

133 In conclusion, the delegate found:

'I do not dispute the applicant's representative's statement that Afghanistan remains an unstable country. I accept that violence is still prevalent and there is still a general feeling of insecurity. I also have no doubts that the current situation can affect the applicant adversely should he return to that country. However, any harm that the applicant may experience as a result of the current situation in Afghanistan will be caused by a non-selective phenomenon. That harm, be it economic, social or even political in nature is non-selective and will equally affect the other citizens of Afghanistan. Such harm is not related to the Convention. It cannot therefore be considered as persecution.'

134 For all of those reasons, the delegate found that the appellant did not have a well-founded fear of persecution at the time the delegate made his decision.

135 It was put to the delegate that, in proceeding on the basis which he did and by refusing the current application, it would amount to cessation of the appellant's refugee status.

136 The delegate said of that submission:

'The refusal of the current application is due to the applicant's failure to meet the criteria for the grant of Protection Visa. A decision on this application is based on the relevant provisions of Australia's migration legislation. As a delegate of the Minister, it is not my intention to cease the applicant's refugee status. This decision refers mainly to an application for a class of visa provided for in the Migration Act and Regulations.'

137 There can be no doubt that the delegate proceeded upon the basis that the inquiry was whether the appellant at the date of the inquiry had a well-founded fear of persecution for a Convention reason.

138 The delegate was not satisfied that the appellant did have a well-founded fear of persecution for a Convention reason. For that reason, and that reason alone, the delegate refused the appellant's application for a permanent protection visa.

139 On 3 May 2004 the Refugee Review Tribunal (RRT) affirmed that decision. The application to Dowsett J was for a review of that decision. Dowsett J dismissed the application with costs. It will be necessary later in these reasons to consider both the RRT's reasons and Dowsett J's reasons.

grounds of appeal

140 At the hearing of this appeal the appellant sought and obtained leave to amend his Notice of Appeal. The respondent did not oppose leave being granted.

141 The grounds of appeal upon which the appellant relied on were:

'6. His Honour Justice Dowsett made jurisdictional errors in finding that:

a. the Applicant is not a person to whom Australia owes protection obligations under the United nations Convention on the Status of Refugees.

b. it was not necessary for the Tribunal to decide whether or not the cessation clause of Article 1C of the Convention had been engaged as a result of changed circumstances in Afghanistan;

c. the grant of the temporary (XC) visa to the appellant by the respondent did not require the respondent to consider the then current circumstances in Afghanistan;

d. the Tribunal did not have to take into consideration the grant of a second subclass 785 temporary protection visa to the Appellant by the Respondent;

7. His Honour Justice Dowsett erred in ordering the appellant to pay the respondent's costs in that he failed to take into account the fact that the matter involved novel questions of law not previously determined and wrongly assumed that such questions should be raised by way of relator action instead of by the appellant.'

142 The thrust of the appellant's arguments before this Court was articulated in the appellant's written submissions:

'5. This appeal concerns whether, and what regard should have been had to:-

(a) the temporary protection (XC) visa granted on 27 March 2003; and

(b) Article 1C(5) of the Convention (the cessation clause).'

143 The first argument was contained in grounds 6(c) and (d) of the Notice of Appeal. Both Wilcox J and Madgwick J have rejected that ground and, for reasons which I will give, I also reject that ground.

144 Ground 6(a) is merely a reference to the primary judge's conclusion. The second argument is put in support of ground 6(b). It is in respect of that second ground that I have reached a different conclusion to the majority.

145 Ground 7 is not relevant on the conclusion reached by the majority. On the conclusion I reach it is relevant, but untenable.

THE RELEVANT SECTIONS OF THE ACT

146 Section 29 of the *Migration Act 1958* (Cth) (the Act) empowers the Minister to grant non-citizens visas to either travel to and enter Australia or remain in Australia.

147 Section 30 provides for two kinds of visas. Section 30(1) provides for a kind of visa known as a permanent visa which allows the holder to remain indefinitely in Australia.

148 Section 30(2) provides for a kind of visa known as a temporary visa which entitles the holder to remain in Australia during a specified period or until a specified event occurs or while the holder has a specified status.

149 Clearly enough, the purpose of providing a system of temporary visas is to enable persons to remain in Australia lawfully, and outside a detention centre, whilst their eligibility for a permanent visa is assessed. But a temporary visa is just that; it does not entitle the visa holder to remain in Australia on a permanent basis.

150 Section 31(3) provides:

'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).'

151 Section 31(5) provides:

'A visa is a visa of a particular class if this Act or the regulations specify that it is a visa of that class.'

152 The Act then provides for different classes of visas. Relevantly, s 36(1) provides for a class of visa to be known as a protection visa.

153 Section 36(2)(a) provides:

'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; …'

154 Section 36(3) provides:

'(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.'

155 Section 36(3) is itself subject to qualification in subsections (4) and (5) but these qualifications are irrelevant in a consideration of this appeal.

156 However, s 36(3) is relevant. It recognises that there will be persons to whom Australia would have had protection obligations under the Refugees Convention as amended by the Refugees Protocol but for the provisions of s 36(3) itself.

157 Because of the provisions of s 30, to which I have already referred, it follows that a protection visa may either be temporary or permanent.

158 The Refugees Convention means the 'Convention relating to the Status of Refugees done at Geneva on 28 July 1951' and the Refugees

Protocol means the 'Protocol Relating to the Status of Refugees done at New York on 31 January 1967': s 5 of the Act.

159 The Convention leaves it to the contracting states to select such procedures as they may be advised to determine status of refugees: *NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs & Another* (2005) 213 ALR 668 ('*NAGV and NAGW of 2002*') at [17].

160 The contracting states to those treaties, of which Australia is one, undertake obligations to each other to apply the terms of those treaties in considering whether persons have the status of refugees. The treaties are not part of the municipal law of Australia: *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 per Gibbs CJ at 294 and per Brennan J at 305. Nor does the Convention confer 'upon the refugees to which it applies international legal personality with capacity to act outside municipal legal systems': *NAGV and NAGW of 2002* at [15].

161 However, s 36(2)(a) makes a criterion for a person's eligibility for a protection visa whether Australia owes that person protection obligations under those treaties subject to s 36(3). Australia would owe a person protection obligations if that person has the status of a refugee.

162 As the High Court said in *NAGV and NAGW of 2002* at [27], s 36(2) is 'awkwardly drawn'. The section assumes that the Convention creates rights in favour of individuals by assuming that obligations are owed by the contracting states to those individuals.

163 The criterion that s 36(2) adopts is that the Minister 'is satisfied'. That can only mean that the Minister must be satisfied that Australia owes protection obligations at the time the Minister considers the application for the protection visa. Thus it is that the Minister must be satisfied that the applicant is a refugee within the meaning of those treaties at the time when the Minister is considering the application.

164 Section 41 of the Act provides that the Regulations may provide that visas are subject to specified conditions. In addition, s 41(3) provides that the Minister is empowered to specify further conditions.

165 Section 45 of the Act provides that a non-citizen who wants a visa must apply for a visa of a particular class.

166 A visa application is valid if it is for a visa of a specified class and it satisfies the criterion requirements prescribed under s 46 of the Act.

167 Section 65 of the Act relevantly provides:

'65(1) After considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the Regulations have been satisfied; and

(iii) …

(iv) …

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa.'

168 Section 77 of the Act provides:

'To avoid doubt, for the purpose of this Act, a non-citizen holds a visa at all times during the visa period for the visa.'

THE REGULATIONS

169 Regulation 2.01 of the Migration Regulations 1994 (Cth) (the Regulations) prescribes classes of visas. Regulation 2.01 provides:

'For the purposes of section 31 of the Act, the prescribed classes of visas are:

(a) such classes (other than those created by the Act) as are set out in the respective items in Schedule 1; and

(b) the following classes:

(i) transitional (permanent); and

(ii) transitional (temporary).'

