FEDERAL COURT OF AUSTRALIA

SZRTC v Minister for Immigration and Border Protection [2014] FCAFC 43

Citation:	SZRTC v Minister for Immigration and Border Protection [2014] FCAFC 43
Appeal from:	Minister for Immigration & Citizenship v SZRTC & Ors [2013] FCCA 1 Minister for Immigration, Multicultural Affairs and Citizenship v SZRUH & Anor [2013] FCCA 1164
Parties:	**SZRTC AND SZRTD v MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND REFUGEE REVIEW TRIBUNAL** **SZRUH v MINISTER FOR IMMIGRATION AND BORDER PROTECTION AND REFUGEE REVIEW TRIBUNAL**
File numbers:	NSD 740 of 2013 NSD 1864 of 2013
Judges:	**TRACEY, FLICK AND GRIFFITHS JJ**
Date of judgment:	11 April 2014
Catchwords:	**MIGRATION** – construction of s 36(3) of the *Migration Act 1958* (Cth) – consideration of "temporary residence" – whether a 'right to enter and reside' in another country is a right comprehended by s 36(3) – whether temporary period of residence must be co-extensive with period of protection obligation
Legislation:	*Border Protection Legislation Amendment Act 1999* (Cth)

	Migration Act 1958 (Cth) – ss 36(2), 36(3)
	Migration Amendment (Complementary Protection) Act 2011 (Cth)
Cases cited:	*Acosta v Gaffney,* 413 F Supp 827 (DNJ, 1976) – cited
	Lopez v Franklin, 427 F Supp 345 (DMich, 1977) – cited
	Minister for Immigration & Citizenship v SZRTC & Ors [2013] FCCA 1 – discussed
	Minister for Immigration, Multicultural Affairs and Citizenship v SZRHU [2013] FCAFC 91, (2013) 215 FCR 35 – applied
	Minister for Immigration, Multicultural Affairs and Citizenhip v SZRUH & Ors [2013] FCCA 1164 – discussed
	NAGV v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 222 CLR 161 – cited
	NBLB v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1051 – cited
	NBLC v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 149 FCR 151 – cited
	NBGM v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 150 FCR 522 – cited
	SZMWQ v Minister for Immigration and Citizenship [2010] FCAFC 97, (2010) 187 FCR 109 – cited
	WAGH v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 194, (2003) 131 FCR 269 – considered
Date of hearing:	27 February 2014
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	52

Counsel for the Appellants: Mr J Gormly

Solicitor for the Appellants: Turner Coulson Immigration Lawyers

Counsel for the Respondents: Mr G Kennett SC with Mr J Smith

Solicitor for the Respondents: DLA Piper

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 740 of 2013**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN: SZRTC

First Appellant

SZRTD

Second Appellant

AND: MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Respondent

REFUGEE REVIEW TRIBUNAL

Second Respondent

JUDGES: **TRACEY, FLICK AND GRIFFITHS JJ**
DATE OF ORDER: **11 APRIL 2014**
WHERE MADE: **SYDNEY**

THE COURT ORDERS THAT:

1. The appeal be dismissed with costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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REASONS FOR JUDGMENT

TRACEY and GRIFFITHS JJ

1. These appeals raise, once more, issues relating to the proper construction of s 36(3) of the *Migration Act 1958* (Cth) ("the Act"). Section 36(2)(a) of the Act establishes that a criterion for a protection visa is that the applicant is a "non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations" under the Convention Relating to the Status of Refugees 1951 as amended by the Protocol Relating to the Status of Refugees 1967 ("the Refugees Convention"). Section 36(3) operates as a qualification on s 36(2). At relevant times it provided that:

> "(3) Australia is taken not to have protection obligations in respect of 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."

