FEDERAL COURT OF AUSTRALIA

WAGH v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 194

MIGRATION– appeal – Refugee Review Tribunal – meaning of "protection obligations" - – meaning of 'right to enter and reside' in third country – doctrine of 'effective protection'

Migration Act 1958, ss 5, 13, 14, 36, 36(1), 36(2), 36(3),65, 91N(3), 91M, 91X, 496,

Judiciary Act 1903 (Cth), 39B,

Border Protection Legislation Amendment Act (1999) (Cth)

Al-Rahal v Minister for Immigration & Multicultural Affairs (2001) 184 ALR 698 approved

Minister for Immigration and Multicultural Affairs v Al-Sallal (1999) 94 FCR 549 cited

Minister for Immigration and Multicultural Affairs v Applicant C (2001) 116 FCR 154 followed

Minister for Immigration and Multicultural Affairs v Thiyagarajah (1997) 80 FCR 543 cited

NAFG v Minister for Immigration & Multicultural& Indigenous Affairs [2003] FCAFC 152 cited

NAGV v Minister for Immigration & Multicultural& Indigenous Affairs [2003] FCAFC 144 cited

R v Connell Ex parte The Hetton Bellbird Collieries Limited (1944) 69 CLR 407 referred to

Plaintiff S157/2002 v Commonwealth of Australia (2003) 195 ALR 24 referred to

V872/00A et al v Minister for Immigration & Multicultural Affairs (2002) 190 ALR 268 approved

G S Goodwin-Gill: "Refugees and Responsibility in the Twenty-First Century: More Lessons Learned From The South Pacific" (2003) 12 Pac. Rim L. & Pol'y J.23

Lawyers Committee for Human Rights: "Is This America? The Denial Of Due Process To Asylum Seekers In The United States" (October 2000) New York, Washington

WAGH v MINISTER FOR IMMIGRATION & MULTICULTURAL & INDIGENOUS AFFAIRS

W 29 OF 2003

LEE, HILL & CARR JJ

27 AUGUST 2003

MELBOURNE (Heard in Perth)

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W29 OF 2003

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

BETWEEN:	WAGH APPELLANTS

AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT
JUDGES:	LEE, HILL & CARR JJ
DATE OF ORDER:	27 AUGUST 2003
WHERE MADE:	MELBOURNE (Heard in Perth)

THE COURT ORDERS THAT:

1. The appeal be allowed.

2. The orders made by this Court on 10 January 2003 be set aside and in lieu thereof it be ordered:

> "1. A writ of certiorariissue quashing the decision of the Refugee Review Tribunal made 5 March 2002.
>
> 2. A writ of prohibitionissue directing the respondent not to take any action to the applicants' detriment pending determination of the applicants' application for protection visas according to law.
>
> 3. The application be remitted to the Tribunal for determination according to law.
>
> 4.. The respondent pay the applicants' costs"

3. The respondent pay the appellants' costs of the appeal.

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

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W29 OF 2003

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

BETWEEN:	WAGH APPELLANTS
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	LEE, HILL & CARR JJ
DATE:	27 AUGUST 2003
PLACE:	MELBOURNE (Heard in Perth)

REASONS FOR JUDGMENT

LEE J:

1 The appellants appeal from the judgment of a Judge of this Court which dismissed their application under s 39B of the *Judiciary Act 1903* (Cth) for the issue of a writ of *certiorari* quashing a decision of the Refugee Review Tribunal ("the Tribunal") which refused the appellants the grant of protection visas under the *Migration Act 1958* ("the Act") and a writ of *prohibition* directing the respondent ("the Minister") not to act on the decision of the Tribunal. In the proceeding before the learned primary Judge, there being no challenge to the validity of s 91X of the Act which purports to direct this Court not to publish the names of parties who have applied for protection visas, the appellants were described by the one set of initials in the heading to the proceeding. That description has been applied in this proceeding. Although

the notice of appeal referred only to a single appellant, the appeal was conducted, and counsel made their submissions, on the assumption that the applicants before his Honour were the appellants in the appeal.

2 Part 2 of the Act (ss 13-274) deals with the control of arrival and presence of non-citizens in Australia by providing, *inter alia*, that a non-citizen entering or in Australia be the holder of a visa (ss 13-15). The appellants are Colombian citizens and partners in a *de facto* marriage. Each is qualified as a petroleum engineer. The female appellant ("the wife"), then aged 35, arrived in Australia on 27 January 2000. At that time she was the holder of an Australian visa granted on 19 October 1999. The visa was described as "Class TR Visitor". It provided a right to make multiple entries into Australia as a visitor until 11 October 2000, and a right to reside in Australia for a period of three months from the date of each arrival.

3 The male appellant ("the husband"), then aged 47, arrived in Australia on 20 July 2000 and held an Australian visa of the same class, issued on the same date. Each appellant came to Australia directly from Colombia.

4 On 7 March 2000 the wife lodged an application for a protection visa, a class of visa provided for in s 36 of the Act. On 25 July 2000 the husband was added to the wife's application as a person who was "a member of the family unit who [did] not have [his] own claims to be a refugee". It appears to be accepted by the Minister that the Act provided for such a joinder.

5 Section 65 of the Act provides that if the Minister is satisfied that, *inter alia,* criteria prescribed for a visa have been satisfied the visa applied for is to be granted, and if not so satisfied the grant of the visa is to be refused.

