FEDERAL COURT OF AUSTRALIA

SZOAU v Minister for Immigration and Citizenship [2012] FCAFC 33

Citation:	SZOAU v Minister for Immigration and Citizenship [2012] FCAFC 33
Appeal from:	SZOAU v Minister for Immigration & Anor [2011] FMCA 820
Parties:	**SZOAU v MINISTER FOR IMMIGRATION AND CITIZENSHIP and REFUGEE REVIEW TRIBUNAL**
File number:	NSD 2120 of 2011
Judges:	**BUCHANAN, BARKER AND ROBERTSON JJ**
Date of judgment:	21 March 2012
Catchwords:	**MIGRATION** – statutory interpretation – meaning of "national" in s 91N(1) of the *Migration Act 1958* (Cth) – "effective national" – "formal national" – legislative history of Subdivision AK of Div 3 of Part 2 – Refugees Convention – dual nationality – fear of persecution – intention of Parliament – whether ambiguity or uncertainty
Legislation:	*Acts Interpretation Act 1901* (Cth) s 15AA *Border Protection Legislation Amendment Act 1999* (Cth) *Migration Act 1958* (Cth) ss 36, 36(2), 36(3), 36(4), 36(5), 36(6), 36(7), 46, 47, 91M, 91N(1), 91P(2), 91Q, subdivision AK of Div 3 of Part 2
Cases cited:	*Australian Education Union v Department of Education and Children's Services* [2012] HCA 3 referred to *KK and ors (Nationality: North Korea) Korea CG* [2011] UKUT 92 (IAC) cited *Koe v Minister for Immigration and Multicultural Affairs* (1997) 74 FCR 508 referred to *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 referred to *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 referred to *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 cited
Date of hearing:	1 March 2012

Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	76
Counsel for the Appellant:	MJ Leeming SC with L Karp
Solicitor for the Appellant:	Legal Aid Commission of New South Wales
Counsel for the First Respondent:	SB Lloyd SC with A Mitchelmore
Solicitor for the First Respondent:	DLA Piper Australia
Counsel for the Second Respondent:	The Second Respondent did not appear

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2120 of 2011**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZOAU** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**BUCHANAN, BARKER AND ROBERTSON JJ**
DATE OF ORDER:	**21 MARCH 2012**
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.

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2120 of 2011**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZOAU** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **First Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**BUCHANAN, BARKER AND ROBERTSON JJ**
DATE:	**21 MARCH 2012**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

BUCHANAN J:

1 The difficulty for the appellant may be shortly stated. He was born in North Korea of North Korean parents. He is a national of North Korea. Under the law of South Korea, he is also a national of South Korea. He therefore, at least formally, has two nationalities. Under the *Migration Act 1958* (Cth) ("the Act"), a holder of dual or multiple nationality may normally not make an application for a protection visa, claiming to be a refugee. Regardless of an applicant's claims to fear persecution, even in each country of which he or she is a national, such an application would not be valid without a special dispensation from the Minister, which the appellant in the present case does not have.

2 Under the Act, only a valid application for a visa may be considered (s 47(3)). The combined effect of s 91N(1) and s 91P(2) of the Act is that the appellant's application for a protection visa was not a valid application unless written notice had been given to the appellant by the Minister under s 91Q of the Act, which would relieve against the invalidity of his application. No such written notice had been given.

3 Despite any assistance which might be available from s 91M in any area of uncertainty in the construction of the relevant subdivision of the Act, there is no ambiguity or lack of certainty in the relevant statutory provisions which apply here, with the result that they must be construed according to their plain meaning.

4 That produces a strange result. Section 36 of the Act deals with claims for protection visas. It clearly contemplates that a holder of dual nationality (or someone with rights of entry and residence in more than one country) may be a genuine refugee and may have a well-founded fear of persecution in each such country. Dual, or multiple, nationality is not a bar to the assessment of such an application or to a conclusion that Australia owes such a person an obligation to protect them. The effect of the operation of ss 91N(1) and 91P(1), to which I have referred, is that a genuine claim for protection from a true refugee who holds dual nationality may not even be considered on its merits unless the Minister, in a non-compellable and substantially unreviewable exercise of discretion under s 91Q of the Act, makes a formal determination permitting consideration of the application on the ground that it is in the public interest to do so. That determination must then be laid, with supporting reasons, before both Houses of Parliament. Only in that circumstance may a holder of dual nationality obtain a right to consideration of a claim for refugee status, regardless of the peril of his or her situation.