2. Each of the appellants is a citizen of Burundi (for ease of reference the court will refer to the appellants in those terms throughout the judgment). Burundi is one of five countries which constitute the East African Community ("the EAC"). The other member countries are Kenya, Uganda, Tanzania and Rwanda. Pursuant to the Free Movement of Persons Regulations, made by the EAC, each appellant had a right to enter and "stay" in any of the other states for a period of up to six months. The central question in these appeals is whether this right was a right comprehended by s 36(3) of the Act.

3. In each case the appellant made application, in Australia, for a protection visa, the application was refused by the same delegate of the Minister for Immigration and Border Protection ("the Minister"), and the appellant sought review of the decision in the Refugee Review Tribunal ("the Tribunal").

4. In each case the Tribunal accepted that the appellant had a right to enter any other country in the EAC and reside there for up to six months. The Tribunal, nonetheless, found that this was not a "right to enter and reside" within the meaning of s 36(3) because the appellant would have to leave the other EAC country within six months. In its decision in *SZRUH* the Tribunal noted that the persecution of political opponents in Burundi was ongoing. Relying on the reasons of Lee J in *WAGH v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 194 at [34], (2003) 131 FCR 269 at 278 the Tribunal held that, while the right to reside comprehended by s 36(3) did not require permanent residence, it "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." It continued:

> "On the basis of reports such as the Human Rights Watch report of May 2012 the Tribunal is not satisfied that persecution of political opponents in Burundi will cease within the foreseeable future or within 6 months such that the applicants could return to Burundi. The Tribunal finds in the circumstances of this case that such a temporary right to enter another EAC country for up to 6 months is not sufficient to amount to a right to enter and reside."

   The joint appeal of SZRTC and SZRTD (who are husband and wife) was heard by the same Tribunal member. The quoted passage was repeated in the Tribunal's reasons in these cases.

5. In all three cases the Tribunal went on to find that each appellant had a well-founded fear of persecution in Burundi and that, as a result, he or she satisfied the s 36(2)(a) criterion. Each appeal was allowed.

6. The Minister sought judicial review of each decision made by the Tribunal.

7. The appeals in the matters of SZRTC and SZRTD were heard jointly by Judge Driver. His Honour found that the Tribunal had committed a jurisdictional error and quashed its

decision: see *Minister for Immigration v SZTRC & Ors* [2013] FCCA 1.

8. His Honour identified the jurisdictional error which he attributed to the Tribunal as being its imposition of a "temporal limitation on the word 'residence' in s.36(3)" of the Act: see at [28]. His Honour explained his reasons for so finding at [25] as follows:

> "It is, in my view, clear that ss.36(3)-(5A) should be read together and interpreted by reference to each subsection. Parliament has not specified in s.36(3) what length of time would constitute 'temporary residence' for the purposes of s.36(3). It is an error to seek to impose some arbitrary temporal limitation on what constitutes temporary residence or residence generally. ... The determination of whether a period of residence will be sufficient for the purposes of s.36(3) does not depend upon the interpretation of the words 'temporarily' and 'residence' in isolation. Those words should be construed by reference to the qualifying provisions in ss.36(4), (5) and (5A). ... That assessment requires an analysis of the legal rights of residence in a particular country and, possibly, the practical arrangements for accessing protection in a country."

9. His Honour continued (at [27]):

> "Further, the Tribunal's concern over the question whether a period of six months would be sufficient to avoid the harm the visa applicants feared in Burundi cannot be addressed properly without considering the question of whether effective protection from that harm could be accessed in another EAC country. It is an error to limit consideration to whether the length of time a person can stay under a general legal right would be sufficient to avoid the feared harm in the person's country of origin. It is necessary also to consider whether that period would be sufficient to access more specific protection for a longer period, which almost inevitably involves consideration of ss.36(4)-(5A), and in particular subsections (5) and (5A)."

10. The Minister's application in SZRUH was determined by Judge Cameron some four months later: see *Minister for Immigration, Multicultural Affairs and Citizenhip v SZRUH & Ors* [2013] FCCA 1164.