6 At the relevant time subs 36(2) of the Act provided that it was a criterion for a protection visa that the applicant be a non-citizen in Australia to whom Australia has "protection obligations" under the "Refugees Convention as amended by the Refugees Protocol". The international instruments referred to are defined in s 5 of the Act as the "Convention relating to the Status of Refugees done at Geneva on 28 July 1951" and the "Protocol relating to the Status of Refugees done at New York on 31 January 1967." The treaties are referred to collectively hereafter as the Convention. Australia is a Contracting State under the Convention.

7 The term "protection obligations" is not used in the Convention and is not defined in the Act. It may be accepted that, generally, and subject to the qualification upon its meaning effected by s 36(3) discussed later in these reasons, the expression means the responsibilities Australia has undertaken as a Contracting State with the respect to a person who is a "refugee" as defined in the Convention, namely, a 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, ("a Convention reason"), is outside the country of his or her nationality and unable, or, owing to such fear, unwilling to avail himself or herself of the protection of that country, not being a

person excluded from the operation of the protective provisions of the Convention by other provisions therein.

8 The Convention imposes numerous obligations on a Contracting State in respect of a refugee. The clear intent of the Convention is to protect a refugee from risk of persecution by binding a Contracting State to extend to a refugee within the territory of that State rights that satisfy that object of the Convention and assist the refugee to live a normal life within that State. In summary, a Contracting State undertakes to: a) assist a refugee within its territory [Art 25 (Administrative assistance), Art 27 (Identity papers), Art 28 (Travel documents), Art 30 (Transfer of assets), Art 34 (Naturalization)]; b) treat a refugee without discrimination [Art 3 (Race, religion or country of origin), Art 31 (Unlawful entry)], and, in specified respects, as favourably as a national of that country [Art 4 (Freedom to practice religion), Art 14 (Protection of intellectual property), Art 15 (Right of association), Art 16 (Access to courts), Art 17 (Right to employment), Art 20 (Rationing), Art 22 (Elementary education), Art 23 (Public relief), Art 24 (Labour and social security laws), Art 29 (Fiscal charges)] and, in other specified respects, no less favourably than an alien in that country is treated in relation to those matters [Art 13 (Acquisition of property), Art 18 (Right to establish a business), Art 19 (Right to practise a profession), Art 21 (Right to housing), Art 22 (Secondary, tertiary education), Art 26 (Freedom of movement)].

9 The foregoing obligations imposed on a Contracting State by the Convention are beneficial provisions with respect to refugees and may come within a broad meaning of "protection obligations". However, for the purpose of construction of subs 36(2) it is enough to have regard to the direct obligations to protect refugees imposed on a Contracting State by Arts 31-33 of the Convention, which read as follows:

'31. Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularised or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

32. Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

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

33. Prohibition of expulsion or return (refoulement)

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

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

10 When Australia acceded to the Convention relating to the Status of Refugees on 22 January 1954 the accession was subject to a reservation in respect of Article 32. That reservation was withdrawn on 1 December 1967.

11 Under Art 31(1) the Contracting State has an obligation to receive and deal with a refugee who enters that State without authorisation, and as long as that person presents to authorities without delay and shows good cause for that entry the Contracting State cannot impose a penalty on that person by reason of that entry. It is unnecessary to determine the meaning of the words "until their status in the country has been regularised" as used in Art 31(2) but it may be postulated that the status of a person would be "regularised" for the purpose of Art 31(2) when the Contracting State is satisfied that the person is a refugee under the Convention, and that thereafter the person would be "lawfully staying in" or "lawfully in" that country for the purposes of the Convention.

12 Articles 32 and 33 protect a refugee by limiting the exercise of any power that a Contracting State may have to expel a refugee from that State.

13 Under Art 32 a Contracting State cannot expel a refugee lawfully in the territory of that country, except for reasons of national security or public order. It is unnecessary to determine the issue but, as noted above, it is probable that a refugee "lawfully in" the Contracting State may include a person to whom Art 31(2) applies, being a person whose entry into that State was unlawful but whose status as a person within the territory has been "regularised".

14 Article 33 provides protection to a refugee in respect of whom a Contracting State seeks to exercise a power to expel or return that person to another country, including the limited power available in the circumstances to which Art 32 applies, by requiring a Contracting State not to expel or return a refugee in any manner where the life or freedom of the refugee would be threatened for a Convention reason. The obligations imposed by Art 33 on a Contracting State would apply to a person within that territory of that State to whom Art 31(1) refers. Article 33(2), however, provides that a refugee cannot claim the *benefit* of the Article if there are reasonable grounds for regarding the refugee as a danger to the security, or to the community, of the Contracting State.

15 A delegate of the Minister, appointed pursuant to s 496 of the Act, refused the grant of protection visas to the appellants on 20 July 2001. The Tribunal, exercising the powers of the Minister under s 65 of the Act, affirmed the decision of the delegate on 5 March 2002.

16 The claims made by the wife in support of her application for a protection visa were that in the course of her employment as a petroleum engineer, a paramilitary force, apparently able to act beyond the control of Colombian government authorities, and which regarded the work being done by the wife as a threat to its interests or to the interests of parties associated with it, made threats against her life causing her to flee Colombia.