170 Regulation 2.02 allows for Subclasses.

171 Schedule 1 of the Regulations provides for Protection visas (Class XA): Item 1401. There are two subclasses of protection (Class XA) visas, namely, Subclass 785 (Temporary Protection) and Subclass 866 (Permanent Protection) visas.

172 Item 1403 provides for a class of protection visa, Protection visa (Class XC) which only has one subclass, being Subclass 785 (Temporary Protection) visa (Class XC). There is no permanent protection visa (Class XC).

173 Regulation 2.03 provides:

‘(1) For the purposes of subsection 31 (3) of the Act (which deals with criteria for the grant of a visa), the prescribed criteria for the grant to a person of a visa of a particular class are:

(a) the primary criteria set out in a relevant Part of Schedule 2; or

(b) if a relevant Part of Schedule 2 sets out secondary criteria, those secondary criteria.

…’

174 Thus it is that Schedule 2 mainly provides the criteria that must be satisfied by an applicant for a permanent or temporary protection visa.

175 Regulation 2.05 of the Regulations provides for the conditions which are applicable to a visa. It provides:

‘(1) For the purposes of subsection 41 (1) of the Act (which deals with conditions that apply to a visa), the conditions to which a visa is subject are the conditions (if any) set out in, or referred to in, the Part of Schedule 2 that relates to visas of the subclass in which the visa is included.’

Temporary Protection Visas

176 Schedule 2 addresses a Subclass 785 (Temporary Protection) visa (Class XA).

177 Relevantly, Item 785 provides:

‘**785.21 Criteria to be satisfied at time of application**

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

(a) makes specific claims under the Refugees Convention; or

…

785.22 Criteria to be satisfied at time of decision

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

178 There are other criteria relating to medical examinations and the applicant’s health. The other criteria are:

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

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

179 A person is entitled to a Subclass 785 (Temporary Protection) visa (Class XA) if that person satisfies the criterion provided for in subclass 785.21 at the time of the application and the further criterion provided for in subclass 785.22 at the time of the Minister or the Minister's delegate's decision. There are other criteria provided for in subclass 785 but they are not relevant to the matters under consideration on this appeal.

180 The important point to notice is that the applicant must satisfy the relevant criteria at two different times; at the time of the applicant's application; and at the time of the Minister's decision.

181 The criterion that must be satisfied at the time of the application is that the applicant claims to be a person to whom Australia has protection obligations under the Refugees Convention and makes specific claims under the Refugees Convention. The criterion that must be satisfied at the time of the decision is that the Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

182 Because the Minister must be satisfied at the time of the decision that the applicant is a person to whom Australia has protection obligations under the Refugees Convention, it would seem to be irrelevant in a consideration of that matter that the person was previously a person to whom Australia had protection obligations under the Refugees Convention.

183 It follows that to obtain a Subclass 785 (Temporary Protection) visa (Class XA) the applicant must establish at the time the Minister makes his or her decision that the applicant is a person to whom Australia owes protection obligations. That, as will be seen, means that the applicant must have satisfied the Minister that the applicant had, at the time the Minister made his or her decision, a well-founded fear of persecution for a Convention reason.

184 The Subclass 785 (Temporary Protection) visa (Class XA) was introduced in 1999. At that time that visa continued until the earlier of 36 months from the date of the grant of the visa or the day on which the applicant's application for a permanent visa was finally determined. Thus it was that the Subclass 785 (Temporary Protection) visa (Class XA) had a maximum life of 36 months.

185 On 19 September 2001 this provision was amended so that the visa would remain in effect until the end of 36 months, or if the holder applied for a permanent visa after the temporary visa was granted before the end of 36 months from the grant, the day on which the application was finally determined. That amendment had the effect of allowing the temporary visa to continue until the applicant's application for a permanent visa was finally determined provided the applicant brought the application for a permanent visa within 36 months.

186 But that amendment did not address those who already held Subclass 785 (Temporary Protection) visas (Class XA). They were still at risk of their visa expiring before their application for their permanent visa was finally determined.

187 For that reason, in November 2002, the Protection visa (Class XC) was introduced. There is only one subclass, being a Subclass 785 (Temporary Protection) visa (Class XC).

188 Item 1403 of Schedule 1 provides:

'**1403. Protection (Class XC)**

(1) Form: Nil.

(2) Visa application charge: Nil.

(3) Other:

(a) Applicant must be a person:

(i) to whom regulation 2.08F applies; and

(ii) who is taken under regulation 2.08F to have applied for a Protection (Class XC) visa.

(4) Subclasses:

785 (Temporary Protection)

Note Regulation 2.08F provides that only certain visa applicants are taken to have applied for a Protection (Class XC) visa.'

189 A person will be entitled to a Subclass 785 (Temporary Protection) visa (Class XC) if the person is a person to whom reg 2.08F applies and who is taken under reg 2.08F to have applied for a Protection visa (Class XC).

190 Regulation 2.08F provides:

'(1) Subregulation (2) applies to a person only if:

(a) the person holds a Subclass 785 (Temporary Protection) visa that was granted before 19 September 2001; and

(b) the person is in Australia but is not in immigration clearance; and

(c) the visa has not been cancelled; and

(d) within 36 months after the date of grant of the visa, the person makes, or has made, an application for a Protection (Class XA) visa; and

(e) the application has not yet been finally determined.

(2) The person is taken also to have applied for a Protection (Class XC) visa on the later of:

(a) the day when he or she makes, or made, the application mentioned in paragraph (1)(d); and

(b) 1 November 2002.'

191 Amendments were made to the Regulations. Subclass 785.5 was amended to provide:

'**785.5 When visa is in effect**

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:

(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 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.'

192 That visa will remain in effect until one or other of two events occurs. First, if the holder applies for a Protection visa (Class XA) after the grant of the Subclass 785 (Temporary Protection) visa (Class XA) the day when the application for that Protection visa is determined or withdrawn and, in any case, at the end of 36 months or, alternatively, if the person is the holder of a Subclass 785 (Temporary Protection) visa (Class XC) on the day when the application mentioned in reg 2.08F(1)(d) is finally determined or withdrawn.

193 For a person to be granted a Subclass 785 (Temporary Protection) visa (Class XA) the person must satisfy the Minister that the person is a person to whom Australia owes obligations under the Refugees Convention.

194 Once that temporary protection visa is granted and the holder of that temporary protection visa also applies for a Subclass 785 (Protection) visa (Class XA) then, after 36 months, that person will become entitled to a Subclass 785 (Temporary Protection) visa (Class XC) without any other event occurring.

195 Thus it is in this case in obtaining the Subclass 785 (Temporary Protection) visa (Class XA) on 28 March 2000 the appellant satisfied the Minister that he was a person to whom Australia owed protection obligations under the Refugees Convention.

196 When the appellant obtained the Subclass 785 (Temporary Protection) visa (Class XC) on 27 March 2003 he did so by operation of reg 2.08F(1)(d) of the Regulations.

197 The appellant's right to claim refugee status was determined on 28 March 2000 because he satisfied the criterion in s 36(2) of the Act and in subclass 785 of Schedule 2 of the Regulations. His right to claim refugee status was not further recognised on 27 March 2003. His entitlement to the Subclass 785 (Temporary Protection) visa (Class XC) was established by force of the Regulations. The appellant's contrary contentions must be rejected. Grounds 6(c) and 6(d) must be rejected.

198 The Regulations provide the circumstances in which a temporary protection visa will cease to have effect. In my opinion, a temporary protection visa will only cease to have effect if one of the events provided for in the Regulations occur.