11. Like Judge Driver, Judge Cameron found that the Tribunal's decision was affected by jurisdictional error. He identified that error at [20]-[21] as follows:

> "20. As noted earlier, it is only once it is determined that an applicant for a protection visa is entitled to reside in a country to which he or she has a right of entry that it becomes necessary to consider whether any of the circumstances referred to in sub-ss.36(4), (5) and (5A) apply and negative the exclusionary operation of sub-s.36(3). Consequently, as a result of concluding that the right of residence referred to in s.36(3) had to be co-extensive with the duration of an applicant's need for protection, thus qualifying the meaning of 'to reside' in sub-s.36(3) by applying concepts connected with sub-ss.36(4), (5) and (5A), the Tribunal erred. Instead of proceeding in that manner, the Tribunal should have first determined whether the first respondent had a right to reside in a third country and then whether that right was rendered irrelevant to its considerations because circumstances existed which caused one or more of the exceptions in sub-ss.36(4), (5) or (5A) to apply.
>
> 21. Because the Tribunal misunderstood the test it had to apply, it constructively failed to exercise its jurisdiction."

In reaching these conclusions his Honour specifically disagreed with Judge Driver's views that the words "temporarily" and "residence" were to be construed by reference to the qualifying provisions in sub-sections (4), (5) and (5A) of s 36 and that s 36(3) contained a temporal element which required a decision maker to determine how long an applicant would need to stay in the third country "in order to access the protection envisaged by those

sub-sections". His Honour held that the exceptions contained in sub-sections (4), (5) and (5A) of s 36 were not enlivened unless and until the decision maker had determined that sub-section (3) applied in a given case: see at [13]-[14]. His Honour considered that temporary residence contemplated by s 36(3) "includes a stay of any length as long as it involves a pause in a person's travels": see at [19].

12. SZRUH appealed from Judge Cameron's judgment on the following grounds:

> "1. The Court erred in that it misconstrued s 36(3)-(5A) *Migration Act* 1958 (Cth) (the Act).
>
> 2. The Court erred in failing to find the second respondent Tribunal had correctly applied s 36(3) of the Act in determining the temporality of the right of 'entry and residence'.
>
> 3. The Court erred in incorrectly characterising the Tribunal as having applied concepts in s 36(4), (5) and (5A) of the Act in concluding that the right of residence referred to in s 36(3) had to be co-extensive with the duration of the non-citizen's need for protection.
>
> 4. The Court erred in finding there was no limitation in s 36(3) of the Act on how temporary the period of 'residence' might be as to involve a pause in the non-citizen's travels.
>
> 5. The Court erred in finding that 'residence' in s 36(3) required only a right of stay in the third country for a period long enough to require the non-citizen to obtain accommodation."

13. SZRTC and SZRTD appealed from Judge Driver's judgment on the following grounds:

> "1. The Court erred in that it misconstrued ss 36(3)-(5A) *Migration Act* 1958 (Cth) (the *Act*).
>
> 2. The Court erred in finding that the second respondent (the Tribunal) committed a jurisdictional error by imposing a temporal limitation on the word 'residence' in s 36(3) of the *Act* in isolation from consideration of ss 36(4)-(5A).
>
> 3. The Court erred in finding that the Tribunal could not properly address the question of whether a period of six (6) months would be sufficient to avoid harm in Burundi without considering ss 36(4)-(5A) of the *Act*, in particular ss 36(5)-(5A).
>
> 4. The Court erred in construing ss 36(5)-(5A) of the *Act* as being concerned with return to the country from which the person had fled.
>
> 5. The Court erred in construing ss 36(4)-(5A) of the *Act* to be capable of applying to extend the period of 'residence' in s 36(3).
>
> 6. The Court erred in failing to find the Tribunal had correctly applied ss 36(2)-(5A) of the *Act* in determining the temporality of the right of 'entry and residence' properly having regard to the circumstances of the case, including a correct characterisation of the existing legal rights of both entry and stay within member countries of the East African Community."