17 Each appellant held a passport that had been issued by the Republic of Colombia on 10 May 1999. In addition to being endorsed with the Australian visas issued on 19 October 1999, each passport was endorsed with a visa "Class B1/B2" that had been issued by the United States of America on 14 May 1999 valid until 11 May 2004. The wife stated that it was a requirement of her employment that she obtain such a visa pursuant to the policy of the Colombian government that petroleum companies based in the United States provide "technology transference" to Colombian personnel. A United States visa of the same class, issued on 6 May 1994 and valid until 5 May 1999, had been endorsed in the earlier Colombian passport that had been issued to the wife on 15 April 1994 and cancelled on 10 May 1999. The statement of reasons provided by the Tribunal recorded that the United States visas were "for the purpose of business and tourism and allow for a stay of up to 6 months with a capacity to apply for an extension of a further six months".

18 The Tribunal was informed by the wife that in June 1998 she had travelled through the United States as a passenger-in-transit from Colombia to Canada and that on return from Canada she had used the visa to enter the

United States and remain there for a period of four days whilst visiting a friend. That had been the only occasion she had entered the United States.

19 The Tribunal determined that it was not satisfied that the appellants were persons to whom Australia had protection obligations under the Convention. It based that determination on a finding that the wife had "a capacity to enter the US where, as a matter of practical reality and fact, she has access to a refugee determination system that offers effective protection to applicants who are refugees and who do not face any prospect of *refoulement* to their country of origin." The Tribunal made no finding as to whether it was satisfied that the fear of persecution held by the wife was a well-founded fear for a Convention reason.

20 As at the date the wife lodged her application for a protection visa, s 36 of the Act, in relevant respects, read as follows:

'(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 Refugees Convention as amended by the Refugees Protocol.

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

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

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

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

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

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

21 On 1 October 2001, subs 36(2) was amended by adding the words "the Minister is satisfied" after the word "whom", but, having regard to the terms of s 65, the amendment does not appear to alter the nature of the decision to be made under s 65.

22 Before 16 December 1999 s 36 was limited to subss 36(1) and 36(2). Those provisions received some amplification by the construction of subs 36(2) applied in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543. The 'ratio decidendi' in *Thiyagarajah* would appear to be as expressed by von Doussa J at 562, namely:

'It is not necessary for the purposes of disposing of this appeal to seek to chart the outer boundaries of the principles of international law which permit a Contracting State to return an asylum seeker to a third country without undertaking an assessment of the substantive merits of the claim for refugee status. It is sufficient to conclude that international law does not preclude a Contracting State from taking this course where it is proposed to return the asylum seeker to a third country which has already recognised that person's status as a refugee, and has accorded that person effective protection including a right to reside, enter and re-enter that country.'

23 A number of cases in this Court thereafter referred to a doctrine of "effective protection", said to have been applied in *Thiyagarajah*, as part of the construction of subs 36(2). Some of those cases appear to have expanded the "doctrine" beyond the elements identified in *Thiyagarajah* as set out above. As I stated in *Al-Rahal v Minister for Immigration and Multicultural Affairs* [2001] 184 ALR 698 (at [50]-[51]) international law provides a limited right of action for a State seeking to restrict the right of a refugee then in the territory of the State to choose that State as the place to seek protection from persecution, and there is no principle of international law described as a doctrine of "effective protection" able to assist in the construction of subs 36(2).

24 If the argument were tenable that alternative constructions of subs 36(2) were available, a construction that avoided abnegation of the responsibilities undertaken by Australia under the Convention as a Contracting State would have to be preferred. In that regard I repeat what I said in *Al-Rahal* (at [49]-[57]) namely, that subs 36(2) does not contemplate that the Minister, or the Tribunal, may determine that it is not satisfied that Australia has protection obligations under the Convention merely because Australia may seek to exercise a power, or discretion, to expel that person to a third country. Under international law Australia may arrange with another country by treaty or accord, or may request another country to agree, to accept from Australia a person to whom the Convention applies and to whom Australia has protection obligations under the Convention, but such a power to deal with that person in that manner has no bearing on the proper construction of subs 36(2) which provides in, clear terms, that the criterion for the grant of a protection visa is that the applicant be a person to whom Australia has protection obligations under the Convention.

25 The Convention does not provide that the incurring of obligations to a refugee to whom the Convention applies is at the option or discretion of a Contracting State and nor does it provide that a Contracting State will not incur obligations to a refugee under the Convention if the refugee has had, or has, the opportunity to seek protection from another country or Contracting State. The obligations imposed by the Convention are of varying degrees of

responsibility but all are attracted when a person to whom the Convention applies is within the territory of a Contracting State. A person does not become a refugee by an act of recognition or grant of status by a Contracting State. A person within the Contracting State who fulfils the Convention definition is, and at all times has been, a refugee. As Professor Goodwin-Gill states:

"Like it or not, the rule that States have obligations towards all those within their territory or subject to their jurisdiction is one of the consequences of sovereignty." (See: Guy S Goodwin-Gill, "Refugees And Responsibility in the Twenty-First Century: More Lessons Learned From The South Pacific" (2003) 12 Pac. Rim L. & Pol'y J.23 at 25.)