5 The statutory language, which erects this barrier and prevents consideration of a genuine claim, appears to me to be intractable. Parliament must be taken to have intended such an apparently inequitable distribution of rights under the Act.

6 In the present case, the application for a visa was not valid. A protection visa could not be granted, or even be considered, regardless of the circumstances of the appellant. The decision of the Refugee Review Tribunal, based on its findings of fact, was therefore correct. No jurisdictional error was committed. The findings of fact were not reviewable in the court below, and are not reviewable in this Court.

7 The policy of preventing consideration of the claims of true refugees, who however formally hold dual nationality, unless specific permission is given in individual cases, is a matter beyond the power of this Court to address.

8 I otherwise agree with Robertson J.

I certify that the preceding eight (8) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan.

Associate:

Dated: 21 March 2012

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2120 of 2011**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN:	**SZOAU** **Appellant**
AND:	**MINISTER FOR IMMIGRATION AND CITIZENSHIP** **Respondent**
	REFUGEE REVIEW TRIBUNAL **Second Respondent**
JUDGES:	**BUCHANAN, BARKER AND ROBERTSON JJ**
DATE:	**21 MARCH 2012**
PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

BARKER J:

9 For the reasons given by Buchanan and Robertson JJ in their reasons for judgment, with which I agree, this appeal must be dismissed with costs. I would however like to add a few observations of my own.

10 As delightfully explained by Professor Karl N Llewellyn in his article "Remarks on the theory of appellate decision and the rules or canons about how statutes are to be construed" (1950) 3 Vand L Rev 395 at 401-406, statutory interpretation speaks a "diplomatic tongue" and there is a technical framework for manoeuvre that permits one party to "thrust" for one interpretation and another party to "parry" for another. As Professor Llewellyn suggested, there are two opposing canons on almost every point. Thus one party might contend that a statute cannot go beyond its text, to which the other might reply that, to effect its purpose, the statute may be implemented beyond its text. And so the debate goes on.

11 In Australia more recently the plurality of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 stated:

> … the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction [footnote omitted] may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

12 In this case, in effect, the respondent Minister contends that when the text of the *Migration Act 1958* (Cth) (Migration Act), particularly s 36, s 46, s 47 and the provisions of subdivision AK Div 3 of Part 2 are taken into account, the legal meaning of the word "national" in s 91N(1) is its literal meaning and there is no room for it to be construed as meaning "effective national".

13 On the other hand, the appellant contends that when one has regard to the purpose that subdivision AK is intended to have, as expressed in s 91M, "national" should be construed to mean "effective national", not merely a person who is a "formal national" according to the law of a third country.

14 The appellant also contends that the literal meaning of the word "national" contended for by the Minister produces a harsh or unsatisfactory outcome, in that, if correct, a dual national, like the appellant, has no way of seeking a ruling of a tribunal or Court concerning his or her claim that the third country will not effectively recognise them as a national. In putting that contention, the appellant recognises that under s 91Q the Minister may exercise a power in effect to allow an applicant to make a valid application for a protection visa, but says that this is an inadequate protection for persons in the appellant's circumstances.

15 This is a case in which it seems to me that the proper construction or meaning to be given to the word "national" in s 91N(1) cannot be resolved sensibly without regard to the legislative history of subdivision AK. Subdivision AK was introduced with a raft of amendments to the Migration Act in 1999 (see *Border Protection Legislation Amendment Act 1999* (Cth)) (1999 amendments). The amendments then introduced also included amendments to s 36, which added the current subsections (3) to (7).

16 It is well understood that the Migration Act has been amended from time to time to deal with the question of non-citizen entries into Australia. The decision of the High Court of Australia in *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161; [2005] HCA 6 (*NAGV and NAGW*) provides a little of the history of current Australian refugee law in this regard. I will return to that decision shortly.

