FEDERAL COURT OF AUSTRALIA

NBEM v Minister for Immigration and Multicultural and Indigenous Affairs

[2005] FCA 161

MIGRATION – application for permanent protection visa - removal of Taliban from power - whether Article 1C(5) of the Refugees Convention applies - interaction with s 36(3) of the *Migration Act 1958* (Cth) – decisions of single Judges of the Federal Court of Australia followed

Migration Act 1958 (Cth) s 36(3)
Refugees Convention 1951, Article 1C(5)

NBGM v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 1373 followed
QAAH of 2004 v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 1448 referred to
SWNB v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 1606 referred to

NBEM V MINISTER FOR IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS
N 697 of 2004

JACOBSON J
7 MARCH 2005
SYDNEY

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES DISTRICT REGISTRY **N 697 OF 2004**

BETWEEN:	**NBEM** **APPLICANT**
AND:	**MINISTER FOR IMMIGRATION, MULTICULTURAL AND INDIGENOUS AFFAIRS** **RESPONDENT**

JUDGE: **JACOBSON J**

DATE OF ORDER: **7 MARCH 2005**

WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The application be dismissed; and
2. The applicant pay the respondent's costs of the application.

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

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JUDGE:	**JACOBSON J**
DATE:	**7 MARCH 2005**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1. This is an application under s39B of the Judiciary Act 1903 (Cth) to review a decision of the Refugee Review Tribunal ("the RRT").

2. The applicant is a citizen of Afghanistan. He belongs to the Hazara ethnic group; is a Shia Muslim; and comes from the village of Tabarghanak Khojali in the Jaghori district of Ghazni province. Having arrived in Australia in October 1999, he lodged an application for a protection visa and was subsequently granted a temporary protection visa for a period of three years. That visa was granted on the basis that the applicant had a well founded fear of persecution by the Taliban for reason of his race (Hazara).

3. The applicant made a further application for a permanent protection visa on 11 August 2000, which was refused by a delegate for the Minister on 25 September 2003. By this time, the Taliban had been removed from power in Afghanistan. The application was rejected on the ground that the applicant did not face a real chance of persecution on return to Afghanistan by the Taliban or other groups or factions. Review of this decision was sought in the RRT on 2 October 2003. On 13 April 2004, the RRT handed down its decision, which affirmed the decision of the delegate.

4. The RRT approached its task on the basis that the applicant had already been found

to be a refugee in relation to his application for a temporary protection visa, and therefore observed that:

> *"the first question I need to address is whether, in accordance with Article 1C(5) of the Convention, he 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"*

5. The RRT went on to consider whether the applicant had ceased to be a refugee under the Refugees Convention 1951 ("the Convention") by reason of the operation of Article 1C(5): s 36(2)(a) of the *Migration Act 1958* (Cth) ("the Act"). Under that Article the Convention ceases to apply to a person owed protection obligations if that person can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he has been recognised as a refugee have ceased to exist. This is known as the "Cessation clause".

6. The RRT looked at various country information and concluded that the situation in Afghanistan had changed. The RRT observed that the applicant was granted refugee status on the basis of his fear of the Taliban, and that the Taliban was removed from power in Afghanistan in mid-November 2001. The RRT accepted that Taliban remnants remain in Afghanistan, but that the information available indicated that the Taliban no longer exists as a political movement.

> *"I find on the basis of the evidence referred to above that the Taliban have been removed from power in Afghanistan. I do not accept that there is any chance of the Taliban re-emerging as a viable political movement in Afghanistan in the reasonably foreseeable future. I do not accept on the evidence before me that there is a real chance that the Applicant will be targeted by elements of the Taliban remaining in Afghanistan because he is a Hazara or a (non-practicing) Shia Muslim. I find that because the circumstances in connexion with which the applicant was recognised as a refugee – namely his fear of the Taliban - have ceased to exist, he can no longer continue to refuse to avail himself of the protection of his country of nationality for those reasons. Therefore, Article 1C(5) of the Convention applies to the applicant."*

7. The RRT went on to consider whether, even if it was wrong in its conclusion about the application of Article 1C(5), s 36(3) of the Act was applicable. That is whether, as at the date of the decision, the applicant has a well-founded fear of being persecuted on the basis of the circumstances in connection with which he was originally recognised as a refugee if he returns now or in the reasonably foreseeable future.