26 The Convention, in Art 1E, provides that the Convention does 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". That is to say, the Convention will not apply to a person who, before arriving in the territory of a Contracting State, has been accepted as a resident and as part of the body politic of a country other than his or her country of nationality. Furthermore, Art 1(C)(1)-(4) provide that the Convention will cease to apply to a person who, *inter alia*, re-avails himself of the protection of the country of his nationality or has acquired a new nationality and enjoys the protection of that country.

27 It is unnecessary to consider whether *Thiyagarajah*,orthe "considerable jurisprudence" developed thereafter, was correctly decided. (See: *NAGV v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 144 per Finn J at [1], Emmett J [61]-[62], [72], Conti J at [92]; *NAFG v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 152 per Gray J at [8]; Gyles J at [60]-[64].) It is enough to say that whatever the proper construction of s 36 may be, on the facts of this case it does not permit the Minister, or the Tribunal, to determine that the wife, if she is a refugee to whom the Convention applies, is not a person to whom Australia has protection obligations under the Convention.

28 If doubt existed as to the foundation in the Act for the decision made in *Thiyagarajah*, that doubt was resolved by the introduction of subs 36(3). On 16 December 1999 significant amendments to the Act were effected by the *Border Protection Legislation Amendment Act* (1999) (Cth) which qualified the operation of subs 36(2) by, *inter alia*, introducing subss 36(3)-(5) and subdiv AK in Part 2. Qualification for the grant of a protection visa under subs 36(2) then became subject to the terms of subs 36(3) as well as to the terms of subdivs AI (Safe third countries), AJ (Temporary safe haven visas), AK (Non-citizens with access to protection from third countries) and AL (Other provisions about protection visas). It may be noted that as at this date the terms of subdiv AK, which prevent a valid application being made for a protection visa by a person "who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country", apply only to a non-citizen who is a national of two

or more countries. The Minister has not made a declaration under s 91N(3) of the Act in respect of an "available country".

29 Section 91M in subdiv AK appears to be a statement of policy made by Parliament to assist construction of the subdivision. Save for the use of the word "re-enter" for the word "enter", subdiv AK, in relevant respects, uses similar terms to those used in subs 36(3) and, to that extent, the subdivision, particularly s 91M, should be taken to be part of the particular context in which subs 36(3) is to be construed. Section 91M reads as follows:

'This Subdivision is enacted because the Parliament considers that a non-citizen **who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country**, should seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.' (Emphasis added)

30 Again insofar as there is any ambiguity in the meaning of subs 36(3) and its effect upon subs 36(2), a meaning more favourable to a person to whom the beneficial provisions of the Convention apply, must be preferred. Given that subs 36(2) is a statement by Parliament that qualification for a protection visa turns on the satisfaction of the Minister as to whether Australia has obligations under the Convention to protect the applicant, it would not be consonant with that provision to apply a meaning to subs 36(3) that is inconsistent with Australia's obligations to a refugee under the Convention or international law.

31 It is for the foregoing reason that a Full Court of this Court in *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154 rejected the submission of the Minister that the phrase "a right to enter and reside" as used in subs 36(3) went beyond a legally enforceable right to enter and reside, and extended to a person who had a "capacity or ability" to enter and reside in a country other than Australia.

32 The 'ratio decidendi' expressed in the reasons of Stone J in *Applicant C* as to the proper construction of subs 36(3) reflected adoption of the reasoning of the learned primary Judge in that matter, who had held, correctly, that the words "a right to enter and reside" meant no less than an existing legally enforceable right. (See also: *V872/00A et al v Minister for Immigration and Multicultural Affairs* (2002) 190 ALR 268 per Hill J at [22].) In my reasons in *Applicant C* I expressly concurred with the reasons of Stone J limited to that ratio. Insofar as Stone J added remarks as to the construction of subs 36(2), in particular as to the accommodation within that subsection of a "doctrine of effective protection", those comments were not within that part of the reasons with which I concurred.

33 Upon arrival in Australia the appellants were "lawful non-citizens" pursuant to ss 13 and 14 of the Act. It was not submitted by the Minister that at material times thereafter the appellants were other than lawfully in Australia. If the wife is a refugee under the Convention she is a refugee

lawfully in Australia and any attempt to expel or remove her from Australia would be a step taken in the breach of the obligation imposed on Australia by Art 32 of the Convention. It was not contended that any exclusionary provision of the Convention applied to the wife, nor was it submitted that an obligation to protect the wife, reflected in a right to enter, re-enter and reside, and thereby receive protection whilst a resident of the United States, had been accepted by that country.

34 The words "right to enter and reside in, whether temporarily or permanently…any country…including countries of which the non-citizen is a national" mean an existing right which a person, who claims to be a person to whom the Convention applies, may exercise, being a right to enter, re-enter, and reside in a country other than Australia pursuant to a prior acceptance or acknowledgement by that country that it will accord that person protection from the risk of persecution that would exist if that person were returned to his or her country of nationality or habitual residence. The word "temporarily" is inserted to acknowledge that the right to reside in another country may not be permanent but the right to reside and receive protection in the other country, at least, will be co-extensive with the period in which protection equivalent to that to be provided by Australia as a Contracting State would be required.

35 If, as the Minister contends, the words "right to enter and reside" mean no more than the opportunity a refugee in Australia may have to enter and remain in a country other than Australia, without acceptance by that country of an obligation to provide protection to that person, Australia could not be seen to observing either the purpose or the spirit of the Convention by purporting to enact such a provision.