17 Some of the legislative history and the apparent reasons for the introduction of 1999 amendments, including subdivision AK, have also been addressed in the reasons for judgment of Robertson J.

18 It is also pertinent to an understanding of the present legal meaning of the word "national" in s 91N(1), in my view, to note the development of a doctrine of "effective nationality" in the Federal Court of Australia prior to the 1999 amendments and prior to the decision of the High Court in *NAGV and NAGW*.

19 Prior to the 1999 amendments, at material times, s 36 of the Migration Act did not include subsections (3) to (7). At that time, a person in the position of the current appellant was able to validly apply to the Minister for a protection visa. Under s 36(2) at that time:

> A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under [the Convention].

20 In *Koe v Minister for Immigration and Multicultural Affairs* (1997) 74 FCR 508 (*Koe*), the Full Court of this Court held, in relation to the legislation as it then stood, that the failure of the Refugee Review Tribunal to consider whether the applicant, who was born in East Timor and had both Indonesian and Portuguese nationality, was an effective national of Portugal, constituted an error of law. The Tribunal had decided that the applicant would face a real chance of persecution on a Convention ground if returned to Indonesia, but decided that he would be safe in Portugal.

21 The Full Court, in applying the criterion then stated in s 36(2), had regard to Art 1A(2) of the Convention and said that the reference in it to nationality was a reference to effective, not merely formal, nationality.

22 Then, in *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (1997) 80 FCR 543 (*Thiyagarajah*) the Full Court of this Court, again in relation to the legislation as it then stood, held that, as a matter of domestic and international law, Australia did not owe protection obligations to a respondent who had effective protection in a third country.

23 Justice von Doussa (and with whom Moore and Sackville JJ agreed) said, at 562, that it was not necessary for the purposes of disposing of the 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. His Honour considered it was sufficient to conclude that international law did 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. His Honour noted that the expression "effective protection" was used in the submissions of the Minister in the appeal and, in the context of the obligations arising under the Refugees Convention, the expression meant protection which would effectively ensure that there is not a breach of Art 33 if the person happens to be a refugee.

24 One might reasonably comment that, from the Minister's point of view, the decision in *Koe* may have been considered to add an unnecessary layer of decision-making, whereas the decision in *Thiyagarajah* did not suffer from any such inconvenience.

25 Following *Thiyagarajah*, a number of decisions of the Federal Court applied that decision, although others questioned the foundations of a "doctrine" of effective nationality or effective protection.

26 Leaving the reception of such a doctrine to one side for the moment, it is pertinent to note that it was in the course of this historical sequence that the 1999 amendments to the Migration Act were introduced and passed into law. As noted above, they introduced amendments to s 36 by adding subsections (3) to (7), as well as subdivision AK.

27 Subsections (3) to (7) of s 36 provide as follows:

> (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.
>
> *Determining nationality*
>
> (6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.
>
> (7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

28 Subsections (3) to (5) of s 36, in my view, directly affected the decision of the Full Court in *Koe*. Whereas that decision effectively required the Minister to deal with the question whether an applicant for a protection visa had effective nationality and thus effective protection in a third country, subsection (3) expressly provides that 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 a enter and reside in," any country apart from Australia, including countries of which the non-citizen is a national.

29 On the face of it, where a person is a dual national they need to be able to demonstrate that they have taken steps to enter in and reside in a third country of which they are apparently a dual national.

30 Subsections (4) and (5) qualify that requirement where the non-citizen has a well founded fear of being persecuted in the third country or a well founded fear that that country will return the non-citizen to another country in which they will be persecuted.

31 It might be seen that in these respects the considerations in subsections (4) and (5) reflect something of the substance of the effective protection concerns expressed in *Koe*.

32 In *NAGV and NAGW*, at [58], the majority noted that these amendments to s 36 were legislative provisions that had not been achieved years earlier by quite differently expressed alterations to the Migration Act. But their Honours noted, at [60], that the interpretation of the revised s 36 did not arise on that appeal.