8. The RRT also found that:

> *"… as a national of Afghanistan, the Applicant is able to avail himself of a right to enter and reside in that country. For the reasons given above, having regard to the changed circumstances in Afghanistan…I find that the Applicant no longer had a well-founded fear of being persecuted on the basis of the circumstances in connection with which he was originally recognised as a refugee if he returns to Afghanistan now or in the reasonably foreseeable future."*

9. Therefore, it found that s36(3) applies and Australia was taken not to have protection obligations to the Applicant.

10. The RRT then turned to consider whether, having regard to the situation in Afghanistan at the date of the decision, the Applicant has a well-founded fear of persecution for one of the five reasons set out in the Convention, but for reasons unrelated to the circumstances in connection with which he was originally recognised as a refugee: see s 36(2) of the Act.

11. I note that the findings of the RRT on this point are not the subject of the application for judicial review. However, for completeness, I note that the RRT considered the applicant's evidence at length, and after addressing each of the applicant's claims, the RRT concluded that it was not satisfied the Applicant had a well-founded fear of persecution for a Convention reason if he returns to Afghanistan, and therefore, pursuant to s36(2), Australia no longer has a protection obligation to him.

Issues for Consideration

12. The application raises issues which have been considered, and determined in a number of first instance decisions of this Court; notably *NBGM v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1373 (Emmett J) (*"NBGM"), QAAH of 2004 v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1448 (Dowsett J) (*"QAAH"), SWNB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1606 (Selway J) (*"SWNB").*

13. I propose to follow these decisions unless I am satisfied that they are plainly wrong.

Article 1C(5)

14. The applicants state, in the first of two grounds of their application, that the RRT:

> "*erred in purporting to apply Article 1C(5) in circumstances where it:*
>
> – *failed to identify the circumstances which had given rise to a well founded fear of persecution on the part of the Applicant, namely a fear of persecution arising from the beliefs and attitudes of the Taliban as part of a larger group known as the Pashtuns.*
>
> – *failed to consider whether there had been such a material change in the beliefs and attitudes and the risk posed by the Taliban, or of those Pashtuns capable of persecuting the Applicant, such that those circumstances had relevantly 'ceased to exist'; and*
>
> – *failed to assess whether the change which occurred as a result of the diminution of the Taliban constituted a substantial, effective and durable change."*

15. Article 1C(5) of the Convention states that:

> *"This Convention shall cease to apply to any person falling under the terms of Section A if:*
>
> *… a. He can no longer, because the circumstances in connection with which he had been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the country of his nationality."*

16. The applicant submits that the RRT should have considered the terms of Article 1C(5) in the context of the Convention, and not simply as the obverse of protection obligations in Article 1A(2), making reference to the principle as stated by the High Court in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 ("*Applicant A* ") that in interpreting an international treaty, primacy is to be given to the words of the text, in the context of the object and purpose; see McHugh J at 254-6, Dawson J at 240, Gummow J at 277 and Kirby J at 294.

17. The applicant argues that the circumstances in connection with which the applicant had been recognised as a refugee are not to be equated simply with the reasons why he was recognised. Rather, there must be a fundamental change in circumstances which may involve, in different cases, the wider political, social, historical and demographic situation in the country or territory concerned, and then the RRT must consider whether that change is so material that the circumstances have ceased to exist, and if so, such change must be substantial, effective and durable.

18. The applicant submits that had the RRT had interpreted Article 1C(5) in this way, it would have found information to support the proposition that Afghanistan is still suffering the effects of the Taliban's misrule, so that it could not be said that the circumstances in connection with which he had been recognised as a refugee had ceased to exist. The applicant submits that the comments of the RRT quoted above at [6], indicate that though the RRT found the Taliban would not re-emerge as a viable political force, the RRT did not, but should have, considered whether the Taliban could re-emerge as a military or religious movement such as could affect people in the applicant's position.

19. In *NBGM*, Emmett J observed that Articles 1A(2) and 1C(5) should be construed as having some symmetry in their effect. At [38] he stated that

> *"When Article 1C(5) speaks of a person no longer being able to continue to refuse to avail himself of the protection of the country of his nationality, it refers back to the prerequisite of Article 1A(2) that the person be unable or unwilling to avail himself of the protection of that country because of a well-founded fear of persecution for a Convention Reason. There is no reason for construing Article 1C(5) as contemplating anything more or less than the negativing of the circumstances that led to the conclusion that a person was a refugee within the meaning of Article 1A(2)."*

20. The applicant submits that this interpretation is 'clearly wrong' and that primacy should be given to the words of the article rather than moulding the words to suit the object and purpose and the Convention. The applicant says that Article 1C(5) specifically concerns people who have been recognised as refugees and directs attention not only to the reason for persecution but to whether there has been a fundamental chance in the circumstances in which the recognition has taken place, a change so fundamental that the circumstances in connection with which an applicant has been recognised as a refugee have ceased to exist.