36 It may be consonant with the terms of the Convention, or with international law, for Australia to provide that protection obligations under the Convention do not arise in respect of a refugee in Australia where that person has an established right to enter and reside in a country that has accepted that person as a person to whom protection is to be provided, equivalent to that required of a Contracting State under the Convention. However, it is the Minister's submission that subs 36(3) contemplates that a refugee within the territory of Australia is liable to be removed from Australia to another country without recognition by that country of that person's need for protection. Such a construction would purport to transfer to the other country Australia's duties and responsibilities under the Convention in respect of a refugee in its territory and would not meet Australia's obligations under international law and, in particular, as a Contracting State under the Convention.

37 The ordinary principles of statutory construction do not allow the words used by Parliament to be supplemented by judicial insertion of implied provisions such as a doctrine of "effective protection". (See: *The Council of the City of Parramatta v Brickworks Limited* (1972) 128 CLR 1 per Gibbs J at 12.) The doctrine enunciated and applied to the construction of s 36(2), namely, that protection obligations do not arise under the Convention when "as a matter of practical reality or fact a person is likely to receive effective protection" from a third country, (*cf: Minister for Immigration and Multicultural*

Affairs v Al-Sallal (1999) 94 FCR 549 at [42]), would seem to infringe that rule. Furthermore, the doctrine so described is of uncertain dimension, the limits thereof being left to be developed by judicial elucidation.

38 The proper construction of the qualification upon the operation of subs 36(2) contained in subs 36(3) is that which meets Australia's obligations under international law, namely, that Australia is to be taken not to have protection obligations under the Convention to a putative refugee where that person has an existing enforceable right, recognized by a third country, to enter and reside in that country and be protected from persecution, thereby obviating the need for that person to seek protection from Australia pursuant to the obligations imposed by the Convention on Australia as a Contracting State.

39 The Tribunal purported to ground its decision upon the following understanding of the relevant law:

'The Tribunal finds that the [the wife] has a capacity to enter the USA where, as a matter of practical reality and fact, she has access to a refugee determination system that offers effective protection to applicants who are refugees and who do not face any prospect of refoulement to their country of origin. In such circumstances she is not owed protection obligations by Australia.'

40 If subs 36(3) had no application to the facts of the appellants' circumstances, the Tribunal erred by purporting to apply to subs 36(2) an erroneous construction.

41 The requirements of subs 36(3) are not satisfied by determining that a person has a "capacity" to enter another country and has as "a matter of practical reality and fact…access to a refugee determination system that offers effective protection to applicants who are refugees". Under subs 36(3) the right to enter and reside in another country that is to be taken to prevent protection obligations to a refugee arising under the Convention for the purpose of determining entitlement to a protection visa, is an existing right to enter and reside and, implicitly, to receive protection equivalent to that to be provided to that person by a Contracting State under the Convention.

42 The visa issued by the United States permits the wife to travel to the United States and, if she satisfies the relevant United States border authority that the purpose of her entry is consonant with the terms of the visa she holds, she may be admitted to the United States for the purpose of the visa. The right to enter and reside in the United States thus obtained would be a right to enter and to reside for the purpose of tourism or business, not a right to enter and reside in the United States for the purpose of receiving protection of some equivalence to that to be provided by a Contracting State under the Convention.

43 The facts of this case reveal the fallacy in the Minister's submissions. The wife has no connection with the United States and the

United States has not accepted any obligation in respect of the wife, in particular, of her need for protection from persecution. As at this time the United States is not a third country willing to accept the wife and perform the obligations that would otherwise be required of Australia under the Convention if the wife is a refugee under the Convention. If the appellants were removed from Australia and transported to the United States, the appellants would not be persons received by the United States as persons whom the United States had undertaken to protect. The appellants would not be travelling to the United States for the purpose of tourism or business and would obtain no entitlement to be admitted into the United States upon arrival. Instead they may be subjected to summary deportation under the expedited removal provisions of United States law, as persons who did not hold valid papers. Alternatively the United States border authority may require the carrier which brought the appellants to America to remove the appellants from the United States forthwith. (See: Lawyers Committee for Human Rights: "Is This America? The Denial Of Due Process To Asylum Seekers In The United States" (October 2000) New York, Washington.) Importantly, there would be no existing right to enter and reside in the United States of which the appellants could then avail themselves.

44 It would be most unlikely, and, indeed, improbable that Parliament intended that in circumstances such as the foregoing, it is deemed that Australia's international obligations under the Convention to a refugee then in Australia do not arise. The provisions in subs 36(3) are predicated upon there being another country willing to receive the refugee and, therefore, the application for a protection visa may be refused by the Minister for the reason that the person holds, and may exercise, a right to enter and reside in another country and receive from that country such protection as the refugee requires. If that were not so it would be difficult to discern the principle Parliament acted upon if the Minister's submission as to construction of subs 36(3) were accepted.

45 The construction of subs 36(3) that is consistent with Australia's obligations under international law is that before the criterion for the issue of a protection visa specified in subs 36(2) can be satisfied, a refugee in Australia, who would be accepted as a resident of a third country pursuant to an existing right to enter and re-enter that country, must take all possible steps to avail himself, or herself, of that existing and enforceable right to reside in that country and thereby receive the protection being sought in Australia.