14. In this latter appeal the Minister filed a notice of contention seeking to uphold Judge Driver's judgment on the bases that s 36(3) of the Act was engaged, subject to the qualifications contained in s 36(4), (5) or (5A), by the existence of a right to enter and reside for any duration in a third country and that the right to enter and reside for up to six

months in any EAC country satisfied the "right to enter and reside" requirement within the meaning of s 36(3).

THE LEGISLATION

15. Section 36 of the Act relevantly provided that:

> "(1) There is a class of visas to be known as protection visas.
>
> (2) A criterion for a protection visa is that the applicant for the visa is:
>
> (a) a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugee 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, subsection (3) does not apply in relation to a country in respect of which:
>
> (a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or
>
> (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.
>
> (5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:
>
> (a) the 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.
>
> (5A) Also, subsection (3) does not apply in relation to a country if:
>
> (a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and
>
> (b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country."

16. Sub-sections (3), (4) and (5) were added by the *Border Protection Legislation Amendment Act 1999* (Cth). Sub-section (5A) was included by the *Migration Amendment (Complementary Protection) Act 2011* (Cth).

17. The Supplementary Explanatory Memorandum for the Bill which became the 1999 Act established that a purpose of the amendments then introduced (of which sub-sections (3)-(5) form part) was to counter forum shopping by refugees who could find protection in countries other than Australia. Paragraph 5 of the Memorandum said that:

> "The purpose of proposed subsections 36(3), (4) and (5) is to ensure that a protection visa applicant will not be considered to be lacking the protection of another country if without valid reason, based on a well-founded fear of persecution, he or she has not taken all possible steps to access that protection."

18. The Minister's Second Reading Speech contained the following passages:

> "The Refugees Convention and Protocol have, from inception, been intended to provide asylum to refugees with no other country to turn to.
>
> Increasingly, however, it has been observed that asylum seekers are taking advantage of the convention's arrangements.
>
> Some refugee claimants may be nationals of more than one country, or have rights of return or entry to another country, where they would be protected against persecution.
>
> Such people attempt to use the refugee process as a means of obtaining residence in the country of their choice, without taking reasonable steps to avail themselves of protection which might already be available to them elsewhere.
>
> This practice, widely referred to as 'forum shopping', represents an increasing problem faced by Australia and other countries viewed as desirable migration destinations."

19. Paragraph 99 of the Explanatory Memorandum for the Bill which became the 2011 Act explained that:

> "The purpose of new subsection 36(5A) is to ensure that subsection 36(3) does not operate in relation to a person who could have sought effective protection in another country apart from Australia if the non-citizen has a well-founded fear that that country will return the non-citizen to a different country and the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to that different country."

THE APPELLANTS' SUBMISSIONS

20. The appellants contended that the Tribunal had not erred in its construction of s 36(3) and that the Federal Circuit Court judges had erred in holding to the contrary albeit for differing reasons.

21. The appellants argued that the phrase "a right to… reside in … temporarily" in s 36(3) should be construed as prescribing a period, short of permanent residence, but sufficient to provide on-going protection against the persecution from which an applicant was fleeing. This construction was suggested, in part, by what was said to be "the inadequacy of s 36(5) to provide the same protection [as s 36(3)] against return to the country of origin …". This was because, it was submitted, Parliament did not intend s 36(5) "to remedy the situation where the need for protection in the country of origin exceeded the period of a 'right of entry and residence' in the third country" and because the words "another country" in s 36(5) did not refer to the appellant's country of origin "except in circumstances where the non-citizen has a well-founded fear that the third country will deny or abrogate the non-citizen's 'right

to enter and reside' by returning the non-citizen to the country of origin."

22. At another point in their submissions, however, the appellants appeared to accept that s 36(5) operates as a qualification on s 36(3) without impinging on the construction of the latter sub-section. So much is implicit in their submission that "[t]he intention of s 36(5) was to provide a remedy where there was a well-founded fear the third country might deny or abrogate that 'right of entry and residence' recognised by s 36(3)."