33 Justice Kirby, in a separate but concurring judgment, also noted the 1999 amendments, but said, at [88], they did not control the interpretation of s 36(2) in that appeal. His Honour, however, added at [88] that:

> they do demonstrate that legislative techniques are available which might have been used by the Parliament to limit the scope of the 'protection obligations' owed by Australia.

34 What was in issue in *NAGV and NAGW* was the correctness of the apparent doctrine of effective protection enunciated in *Thiyagarajah*. Ultimately, as described in the headnote to the report of the case, the majority in *NAGV and NAGW* held (Kirby J concurring) that the phrase in s 36(2) "to whom Australia has protection obligations under [the Convention]" did no more than describe a person who was a refugee within the meaning of Art 1 of the Refugees Convention. The circumstance that Australia might not breach its international obligation under Art 33(1) by sending the appellants to Israel did not mean that Australia had no protection obligations to the applicants under the Convention. Accordingly, the Tribunal had erred in its construction of s 36(2).

35 I should note in passing that the ruling in *NAGV and NAGW* does not necessarily mean that there may not be a relevant "effective nationality" issue in other circumstances. That issue was left unresolved in *NAGV and NAGW*. At [53], the majority said that if an issue respecting the construction of Art 1E of the Convention later arises before the Federal Court, "it should not regard further consideration as limited by what was said respecting Art 1E in *Thiyagarajah* and *Barzideh* [*Barzideh v Minister for Immigration and Ethnic Affairs* (1996) 69 FCR 417]".

36 The legal and legislative history that I have just set out, when regarded with the parliamentary statements conveyed in the speeches and debate adverted to in the reasons for judgment of Robertson J, puts it beyond any real doubt that a non-citizen in Australia with a dual nationality is unable to make a valid application for a protection visa unless the Minister

provides an effective entitlement to do so by the exercise of the non-compellable discretionary power given to the Minister by s 91Q.

37 As Buchanan J says in his reasons for judgment, "Parliament must be taken to have intended such an apparently inequitable distribution of rights under the Act."

38 For these reasons, I agree that the appeal must be dismissed with costs.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker.

Associate:

Dated: 21 March 2012

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION **NSD 2120 of 2011**

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

BETWEEN: **SZOAU**
Appellant

AND: **MINISTER FOR IMMIGRATION AND CITIZENSHIP**
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

JUDGES: **BUCHANAN, BARKER AND ROBERTSON JJ**
DATE: **21 MARCH 2012**
PLACE: **SYDNEY**

REASONS FOR JUDGMENT

ROBERTSON J:

Introduction

39 This appeal concerns the meaning of the expression "the non-citizen is a national of 2 or more countries" in s 91N(1) of the *Migration Act 1958* (Cth) (the *Migration Act*).

40 On 2 July 2009 a delegate of the Minister refused the appellant's protection visa application made on 20 April 2009. That decision was upheld by the Refugee Review Tribunal (the Tribunal) but set aside and remitted to the Tribunal by the Federal Magistrates Court on 19 August 2010.

41 On 14 April 2011 the Tribunal set aside the decision refusing to grant the appellant a protection visa and substituted a decision that his protection visa application was not valid and could not be considered. The Tribunal found that the visa application was rendered invalid by force of s 91P(2) and s 91N(1) of the *Migration Act* because the appellant was at

the time of visa application a national of both North and South Korea, and he had not obtained a determination from the Minister under s 91Q allowing him to apply for a protection visa in Australia.

42 An application was filed in the Federal Magistrates Court on 19 May 2011. As amended, the grounds of application were that:

> 1. The Tribunal misconstrued and misapplied s 91N of the *Migration Act*.
> Particulars
> (a) Error in construing that provision as not requiring consideration whether such "nationality" as was conferred by the law of the Republic of Korea on the applicant was effective to give him an immediate right to enter and reside in that country.
> (b) Error in finding that section 91N of the *Migration Act* was not to be construed in the light of section 91M of that Act.
> 2. The Tribunal misdirected itself in considering the law of the Republic of Korea for the purposes of s 91N(6) of the *Migration Act*.
> Particulars
> (a) Failure to consider the practice of the Republic of Korea pertaining to its nationality rather than simply the written words of relevant statutory provisions.