46 It follows that the purported decision of the Tribunal was based on an error of law. The authority conferred on the Tribunal to exercise a decision-making power was conditioned upon the formation of a state of satisfaction on a matter stipulated by the Act, which in turn depended upon the Tribunal applying correctly the law under which the Tribunal purported to act. (See: *R v Connell; ex parte The Hetton Bellbird Collieries Limited* (1944) 69 CLR 407 per Latham CJ at 430-432). The Tribunal misconstrued the relevant law and failed to apply that law correctly to the facts before it. In doing so it deflected itself from considering and determining the proper question to be determined. The decision made by the Tribunal was not a decision made

under the authority of the Act and the writs of *prohibition* and *certiorari* sought by the appellants should issue to the Tribunal, and the Tribunal should be directed to determine the application before it according to law. (See: *PlaintiffS157/2002 v Commonwealth of Australia* (2003) 195 ALR 24 per Gaudron, McHugh, Gummow, Kirby, Hayne JJ at [71]-[78].)

47 The appeal must be allowed, the judgment of the learned primary Judge set aside, writs of *certiorari* and *prohibition* issued and the matter returned to the Tribunal for re-determination according to law.

I certify that the preceding forty-seven (47) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Hon Justice Lee.

Associate:

Dated: 26 August 2003

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W29 OF 2003

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

BETWEEN:	WAGH APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	LEE, HILL & CARR JJ
DATE:	27 AUGUST 2003
PLACE:	MELBOURNE (HEARD IN PERTH)

REASONS FOR JUDGMENT

HILL J:

48 I have had the opportunity of reading in draft the reasons for judgment of Lee J in this matter and accordingly I am relieved of setting out the facts with which the present appeal deals and the legislative background against which the appeal is to be decided.

49 As the judgment of Lee J recognises the question for decision is whether the Tribunal erred in law in construing s 36(3) of the *Migration Act 1958* ("the Act") so as to find that a person who holds a Class B1/B2 visa issued by the United States of America is a person to whom Australia is taken not to have protection obligations where the person does not seek to avail himself or herself of the right granted by the visa. The visa in question was one issued "for the purpose of business and tourism" and allowed the holder to enter and stay in the United States for a period of six months with a capacity for an extension of a further six months.

50 Section 36(3) which was introduced by the *Border Protection Legislation Amendment* Act 1999 (Cth) provides:

"Protection obligations

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

51 The subsection clearly was part of provisions having the policy that a non-citizen who could avail himself or herself of protection from a third country should be required to seek protection in that country, rather than be permitted to apply in Australia for a protection visa (cf s 91M of the Act).

52 It is no doubt correct to say that the provisions of s 36(3) and other provisions enacted at the same time should be read against the background of

the provisions of the Refugees Convention as amended by the Refugees Protocol (both are identified in the judgment of Lee J) and on the assumption that Parliament should not be intended to enact legislation contrary to Australia's obligations under the Convention unless specific language is used or the construction is one that arises by necessary implication. It must also, however, be read against the background of the jurisprudence which has interpreted the Act and the Convention.

53 What s 36(3) requires before it operates to disentitle a person to be included in the class of persons to whom Australia has protection obligations is that the person be one who has "a right to enter and reside in" the other place. It is clear that the word "reside" is not used in the sense of reside permanently because s 36(3) makes it clear that the right to reside may be merely temporary. I shall refer to the meaning of the word "reside" later in these reasons.

54 The word "right" tends to suggest, prima facie, a legally enforceable right. However, it was held by a Full Court of this Court in *V872/00A, V900/00A, V854/00A, V856/00A, and V903/00A v Minister for Immigration & Multicultural Affairsv Minister for Immigration and Multicultural Affairs* (2002) 190 ALR 268 that "right" as used in the subsection did not mean legally enforceable right of entry and re-entry to a safe third country. The ratio of that decision in the narrowest sense is that s 36(3) will operate in a case where not only is there a legal right of entry but also where, absent a legally enforceable right of entry the person is likely to be allowed entry to the third country and is likely, as a matter of practical reality to have effective protection there and not be subject to refoulement contrary to Art 33 of the Convention: see per Black CJ at [5] and per Tamberlin J at [83], where his Honour said that the question is whether there was "any real risk that the applicant would *not* be able to secure access to that country so as to attract its protection". In the same case I suggested that s 36(3) would have no operation where the Tribunal was not comfortably satisfied that the applicant would practically be granted access, a view which might not be in complete accord with the majority in that case.

55 *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154 was another Full Court decision, prior to *V872/00A* which discussed the meaning of s 36(3). The leading judgment was given by Stone J with whom Lee J agreed. I do not read her Honour's judgment as differing in any significant relevant way from the decision of the Full Court in *V872/00A.*

56 In the course of her judgment her Honour said, in a passage quoted by the learned Primary Judge at [65]:

"The combination of the amendments to s 36 and the doctrine of effective protection leads to his position. Australia does not owe protection obligations under the Convention to:

(a) a person who can, as a practical matter, obtain effective protection in a third country; or

(b) a person who has not taken all possible steps to avail himself or herself of a legally enforceable right to enter and reside in a third country."