23. The appellants, nonetheless, maintained that the words "reside" and "temporarily" each carried a "temporal meaning". By this we understood the appellants to mean that, in cases such as the present, "temporarily" must be understood to mean an indefinite period which would not expire until the applicant ceased having cause to fear persecution for a Convention reason in his or her country of origin.

CONSIDERATION

24. Section 36 of the Act contains a cascading series of qualifications. Sub-section (3) operates as a qualification on sub-section (2). Sub-sections (4)-(5A) then operate as qualifications on sub-section (3): see *NBLB v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1051 at [38] (Emmett J), a construction endorsed on appeal by Bennett and Graham JJ; *NBLC v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 149 FCR 151 at 155, 166-7; and see also *NBGM v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 150 FCR 522 at 529 (Black CJ).

25. The correct approach is, therefore, for the decision-maker to determine whether an applicant satisfies one or more of the criteria for a protection visa prescribed by s 36(2). If the answer to that question is in the affirmative it is necessary for the decision-maker then to turn to s 36(3) and determine whether or not the applicant is a person to whom that sub-section applies. If it does not, the "gateway", created by s 36(2) to the granting of a visa remains open and there is no occasion to consider whether one or more of the qualifications to s 36(3) applies. If s 36(3) is found to apply, the decision-maker must then determine whether one or more of the qualifications contained in sub-sections (4), (5) and (5A), which ensure that Australia's international obligations under the Refugee Convention are met, limit the operation of s 36(3) and keep the "gateway" open.

26. This is the context in which s 36(3) falls to be construed.

27. By s 36(3) Australia is deemed 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" any third country. The relevant question posed by the sub-section is whether it can be said, having regard to all of the circumstances, that an applicant for a protection visa has a right (in the broad sense recognised by the Court in *Minister for Immigration, Multicultural Affairs and Citizenship v SZRHU* [2013] FCAFC 91, (2013) 215 FCR 35) to "reside .... temporarily" in the third country. There is an obvious tension between the stability which is suggested by the word "reside" and the transience implied by the word "temporarily". That, however, is a tension which must be resolved on the facts in each case. It is not a warrant for extending the meaning of "temporarily" such that it covers the whole of the period (which may or may not be able to be ascertained at the time at which the relevant decision is made) during which the applicant remains subject to persecution in his or her country of origin.

28. In the context of s 36(3) the word "temporarily" does not introduce any temporal limitation. Such a limitation may be inherent in the word "reside" because residence in a place suggests something more than a short or passing visit. Any such inherent temporal limitation is not, however, linked with protection obligations owed to an applicant. Such

protection is provided by the qualifications which are to be found in sub-sections (4), (5) and (5A) of s 36. These provisions may well be otiose or of marginal utility were the period of residence contemplated by s 36(3) to be held to be co-extensive with the period during which the applicant stood in need of protection under the Refugee Convention.

29. The Tribunal was led to adopt a different construction of s 36(3) by some observations of Lee J in *WAGH v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 194 at [34], (2003) 131 FCR 269 at 278. His Honour there said that:

> "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 acknowledgment 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."

30. These observations were made before the High Court, in *NAGV v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161, rejected the notion that a doctrine of "effective protection" should be read into s 36(2) of the Act and before a Full Court of this Court, in *SZRHU*, held that the "right" referred to in s 36(3) was not confined to legally enforceable rights but extended to a liberty, permission or privilege lawfully given. As the passage quoted from Lee J's reasons makes clear, his approach to the construction of the word "temporarily" was informed by both of these concepts. His Honour was also moved by what he saw as a perceived need to construe s 36(3) in a manner that was consistent with Australia's obligations to refugees under the Refugee Convention and international law: see at 277-278 [30]. The construction favoured by his Honour was not adopted by other members of the Full Court in *WAGH*; nor has it subsequently been adopted in other cases.

31. A finding that it was likely that the circumstances in the appellants' home country which gave rise to protection obligations would persist or be likely to persist for more than six months would not, in our opinion, compel the conclusion that the appellants did not have a right to reside temporarily in the third country. On the contrary, we consider that the appellants' right to enter other EAC countries and stay there for up to six months, constituted such a right.