43 On 9 November 2011 the Federal Magistrates Court of Australia ordered that the application to that court be dismissed.

44 By notice of appeal filed on 28 November 2011, the appellant appealed to this Court. The sole ground of appeal was "the Court erred in holding that the second respondent was correct in finding that the appellant's application for a Protection Visa lodged on 20 April 2009, was invalid."

The Tribunal's findings

45 The facts found by the Tribunal, which were not the subject of challenge before this Court, were as follows.

46 The appellant was born in North Korea and has the nationality of that country. He is a North Korean. His parents and ancestors were also North Koreans. The appellant had Democratic People's Republic of Korea nationality at the time of application and also at the time of decision.

47 As a North Korean national, the appellant had South Korean nationality at the time of application and continued to do so, according to the laws of South Korea.

48 The Tribunal referred to the Constitution of the Republic of Korea and the Nationality Act of 1948, and it placed weight on the expert opinion of Professor Lee which the Tribunal considered recent, relevant and authoritative.

49 The opinion of Professor Lee was found by the Tribunal to conclude that a person who is a North Korean also has South Korean nationality and that a North Korean is not granted South Korean citizenship: he or she is already a national (citizen) of the Republic of Korea under the law of the Republic of Korea. The Tribunal also accepted the statement of Professor Lee that a person claiming to be a North Korean must have their identity and nationality ascertained but these were procedures to confirm a presently existing nationality. The Tribunal found that a North Korean's ineligibility for assistance under the Act on the Protection and Settlement Support of Residents Escaping from North Korea (as in the present case, where the appellant had lived abroad for many years) had no effect on the person's citizenship under the law of the Republic of Korea or their ability to have this citizenship confirmed by other means.

50 The Tribunal said it was satisfied that North Koreans have South Korean citizenship and that, even for those who are ineligible for settlement assistance (for instance, those who have lived abroad for a long period) there were alternative procedures for them to have their existing South Korean citizenship confirmed. The Tribunal also found that the appellant's South Korean citizenship existed at the time of application, and was not contingent on any further acts or desires.

51 The Tribunal was clearly of the view that its task was to determine only whether the appellant had South Korean nationality and it was not permitted to make an assessment beyond the fact of that nationality.

The legislation

52 The first provision for present purposes is s 91P. It provided:

91P Non-citizens to whom this Subdivision applies are unable to make valid

applications for certain visas

(1) …

(2) Despite any other provision of this Act but subject to section 91Q, if:

(a) this Subdivision applies to a non-citizen at a particular time; and

(b) at that time, the non-citizen applies, or purports to apply, for a protection visa; and

(c) the non-citizen is in the migration zone and has been immigration cleared at that time;

neither that application, nor any other application made by the non-citizen for a protection visa while he or she remains in the migration zone, is a valid application.

53 Section 91Q permitted the Minister to determine that s 91P does not apply to an application for a visa made by the non-citizen. It provided:

91Q Minister may determine that section 91P does not apply to a non-citizen

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 91P does not apply to an application for a visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day that the notice is given.

(2) For the purposes of subsection (1), the matters that the Minister may consider include information that raises the possibility that, although the non-citizen satisfies the description set out in subsection 91N(1) or (2), the non-citizen might not be able to avail himself or herself of protection from the country, or any of the countries, by reference to which the non-citizen satisfies that description.

(3) The power under subsection (1) may only be exercised by the Minister personally.

(4) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(5) A statement under subsection (4) is not to include:

(a) the name of the non-citizen; or

(b) any information that may identify the non-citizen; or

(c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(6) A statement under subsection (4) is to be laid before each House of the Parliament within 15 sitting days of that House after:

(a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or

(b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

(7) The Minister does not have a duty to consider whether to exercise the power

under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

54 The remaining question under s 91P is whether the Subdivision applied. The answer to that question is given by s 91N which relevantly provided:

91N Non-citizens to whom this Subdivision applies

(1) This Subdivision applies to a non-citizen at a particular time if, at that time, the non-citizen is a national of 2 or more countries.