199 Importantly, the temporary protection visa will not cease to have effect at any time before the applicant's application for a permanent protection visa is determined if the applicant can bring himself within item 1403 and thereby become entitled to a Subclass (Temporary Protection) visa (Class XC). Even more importantly, the temporary protection visa, whether Class XA or Class XC, will not cease to have effect before the application for a permanent protection visa is determined, even if within that time the applicant ceases to be a person to whom Australia owes protection obligations for any reason. That is so because the Regulations do not prescribe that as a determining event.

Permanent Protection Visas

200 A person therefore who has applied for a permanent protection visa and who has been granted either a Subclass 785 (Temporary Protection) visa (Class XA) or a Subclass 785 (Temporary Protection) visa (Class XC) must satisfy the criteria relevant to a permanent protection visa.

201 That criteria is provided for in subclass 866 of Schedule 2 of the Regulations.

202 Subclass 866 relevantly provides:

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

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

(a) makes specific claims under the Refugees Convention; or

…

866.212(1) If the applicant meets the requirements of paragraph 866.211(a), the applicant:

(a) is immigration cleared; and

(b) meets the requirements of subclause (2), (3) or (4).

…

866.22 Criteria to be satisfied at time of decision

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

…

866.222A In the case of an applicant referred to in paragraph 866.211(a), the applicant has not, in the last 4 years, been convicted of an offence against a law of the Commonwealth, a State or Territory for which the maximum penalty is imprisonment for at least 12 months.’

203 Further criteria relating to medical tests and the appellant’s medical condition follow:

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

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

…

866.228 If the applicant holds a Subclass 785 (Temporary Protection) visa, the applicant has held that visa, or that visa and another Subclass 785 (Temporary Protection) visa, for the lesser of:

(a) a continuous period of 30 months; and

(b) a shorter period specified in writing by the Minister in relation to the applicant.

…

866.511 Permanent visa permitting the holder to travel to and enter Australia for a period of 5 years from the date of grant.'

204 Subclass 866.212 deems a person who has claimed to be a person to whom Australia has protection obligations under the Refugees Convention (Item 866.211(a)) as immigration cleared and as meeting the necessary requirements of subclauses (2), (3) and (4) of subclass 866.212.

205 The Minister, however, cannot issue a Subclass 866 (Permanent Protection) visa (Class XA) unless the Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

206 That criterion must be satisfied at the time that the Minister makes his or her decision to grant a protection visa.

207 But even if the Minister is so satisfied, that does not make the applicant eligible for a Subclass 866 (Permanent Protection) visa (Class XA). The applicant must also satisfy all of the other criteria provided for in subclass 866 of Schedule 2 of the Regulations at the time the Minister makes his or her decision.

208 An applicant is not entitled to a permanent protection visa simply because he or she has previously been granted a temporary protection visa, even a Subclass (Temporary Protection) visa (Class XA). If that had been the Regulation maker's intention the Regulation would have so provided.

209 Because of the provision of subclass 866.222A, although the applicant might be entitled to the status of a refugee under the provisions of the Refugees Convention, the applicant will not be entitled to a permanent visa to remain in Australia if the applicant has, in the four years before the Minister was called upon to make a decision, been convicted of an offence against a law of the Commonwealth or State or a Territory for which the maximum penalty is imprisonment for at least 12 months: subclass 866.222A.

210 Because the application for a permanent protection visa would thereby fail, the temporary protection visa, whether Class XA or Class XC, would come to an end and the applicant would be liable to be detained and be removed from Australia, notwithstanding the applicant has been considered by the Minister or other decision-maker as entitled to the status of a refugee. That must follow because the Refugees Convention creates no rights in favour of the person seeking the protection visa. It is merely one of the criterion that must be satisfied if the person is to obtain a protection visa.

THE REFUGEES CONVENTION

211 Article 1 of the Convention relating to the Status of Refugees relevantly provides:

‘**Definition of the term refugee**

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

(1) Has been considered a refugee unde the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1993 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) **[As a result of events occurring before 1 January 1951 and]** owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence **[as a result of such events]**, is unable or, owing to such fear, is unwilling to return to it.

In 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.

[The emphasised words were deleted by the Protocol of 1967.]

…

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 this 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.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. 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.’ (Footnotes omitted.)

212 It is Article 1 that deals with the definition of the term ‘refugee’. In considering whether a person is a refugee regard must be had to the whole of Article 1: *NAGV and NAGW of 2002* per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ at [32].

213 The Articles of the Convention which follow deal with the obligations that the contracting states assume to those who are entitled to and accorded the status of refugee.

214 Article 9 provides:

‘ Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally [sic] measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.’

215 Articles 32 and 33 indicate the significant obligations undertaken by the contracting states. They provide:

‘32 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.

33 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.’

216 Article 1A addresses two groups of person. Article 1A(1) deals with that group of person who had already been recognised as refugees at the time of the drafting of the Refugees Convention.

217 Article 1A(1) applies to persons who have been historically victims of persecution and thereby assessed as refugees. Those persons are sometimes called ‘statutory refugees’: *R (Hoxha) v Special Adjudicator; Regina (B) v Immigration Appeal Tribunal* (2005) 1 WLR 1063 (‘*Hoxha*’) per Lord Hope of Craighead at [14]. Thus, Article 1A(1) has little relevance to those seeking refugee status in relation to events occurring after 1951.

218 The opening words to Article 1A(2), ‘As a result of events occurring before 1 January 1951 and’ and the words ‘as a result of such events’ later appearing in that clause were deleted by the Protocol in 1967. Thus, Article 1A(2) applies to all persons who are seeking refugee status but who have not been considered a refugee under Article 1A(1). Since the Protocol they may be persons who have become refugees in relation to events which occurred before or after 1 January 1951.

219 If a person had been historically considered as a refugee under any of the arrangements prior to 1951, that person was, for the purpose of the Convention of 1951, a refugee.

220 On the other hand, if a person had not been so considered under any of those Arrangements, Conventions, Protocols or Constitutions mentioned in Article 1A(1) that person could only achieve the status of a refugee if that person could bring himself or herself within Article 1A(2).

221 Article 1A(2) is expressed in the present tense.

222 It suggests that the refugee status accorded the person by reason of Article 1A(2) may cease to exist when any of the criteria provided for in Article 1A(2) cease to exist.

223 A person’s status as a refugee is not only determined by reference to Article 1A(1) or (2). That status is determined by reference to Article 1A and Articles 1B to 1F.

224 Since the Protocol, Article 1B is no longer relevant except in a very limited circumstance which is not relevant to the construction of Article 1 or this appeal. Article 1C assumes that the Convention has previously applied to the person because, in its terms, it speaks of the Convention ceasing to apply to any person falling under the terms of Section A.

225 On the other hand, Sections D, E and F provide that the Convention will not apply to a person of the kind mentioned in those three sections.

226 Those three sections assume that the person can otherwise bring himself or herself within Section A and are not persons to whom Section C applies. That must be so because there would be no reason to consider Sections D, E and F if the person could not bring himself within Section A or if the Convention had ceased to apply to the person for any of the reasons in Section C.

227 Article 1, therefore, assumes three different classes of people. First, those who can bring themselves within Section A and to whom none of the other sections in Article 1 apply. Thus, they are people who are refugees within the definition of 'refugee' in Article 1A(2). Secondly, those who can bring themselves within Section A but to whom the Convention does not apply because they are of the class of persons mentioned in Sections D, E and F. Thirdly, those who have at some stage brought themselves within Section A but who, at some later point of inquiry, are persons to whom the Convention has ceased to apply.

228 Sections D, E and F have no relevance to the facts in this case but are relevant for the purpose of a consideration of Section A for the reasons given above.