32. It would be open to a decision-maker, consistently with the provisions of s 36(3), to take the view that the appellants' right to enter and reside in another EAC country for up to six months constituted a right of temporary residence. If the decision-maker so decided a question would then arise as to what was likely to occur at the conclusion of the six month period. One possibility might be that the third country would extend protection to the applicant if there was a basis for apprehending persecution of the applicant in his or her country of origin. Another possibility might be that the applicant could move on to another EAC country for a further six month period. If, however, at the expiry of the first six months, there was reason to expect that the third country would return the applicant to his or her country of origin or send him or her somewhere else where the applicant might have reason to fear persecution, the decision-maker would be required to determine whether or not sub-sections 36(4), (5) or (5A) were engaged. In this way the legislative purposes of avoiding forum shopping and ensuring that Australia's protection obligations under the Refugee Convention were honoured would both be satisfied.

33. In our view the Tribunal, in each case, applied the wrong test when it held that the temporary period of residence, contemplated by s 36(3), must be co-extensive with the period during which protection obligations persisted in relation to an applicant by reason of the circumstances confronting the applicant in his or her country of origin. This was a material error.

34. In *SZRHU* Judge Cameron adopted a construction of s 36(3) which substantially accords with the meaning which we favour. Specifically, he found that the Tribunal erred by importing temporal considerations relating to protection obligations into s 36(3). We do not, however, consider that "a stay of *any* length" in a third country so long as it involves a "pause in a person's travel" necessarily constitutes temporary residence. Nor do we consider that to satisfy any "abode" element of temporary residence, the affected person "would have to be able to stay in the third country for a period which would ordinarily require him or her to obtain accommodation." The appeal from his decision should be dismissed.

35. In *SZRTC* and *SZRTD* Judge Driver held that the words "temporarily" and "residence" in s 36(3) "should be construed by reference to the qualifying provisions in ss.36(4), (5) and (5A)." His Honour would have gone further than the Tribunal, holding that it was necessary for it, in applying s 36(3), to consider whether the period during which an applicant had a right to stay in the third country would be sufficient to access more specific protection for a longer period, which would, almost inevitably, involve it in consideration of ss 36(4)-(5A), and in particular sub-sections (5) and (5A). In doing so, in our respectful opinion, he erred. Nonetheless, the orders which he made quashing the Tribunal's decision and remitting the two matters for hearing according to law were correct, albeit for the wrong reasons. The orders which he made were supportable because the Tribunal made the same error in these cases as it did in *SZRUH*. The appeals in *SZRTC* and *SZRTD* should, therefore, also be dismissed by upholding the Minister's notice of contention.

36. Each appeal should be remitted to the Tribunal to be heard and determined, consistently with these reasons, and on the basis of such relevant material as may be before it. It will be necessary for the Tribunal to consider, on that material, whether any of the provisions of sub-sections 36(4), (5) or (5A) operate to qualify the effect of s 36(3). There was evidence relating to a number of matters before the Tribunal on the hearing of each of the appeals from the delegate with which, because of the view it took of the meaning of s 36(3), it did not deal. There was, for example, evidence that each of the member countries of the EAC was a signatory to the Refugee Convention. This raised the possibility of protection applications being made in those countries while the appellant was present in them. Whether such protection could be regarded as effective, however, may have been called into question by the appellants. Each gave evidence to the Tribunal which raised the prospect that his or her persecutors in Burundi might pursue him or her into other EAC countries. It may also be observed that, although the Tribunal referred to Regulation 5 of the EAC Regulations on the Free Movement of Persons as the source of the right of citizens of Burundi to enter other EAC countries and receive a pass "to stay for up to six months", it did not, in its findings, refer to Regulation 5.4 and 5.5 which provides for a person holding such a pass to apply, prior to its expiry, for an extension and the obligation on the third country to "renew the pass where the applicant provides justification for a longer period of stay." These are all matters which are of potential relevance in determining whether the exclusionary provisions of s 36(3) are, in the circumstances, qualified by the succeeding sub-sections.