(2) This Subdivision also applies to a non-citizen at a particular time if, at that time:

(a) the non-citizen has a right to re-enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country (the ***available country***) apart from:

(i) Australia; or

(ii) a country of which the non-citizen is a national; or

(iii) if the non-citizen has no country of nationality—the country of which the non-citizen is an habitual resident; and

(b) the non-citizen has ever resided in the available country for a continuous period of at least 7 days or, if the regulations prescribe a longer continuous period, for at least that longer period; and

(c) a declaration by the Minister is in effect under subsection (3) in relation to the available country.

(3) The Minister may, after considering any advice received from the Office of the United Nations High Commissioner for Refugees:

(a) declare in writing that a specified country:

(i) provides access, for persons seeking asylum, to effective procedures for assessing their need for protection; and

(ii) provides protection to persons to whom that country has protection obligations; and

(iii) meets relevant human rights standards for persons to whom that country has protection obligations; or

(b) in writing, revoke a declaration made under paragraph (a).

(4) A declaration made under paragraph (3)(a):

(a) takes effect when it is made by the Minister; and

(b) ceases to be in effect if and when it is revoked by the Minister under paragraph (3)(b).

(5) The Minister must cause a copy of a declaration, or of a revocation of a declaration, to be laid before each House of the Parliament within 2 sitting days of that House after the Minister makes the declaration or revokes the declaration.

Determining nationality

(6) For the purposes of this section, the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

55 Section 91M, referred to in the application to the Federal Magistrates Court and which is central to the appellant's submissions, provided as follows:

> **91M Reason for this Subdivision**
> 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.
> Note: For protection visas, see section 36.

56 As I have said, the Tribunal found that the appellant non-citizen was at the particular time a national of 2 or more countries, North Korea and South Korea. The issue is whether s 91N(1) should be construed in a manner that involves the non-citizen having the ability to avail himself or herself of protection beyond what is implicit in being a national of a country.

The parties' submissions

57 The appellant submitted that the resolution of the issue, whether the court below was correct in holding that the application for a protection visa was invalid because of the operation of Subdivision AK, was a pure question of construction of the provisions of the *Migration Act*. Thus no attack was made on the Tribunal's findings of fact. It is of course well established that a question of foreign law is a question of fact.

58 The appellant's submissions centred on s 91M. The effect of the submissions was that the expression "a non-citizen who can avail himself or herself of protection from a third country" was the controlling expression in that section and that "nationality" or "some other right to re-enter and reside in the third country" were the two relevant classes of that capability. It was also submitted that the natural meaning of "can avail" is that the right is real rather than merely theoretic. It was submitted that the word "other" connoted that the two classes of rights referred to were of the same nature. It was submitted that on the natural meaning of the words, mere nationality, which might not include a right to enter and reside, was not sufficient to cause the Subdivision to apply. In that way the words in s 91N(1) "the non-citizen is a national of 2 or more countries" meant a non-citizen who at the relevant time was a national of 2 or more countries and who can avail himself or herself of protection from those countries.

59 The first respondent largely relied on the submissions which had succeeded in the Federal Magistrates Court. He submitted that Subdivision AK was consistent with the ordinary meaning of "nationality" and removed the duty to consider the application for a visa where there was nationality and a presumption of protection. This was subject to a non-compellable power in the Minister personally to lift that legislative bar. If the bar was lifted then s 46 of the Act would be disengaged, s 47 would apply and the application would be considered against the usual criteria.

Analysis

60 It may be accepted that s 91M states the reason for the Subdivision. The Subdivision was enacted because "the Parliament considers" certain things. In my opinion, one of the things which Parliament considered or assumed was that a non-citizen could avail himself or herself of protection because of nationality.

61 Consistently with that construction of the "reason for this Subdivision", the preferable construction of s 91N(1), when read with s 91N(6), is that it has its ordinary meaning and that for present purposes nationality is assumed, prima facie, to carry a capability on the part of the non-citizen to avail himself or herself of protection. In consequence, for the purposes of s 91N(1), no additional inquiry into the non-citizen's ability to avail himself or herself of protection is to be made, beyond the fact of nationality.

62 In my opinion, the appellant's construction does not sit well with s 91N(6) since that construction would involve a full factual enquiry at the point of determining the validity of the application.