57 It is true that the Court affirmed the decision of the learned Primary Judge in that case. I am not sure that the reference to "effective protection" can, however, be ignored. In any event, after *V872/200A* the comments of Stone J should, in my view, be read so as to include (if not already comprehended by (a)), a category of persons of whom it can be said that while they have not, in a strict sense, a legally enforceable right, the factual situation is that they are likely to be afforded entry to the third country and as a mater of practical reality, have effective protection there. If there is any conflict between *Applicant C* and *872/00A* I would follow the latter and later case.

58 One reason why a strict construction can not be given to the word "right", so that it is to be read as "legally enforceable right" is that all countries retain as a matter of sovereignty a right to exclude persons from the country. It would be unlikely in many cases that a visa would give a legally enforceable right, although as a matter of practical reality it would be virtually certain that the person in question would be permitted entry.

59 The present is a case where the appellant held a visa, which on its face was valid and which on its face carried with it the right to enter and remain for a period of up to six months in the United States for, inter alia, purposes of tourism. I see no reason why within the principles discussed in *V872/00A* and *Applicant C,* it would not be open to the Tribunal to find that the appellant had a right to enter if the visa gave practically a right to reside, even if not permanently.

60 This was the view of the Tribunal which found the following facts:

- The appellant and her husband had been issue with entry visa which remained valid.
- The appellant and her husband had entered on one occasion the USA on a comparable visa.
- In the USA the appellant could access a properly functioning refugee determination process through which a significant number of Colombians and others had obtained refugee status.
- If the appellant were found to be a refugee in the USA she would not face refoulement to Colombia.
- The appellant was not at risk of persecution in the USA.

61 The Tribunal's conclusion, and it is a conclusion of fact, was:

"The Tribunal finds that the applicant has a capacity to enter the USA where, as a matter of practical reality and fact, she has access to a refugee determination system

that offers effective protection to applicants who are refugees and who do not face any prospect of refoulement to their country of origin. In such circumstances she is not owed protection obligations by Australia."

62 With respect to Lee J, s 36(3) does not require that it be shown that the third country acknowledge that it would accord the person protection from persecution if returned to the country of residence or nationality. There is nothing in the section which suggests the need for a prior recognition by the third country. If such prior acknowledgment or recognition is to be required then it would be necessary to add substantially to the words used in s 36(2). Accordingly I do not accept that s 36(3) requires that the Minister show that the applicant have an existing right to enter and reside and receive protection equivalent to that to be provided to that person by a Contracting State under the Convention.

63 In my view the question to be determined by the Tribunal is whether the appellant was a person who had what may be described as a right that was practically likely to be exercised, albeit not legally enforceable, to enter and reside even if only temporarily in the United States and in circumstances where it was practically likely that she would obtain effective protection there. It is not necessary that the Tribunal decide whether the "right" in that sense carries with it the right to receive protection in the third country.

64 I agree with Lee J, naturally, that not any visa, no matter how restrictive, would activate s 36(3) and thus result in the person not being a person to whom Australia owed protection obligations. The right, to which s 36(3) refers, is not merely a right to enter. It must be a right to enter and reside. A transit visa, for example, would, or could, be a right to enter, but clearly is not a right to enter and reside.

65 The fact that the residence of which the section speaks may be temporary is clear from the face of the section. Whether a visa to enter for tourist purposes is a visa which authorises both entry and (temporary) residence is a difficult question. "Reside" in its usual dictionary sense means "to dwell permanently or for a considerable time; have one's abode for a time" (see *The Macquarie Dictionary* (3rd ed)). It would be an unusual, although not impossible, use of the word to refer to a tourist. A tourist may stay overnight, or for a time in a country, but that country would not be his or her place of abode, even temporarily. The present is not a case where the appellant carried on any business, or indeed was employed by some other person in that person's business. If she were then it would be possible to argue that residence was necessary for business purposes.

66 In my view the error which the Tribunal committed was to ignore altogether the requirement in s 36 that an applicant have not merely a right of entry, but a right to reside, in the sense I have suggested. That more readily conforms with the policy to which Lee J refers. No doubt a person with a right to reside, even temporarily, in a country, will have the practical ability to access the refugee process in that country. Hence there is no need for that

person to apply in Australia for a protection visa. He or she can avail himself or herself of protection from that third country.

67 I agree, therefore, although for different reasons than those enunciated by Lee J, that the Tribunal having erred in law has not made a decision under the Act so that writs of prohibition and certiorari should issue and the Tribunal be directed to determine the application according to law. I agree also with the orders which his Honour has foreshadowed.

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

Associate:

Dated: 27 August 2003

IN THE FEDERAL COURT OF AUSTRALIA	
WESTERN AUSTRALIA DISTRICT REGISTRY	W29 OF 2003

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

BETWEEN:	WAGH APPELLANT
AND:	MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS RESPONDENT

JUDGES:	LEE, HILL & CARR JJ
DATE:	27 AUGUST 2003
PLACE:	MELBOURNE (HEARD IN PERTH)

REASONS FOR JUDGMENT

CARR J:

68 I have had the advantage of reading, in draft form, Lee J's reasons for judgment in this matter. I am grateful to his Honour for saving me from having to set out much of the factual, legislative and procedural background.

69 I agree that the appeal should be allowed. While not necessarily disagreeing with Lee J's reasoning, with due respect, I should not be taken as accepting by implication all of it. Accordingly, I shall give brief reasons for joining in the orders proposed.