229 Section C is relevant. Article 1C(5) and (6) apply to any refugee in Article 1.

230 However, the provisos to both Articles 1C(5) and (6) only apply to those persons who are considered refugees under Article 1A(1). That is the ordinary meaning of the words in the provisos: *Hoxha* at [15] per Lord Hope of Craighead.

231 The provisos to the paragraphs in Article 1C point out the differences between the consideration of persons' status under Article 1A(1) and 1A(2).

232 A person under Article 1A(1) is a refugee because of historical events and is entitled to continue to remain a refugee notwithstanding the change in circumstances predicated in Article 1C(5) and Article 1C(6) if that person can establish the matters in the provisos to those paragraphs.

233 Matters which are to be considered in respect of the persons considered to be refugees under Article 1A(1) are entirely historical.

234 On the other hand, a person who is seeking refugee status under Article 1A(2) must establish that he or she presently has a well-founded fear of being persecuted for any of the reasons in Article 1A(2) and, as a result, is unable or unwilling to avail himself of the protection of his or her country of nationality or is unable or unwilling to return to it.

The English Authorities

235 In *Adan v Secretary of State for the Home Department* [1999] 1 AC 293 at 304, Lord Lloyd of Berwick said that Article 1A(2) includes four categories of persons. He said:

' It was also common ground 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.'

236 Later, at 305, he considered the construction of Article 1A(2) and said:

' 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 the light of the Convention as a whole, and the purposes which the framers of the Convention were seeking to achieve, rather than by concentrating exclusively on the language. A broad approach is what is needed, rather than a narrow linguistic approach.

But having said that, the starting point must be the language itself. The most striking feature is that it is expressed throughout in the present tense: "is outside," "is unable," "is unwilling." Thus in order to bring himself within category (1) Mr. Adan must show that he is (not was) unable to avail himself of the protection of his country. If one asks "protection against what?" the answer must surely be, or at least include, protection against persecution. Since "is unable" can only refer to current inability, one would expect that the persecution against which he needs protection is also current (or future) persecution. If he has no current fear of persecution it is not easy to see why he could need current protection against persecution, or why, indeed, protection is relevant at all.

But the point becomes even clearer when one looks at category (2), which includes a person who (a) is outside the country of his nationality owing to a well-founded fear of persecution and (b) is unwilling, owing to such fear, to avail himself of the protection of that country. "Owing to such fear" in (b) means owing to well-founded fear of being persecuted for a Convention reason. But "fear" in (b) can only refer to current fear, since that fear must be the cause of the asylum-seeker being unwilling now to avail himself of the protection of his country. If fear in (b) is confined to current fear, it would be odd if "owing to well-founded fear" in (a) were not also confined to current fear. The word must surely bear the same meaning in both halves of the sentence.'

237 Lord Slynn of Hadley, who agreed with Lord Lloyd of Berwick said, at 301:

'The first matter to be established under paragraph (2) of the article is that the claimant is outside the country of his nationality owing to a well-founded fear of persecution. That well-founded fear must, as I read it, exist at the time his claim for refugee status is to be determined; it is not sufficient as a matter of the ordinary meaning of the words of the paragraph that he had such fear when he left his country

but no longer had it. Since the second matter to be established, namely that the person “is unable or, owing to such fear, is unwilling to avail himself of the protection of that country” (emphasis added) clearly refers to an inability or unwillingness at the time his claim for refugee status is to be determined, it seems to me that the coherence of the scheme requires that the well-founded fear, the first matter to be established, is also a current fear. The existence of what has been called a historic fear is not sufficient in itself, though it may constitute important evidence to justify a claim of current well-founded fear.’

238 I return to Lord Lloyd’s speech. In his Lordship’s opinion, because of the constant use of the present tense, a person seeking refugee status under Article 1A(2) could only achieve that status by proving a current well-founded fear of persecution. He said at 306:

‘I had at first thought that article 1C(5) provided a complete answer to [Mr Adan’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 persecution. 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.’

239 Later he said at 308:

‘I am glad to have reached that conclusion. For a test which required one to look at historic fear, and then ask whether that historic fear which, ex hypothesi, no longer exists is nevertheless the cause of the asylum-seeker being presently outside his country is a test which would not be easy to apply in practice. This is not to say that historic fear may not be relevant. It may well provide evidence to establish present fear. But it is the existence, or otherwise, of present fear which is determinative.’

240 As I have said, Article 1C recognises that a person may have been considered a refugee under Article 1A(2) but no longer be entitled to the benefit of the Convention if any of the matters contained in Article 1C have occurred.

241 In *Hoxha*,Lord Hope of Craighead said at [13]:

‘… 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 6(a) of the Statute, support that interpretation.’

242 Lord Brown of Eaton-under-Heywood said at [56]:

‘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.’

243 There is a natural symmetry between Article 1A(2) and Article 1C(5). Before one can consider whether Article 1C(5) applies to any person to determine whether the circumstances in connexion with which he has been recognised as a refugee have ceased to exist, one must determine what those circumstances were.

244 It would be pointless, however, to merely determine the circumstances that existed without considering the circumstances as they exist.

The Australian Authorities

245 The time for determining whether an applicant is a person to whom Australia owes protection obligations is at the time when the decision-maker (i.e. the Minister or the Minister’s delegate or the RRT) is called upon to make the decision. In *Minister for Immigration and Ethnic Affairs & Another v Singh* (1997) 72 FCR 288, a Full Court consisting of Black CJ, Lee, von Doussa, Sundberg and Mansfield JJ said at 291:

‘ The fact that in many cases there will be an interval between a person’s departure from the country of nationality or former habitual residence and arrival in Australia and application for a protection visa, and a further interval, perhaps a lengthy one, between the application and the Minister’s determination, does not alter the fact that the definition of “refugee”, and thus s 36(2), require the applicant to show a well-founded fear of being persecuted if returned to the country of nationality or former habitual residence. The fear is not a fear in the abstract, but a fear owing to which the applicant is unwilling to return, and thus it must exist at the time the question of return arises, namely at the time the decision is made whether the applicant is a refugee.’

246 That decision was followed in *Minister for Immigration and Ethnic Affairs & Another v Singh* (1997) 74 FCR 553 at 556 by the same members of the Full Court where Black CJ, von Doussa, Sundberg and Mansfield JJ said:

‘ For the reasons given by the Court in Minister for Immigration and Ethnic Affairs v Mohinder Singh (1997) 72 FCR 288 at 290-294 we conclude that the learned primary judge was in error in holding that the critical time for the determination of an applicant’s status as a refugee was the time of the application: see now “Applicant A” v Minister for Immigration and Ethnic Affairs (1997) 142 ALR 331 at 382. In the present appeal, however, there is an additional issue to be determined. It relates to

the Tribunal's conclusion that the documents purporting to be warrants for arrest were not authentic.'

247 In a separate judgment, Lee J, at 562, said:

'For the reasons stated by this court in Minister for Immigration and Ethnic Affairs and Refugee Tribunal v Mohinder Singh (1997) 72 FCR 288, the decision of the learned primary Judge is to be regarded as having been made in error.'