63 Section 91Q(2) is, in my opinion, clearly against the appellant's construction. It expressly contemplates the possibility that although a non-citizen is a national of 2 or more countries, the non-citizen might not be able to avail himself or herself of protection from those countries or any of them.

64 Sections 91N(1) and s 91N(2) are framed in the alternative and s 91N(1), in my opinion, is itself in sufficiently clear terms. In addition my conclusion as to the preferable construction of s 91N(1) derives some support from s 91N(2)(a)(ii) which refers to the

Subdivision also applying to a non-citizen if he or she has a right to re-enter and reside in any country apart from, relevantly, a country of which the non-citizen is a national. The appellant submitted that "a country of which the non-citizen is a national" is excluded from s 91N(2)(a) because nationality and the availability of protection in fact is dealt with in s 91N(1). However in my opinion the better view is that s 91N(2)(a)(ii) is one part of a three part identification of a third country in which the non-citizen has a right to re-enter and reside. That is consistent with the exclusion of Australia (s 91N(2)(a)(i)) and, if the non-citizen has no country of nationality, the exclusion of the country of which the non-citizen is an habitual resident (s 91N(2)(a)(iii)).

65 The appellant contends for an inconsistency between construing s 91N(1) as limited to the fact of nationality and the words "countries of which the non-citizen is a national" in s 36(3). Section 36(3) provided:

> (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.

66 It is submitted that those words would be otiose because a person with dual or multiple nationality could not lodge a valid protection visa application. However, Subdivision AK is addressed to a different though related question and operates at the level of the validity of the application for a visa. Further, that submission puts out of account the existence of the power in the Minister to determine that s 91P does not apply, the Minister being entitled to consider information that raises the possibility that although the non-citizen is a national of 2 or more countries, the non-citizen might not be able to avail himself of protection from the country or any of the countries of which he is a national.

67 Further, in my view the presence of the qualifying words in s 36(3) and their absence from s 91N(1) supports the conclusion that those qualifying words were not to apply to s 91N(1).

68 The process of construction begins with a consideration of the ordinary and grammatical meaning of the words of the provision having regard to their context and

legislative purpose. I accept that s 91M is intended to assist construction of the Subdivision and should be so regarded. I also accept that s 15AA of the *Acts Interpretation Act 1901* (Cth) applies. It provides that:

> In interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation.

See, most recently, *Australian Education Union v Department of Education and Children's Services* [2012] HCA 3 at [26]-[27] per French CJ, Hayne, Kiefel and Bell JJ.

69 However the language of s 91M is not sufficiently clear as to require reading down s 91N(1) and s 91N(6), or reading into those provisions "who can avail himself of protection" or a reading of those provisions which departs from the plain meaning of those words.

70 Neither do I see any relevant inconsistency between what in my opinion is the better construction of the provisions and Australia's obligations under the Refugees Convention. The appellant submits that Subdivision AK derogates from the duty to assess claimants but, in my opinion, the point of the provisions is to permit a threshold decision of the circumstances where Australia may not have that duty. Thus it was common ground that the reference to the public interest in s 91Q(1) included, but was not limited to, Australia's international obligations under the Refugees Convention. I see nothing to the contrary in the decision of the Upper Tribunal in *KK and ors (Nationality: North Korea) Korea CG* [2011] UKUT 92 (IAC) to which the Court was taken.

71 As to the Federal Magistrate's reference to "otherwise arising" as the correct construction of the phrase in which the word "other" is found in s 91M, in my opinion it is unnecessary so to construe the provision and, as I have said, it is preferable to approach the section on the basis that it assumed that nationality would prima facie afford the right to which reference is there made. This is a different proposition to concluding that s 91N(1) involves an additional inquiry into the non-citizen's ability to avail himself of protection, beyond the fact of nationality.

72 Having considered the competing submissions founded on textual and structural indications and on the context provided by the Refugees Convention I agree with the

conclusion of the Federal Magistrate that the word "national" in s 91N(1) is not to be construed as involving more than the fact of nationality.

73 The construction of the provisions which I prefer is, I consider, consistent with the extrinsic material to the *Border Protection Legislation Amendment Act 1999* (Cth), which introduced these provisions.