DISPOSITION

37. Each of the appeals should be dismissed with costs.

I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the

Reasons for Judgment herein of the Honourable Justices Tracey and Griffiths.

Associate:

Dated: 11 April 2014

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 740 of 2013**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN: **SZRTC**

First Appellant

SZRTD

Second Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**

First Respondent

REFUGEE REVIEW TRIBUNAL

Second Respondent

JUDGES: **TRACEY, FLICK AND GRIFFITHS JJ**

DATE: **11 APRIL 2014**
PLACE: **SYDNEY**

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 1864 of 2013**

ON APPEAL FROM THE FEDERAL CIRCUIT COURT OF AUSTRALIA

BETWEEN: **SZRUH**

Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**

First Respondent

REFUGEE REVIEW TRIBUNAL

Second Respondent

JUDGES: **TRACEY, FLICK AND GRIFFITHS JJ**
DATE: **11 APRIL 2014**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

FLICK J

38. There are presently before the Court two appeals from decisions of two Judges of the Federal Circuit Court of Australia.

39. The manner in which each of the *Applications* as filed in the Federal Circuit Court were argued and the issues resolved have been set forth by Tracey and Griffiths JJ. That detail need not be repeated.

40. In issue once again is the meaning of s 36(3) of the *Migration Act 1958* (Cth) ("*Migration Act*"). That sub-section provides as follows:

> Australia is taken not to have protection obligations in respect of 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.

The meaning of the phrase "*a right to enter and reside*" was addressed by the Full Court in *Minister for Immigration, Multicultural Affairs and Citizenship v SZRHU* [2013] FCAFC 91, (2013) 215 FCR 35. All members of that Court concluded that that phrase was not confined in its operation to legally enforceable rights. That Court did not then address and did not need to resolve any question as to the meaning and application of the phrase "*reside in, whether temporarily or permanently*".

41. But in *WAGH v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCAFC 194, (2003) 131 FCR 269 a differently constituted Full Court did have to consider whether the ability of passport holders to enter and remain in the United States for a period of up to six months for the purposes of business and tourism fell within s 36(3). Lee and Carr JJ separately concluded that it did not. In so concluding Lee J reasoned:

> [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: (2003) 131 FCR at 279 – 280.

Carr J agreed with Lee J. Hill J dissented. To the extent that Carr J stated that "*the word 'right' in s 36(3) means a legally enforceable right*" ([2003] FCAFC 194 at [74], (2003) 131 FCR at 285), that conclusion can no longer survive the decision in *SZRHU,* supra. But, of present relevance are the following observations of Lee J in *WAGH*, supra:

> [34] ... 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: (2003) 131 FCR at 278.

Those observations, it should be noted, were *obiter*. It may be questioned whether the agreement expressed by Carr J, in the reasoning of Lee J, extended to agreement with the conclusion expressed at [34]. Hill J approached the issue differently and tested the content of the term "*reside*" by reference to whether the time spent in a country by a tourist could constitute "*residence*": [2003] FCAFC 194 at [62] to [65], (2003) 131 FCR at 283 – 284. It is respectfully concluded that the *obiter* observations of Lee J should not be followed.

42. In the present appeals, the Appellants could enter and remain in any of five countries which constitute the East African Community. But after six months they had to leave.

43. In the absence of any reason to question the safety and protection afforded to each of the Appellants in the present appeals after entering one or other of these five countries, their ability to do so – even though subject to a maximum stay of six months – constituted "*a right to enter and reside*" for the purposes of s 36(3). It is separately concluded that it is erroneous to construe the phrase "*reside ... temporarily...*" as requiring a period of residence commensurate with the period of time during which a fear of persecution is likely to continue. The Tribunal was wrong to so construe and apply s 36(3).