248 Those decisions are consistent with the decisions of the High Court in considering the application of the treaties to a person's claim for refugee status. In *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 ('*Mayer*'), Mason, Deane and Dawson JJ said at 299-300:

' Each of the Convention and the Protocol refers to the "status" of refugees in its title and in its preambles. So used, the word does not refer merely to the fact that a person is a "refugee" within the meaning of the Convention or the Protocol. Rather, it is a compendious reference to the "rights", "benefits" and "duties" of persons who are "refugees" in the various circumstances to which different Articles of the Convention (and Protocol) refer. In that sense, the "status" of a particular person under the Convention and Protocol is a temporal one depending upon whether or not the person comes within the definition of "refugee" at the relevant time and upon his or her particular past or present circumstances. Thus, for example, Art. 10 of the Convention contains special provisions relating to the "[c]ontinuity of residence" of a refugee who "has been forcibly displaced during the Second World War" and removed to or from the territory of a Contracting State while Art. 11 is restricted to dealing with the case of refugee seamen serving on board a ship flying the flag of a Contracting State. The corollary is that the obligations of a State Party in respect of a person depend upon the particular circumstances in which the person is placed and upon whether or not he or she is a "refugee" within the meaning of the Convention or the Protocol. There is nothing in the Convention or Protocol which expressly or impliedly calls for a general determination by a State Party that a person enjoys the abstract "status of refugee within the meaning of" the Convention or Protocol. The most that the Convention and Protocol do is to require that a State Party determine whether or not a person who is within or is claiming or seeking entry to its territory is a "refugee" at the particular time and, if he or she is, to define what that State's actual obligations are in respect of that particular person in the particular circumstances in which he or she is placed.'

249 It might also be said that *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 ('*Chan*') is to the same effect, although more recently in *NAGV and NAGW of 2002* at [45] the High Court considered there was some 'possible ambiguity' in the legislation under consideration. Both *Mayer* and *Chan* were decided under a previous statutory regime but, in my opinion, that previous statutory regime is not so different as to make the decisions distinguishable. The relevant provision was s 6A(1)(c) of the Act which required that an entry permit not be granted to a non-citizen after his entry into Australia unless 'he is the holder of a temporary entry permit which is in force and the Minister has determined, by instrument in writing, that he has the status of refugee within the meaning of the Convention relating to the

Status of Refugees that was done at Geneva on 28 July 1951 or the Protocol relating to the Status of Refugees that was done at New York on 31 January 1967'. Indeed, if anything, the present s 36(2) and the Regulations are even clearer in their terms than s 6A(1)(c) as to their effect. However, in *Chan*, Mason CJ said at 386-387:

' For the reasons given by McHugh J., the question whether or not a person has the status of "refugee" within the meaning of Art. 1A(2) of the Convention relating to the Status of Refugees (the Convention) is one for determination upon the facts as they exist when the person concerned seeks recognition as a refugee. Section 6A(1)(c) proceeds upon that view of the Convention. The words "the Minister has determined … that he has the status of refugee …" (my emphasis) make this clear. Moreover, it is a view that accords with that expressed by Mason, Deane and Dawson JJ. in Mayer (1985) 157 C.L.R., at p. 302.'

250 Dawson J said at 398-399:

' The other question which arises in the interpretation of the Convention is whether the relevant Article requires refugee status to be determined as at the time when the test laid down by the Convention is first satisfied, so that it ceases only in accordance with the Article of the Convention providing for cessation, or whether refugee status is to be determined at the time when it arises for determination. The Handbook in par. 28 suggests that the former is the correct interpretation, as does Grahl-Madsen, The Status of Refugees in International Law (1966), vol. 1, p. 157. However, all else points to the latter conclusion. Article 1C(5) of the Convention provides tha the Convention shall cease to apply to a person if 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". Similarly Art. 1C speaks of the circumstances in connexion with which he has been recognized as a refugee having ceased to exist, suggesting that refugee status under the Convention may come and go according to changed conditions in a person's country of nationality and is to be determined according to existing circumstances whenever a determination is required. This view, which appears to me to be correct, was adopted by the majority in Minister for Immigration and Ethnic Affairs v. Mayer (1985) 157 C.L.R., at p. 302, where it is said that the reference in s. 6A(1) of the Migration Act to a determination that an applicant for an entry permit "has" the status of a refugee "is a reference to a contemporaneous determination rather than to some past determination that the applicant had the 'status of refugee' at the time when that past determination was made". See also Reg. v Home Secretary; Ex parte Sivakumanaran [1988] A.C., at p. 992.'

251 Toohey J followed Mason, Deane and Dawson JJ in *Mayer*. Gaudron J said at 414:

'Moreover, the definition of "refugee" is couched in the present tense, thus suggesting that an applicant must have a well-founded fear which accounts for unwillingness to avail himself of the protection of the country of his nationality at the time that his application for recognition as a refugee is considered. That interpretation, which accords with the decision in Sivakumaran and gives due recognition to the humanitarian purpose of the Convention and the Protocol, is, I

think, to be preferred in the light of the quite specific operation of Art. 1C(5) with respect to persons whose refugee status has been recognized.'

252 McHugh J said at 432:

' Notwithstanding par. 28 of the Handbook and the opinion of Grahl-Madsen, I think that the better view of the Convention and Protocol is that whether or not a person is a "refugee" within Art. 1A(2) has to be determined upon the facts as they exist as at the date when he seeks recognition by a State party: The speeches of Lord Keith [1988] A.C., at p. 993 and Lord Goff [1988] A.C., at p. 998 in Sivakumaran support this conclusion.'

253 No such possible ambiguity arises under the present legislation.

254 The matter, in my opinion, is now free from doubt. In *NAGV and NAGW of 2002*, the High Court was called upon to consider s 36(2) of the Act which was in slightly different form to the present s 36(2) but not so as to be distinguishable. Section 36(1) and (2), under consideration on that appeal, 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].'

255 The majority(Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ) said at [45]-[47]:

'[45] The possible ambiguity present in the previous statutory definition of "refugee" is apparent from this court's decision in Chan v Minister for Immigration and Ethnic Affairs. A question which arose in Chan was whether Art 1 requires refugee status to be determined as at the time when the test laid down by the Convention is first satisfied, so that it ceases only in accordance with the Article of the Convention providing for cessation, or whether refugee status is to be determined at the time when it arises for determination. These distinct conclusions could only be understood to produce different results if s 6A(1)(c) of the Act required regard to be had to only s A of Art 1 of the Convention, and not the cessation provisions in s C. If this was not so, then the distinction held no meaning because an applicant who once fell within the terms of Art 1 would cease to do so by operation of s C of that Article and thus not be entitled to an entry permit under s 6A(1).

[46] By contrast, in Minister for Immigration and Multicultural Affairs v Singh, the court, in considering s 36(2) of the Act, proceeded on the footing that a decision-maker does not err in law in considering as a preliminary issue whether the applicant for a protection visa falls within an exception in Art 1F.

[47] The adoption of the expression "to whom Australia has protection obligations under [the Convention]" removes any ambiguity that it is to s A only that regard is to be had in determining whether a person is a refugee, without going on to consider, or

perhaps first considering, whether the Convention does not apply or ceases to apply by reason of one or more of the circumstances described in the other sections in Art 1.' (Footnotes omitted.)

256 The conclusion at which I have arrived is not only consistent with the High Court authority to which I have referred, it is also consistent with a number of decisions of this Court.

257 In *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 1373, the applicant was granted a temporary protection visa. In doing so, the delegate of the Minister found that the applicant was a person to whom Australia had protection obligations under the Refugees Convention. He lodged a further application for a permanent protection visa. A delegate of the Minister refused to grant a permanent protection visa. The applicant applied to the RRT for a review of that decision but the RRT affirmed the delegate's decision not to grant a further protection visa. In reaching its decision, the RRT said that the first question that arose was whether, in accordance with Article 1C(5) of the Refugees Convention, the applicant could no longer continue to avail himself of the protection of Afghanistan because the circumstances in connection with which he was recognised by Australia as a refugee had ceased to exist.