21. In support of this interpretation of Article 1C(5), the applicant refers to the obligations of the contracting State in Articles 33 and 34 of the Convention, to protect a refugee and assimilate and naturalise a refugee. The applicant submits that a person who has been recognised as a refugee will be in a different position to a person who has not been recognised as a refugee. The applicant says that a State owes a refugee a duty additional to simply protecting him or her from a well founded fear of persecution, therefore, removing a refugee to their country of origin should occur in circumstances that are not simply that there has been a change in circumstances so that there is no longer a

well-founded fear of persecution.

22. The respondent submits that a holistic and purposive approach to construing the Convention causes Article 1A(2), 1C(5) and 33 to turn on the same basic notion, which is that the Convention provides international protection to persons in relevant need. Conversely, the Convention is not designed to provide protection to those with no such need.

23. The respondent argues that the reference in Article 1C(5) to the circumstances "in connection with which he has been recognised as a refugee" links Article 1C(5) with the same underlying purpose as Article 1A(2), and that the article is enlivened when a person can no longer justify an unwillingness to avail himself or herself of the protection of his or her country: *Minister for Immigration and Multicultural and Indigenous Affairs v Respondents S152/2003* (2004) 78 ALJR 678.

24. The respondent adds that even if a person's refugee status has not been formally determined to have ceased under Article 1C(5), the effect of Article 33(1) is that Australia no longer has protection obligations to that person, because the person does not have a well-founded fear of persecution, and therefore the country of origin is no longer a country where his or her "life or freedom is threatened" in a convention sense: *Minister for Immigration and Multicultural and Indigenous Affairs v Thiyagarajah* (1997) 80 FCR 543 at 557-558 per Von Doussa J.

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.

26. In *Minister for Immigration and Ethnic Affairs v Guo Wei Rong* (1997) 191 CLR 559 at 572 the High Court warns against departure from language of the Convention. The applicant seeks to import an interpretation of Article 1C(5) that the circumstances which have ceased to exist amount to a 'fundamental change' in a way which is 'substantial,

effective, and durable'. Though, as Emmet J observes in *NBGM* at [40], the terms 'substantial, effective, and durable' may provide guidance to the application of Article 1C(5), the terms ought not, in my view, be used to import a gloss on the Article which leads to an element of disconformity between Articles 1A(2) and 1C(5).

27. In my view, the RRT in the present case correctly interpreted Article 1C(5). Accordingly, there is no jurisdictional error in the RRT adopting a course of considering the material before it to determine if circumstances in connection with which the applicant was recognised as a refugee had ceased to exist.

s36(3) of the Act

28. The second ground of the application is that that the RRT:

> *" erred in law in purporting to determine the eligibility of the Applicant for a further protection visa by reference to s36(3) of the Act in circumstances where that provision had no relevant operation."*

29. The applicant submits that the RRT was in error in interpreting Article 1C(5) as having no operation independent of the requirements of s36(3). The applicant argues that s36(3) is directed to persons who have come to Australia to seek protection, and does not operate at all in relation to a person who has already obtained a protection visa. Making reference to various extrinsic material, the applicant submits that s36(3) was not intended to have any application in the circumstances of the present case, nor to have the effect of removing protection.

30. Emmet J dealt with the Article 1C(5) and its interaction with ss 36(3) and 36(2)(a) at some length. The principles stated by Emmet J, which I respectfully consider to be correct, were conveniently summarised and adopted by Selway J in *SWNB* at [12]. I adopt what his Honour said there as follows:

> *"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.*
>
> *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."

31. The applicant takes issue with the reasoning of Emmet J, and submits that this construction of section 36(3) leaves Article 1C(5) with no independent operation. However, in my view, as Selway J said at [16], 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.

32. As a result, no jurisdictional error arises from this aspect of the RRT's decision.

Conclusion

33. The applicant had not demonstrated any jurisdictional error on the part of the RRT. Therefore, the orders I make are that the application be dismissed with costs.

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

Associate:

Dated: 7 March 2005

Counsel for the Applicant:	Mr Karp
Solicitor for the Applicant:	KesselsGoddard + Ajuria
Counsel for the Respondent:	Mr S Lloyd
Solicitor for the Respondent:	Sparke Helmore
Date of Hearing:	17 February 2005
Date of Judgment:	7 March 2005