70 The question in the appeal is whether the Tribunal erred in its construction and application of s 36(3) of the *Migration Act 1958* (Cth) ("the Act") to the extent that its decision was not one made under the authority of the Act. That sub-section provides as follows:

'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.'

71 In my opinion, for the purposes of this appeal, s 36(3) should be viewed as a clear expression of Parliament's intention to put limits on whatever obligations Australia might, having adopted the Convention, legislatively choose to accept as part of its municipal law.

72 Recent history has shown, in my view, that for at least the last ten years countless attempts have been made, by persons who are clearly not refugees, to abuse the Convention and impose upon those countries which are signatories to it. Those persons have usually been aided by organised criminals in a quest for a better life in Australia and other similar countries. In their journeys they have often passed through countries (apparently perceived as not being quite so attractive) which would have granted them refuge whether pursuant to the Convention or otherwise.

73 If extrinsic indications of Parliament's intention to remedy this mischief were needed, which I do not think is the case, the relevant portions of the Parliamentary proceedings and the Supplementary Explanatory Memorandum

are set out in Stone J's reasons for judgment in *Minister for Immigration and Multicultural Affairs v Applicant C* (2001) 116 FCR 154 at [50] and [52].

74 In my view, *Applicant C* is authority for the proposition that the word "right" in s 36(3) means a legally enforceable right, albeit one that can be revoked – see Stone J at [57] and [58]. I do not see the subsequent Full Court decision of *V872/00A v Minister for Immigration and Multicultural Affairs* (2002) 190 ALR 268 as being inconsistent with *Applicant C.* It would appear that *Applicant C* was not cited to the Court in *V872/00A.*

75 I agree, respectfully, with Lee J's assessment that the Tribunal made its decision by relying upon an erroneous construction of s 36(3). In my view, the Tribunal erred in law by regarding the tourism or business visa held by the appellants as amounting to a right to enter and reside in the USA within the meaning of s 36(3). As Lee J points out, the appellants would not be travelling to that country for the purpose of tourism or business and would obtain no entitlement to be admitted into the USA upon arrival.

76 The learned primary judge concluded (in paragraph 45 of his Honour's reasons) that the Tribunal did not limit itself to applying s 36(3). His Honour's assessment in that regard was based on the Tribunal's references to Article 33 of the Convention and to the decisions in *Patto v Minister for Immigration and Multicultural Affairs* (2000) 106 FCR 119, *Al-Rahal v Minister for Immigration and Multicultural Affairs* [2000] FCA 1141 and *Applicant C*.

77 I have a slight doubt about that. But, in any case, the Tribunal's conclusion that the female appellant would be given effective protection in the United States of America was expressly qualified by the condition that she be found to be a refugee in that country. At pp 10-11 of its reasons the Tribunal said this:

'It is apparent from the foregoing that the applicant has a capacity to re-enter the USA where she can access a properly functioning refugee determination process through which a significant number of Colombians and others have attained refugee status. If the applicant were found to be a refugee in the USA it is apparent that she would not face refoulement to Colombia.'

78 In my view, that is not how the doctrine of effective protection, developed by numerous decisions of this Court, is intended to work. That is, unless the third country is a party to the Convention. In *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 for example, the relevant country, France, was a party to the Convention. In *Minister for Immigration and Multicultural Affairs v Al-Sallal* (1999) 94 FCR 549 the relevant country, Jordan, though not a party to the Convention had a law (No 24 of 1973) which the Tribunal found, as a matter of fact, gave the applicant the right to reside in and re-enter Jordan.

79 In *Al-Sallal* at 559 the Full Court considered proposed refoulement direct to the asylum seeker's country of nationality (country A) or indirectly by means of refoulement to another country (country B) which would or might

refoule him or her to A. In this appeal A is Colombia and B is the USA. The Court said this:

'In the former case the decision-maker has to make a factual assessment. Is there a "real chance" of persecution for a Convention reason in country A? That real chance may exist whether or not country A is a party to the Convention. Likewise in the latter case, the decision-maker has to assess (also in terms of "real chance") the prospects of "effective protection" in country B against refoulement to country A.'

80 In my view, the Tribunal erred in law even if it did purport also to apply the doctrine of effective protection. It did this in two ways. First, by misconstruing s 36(3) and, secondly, by failing to apply the "real chance" alternative test explained by the Full Court in *Al-Sallal*.

81 As Stone J observed in *Applicant C* at [64]:

'The circumstances in which one might be "satisfied" that effective protection is available in the absence of a right (in the sense in which I have explained at [23] above) would be rare but not impossible to imagine. For example, if the third country were to give an undertaking to Australia that a certain person would be admitted and allowed to reside in that country, it might be possible to be so satisfied although the person could not be said to have thereby acquired a right.'

Conclusion

82 For the foregoing reasons I agree that the appeal should be allowed, the judgment at first instance and the decision of the Tribunal set aside, and the matter returned to the Tribunal for re-determination according to law. It is not, in those circumstances, necessary to consider the other grounds of appeal.

I certify that the preceding fifteen (15) numbered paragraphs are a true copy of the Reasons for Judgment herein of Justice Carr.

Associate:

Dated: 26 August 2003

Counsel for the Appellants:	R C Hooker (*pro bono publico)*

Counsel for the Respondent:	J D Allanson
Solicitor for the Respondent:	Blake Dawson Waldron
Date of Hearing:	30 May 2003
Date of Judgment:	27 August 2003