258 After concluding that Article 1C(5) applied, the RRT turned to consider whether the applicant had a well-founded fear of persecution. It found that the applicant did not have a well-founded fear of persecution on the basis of the circumstances in connection with which he was originally recognised as a refugee. It found s 36(3) applied and that Australia did not have protection obligations in relation to the circumstances in which he was originally recognised as a refugee. Then it considered whether the applicant was a refugee as a result of any other circumstances. It concluded that the applicant did not have a well-founded fear of persecution for any Convention reason. The applicant applied to this Court for a review of that decision.

259 There is no relevant difference between the facts of that case and the facts on this appeal. Emmett J said at [61]-[64]:

'61 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.

62 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.

63 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.

64 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.'

> 260 However, his Honour concluded that the RRT had not committed jurisdictional error in the way in which it had approached its task.
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> 261 That decision is under appeal. However, it has been followed by other judges of this Court. In *SWNB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1606, Selway J said at [10]-[16]:

'10 The applicant says that the Tribunal has misunderstood the interrelationship of cl 1C(5) of the Convention and ss 36(2) and (3) of the Act. The applicant argues that the Tribunal is obliged to find that an applicant for a permanent visa, who has already been determined to be a refugee in relation to a temporary visa, continues to meet the requirements of s 36(2) of the Act, unless article 1C(5) of the Convention applies.

11 The applicant then argues that the Tribunal misapplied article 1C(5) of the Convention. The applicant says that that paragraph requires that a change in circumstances be 'substantial, effective and durable'. The applicant says that the Tribunal did not apply that test.

12 These issues were considered by Emmett J in NBGM v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1373. His Honour's analysis seems to me to be plainly right and I adopt and apply it. His Honour reached the following conclusions:

1. Where the Tribunal is considering the grant of a fresh visa, including a permanent protection visa, the Tribunal is required to determine at the time of its decision whether the applicant is a person to whom Australia has protection obligations under the Refugees Convention. Article 1C(5) does not necessarily have any role in that decision. I note that Dowsett J reached a similar conclusion in the case of QAAH of 2004 v Minister for

Immigration and Multicultural and Indigenous Affairs [2004] FCA 1448.

2. In making that decision, the tribunal may start with a position that the Refugees Convention applied to the applicant as at the date he was granted a temporary protection visa and then ascertain whether the circumstances in connection with which the applicant had been recognised as a refugee had ceased to exist.

3. Even if article 1C(5) of the Refugee Convention was applicable, it did not require that there be a 'sustainable, effective and durable' change; merely that there had been a change such that the applicant no longer had a well-founded fear of persecution if he was returned to his country of origin.

4. Section 36(3) of the Act should be interpreted in its usual and ordinary meaning. So interpreted, it adds little to the terms of section 36(2) of the Act where the issue involves the return of the applicant to his country of nationality.'

13 There are two matters I would wish to add to that analysis. The first is that a person having been previously found to be a refugee would in my view have a legitimate expectation that that status would remain. I say this notwithstanding the fact that status is no longer itself a criterion for eligibility under s 36(2) of the Act. Consequently, the person should be given the opportunity to comment specifically on any issues that may cause the decision-maker to reach a different conclusion. It should also be specifically addressed by the decision-maker in his or her reasons. Of course these obligations for a fair hearing may need to be complied with in any event, even apart from whatever extra obligations that might arise from the legitimate expectation based upon a previous finding that the person was a refugee.

14 In any event, as the applicant accepts, the obligation to afford him a fair hearing was met in this case.

15 Secondly, in my view the obligation to consider whether Australia has protection obligations at the time of the grant of a permanent visa flows from par 866.22 of Sch 2 of the Migration Regulations. For my part, I would leave open the question whether s 36(2) of the act itself requires a result that every decision in relation to a protection visa must be a decision de novo. It seems to me to be at least arguable that a regulation could be made adopting a criterion by which previous decisions made under s 36(2) can be applied without the Minister needing to be satisfied ab initio. Indeed, it would seem from the reasons of Emmett J that he accepted that that was a possibility.

16 In my view, the reasons of Emmett J are a complete answer to the issues raised by the applicant in relation to the interrelationship of the various provisions. They have the effect that the decision of the Tribunal on any of the three bases adopted by it was sufficient to justify the decision reached. In particular, those reasons mean that the de novo analysis by the Tribunal of whether Australia had protection obligations to the applicant at the time of its decision was a sufficient basis for its decision.'

262 In *SVYB v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 15 and in *Minister for Immigration & Multicultural & Indigenous Affairs v SWZB* [2005] FCA 53, Finn J followed Emmett J's decision.

263 In *NBEM v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 161, Jacobsen J said at [25]:

' I note that a number of judges of this court have adopted Emmett J's interpretation of Article 1C(5) in NBGM, including Dowsett J in QAAH and Selway J in SWNB. The applicant has failed to convince me that Emmet J, or the other judgments in which NBGM has been followed, are plainly wrong. In my opinion, his honour's interpretation is correct, and it accords with the principles of interpretation of the Convention stated in recent years by the High Court.'

264 In *NBEI v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 171, Branson J said at [9]-[10]:

'9 The Tribunal identified its task on review of the decision of the delegate of the Minister as being to consider whether, in accordance with Article 1C(5) of the Convention, the applicant can no longer continue to refuse to avail himself of the protection of his country of nationality because circumstances in connection with which he was recognised as a refugee have ceased to exist. I am inclined to doubt that this was the task of the Tribunal in the circumstances. In NBGM v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 1373 (NBGM v MIMIA) Emmett J observed:

> "… 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."

10 The judgment in NBGM v MIMIA is the subject of an appeal to the Full Court. As I consider that this application can be determined without resolving whether the Tribunal accurately identified its task, no useful purpose would be served by my considering further whether Emmett J accurately identified the task of a decision-maker when considering an application for a protection visa made by a

person who holds a temporary protection visa. Nor, having regard to the view which I have taken of the Tribunal's reasons for decision, have I considered it necessary to defer publishing these reasons for judgment to allow the parties to make submissions with respect to the recently published decision of the High Court in NAGV and NAGW of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [2005] HCA 6.'

265 Since the judgment in this matter was reserved, Kiefel J has delivered reasons for judgment in *QAAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 968 agreeing with Dowsett J's reasons in this matter and Emmett J's reasons in *NBGM v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1373. Her Honour said, at [35]:

' I would respectfully agree with their Honours. In my view the cessation clause has application to the situation where a person has been granted refugee status but the circumstances in connexion with that recognition have ceased to exist. Consideration might be given to implementing the cessation clause in relation to a procedure such as revocation. Where a person applies for a protection visa the question whether they are owed protection obligations is addressed on the determination of each application.'

266 Emmett J's decision is under appeal. Nevertheless, five judges of this Court have not found any fault in his Honour's reasons. Branson J left the question open.

267 I agree with Emmett J's reasons. I think, with respect, that his Honour's decision properly recognises the way in which the Act and Regulations govern applications for permanent protection visas.

THE APPLICATION OF THE LEGISLATION AND REGULATIONS

268 The inquiry is whether the applicant is entitled to the grant of a Subclass 866 (Permanent Protection) visa (Class XA) and that will be determined by addressing whether the applicant has satisfied the criteria in subclass 866 of Schedule 2 of the Regulations.

269 The Regulations govern the application. Subclass 866.221 requires the Minister to be satisfied, at the time the Minister makes a decision, that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

270 The inquiry must be as to whether at the time of that decision does the applicant have a well-founded fear of persecution for one of the reasons in Article 1A(2) and is thereby unwilling or unable to return to his or her country of nationality.

271 Section 36(2) and the Regulations require that matter be addressed.

272 In my opinion, the scheme of the Act and Regulations means that each time there is an application for a temporary protection visa (with the exception of a temporary protection visa (Class XC) which is granted by operation of the Regulations) or a permanent protection visa, the applicant must establish afresh that he or she has a well-founded fear of persecution and is thus a person to whom Australia owes protection obligations. Each application is a fresh application. The cessation clause has no operation after the grant of the grant of the Subclass 785 (Temporary Protection) visa (Class XA) and before the determination of the application for the protection visa.