44. It is, with respect, a mistake to construe s 36(3) such that any period of "*temporary*"

residence has to be co-extensive with any particular period of time, whether related to the perceived period of persecution in a claimant's country of origin or otherwise. To so construe the term "*temporary*" is to put an unwarranted gloss upon that term. The term "*temporary*" has simply been used by the Parliamentary draftsman in contradistinction to "*permanent*". The term "*temporary*" is not to be construed, for example, as meaning "*indefinite*". The reasons for a claimant being exposed to persecution in a country of origin may well continue for a considerable or an indefinite period of time. But a claimant who can enter and reside in another country in safety cannot invoke s 36(3) simply because the period of such residence is not commensurate with the "*indefinite*" period of time during which the fear of persecution is likely to continue. If that were the case, a period of residence may become so extended or so indefinite as to fall into – or run the real risk of falling into – a right of "*permanent*" residence.

45. Contrary to the submission of the Appellants, the right of a claimant seeking asylum "*to enter and reside*" in another country is in no way comparable to the right of a citizen "*to enter and remain*" in the country of his citizenship. Neither the decisions in *Acosta v Gaffney*, 413 F Supp 827 (DNJ, 1976) and *Lopez v Franklin*, 427 F Supp 345 (DMich, 1977), nor the decision in *SZRHU* ([2013] FCAFC 91 at [109], (2013) 215 FCR at 59), provide any support for a conclusion that an asylum seeker may enter and remain "*for as long as one sees fit…*".

46. At some point in time this Court may have to construe in greater detail what is meant by the term "*reside*". But the precise perimeters of that term are in no need of present resolution. At the end of the six month period of time applicable in the present appeals, each of the Appellants may have to "*move on*" (for example) to one or other of the remaining East African Community countries in order to gain protection from the persecution that each was fleeing. Each of the Appellants, indeed, may be required to "*move on*" on more than one occasion. But any inconvenience that may be thereby occasioned cannot deny their right to enter and remain in one or other of those countries of either the character of "*residence*" or "*temporary*" residence.

47. It remains a question of fact in each individual case to determine whether the ability of a claimant to enter another country constitutes a "*right*" and a question of fact as to whether the conditions in which a claimant lives in that country constitutes "*residence*" and whether the period of time during which a claimant can remain constitutes "*temporary residence*". A period of time during which a claimant may remain, for example, may be so transitory as to not constitute "*temporary*" residence.

48. It has previously been left open for future consideration "*whether a person who has a 'right to enter and reside' in another country may so confront economic or physical circumstances that he may not truly be said to have such a 'right'…*": *SZMWQ v Minister for Immigration and Citizenship* [2010] FCAFC 97 at [110], (2010) 187 FCR at 139. A right to cross a border into a third country but to thereafter remain in economic or physical conditions so devoid of any acceptable standard may be found to not constitute a right of the kind being described. The present appeals, however, again do not require such questions to be presently resolved.

49. Sections 36(4) to (5A) do not require s 36(3) to be read in such a manner that imported into s 36(3) is the notion that the right referred to has to be a right to remain for so long as is necessary to protect the claimant from persecution.

50. Such a conclusion, it is considered, flows inevitably from the terms of s 36(3). No different construction is warranted if s 36(3) is construed in the context of s 36 in its entirety or in the more specific context of ss 36(4) to (5A). Nor does the *Supplementary Explanatory Memorandum* referred to by Tracey and Griffiths JJ provide any support for any different

construction.

51. It is noted that Senior Counsel for the Minister correctly submitted that success on the appeal necessarily meant that the decisions of the Tribunal were to be set aside. It would not be possible for one or other of the parties to "*hold on to*" favourable facts and seek to revisit the rest. It is also noted that Senior Counsel did not seek to disturb the orders for costs made by the Federal Circuit Court but did seek the costs of the appeal, if successful. Such an order should be made.

52. Concurrence is expressed with the orders proposed by Tracey and Griffiths JJ.

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

Associate:

Dated: 11 April 2014