74 This extrinsic material was, first, a Supplementary Explanatory Memorandum circulated by authority of the then Minister. It stated, relevantly:

> **OUTLINE**
> **Overview**
> 1 Australia has comprehensive refugee determination processes in place to fulfil its obligations under the 1951 Convention and 1967 Protocol Relating to the Status of Refugees. A significant number of persons seeking asylum in Australia are nationals of more than one country, or have rights of return or entry to another country, where they may reside free from persecution or forced return to the country where they claim they will be persecuted. . . .
> 2 . . . These amendments will ensure that persons who are nationals of more than one country, or who have a right to enter and reside in another country where they will be protected, have an obligation to avail themselves of the protection of that other country.
> 3 In particular, the amendments will provide for the following in the *Migration Act 1958* ("the Migration Act"):
>
> - an interpretative provision which will make it clear that Australia does not owe protection obligations to non-citizens who, without a well-founded fear of persecution, do not take all possible steps to avail themselves of a right to enter and reside in another country;
> - a legislative definition of nationality such that nationality is determined solely by reference to the domestic law of the country in question;
> - statutory bars on protection visa applications, or in some cases, any other visa applications, by non-citizens in the migration zone who are dual or multiple nationals, or who have a right to enter and reside in another country. Non-citizens who fall within this group and have not been immigration cleared will be barred from making any visa application while remaining in the migration zone. On the other hand, non-citizens who have been immigration cleared will only be barred from making protection visa applications while remaining in the migration zone; and
> - accompanying discretionary provisions for Ministerial intervention to lift the bars in the public interest.
>
> **NOTES ON AMENDMENT TO SCHEDULE 1**
> …
> 6 New subsection 36(6) introduces a legislative definition of "nationality" which is the term used in the Refugees Convention and international law generally to cover a person's "nationality" or "citizenship". It provides that the question of whether a non-citizen is a national or citizen of a particular country must be

determined solely by reference to the law of that country. This will ensure that nationality is determined solely with reference to the domestic law of the country in question, and not in relation to assessments made in Australia as to the effectiveness of a nationality held by a protection visa applicant.
…

Subdivision AK - Non-citizens with access to protection from third countries
Section 91M Reason for this Subdivision
9 This section sets out Parliament's intention that this Subdivision is enacted to ensure that non-citizens who can avail themselves of protection from a third country, should seek protection from that third country rather than apply for a protection visa, or in some cases, any other visa. Any such person who is an unlawful non-citizen will be subject to removal under Division 8 of Part 2 of the Migration Act.
Section 91N Non-citizens to whom this Subdivision applies
10 New section 91N provides that this Subdivision applies to a non-citizen at a particular time if, at that time, the non-citizen:

- is a national of two or more countries; or
- has a right to re-enter and reside in any country apart from Australia, a country of which the non-citizen is a national or, if the non-citizen has no country of nationality, the country of which the non-citizen is an habitual resident. In addition, the non-citizen must have resided in that other country for a continuous period of at least seven days.

11 New subsection 91N(3), as per proposed subsection 36(6), introduces a legislative definition of "nationality" to provide that the question of whether a non-citizen is a national or citizen of a particular country must be determined solely by reference to the law of that country.

75 There was also a tabling statement (*Hansard*: The Senate: 25 November 1999 at p 10668) which relevantly read as follows:

. . .
The amendments will introduce into the Migration Act a new subdivision which will apply to non-citizens who are dual or multiple nationals, or who have a right to re-enter and reside in a third country.

A statutory bar will prevent such non-citizens while onshore from making a valid application for a protection visa if they have been immigration cleared, or, if they have not been immigration cleared, from making a valid application for any visa.

The statutory bar will be accompanied by discretionary provisions for ministerial intervention to lift the bar in the public interest.
. . .
This will ensure that where a person may not have protection in a third country, the statutory bar would be lifted to allow them to make an application.

Conclusion

76 In my opinion the appeal should be dismissed with costs.

I certify that the preceding thirty-eight (38) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Robertson.

Associate:

Dated: 21 March 2012