273 The Act and Regulations simply do not contemplate that the Subclass (Temporary Protection) visa (Class XA) will expire because any of the provisions of Section C apply.

274 After the grant of a Subclass (Temporary Protection) visa (Class XC) there is even less reason to think that the cessation clause in the Convention would apply. The Subclass (Temporary Protection) visa (Class XC) was not granted because Australia owed protection obligations to the applicant at the time of the grant but only because the applicant's application for a permanent protection visa had not been granted and the Regulations applied.

275 To conclude that because the applicant had been granted a temporary protection visa, of either class, the inquiry to be conducted by the Minister in considering an application for a Subclass 866 (Permanent Protection) visa (Class XA) and in applying the criteria under subclass 866.222 is as to whether the Convention has ceased to apply to that applicant because the circumstances which applied some years ago no longer apply, is to ignore, in my respectful opinion, the words of s 36(2) and the Regulations.

276 Whether the applicant is to be considered to be a person to whom Australia has protection obligations must be determined on the facts and circumstances as they apply at the time of the decision and, in particular, whether those facts and circumstances establish that the applicant has a well-founded fear of persecution for a Convention reason.

277 If the matters in Article 1A(2) can be established at the time the decision is made in relation to the applicant's application for a permanent protection visa, Article 1C(5) has no part to play because the applicant, by proving a present well-founded fear of persecution for a Convention reason, will, unless the previous circumstances were different, have established that the circumstances giving rise to his previous claims for a well-founded fear of persecution have not ceased to exist. If they were different, they are no longer relevant in any event.

278 Once a person has established that he or she is entitled to a permanent protection visa that person will have established that he or she has the status of a refugee. That status will continue until one of the events in Article 1C occur and the Convention ceases to apply to that person. The circumstances in which the Convention might cease to apply to a person

whose status has been recognised at the time of the grant of the permanent protection visa do not need to be explored on this appeal.

THE RRT'S DECISION

279 It is convenient to address the way in which both the RRT and the primary judge addressed their respective tasks.

280 The RRT said, after referring to Article 1A:

'In the case of a person who has been recognised in Australia as a refugee under Article 1A(2), Article 1C of the Convention sets out the circumstances in which the Convention ceases to apply in respect of that person.'

281 It said:

'The central issue presented by Article 1C(5) is whether an individual can no longer refuse to avail him or herself of the protection of his or her country because the circumstances in connection with which he or she was recognised as a refugee have ceased to exist.'

282 Next, it said:

'Where an applicant makes claims to be a refugee for reasons unrelated to the circumstances in connection with which he or she was recognised as a refugee, those claims would fall to be assessed under Article 1A(2) of the Convention.'

283 It seems to me in the passages to which I have referred that the RRT assumed, with the exception last mentioned, that if a person has previously had his or her status as a refugee recognised then the inquiry before the RRT should proceed by first addressing Article 1C(5) to determine if there is evidence to suggest the circumstances in connection with which the application was recognised as a refugee have ceased to exist. It is not necessary to address the exception referred to in the last mentioned paragraph.

284 Next, the RRT noticed the qualification of s 36(2) of the Act contained in s 36(3). It said:

'Therefore, even if a non-citizen satisfies Article 1A(2) and does not fall within one of the cessation clauses, he or she will not be a person to whom Australia has protection obligations for the purposes of s. 36(2) of the Act if he or she falls within s. 36(3).'

285 The RRT accepted that the applicant was an Afghani. It then discussed the circumstances in which the appellant originally sought refugee status.

286 The RRT found:

‘That said, the applicant was recognised by Australia as a refugee in March 2000 on the basis of the circumstances then prevailing in Afghanistan. Therefore, for the purposes of the Refugees Convention, he remains a refugee in relation to those circumstances unless one of the cessation clauses in Article 1C applies. The provision that is relevant to the facts of this case is Article 1C(5). The Tribunal has therefore considered whether, in accordance with Article 1C(5) of the Convention, the applicant can no longer continue to refuse to avail himself of the protection of his country of nationality because the circumstances in connection with which he was recognised as a refugee have ceased to exist.’

287 The RRT then discussed the circumstances then prevailing in Afghanistan and concluded:

‘On the basis of all the material before it concerning the circumstances in connection with which the applicant was recognised as a refugee, the Tribunal finds that he can no longer refuse to avail himself of the protection of Afghanistan because those circumstances have ceased to exist. Therefore, Article 1C(5) of the Convention applies to the applicant.’

288 Thus it is that the RRT proceeded upon the basis that the appellant was a person whose refugee status had been recognised at the time that he obtained his Subclass 785 (Temporary Protection) visa (Class XA) on 28 March 2000. It proceeded upon the basis that Australia continued to owe protection obligations to him unless it could be said that Article 1C(5) applied and the Convention had ceased to apply to him.

289 It made a finding on the facts that Article 1C(5) did apply and the appellant was a person to whom the Convention had ceased to apply.

290 In my opinion, for the reasons already given, that approach was wrong. For the reasons already given, the RRT should have considered afresh, at the time of the hearing before it, whether the appellant was a person to whom the Minister ‘is satisfied Australia has protection obligations’.

291 For the reasons already given, in my opinion, subclass 866 in Schedule 2 of the Regulations requires the Minister to be satisfied of the matters contained in Article 1A(2) at the time that the Minister makes her or his decision.

292 However, it seems to me that the RRT proceeded in the manner in which the majority have suggested was appropriate. It certainly proceeded in a way which, in my opinion, was too favourable to the appellant. It follows therefore that, even if my construction of the Act and Regulations is wrong and the construction favoured by the majority is right, I would still dismiss the appeal.

293 Having found that the appellant was not a person to whom the Convention applies because of the provision of Article 1C(5), the RRT turned to consider whether the appellant was a refugee for other reasons. In that regard, it addressed Article 1A(2) of the Convention.

294 After discussing the appellant's claims and considering country information it found that, on the circumstances as they prevailed at the time of the hearing, the appellant did not have a well-founded fear of persecution for a Convention reason.

295 For the reasons I have already given, in my opinion, the RRT should have addressed that issue first. If it had and because of the conclusion at which it arrived, it would not have needed to consider the question of Article 1C(5) because it would have found that, at the time of the hearing before the RRT (which is the relevant time), the appellant did not have a well-founded fear of persecution. If the appellant could not bring himself within Article 1A(2) then Article 1C, and in particular Article 1C(5), was irrelevant.

296 In any event, the RRT, in my opinion, addressed the appellant's application in its most favourable light by first having regard to the application of Article 1C(5) upon the assumption that the appellant had previously been granted refugee status at the time of the grant of the Subclass 785 (Temporary Protection) visa (Class XA).

297 In the end result, whatever construction one puts upon Article 1, whether it be the construction arrived at by the majority or by me, the appeal, in my opinion, has to fail.

298 I should just add one further matter.

299 The RRT also addressed a submission that the appellant had been accorded refugee status at the time of the grant of the Subclass 785 (Temporary Protection) visa (Class XC). That was rightly rejected in my opinion. It can also be observed that that is the opinion of the majority.

300 If the decision of the RRT to affirm the decision of the delegate of the Minister was right, and in my opinion the end decision was right, then Dowsett J's conclusion dismissing the application for review cannot be impugned. However, for completeness, I should address his Honour's reasons.

DOWSETT J'S REASONS

301 Dowsett J, after referring to the Act and the Regulations, identified the four issues which were before him. First, the appellant contended that the issue of the Subclass 785 (Temporary Protection) visa (Class XC) on 27 March 2003 was a recognition that Australia owed him protection obligations at that time. It was contended before Dowsett J that therefore the Tribunal had addressed the wrong point of time in addressing the question as to whether or not the Convention had ceased to apply to the appellant under Article 1C(5).

Secondly, the appellant contended that the RRT had failed to consider whether the appellant held a well-founded fear of persecution for a Convention reason from the Taliban or any other group against which the government of Afghanistan could not, or would not, defend him. Thirdly, it was contended that the RRT had failed to consider the consequences for the appellant were he to return to an area of Afghanistan other than the province from which he came. Fourthly, it was submitted that the RRT's decision was based on no evidence and/or was '*Wednesbury* unreasonable'.

302 Dowsett J rejected all four contentions. The first contention was the subject of grounds 6(c) and 6(d). That is the ground which has been rejected by all members of this Court. The other three matters argued before Dowsett J were not advanced on this appeal. Viewed in that light, it is difficult to see where his Honour has erred.

303 In any event, his Honour reasoned in this way. First he said, refugee status is to be determined having regard to the position at the time at which the determination is made. He relied on the decisions of the High Court in *Mayer* at 302; *Chan* at 386 and *Minister for Immigration & Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 at [29].

304 In my opinion, that proposition is right. The more recent High Court decision in *NAGV and NAGW of* 2002 also supports that proposition.

305 Next, he said that it was not strictly relevant that the appellant had previously applied for and received a Subclass 785 (Temporary Protection) visa (Class XA) and a Subclass 785 (Temporary Protection) visa (Class XC). He said it was not necessary to decide whether Article 1C(5) had been engaged as a result of any changed circumstance in Afghanistan. He distinguished Dawson J's judgment in *Chan* at 405-406.

306 For the reasons I have already given, in my opinion, Dowsett J was correct.

307 Next, he reasoned that the grant of the Subclass 785 (Temporary Protection) visa (Class XC) was not relevant because, in granting that visa, the Minister did not have regard to the current circumstances and, in particular, to the appellant's status as a refugee.

308 He relevantly concluded, at [25]:

'In my view, the applicant's entitlement to a permanent visa depended upon the circumstances as they were at the time of the Tribunal's decision, meaning that it was necessary that he then hold a well-founded fear of persecution for a Convention reason. His argument to the contrary is without merit. If I am wrong in my understanding of the decision in Chan, nonetheless, the appellant's argument would still fail. The cessation clause will be engaged if "the circumstances in connexion with which [the applicant] has been recognised as a refugee have ceased to exist". It cannot be sensibly argued that Australia has ever recognised the appellant as a refugee other than in connection with circumstances as they existed in March 2000.

As I understand it, the applicant accepts that those circumstances have ceased to exist. No recognisable legal basis has been advanced on behalf of the applicant to support the assertion that the grant of the Temporary (XC) visa in 2003 raises a conclusive presumption that he was entitled to a visa on the basis of circumstances which then existed. Those circumstances were never identified or relied upon by the appellant and never considered by the Minister. The applicant's argument is without merit.'

309 A number of matters arise out of that dicta. First, his Honour repeated that the question before the RRT was whether or not the appellant could bring himself within Article 1A(2) at the time of the hearing before the RRT. Secondly, he found that even if he were wrong about that and the RRT needed first to consider Article 1C(5), the appellant's case had to fail because 'the applicant accepts that those circumstances have ceased to exist': at [25]. Thirdly, he again concluded that the contention that the grant of the Subclass 785 (Temporary Protection) visa (Class XC) in 2003 was not relevant to a determination of the appellant's right to a permanent protection visa at the time of the hearing before the RRT.

310 His Honour then considered the RRT's finding that the appellant could not bring himself within Article 1A(2) in any event. He dismissed the appellant's contention that there was no evidence to support the RRT's conclusions which were adverse to the appellant.

311 He dismissed the other contentions which are not relevant to this appeal.

312 In my opinion, Dowsett J was correct in concluding that the RRT had to determine for itself, at the time of the hearing before it, whether the appellant was a person to whom Australia owed protection obligations. The RRT therefore had to determine whether or not the appellant was then a person who had a well-founded fear of persecution for a Convention reason.

313 He was also right to conclude that Article 1C(5) never engaged.

314 In my opinion, for those reasons, the appeal from Dowsett J must be dismissed.

315 However, even if Dowsett J erred and the proper approach was to consider whether there had been a change of circumstances of the kind predicated in Article 1C(5) since the recognition of the appellant's status as a refugee on 28 March 2000, the application to Dowsett J had to be dismissed. That follows because that is exactly what the RRT did in considering the application before it. It proceeded in that very manner and decided that Article 1C(5) did operate and the Convention had ceased to apply to the appellant. It also found that the appellant did not have a well-founded fear of persecution for a Convention reason at the time it made its decision.

316 It was not for Dowsett J to inquire into the merits of the case. The merits were for the decision-maker: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at 347-348.

317 For those reasons, in my opinion, the application to Dowsett J was bound to fail.

COSTS

318 Ground 7, of course, is an alternative ground to those contained in paragraph 6. It only arises if the other grounds are dismissed.

319 As I have previously mentioned, ground 7 was in the following terms:

> '7. His Honour Justice Dowsett erred in ordering the appellant to pay the respondent's costs in that he failed to take into account the fact that the matter involved novel questions of law not previously determined and wrongly assumed that such questions should be raised by way of relator action instead of by the appellant.'

320 It was submitted by the appellant that the matters before Dowsett J in this Court involve novel questions of law which have not previously been determined, including the application of the cessation clause and the relevance and effect of a Subclass 785 (Temporary Protection) visa (Class XC). It was submitted:

'In such circumstances an unsuccessful applicant should not be ordered to pay costs. This is particularly so in proceedings which can fairly be described as having the hallmarks of "public interest litigation". His Honour rejected the Applicant's submission that there be no order as to costs apparently for the reason that public interest litigation should be brought by the Attorney-General. It is submitted that his Honour should not have awarded the applicant to pay costs.'

321 His Honour gave no reasons for ordering the appellant to pay the respondent's costs of the application before him. There is nothing unusual about that. Ordinarily, the unsuccessful party would pay the successful party's costs. Whilst, as the majority of the High Court explained in *Oshlack v Richmond River Council* (1998) 193 CLR 72, there is no rule of law to that effect, the accepted practice in this jurisdiction and other jurisdictions is that costs follow the event: *Milne v Attorney-General (Tas)* (1956) 95 CLR 460 at 477.

322 There will be circumstances where an unsuccessful party will not have to pay the successful party's costs. Indeed, there might be circumstances where a successful party should have to pay the unsuccessful party's costs.

323 This, however, is not a case where the successful party should be deprived of its costs.

324 The argument in relation to the grant of the Subclass 785 (Temporary Protection) visa (Class XC) was novel but unarguable. The argument in relation to Article 1C(5) has been considered, as previously noted, by a number of judges of this Court.

325 This was not public interest litigation but litigation brought by the appellant to advance his own interests. He was undoubtedly entitled to do that. However, in so doing, if his arguments failed he ran the risk of an order that he pay the respondent's costs.

326 There was no reason for Dowsett J to exercise his discretion in the manner suggested by the appellant. Certainly, there is nothing before this Court to indicate that Dowsett J erred in the exercise of his discretion. I would also reject ground 7.

327 For all those reasons, in my opinion, the appeal should be dismissed and the appellant should pay the costs of the appeal.

I certify that the preceding two hundred and fifteen (215) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lander.

Associate:

Dated: 27 July 2005

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Solicitor for the Respondent:	Clayton Utz
Date of Hearing:	16 May 2005
Date of Judgment:	27 July 2005